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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.

EDITED BY

JAMES A. PETRIE, M.A. and F. A. P. ROWE, B.A.

BARRISTERS-AT-LAW

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January 27 and 29, and February 5, 1936.

(Before BUCKNILL, J., assisted by Trinity Masters.)

Owners of the Steamship Albatross v. Ford Motor Company Limited and the Port of London Authority. (*a*)

Negligence — Damage to ship at jetty — Berth fouled by P.L.A. dredger's anchor — Duty of harbour authority—Duty of owner of jetty—Knowledge of plaintiffs and first defendants—Adequacy of notice given by second defendants—Port of London (Consolidation) Act, 1920—*Costs.*

This was a claim by the owners of the steamship A. *against the Ford Motor Company Limited and the Port of London Authority for damage sustained by the* A. *whilst lying moored at Ford's Jetty, Dagenham, on the 3rd May*, 1935. *At low water she took the ground and sustained damage by sitting on an anchor which was out from a P.L.A. dredger dredging in the river abreast of the jetty and about 250ft. away from it. The* A. *was part laden when she arrived at the jetty at about 2 a.m. The berth was assigned to her by the first defendants, and she moored head down river under the directions of their servants. The plaintiffs claimed that the first defendants should have known and warned them that the berth was unsafe. They alleged that the second defendants placed the anchor upon which the* A. *sat without buoying it, without giving warning, and without removing it after the* A. *arrived and before the water ebbed. The first defendants did not admit that the ship was properly moored or moored in accordance with the orders of their servants, nor did they admit the damage. They denied that they ought to have known that the berth was unfit and said that, if it was, the second defendants were to blame for placing the anchor upon the berth. The second defendants denied that they had been negligent, contending that the moorings of the* A. *were not properly secured, and they further denied that the* A. *was damaged by an anchor of theirs. They further alleged that both the plaintiffs and the first defendants had had circular notification that the dredger would be working opposite Ford's Jetty and that the first defendants had also been notified to that effect by a letter sent to them after the circular.*

Held, that the presence of the dredger did not put the first defendants on inquiry as to where the dredger's anchors were; that the plaintiffs had failed to establish that the first defendants ought to have ascertained that the berth was safe, and that accordingly the first defendants were not liable.

Held further, that the second defendants were negligent in putting the anchor where they did without giving proper notice to the first defendants or the plaintiffs, as to where the anchor actually was; that those in charge of the dredging operations had not taken reasonable care to see the exact position where the anchor was dropped; that if they had taken such reasonable care they would have realised that it was unsafe for the A. *to berth where she did, and that they ought to have warned the plaintiffs and the first defendants before the* A. *took the ground of the danger of her doing so.*

Judgment entered for the plaintiffs with costs and for the first defendants with costs, the plaintiffs to recover from the second defendants the costs which they (the plaintiffs) would have to pay to the first defendants.

DAMAGE at berth.

The plaintiffs were the General Steam Navigation Company Limited, owners of the steamship *Albatross*. The first defendants were the Ford

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

Motor Company Limited, owners of the Ford Jetty situated at Dagenham, on the north side of Halfway Reach, River Thames. The second defendants were the Port of London Authority, owners of the P.L.A. dredger, No. 7, which was dredging in the river abreast of the upper part of Ford's Jetty, and about 250ft. away from it. The *Albatross*, in charge of a duly licensed Trinity House pilot, had moored at Ford's Jetty to load tractors. She was in the course of a voyage to the Mediterranean, and was part-laden when she arrived at the jetty, her draft being 17ft. 6in. forward and 18ft. 6in. aft.

The plaintiffs' case was that the first defendants had for reward allotted to the *Albatross* a berth alongside the outer face of their jetty at Dagenham. At about 2 a.m. on May 3rd, 1935, the *Albatross* came alongside the jetty head down river, and was properly and securely moored by her crew in accordance with the orders or directions of the first defendants or their servants in the allotted berth. As the tide fell the *Albatross* took the ground and the starboard side of her bottom in the way of No. 4 tank was holed by an anchor which, unknown to the plaintiffs, was lying in and on the berth. The plaintiffs alleged that the first defendants, or their servants, negligently and in breach of their duty to the plaintiffs, ordered and (or) permitted the *Albatross* to occupy the berth when they knew or ought to have known that it was unfit and unsafe for the *Albatross* to lie in; failed to take any or any proper steps to ascertain that the berth was in a fit condition for the *Albatross* to lie in and upon; failed to give any warning that the berth was in an unsafe condition or that they had failed to take any or any proper steps to ascertain its condition. Further, or in the alternative, the plaintiffs alleged that the second defendants, who were engaged in dredging the river bed, and were the owners of the anchor in question, negligently placed the said anchor on or in the immediate vicinity of the said berth shortly before the 3rd May, 1935; that the second defendants failed to buoy the said anchor; failed to warn the first defendants or the plaintiffs of the said anchor's position, and failed to remove the said anchor after the *Albatross* occupied the berth and before the tide fell.

The case put forward by the first defendants was as follows: They did not admit that the vessel was properly or securely moored, or moored in accordance with the orders or directions of their servants, or that she had sustained the alleged damage. They denied that they knew, or ought to have known, that the berth was in an unfit or unsafe condition, or that they failed to take proper steps to ascertain that the berth was in a fit condition for the *Albatross* to lie in. At the time when the alleged accident occurred to the *Albatross* the dredger belonging to the Port of London Authority and (or) acting upon instructions from the Authority, was engaged in dredging the channel abreast of the upper end of the Ford Jetty, and they contended that if the berth was unfit or unsafe, such condition was due to the wrongful and negligent act of those on board the dredger in laying an anchor in or in the immediate vicinity of the berth. The first defendants said that they had no knowledge that the anchor had been so laid until after the accident had occurred.

In their defence, the second defendants denied that they or their servants had been guilty of the alleged or any negligence or breach of duty. They further denied that the *Albatross* was properly or securely moored, that she was holed by an anchor, and that she ever came into contact with an anchor belonging to them. In the alternative, they alleged that if the *Albatross* did come into contact with an anchor belonging to these defendants and thereby sustained the alleged damage, the No. 7 dredger was at all material times, as the plaintiffs and the first defendants both well knew, engaged in dredging in a position about 250ft. out into the river from Ford's Jetty. They said that the dredger was working in pursuance of the powers conferred by sect. 215 of the Port of London (Consolidation) Act, 1920, and was moored in the usual and proper manner with six anchors, one ahead, one astern, and two on either side. The nearest anchor to the jetty was at all material times in a position well clear of the berth alongside the jetty and of the place where a vessel of the size of the *Albatross* would lie if properly and securely moored. The second defendants had circulated on or about the 23rd April, 1935, to all the principal users of the River Thames, including both the plaintiffs and the first defendants, a notice in the following terms:

> "Port of London Authority.—Dredging in Halfway Reach.—Notice is hereby given that on or after Wednesday, the 24th April, 1935, a dredger will be at work in the river on the north edge of the channel abreast of Ford's Jetty. Chains will be laid out ahead, astern, and abreast of the dredger."

The Port of London (Consolidation) Act, 1920, provides that:

> "(1) Special care and caution shall be used in navigating vessels when passing . . . vessels employed in dredging. . . ."

The second defendants alleged that by letter dated the 24th April, 1935, they gave further notice to the first defendants that such dredging would take place, and they contended that both the plaintiffs and the first defendants knew, or ought to have known, that an anchor or anchors would be, or might be, laid out in a position close to the berth alongside the jetty. Further, or alternatively, the second defendants contended that if the *Albatross* ever came into contact with an anchor of theirs and thereby sustained the alleged or any damage, such damage was solely caused by the negligence of the plaintiffs and (or) the first defendants and (or) of their respective servants. They said that the plaintiffs or their servants were negligent in that they failed to keep the *Albatross* properly and securely moored; failed to tend their moorings properly; caused or allowed the *Albatross* to fall away from the said jetty as the tide fell, and failed to comply with sect. 278 of the Port of London (Consolidation) Act, 1920, and with rules 19B and 41 and 42 of the Port of London River Bye-laws, 1914–30. The first defendants, or their servants, on the other hand, were negligent in that they failed to warn the second defendants that the *Albatross* was about to come and lie in the berth.

In argument, counsel for the second defendants cited *The Moorcock* (1889, 6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64, C. A.), in which it had been laid down by Lord Esher, M.R. and Bowen, L.J. that: "Where a wharfinger invites a ship to come alongside and use his jetty at a place where the vessel must ground at low water, he must be deemed to have impliedly represented that he has taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel." *The Bearn* (10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48, per Lord Collins, M.R.

at p. 76) was also referred to as approving the passage in which Bowen, L.J. in *The Moorcock* (*sup.*) said that "Wharf-owners who invite vessels alongside for profit to themselves, being the persons who have the opportunity of ascertaining the condition of the berth, should either satisfy themselves that it is reasonably fit or warn those in charge of the vessel that they have not done so."

R. F. Hayward and *G. St. C. Pilcher* for the plaintiffs.

K. S. Carpmael, K.C. and *Harry Atkins* for the first defendants.

H. G. Willmer for the second defendants.

Bucknill, J.—This is a claim by the owners of the steamship *Albatross* against two defendants, the Ford Motor Company Limited, and the Port of London Authority, to recover compensation in respect of damage received by the *Albatross* under the following circumstances.

On the 3rd May, 1935, the *Albatross*, which is a steamship of 280ft. long and about 42ft. in beam, proceeded to the jetty of the Ford Motor Company, on the north side of Halfway Reach, River Thames, to load cargo. The *Albatross*, which was partly loaded at the time of her arrival at the jetty, was then drawing about 18ft. mean. The *Albatross* arrived off the jetty at about 1.50 a.m. on the 3rd May, and was instructed by one of the employees of the Ford Motor Company as to the exact position in which to berth herself, and she was berthed in accordance with these instructions near the upper end of the jetty, heading down river, at about high water.

The jetty is a long structure facing the river. At the upper end of the jetty, according to the chart supplied by the Port of London Authority, and put in at the trial, there was at the time in question about 14ft. of water at low water spring tides. At the lower end of the jetty there was about 22ft. of water at low water spring tides.

At the time when the *Albatross* berthed at the jetty there was a dredger lying off and abreast of the jetty. I accept the evidence from those in charge of the *Albatross* that at this time the dredger was more than 250ft. from the jetty and that there was ample room to swing the *Albatross* between the jetty and the dredger. This dredger had been at work during the day off the jetty since the 26th April. A notice had been issued by the Port of London Authority, of which the owners of the *Albatross* had received copies, in the following terms:

> "Port of London Authority.—Dredging in Halfway Reach.—Notice is hereby given that on or after Wednesday, the 24th April, 1935, a dredger will be at work in the river on the north edge of the channel abreast of Ford's Jetty. Chains will be laid out ahead, astern and abreast of the dredger."

The Port of London (Consolidation) Act, 1920 provides that:

> "Special care and caution shall be used in navigating vessels when passing . . . vessels employed in dredging. . . ."

There is something about a penalty which is not material.

When the *Albatross* arrived at the jetty the dredger was not working but was exhibiting the lights which a steam dredger has to exhibit under rule 18 of the Thames Bye-laws when moored in the river.

The *Albatross*, as I find and am advised by the Elder Brethren, was properly and securely moored alongside the jetty, and as the tide fell her mooring ropes were properly tended and she took the ground in a proper way with her port shoulder about 6ft. out from the facing piles of the jetty and her port quarter about 3ft. out from the outside of the facing piles of the jetty. These piles are about 18in. thick. The *Albatross* had slipped out a little from the jetty before she settled on the berth, but I find and am advised by the Elder Brethren that this might happen, although all proper care and skill was exercised in tending the mooring ropes.

The *Albatross* took the ground at about 6 a.m. At about 7 a.m. it was found that water was leaking into the No. 4 tank on the starboard side of her engine-room. The bottom of the *Albatross*, as I find, had been holed in two places approximately 7ft. in from the starboard side of the ship, by sitting on the two horns of an anchor which was lying on the ground at right angles to the jetty. The anchor was about 7ft. 10in. in length and was attached by an anchor chain to the dredger, and was one of six anchors by which the dredger was moored, and was the forward starboard breast anchor of the dredger, which was heading up river.

The question which I have to decide is whether the plaintiffs are entitled to recover in respect of this damage from either or both of the defendants.

Taking the defendants, the Ford Motor Company, first. The case made against them is that the legal duty of these defendants as owners and occupiers of the jetty was to take reasonable action to ascertain whether the berth was fit for the *Albatross* to lie upon before they invited her there, and that they failed in this duty in that they neither took any action to ascertain whether the berth was safe, or to inform the owners of the *Albatross* that they had not taken any such action. The plaintiffs also say that the first defendants had in fact reasonable notice that the berth was unsafe for the *Albatross* to sit upon owing to the presence of the dredger's anchor. The plaintiffs then say that the first defendants failed to perform any of these duties.

These defendants, on the other hand, say that the berth was quite safe for the *Albatross* to lie upon apart from the presence of the dredger's anchor thereon, and that they did not know and could not reasonably be expected to know that the anchor was on their berth at the time when the *Albatross* came alongside the jetty and took the ground there.

There is no suggestion that there was anything wrong with the berth apart from the presence of the anchor. On the other hand, there was positive evidence, which I accept, that apart from the anchor the berth was in good order and fit for the *Albatross* to lie upon. There is also positive evidence, which I accept, that the first defendants' agents responsible for berthing the *Albatross* where they did, did not in fact know of the presence of the dredger's anchor on the berth.

The main issue which I have to decide upon the question as to the liability of the first defendants is whether they ought to have known that the anchor was lying on the berth in the position in which it was when the *Albatross* sat upon it. From the findings of fact which I have already stated, it follows that the horns of the anchor were about 41ft. out from the actual face of the jetty.

The plaintiffs say that the first defendants ought to have known that the anchor was in this position from four facts which were within their knowledge. These facts are, first, that they got a letter from the

Port of London Authority on the 24th April, 1935, in the following terms :

"Dear Sirs,—Dredging abreast of steamer jetty. I have to inform you that as from to-morrow, 25th inst., a dredger will be at work on the northern edge of the channel, just abreast of the up-river end of your jetty at Dagenham. It is anticipated that little inconvenience will arise through the presence of the dredger, but your co-operation for the period of the work (about ten days) is desired.—Yours faithfully, E. C. SHANKLAND, River Superintendent and Chief Harbour-Master."

That letter was acknowledged on the 1st May in these terms :

"We wish to acknowledge receipt of your letter of the 24th April, reference F.275/35, in connection with the dredging abreast of the Ford Motor Company's Jetty. We note your remarks, and assure you of our willing assistance and co-operation during the period the dredger will be at work."

That is the first material fact alleged.

The second was that they saw the dredger working off the jetty from the 26th April, 1935, until the 2nd May ; thirdly, that they saw or ought to have seen the Port of London Authority tug actually drop the anchor in question on the 2nd May ; and, fourthly, that they could see the lead of the anchor chains from the dredger.

Dealing shortly with these facts : (1) The letter must be taken in conjunction with the letter from the Port of London Authority dated the 24th January. That letter is in answer to the following letter from the Ford Motor Company of the 22nd January, and marked "O" :

"Dear Commander Shankland,—With further reference to the cleaning up of the berth in front of our jetty which is about to take place for the removal of the shoal at the west end of the deep water as referred to in your letter of the 7th inst., I would like to obtain some agreement with you as to the definite area which we should dredge in future. As you know, in the first instance we cleaned up the river bed in certain places up to a distance of about 200ft. from the face of the jetty. I understand that the dredging of the deep water channel is a responsibility of the Port of London Authority, and would like to receive, therefore, a plan from you which indicates the position of such main or navigation channel as it exists at present, so as to compare this with the line above referred to extending 200ft. from the face of our jetty."

The answer to that is on the 24th January from Mr. Shankland, in which he says :

"Dear Sir,—Jetty at Dagenham.—Referring to your letter of the 22nd inst. (O), and to the conversation over the telephone yesterday, I would mention that on the tracing sent to you with my letter of the 7th inst., I showed the soundings out to the northern channel line, which latter is approximately 350ft. from the face of your jetty. If you clear up a distance of 200ft. from the face of your jetty, this should take you out to the 24ft. contour line at low water of spring tides, and the depth between that line and your jetty will, of course, depend upon the dredging which you propose to put in hand."

This letter does not appear to me to suggest that the dredger would place an anchor on the ground about 41ft. outside the jetty at the upper end thereof, and thereby effectively prevent a vessel of the size of the *Albatross* from taking the ground in the berth with safety. It indicates that dredging would take place about 350ft. from the face of the jetty.

Mr. Shankland, the writer of the letter and the chief harbour-master of the Port of London Authority, who was called as a witness, stated in his evidence that Ford's Jetty was opened in about 1929 or 1930 and had been very busy for the last few years, and that ships of all sizes went to the jetty, that there was only 14ft. of water about 200ft. from the upper end of the jetty, and that ships going to the jetty would draw anything from 10ft. to 30ft. I think that with this information in their possession the Port of London Authority must be taken to have known that ships of the size of the *Albatross* would lie alongside the jetty and take the ground there, and that it would seriously inconvenience and almost immobilise the upper part of the jetty to lay an anchor on the ground about 41ft. out from the jetty.

I, therefore, think that there was nothing in this letter to put the first defendants on inquiry as to whether the dredger would put down an anchor in the position in which it was put down by the Port of London Authority's tug on the 2nd May.

(2) As regards the fact that the dredger was working off the jetty from the 26th April to the 2nd May, here again I do not think that her presence ought to have put the first defendants on inquiry as to the position of the dredger's anchor. They received no warning of any kind other than the letter to which I have referred from the Port of London Authority that an anchor would be placed so near their jetty. For reasons which I will give later, I think the Port of London Authority dredger and her tug were negligent in putting the anchor so close to the jetty, and I do not think that the servants of the first defendants in charge of the jetty can be expected to deduce from the mere presence of the dredger off their jetty that an anchor will be negligently laid on their berth.

(3) As regards this point, the tugmaster who is said to have laid the anchor in question was not called as a witness, and I have no evidence as to the exact way in which it was laid out. The master of the dredger said that the anchor was moved between 11.30 a.m. and 1 p.m. on the 2nd May, and that he told the tugmaster to drop it just clear of the berth. There were two dumb barges abreast of each other at the jetty. The tugmaster probably dropped the anchor just outside these craft. The dredger-master said he would not think of putting the anchor on the berth, and he left it to the tugmaster to judge the size of the berth.

This is perhaps the most difficult point on this part of the case. Ought the men responsible for berthing ships at Ford's jetty to have seen where the tug dropped the anchor or to have ascertained its position ? My view is that in the circumstances they were not under any duty to do so. While the dredger was at work off their jetty, two ships, one certainly as large as the *Albatross*, had lain in the same berth as the *Albatross*. These ships were the *Tractor* and the *Ardgryfe*. The *Tractor*, a vessel of 42ft. in beam, left the berth at 10.20 a.m. on the 1st May. This fact would be clearly visible to those on board the dredger, and I think the owners of the jetty were entitled to rely on the Port of London Authority officials being careful not to do what they themselves said they were careful not to do, namely, put an anchor in a berth where ships take the ground. "We do not place anchors on a berth," Mr. Shankland said. "I should not think of putting an anchor on the

berth," said Mr. Buck, the master of the dredger. It may also be noted that the defence of the second defendants as pleaded was as follows :—

The nearest anchor to the jetty was at all material times in a position well clear of the berth alongside the jetty and well clear of the place where a vessel of the size of the *Albatross* would lie if properly and securely moored.

I therefore find that even if the officials of the Ford Motor Company had seen the tug manœuvring about and dropping an anchor on the morning of the 2nd May, this fact would not and should not have warned them that the anchor was likely to make the berth unsafe for the *Albatross* to lie in.

(4) As regards this point, I do not think that the lead of the dredger's chains would indicate anything as to the precise position of the dredger's anchors to these defendants.

In my judgment, therefore, the plaintiffs fail to establish that the first defendants ought to have known that the berth was unsafe or to have warned the plaintiffs that the berth was unsafe or that they had not taken any steps to ascertain whether it was safe. I do not think they had any more material knowledge than the plaintiffs or their agents had as to the position of the dredger's anchors, and I find that they are not liable to the plaintiffs in respect of the damage to the *Albatross*.

I now have to consider whether the second defendants, the Port of London Authority, are liable. Mr. Willmer argued on behalf of the Port of London Authority that their duty to the plaintiffs was different from the duty of the Ford Motor Company who, as occupiers of the wharf, owed a special duty to persons bringing ships to their jetty on their invitation. Mr. Willmer argued that the Port of London Authority had certain statutory rights and duties, and one of these rights and duties was to dredge the river by virtue of the provisions of the Port of London (Consolidation) Act, 1920. But it was not argued on behalf of the Port of London Authority that this right or duty entitled the Port of London Authority to place an anchor of a dredger on a berth alongside a jetty where ships normally take the ground, and where the anchor would be a hidden danger to any such ship, without giving any warning of the presence of the anchor or of their intention to place it there to the occupiers of the jetty or those in charge of ships using the jetty. Neither was it suggested that the Port of London Authority had any statutory rights or duties which entitled them to lay such an anchor in any such place if it was unnecessary for the purpose of their work as dredging authority, having regard to the fact that the anchor would be a hidden danger to vessels taking the ground at the jetty.

In my judgment, the Port of London Authority are liable to the plaintiffs in this case, because their agents negligently placed the anchor in question on the berth without giving any warning to those on board the *Albatross* or to the first defendants that they intended to do so or had done so.

I find that it was unnecessary for the dredger, when dredging on the 2nd May, to have the anchor as close to the jetty as 41ft. I thought the evidence of the dredger-master was not satisfactory as to the distance of the dredger from the jetty when the *Albatross* was berthed or as to the scope of cable out to the starboard anchor or as to the position of this anchor at this time. In any case, if no more than two lengths of cable were being used, I think that dredging might well have been attempted, having regard to the proximity of the jetty, with a scope of cable on this starboard breast anchor of less than two lengths. Apparently the holding ground was good. If two lengths were necessary and if it was necessary to put the anchor so close to the berth as it was in fact put, I think the anchor should have been hove up when the work was finished for the day on the 2nd May, as indeed it was hove up by the dredger on the afternoon of the 3rd May, or it should have been moved out from the berth by a tug after the work was finished on the 2nd May.

In my judgment, the second defendants misled the first defendants by their letter of the 24th April, if in fact it was their intention and necessary to place an anchor on the berth in the position in which it was placed on the 2nd May, and thereby caused damage to the *Albatross*, but I do not think it was necessary to place the anchor there. The dredger-master admitted that he was astonished when he heard the diver's report and learnt what damage his anchor had done.

I also think that if those in charge of the dredging operations had taken reasonable care to note the exact position in which this anchor had been dropped on the 2nd May, and in which it was when the *Albatross* came to the jetty on the 3rd May, and had taken reasonable care to note what vessels came to the jetty, they would have realised that it would be unsafe for the *Albatross* to take the ground in the berth into which she came, and ought to have warned her before she took the ground of the danger of so doing. The Elder Brethren advise me that in their opinion it would not be practicable or helpful to have buoyed the anchor in question.

Having regard to all the circumstances, I think there was a duty on those in charge of the dredging to give warning to the first defendants and to the owners of the *Albatross* that their starboard anchor was close to the jetty and was a source of danger to vessels sitting on the berth. I think that the notice issued by the Port of London Authority was quite inadequate to give any such warning. The north edge of the channel, as marked on the Port of London Authority chart of Halfway Reach in use at the time in question, was about 350ft. from the jetty. The notice refers to vessels navigating and no mention is made of any danger to vessels taking the ground in the ordinary course of their business alongside Ford's jetty.

I have asked the Elder Brethren for their advice as to whether the pilot of the *Albatross*, when he saw the dredger's lights and later the dredger, ought as a skilful pilot to have concluded that one of the dredger's breast anchors would probably be laid less than 50ft. from the jetty and in such a position that it was a danger to his vessel when she took the ground. The Elder Brethren have advised me that in their opinion a skilful pilot would not come to any such conclusion.

For these reasons my judgment is that the Port of London Authority is liable to the plaintiffs for the damage in question.

Judgment was entered in favour of the plaintiffs, with costs, and in favour of the Ford Motor Company, Limited, with costs, the learned judge directing that the plaintiffs should recover from the second defendants the costs which they would have to pay to the first defendants.

Solicitors for the plaintiffs, *Keene, Marsland Bryden, Besant, Batham*, and *Cork*.

Solicitors for the first defendants, *Dennes* and *Co*,

Solicitor for the second defendants, *J. D. Ritchie*.

February 4, 5 and 6, 1936.

(Before LANGTON, J., assisted by one Elder Brother of Trinity House.)

The Rotorua. (*a*)

Collision in Thames — Vessel waiting to enter Royal Albert Dock—Duty of waiting vessel to other craft in river—Duty of other craft towards waiting vessel—Apportionment of costs.

This was a claim by the owners of the motor barge C., *which was towing their dumb barge* F. *up-river in the Thames, against the owners of the steamship* R. *for damage suffered by the* F. *in a collision with the* R. *which occurred on the night of the 4th April,* 1935, *opposite the Royal Albert Dock, which the* R. *was waiting to enter. The plaintiffs contended that as the* C. *was proceeding up-river with three barges in tow laden with cement, the* R. *which was waiting to enter the Royal Albert Dock but which was moving slowly down river and was angled across it, struck the* F., *the port hand barge in tow of the* C., *doing her so much damage that she had to be beached to avoid sinking in deep water. The defendants denied liability and said that the* R. *was not moving; she was stemming the tide and not altering her heading; they contended that the* C. *was alone to blame for the collision in that, instead of passing the* R. *on the starboard side, the* C. *tried to pass ahead of the* R. *from starboard to port, and although the starboard engine of the* R. *was immediately put full speed astern, the* C. *having got her craft across the tide was unable to regain control of the barges, with the result that the* F. *fell across the stem of the* R. *At a later stage in the hearing and after the conclusion of the evidence, the defendants applied for leave to amend the defence by alleging that the* C. *failed to give any sound signal of her intention to alter course so as to pass the* R. *port to port. The amendment was allowed.*

Held, in a reserved judgment, that the governing fact of the collision was that the R. *was moving down river and trailing across to the northward while her head was falling off to port; she was swinging from time to time and straddling across the water. The* R. *was to blame for bad look-out, for going across into the northern water when she ought to have been held steady in the channel if she were going to remain there at all, and for not taking timely steps to assist the* C. *which, owing to the action of the* R., *had to go closer to the north shore than she originally intended.*

Held, further, that the C. *was also to blame for not letting the* R. *know by sound signal what she was doing and for substantially contributing to the collision thereby.*

The blame was apportioned as to two-thirds on the R. *and as to one-third on the C., the judge directing that the costs of the action should follow the event in the same proportion.*

In the course of his judgment the learned judge observed that the task of pilots who had to hold large ships off the docks waiting their turn for docking, was a difficult one, and that he accordingly did not wish anything he said to be construed as fettering them or putting upon them any higher or more difficult duty than they had at present. But, whilst the R. *did nothing wrong in remaining off the Albert Dock, he considered that when a ship was in her position, it was her duty to navigate so as not to embarrass or endanger the navigation of up-coming vessels. It was not to be supposed, as those in the* R. *supposed, that, having placed themselves outside the Albert Dock, it was for any up-coming craft to get out of their way. Up-coming vessels had a right to expect of vessels so close, that they would do their best not to embarrass navigation and that they would not allow themselves to fall across the river at an angle other than the slight angle which might be necessary to lie steady, and that if they did so fall, they would notify up-coming craft by sound signals.*

DAMAGE by collision.

The plaintiffs were the British Portland Cement Manufacturers Limited, of Westminster, owners of the motor barge *Colorcrete* and of the dumb barge *Fawn* which was being towed by the *Colorcrete* from Greenhithe to Brentford. The defendants were the owners of the steel twin screw steamship *Rotorua* (10,890 tons gross) which was on a voyage from New Zealand to United Kingdom ports and at the time here in question was in Gallions Reach, River Thames, waiting her turn to enter the Royal Albert Dock. The collision occurred at about 10.40 p.m. on the 4th April, 1935, about opposite the knuckle between the two entrances to the Royal Albert Dock and about 300ft. from it.

The case for the plaintiffs was that shortly before 10.40 p.m. on the 4th April, 1935, the *Fawn*, a canal dumb barge of 78ft. in length and 14ft. 6in. in beam, while proceeding from Greenhithe to Brentford, laden with cement, was in the River Thames. The wind was W., fresh; the weather fine and clear; and the tide flood of a force of about 2 to 3 knots. The *Fawn* was the port hand barge of three which were being towed by the plaintiffs' motor barge *Colorcrete*, the centre barge being the *Donia* and the starboard barge the *Regia*. The *Colorcrete* was proceeding on an up-river course to the northward of mid-channel, having a slight angle to the northward, under slight port wheel and with engines working at full speed. She was making about 2 to 3 knots through the water. She was carrying the regulation masthead, towing and side lights, and these were being duly exhibited and were burning brightly; a good look-out was being kept on board her. A white all-round light was being exhibited on the stern of the *Donia*. In these circumstances those on board the *Colorcrete* observed distant about half a mile, or a little less, and bearing about 1 to 2 points on the port bow, both masthead lights and side lights of a steamship, which proved to be the *Rotorua*, and the masthead, towing and side lights of a tug on her starboard quarter. The *Colorcrete* continued on her course and shortly afterwards eased her speed in order

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

that a tug and tow which were overtaking her to the northward might more quickly pass clear. The *Rotorua*, however, instead of keeping her position or signalling her intended manœuvres, caused or allowed her head to fall off to port and came bodily to the northward, shutting in her red light, and, although the wheel of the *Colorcrete* was starboarded and her engines were put full speed ahead and her wheel was put hard-a-port in an endeavour to swing her craft clear, the *Rotorua* with her stem struck the port side of the *Fawn* a little abaft amidships a heavy blow, breaking the tiller of the *Regia*, which was lashed a little to port, and doing so much damage to the *Fawn* that she had to be beached to prevent her from sinking in deep water. Considerable damage was also done to the cargo laden on board the *Fawn*. The plaintiffs alleged that those on board the *Rotorua* negligently failed to keep a good look-out; failed to pass the *Colorcrete* and her tows port to port; ported; caused or allowed her head to fall off to port and the *Rotorua* to come bodily to the northward; failed to indicate the *Rotorua's* intended manœuvres by the appropriate or any sound signal; caused or allowed her tug to pull on her starboard quarter; failed to ease, stop or reverse her engines, or to do so in due time, and failed to comply with Rules 27, 33, 39, 40, 41 and 42 of the Port of London River By-Laws, 1914 to 1926.

The defendants' case was that the *Rotorua*, which was laden with a cargo of refrigerated produce was, shortly before 10.36 p.m. on the 4th April, 1935, in Gallions Reach, River Thames, with her stem about off the upper entrance to the Royal Albert Dock and 250ft. to 300ft. out from the line of the pierheads. The wind at the time was W., a gentle breeze; the weather fine and clear; and the tide flood of about 3 to 3½ knots in force. The *Rotorua* was lying stemming the tide, heading N.N.E. mag. and waiting to enter King George V dock. The regulation masthead lights, side lights and a stern light were being duly exhibited on board the *Rotorua*, and were burning brightly and a good look-out was being kept on board her. In these circumstances the towing lights and the green light of a vessel, which proved to be the motor barge *Colorcrete*, with three barges in tow in one rank, were particularly observed about 450ft. to 500ft. distant, bearing about a point on the starboard bow of the *Rotorua*. The *Rotorua* remained stemming the tide, without altering her heading, but shortly afterwards the *Colorcrete* instead of passing the *Rotorua* starboard side to starboard side, as she could and ought to have done, was seen to open her red light and close in her green, and to be endeavouring to tow her craft across the head of the *Rotorua* from starboard to port. The starboard engine of the *Rotorua* was at once ordered full speed astern and three short blasts were sounded on her whistle, but the *Colorcrete*, having got her craft across the tide, was unable to regain control of them, with the result that the *Fawn* with her port side fell across the stem of the *Rotorua*. The defendants alleged that those on board the *Colorcrete* negligently and improperly failed to keep a good look-out; failed to pass the *Rotorua* starboard side to starboard side when in a position so to do; starboarded their wheel at an improper time; failed to keep their tows under any or any sufficient control; caused or allowed their tows to get athwart the tide; failed to straighten their tows up in due time by the use of helm and/or engines; failed to give any sound signal of her intention to alter course so as to pass the *Rotorua* port to port; and failed to comply with Rules 41 and 42 of the Port of London River By-laws, 1914–1926.

The arguments of counsel and the findings of the learned judge appear fully from the judgment. In support of the contention that the *Colorcrete* was alone to blame for the collision, counsel for the defendants referred to the case of *Admiralty Commissioners* v. *Owners of the "Volute,"* (1922) 15 Asp. Mar. Law Cas. 530; 1 A. C. 429; 126 L. T. Rep. 425), in which the law of contributory negligence in Admiralty was summarised by the House of Lords. The learned judge's observations upon what he regarded as being the true effect and implication of that decision appear in the latter part of his judgment.

R. F. Hayward and *Vere Hunt*, for the plaintiffs.

Lewis Noad, K.C. and *Owen L. Bateson*, for the defendants.

Langton, J.—This case arises out of a collision between a large steamship, the *Rotorua*, and a big canal barge in tow of the motor barge *Colorcrete*. The case is not a large one, but it is not devoid of interest, nor, I think, entirely devoid of importance. The *Rotorua* is a steel twin-screw steamship of upwards of 10,000 tons gross, and the barge, the *Fawn*, which came into collision with her, is a canal dumb barge 78ft. in length, and was the tail end of three barges in tow of the motor barge *Colorcrete*. Not the least important feature in this case is that the towing incidence was not that of an ordinary handy river tug, but was that of a comparatively cumbrous boat, the motor barge *Colorcrete*.

The towing flotilla was proceeding up-river on the flood tide between two and two-and-a-half knots in force. The wind was light from the westward, and the night, which was the night of the 4th April, 1935, was fine and clear.

The case has been well argued and expeditiously fought, and two or three of the main factors, around which contention usually fastens, were, in this case, either agreed or practically agreed. To begin with, it was agreed that the angle of the blow was about 80 deg. Any further precision would have been quite unnecessary in the circumstances. The place of collision is almost agreed at, I think, about opposite the knuckle between the two Albert Dock entrances, and about 250 to 300ft. from the knuckle. The parts of the various vessels in collision are agreed. The stem of the *Rotorua* struck the port side of the barge *Fawn* somewhere aft of amidships on the *Fawn*.

While I am dealing with that part of the case, I may say that my finding as regards this angle is that it was slightly over seven points—80 deg., and that the larger portion of the angle was on the barge in relation to the lying up and down the channel, but a considerable portion of it was on the *Rotorua*.

The case for the *Rotorua* was that she was lying on a very slight angle off the straight line up and down river, an angle of not more than a point. I think that is wrong, and I think that the angle which she had at the moment of collision was more than two points—probably less than three, but more than two. The result of the agreed angle, of course, will be that the *Fawn* had the remainder—what I call the larger portion of the angle—which was something over four points.

While there were all these features in agreement, there were also other features in sharp disagreement. To make my position in the matter clear from the outset, I will say that wherever this disagreement is apparent I prefer, and accept, the case for the

Colorcrete, the plaintiffs, as against the case for the *Rotorua*.

The master of the *Colorcrete*, Mr. Connelly, was called before me and gave a clear and succinct account of how he was proceeding up river, the difficulty in which he was placed, and the circumstances in which the collision occurred. He was forcibly, clearly, fairly, and I may say admirably, cross-examined by Mr. Bateson. It is not surprising in the circumstances that he found himself in more than one difficulty from which he was unable to extract himself with any very great degree of brilliance. Therefore, in truth and in fact, I hold that in his navigation there was a fault which he was unable to cover up, but I shall have to deal with that more extensively later. My confidence in his credibility was at no time shaken, and I think he was retailing a story of something which actually occurred to all intents and purposes as he retailed it.

The mate was a man who I am ready to believe would be more useful on the river than brilliant in the witness-box. He was a man of a very small degree of instruction, and I do not think he assisted me very much one way or the other.

That evidence was buttressed by the evidence of two tugmasters whose tugs were proceeding up river; one, the *John Wilson*, was, I think, always ahead of the *Colorcrete*, and the *Ditto* was overtaking. I do not know whether they were both behind at some period. However that may be, they were proceeding up river on their starboard side and had got out of the way, as far as this collision happened, before the collision occurred. They were in a position to deal with a good many crucial facts of the case. Everyone who is acquainted with the river knows that there are classes, I might say, clans, upon the river, and that one approaches the evidence of a member of a class, or clan, with some suspicion. The tugmasters are no less a class, or clan, than the pilots or the men who navigate the barges. I do not accept the evidence of these two independent witnesses with any great alacrity.

Mr. Bateson criticised their evidence, saying that it did not really confirm Mr. Connelly—and indeed, it was far from confirming him because they used different expressions to indicate what the *Rotorua* was doing. But, broadly, I think they told the same story as Mr. Connelly told me, and I am satisfied on the facts of this case—the main governing facts of this case—that the *Rotorua* was not, as she said, lying quite steadily in the river with a slight angle during the material time when the *Colorcrete* was approaching her.

I am, on the contrary, satisfied that she was in fact proceeding down and across—very slightly down river, and substantially across—and at the same time her head was falling to the northward. I do not think it is a matter of importance whether one uses the word "sidling," "swaddling," or the phrase that is sometimes used, and I think it is better than either, "trailing" across the water. The important thing is that she was moving and falling. I emphasise the distinction there, because her head was falling as well as the vessel moving. She was moving and falling to the northern water.

That is, to my mind, the main and governing fact of this collision, because it was strenuously denied by those on board the *Rotorua* that she was doing anything of the kind; and if she had been, in fact, lying steadily in the tide, my view of this case would have been wholly different. I do not accept the evidence from the *Rotorua*. I did not like the pilot's evidence at all. He spoke of seeing the motor barge *Colorcrete* making a sweep in the bight, as I understood it, as she came out of Barking Reach into Gallions Reach. I asked him at the end of his evidence to describe it on a chart, and he took the pencil that I gave him right round the north shore.

Now, I am quite satisfied (1) that he never saw it, and (2) that the barge did not do it. There is no reason why she should. It would not have been the natural thing to do in the circumstances, and moreover, if she had done it the one difficulty in which she found herself, and the difficulty which caused the whole of this collision, would not have arisen. If the *Colorcrete* had been proceeding round in the way described by Bowen she would have been able to make that passage quite simply, and there never would have been any reason for her putting her wheel sharply to starboard, as she says she did, and as everyone else says she did—in fact, as we know now that she must have done in order to cause the collision. I think that that was an invented story by pilot Bowen, and I do not think he ever saw the approaching vessel, the *Colorcrete*, at any greater distance than the distance entered in the preliminary act, of 400ft. to 500ft. In fact, I greatly doubt whether he ever saw her at that distance at all.

I did not much like the rest of the witnesses from the *Rotorua*, save the chief officer, who really added very little to the facts as we know them. The third officer, who was the officer of the watch, seemed a smart young man, but the document that he contributed as his contemporaneous record on the bridge of the movements of the engines was deficient, in that the time at the material time had obviously been altered. Why it had been altered he could not tell me; how it had been altered he could not tell me. He kept repeating that he had nothing to hide, but the plain fact appeared that he had hidden something. I have not had to enter into any regions of speculation regarding this book in order to determine this case, because, fortunately, the engineer produced a book which Mr. Hayward was much too discreet to attempt to assail, and I am satisfied that the engineer gave in his book an accurate account of the movements of the vessel's engines.

Therefore it is not to be supposed that I am determining this case at all against the *Rotorua*, in so far as I am against her by reason of the fact that the bridge movement book happens to have been altered. But it does not tend to increase one's confidence in an officer of the watch in a large vessel of this kind that he cannot present a book to the court which will give any accurate account of what really happened on the bridge.

The chief officer was forward, but with him forward was a waterman, and the waterman's view of what he had to do was pretty clear. He was there, he said, to assist or advise the pilot in matters of docking. He agreed that he had a duty to tell him of any vessels that might be approaching, but he scouted the idea that he had to take any account whatever of any vessel coming up the river at any greater distance than 400ft. or 500ft.

I was rather sorry that the story was reinforced here (if the word can be used) by the attendance of another pilot who had been engaged during the whole of the important time of this story in getting his own ship, the *Edda*, out of King George V. Dock. This was pilot Smith. Pilot Smith appeared, at a very early stage, to be very much an advocate of the *Rotorua*. As I have said, there are classes in these cases on the river, and we must not take an uncharitable view of the fact that a man should be willing to defend his friends. I am sorry to say that Mr. Smith gave me the impression that he was far more of an advocate than a witness. His

attitude towards the perfectly fair questions that Mr. Hayward addressed to him was never to accept the questions but to pontify upon the matter in issue. I think Mr. Smith came with the intention of teaching me how vessels should be navigated in the river. I have not any doubt about his skill and his instructions in these matters, and I hope I am sufficiently wise to keep an open mind after thirty years' vicarious experience, and to get knowledge from those who have practical experience. But the witness box is not the place in which to give instructions, and pilots would do well to realise that advocacy for each other does not help them in this court. The duty that I have here is to determine the case before me and not to wander outside into realms of speculation.

Pilot Smith did not help me at all, save in one particular, that when I asked him whether he considered it necessary to keep an eye upon events which were happening at a distance of 1300ft. and perhaps 1500ft. ahead of him, he emphatically endorsed my view that it was part of his duty. This put the waterman, Wager, in a somewhat unenviable position. Mr. Wager thinks that 400ft. is the maximum distance at which he need take any account of vessels approaching his ship. Pilot Smith agrees with me at least in that, that the estimate of 400ft. would be a good deal too low. On the facts, therefore, I place not the smallest reliance upon the evidence I have had from the *Rotorua*.

One interesting feature in this case has been a claim on behalf of the *Rotorua* that they were angling slightly, as they say they were (that is their phrase, on account of an offset of tide from the entrance of the Royal Albert Dock. Fortunately, I am not left to my ignorant speculation as to the existence of this offset. I have, of course, an experienced adviser beside me, and he knows of no such offset, but we have also in this case the evidence of the hydrographer of the Port of London Authority, who has conducted experiments extending over a fortnight in this very reach and has given me what is, I am satisfied, a perfectly true account of the run of the tide in this locality. I am perfectly satisfied upon his evidence that the run of the tide is what I, a perfectly ignorant man, would have expected, a straight run up and down the reach in a north-easterly to south-westerly direction, and that there is no offset at all from the Royal Albert Dock on the north side. The tide runs strongest in the deep water channel and with diminishing force as it approaches the northern shore.

I am completely indebted to Captain Birnie at my side for an explanation as to why the *Rotorua* was lying with a slight angle, and why, as the chief officer of the *Rotorua* assured me, every ship that he has known in twenty years when lying in this position at this state of tide always does lie with a slight angle. It was a matter that troubled me at first because there was no obvious reason why the *Rotorua* should confess to an angle at all if it were not a fact. If they wanted to strain the truth in that particular they might have said they were lying straight on the tide—of the two cases, slightly the better for them. But they confessed to a slight angle. Now, if the tide runs, as the hydrographer told me, and I am sure that it does run, with diminishing force as it nears the northern shore, Captain Birnie tells me that it would be very natural for a seaman on a long ship who wished to lie steady, to lie on a straight angle, always assuming that he was lying in the position where the *Rotorua* undoubtedly was lying. She would be lying heading to the tide, and if she had just a small cant to the northward her stern would always be feeling the force of the tide a little bit more than her bow. In that position, Captain Birnie tells me—and I readily accept it—it would be more easy to lie steady than merely to lie with her head directly on the tide. With the slight corrective force of the tide on the stern, it would be the easiest and best way to lie in this channel at this place. That, I am satisfied, is how the *Rotorua* meant to lie, and was attempting to lie. It may be that she thought she was lying like that. I am equally satisfied that in fact she was swinging from time to time with her head to the northward and trailing, as I say, or swaddling across by reason of her downward motion to the northward.

This accounts for what Mr. Connelly saw. He saw on his port bow the two side lights of the *Rotorua*, and he continued to see them. It is the most natural and simplest explanation of this continuing to see them that the *Rotorua* was, so to speak, following him across the channel, coming gently across in that way and continuing to show both lights, because she was gently moving in that direction to the northward. Her engine-room log confirms this view. Some two-and-a-half minutes before the collision somebody noticed that she was falling to northward and gave her starboard engine two turns half-speed astern. Whoever it was was probably much engaged with the approaching vessel which was coming out of King George V. Dock to vacate the lock for the *Rotorua* to take her turn in.

The fact that the *Colorcrete* was only seen at the almost trifling distance of 400ft. shows that very little, if any, attention was concentrated on forward; therefore it did not happen to be noticed that the head of the *Rotorua* was falling off again, and perhaps faster, to the northward, thereby embarrassing the *Colorcrete* and gravely embarrassing her navigation.

As far as the *Rotorua* is concerned, I find her to blame for a very bad look-out. Secondly, I find her to blame for falling to the northern water in this way, when she ought to have been held steadily in the channel if she was going to remain there at all; thirdly, for not taking any appropriate steps to assist the *Colorcrete* in the manœuvres that were forced upon her of getting in closer to the north side than she had had any original intention to do.

It would be unwise to enter upon a definition, and I am not going to attempt at the moment to define the whole duty of the *Rotorua* in the circumstances in which she found herself. But I do not wish there to be any misunderstanding as to the finding in this case. The task of the pilots when they have to hold these large ships off the docks in order to wait their turn for docking is a difficult one. It is very easy to sit ashore and lay down what is ideal in the circumstances. But the circumstances vary, the tide varies, the wind varies, and the holding of a large ship in those circumstances is no easy matter for a pilot. I do not wish anything I say to be construed so as to fetter the pilots, or to put upon them in those circumstances any higher or more difficult duty than they have at present. I think that vessels held in this way have been so held for many, many years past, and will have to be so held in the future.

I am not laying down that the *Rotorua* did anything wrong in remaining off the Royal Albert Dock in order to wait her turn to get into the dock, although with other vessels proceeding up and down river she was perhaps in her wrong water. But, again, no experienced advocate would press that against her. If she was in her wrong water it depends for what purpose she was put there. She was there for a perfectly proper purpose, and that

is not a point that I am taking against her. I think that her duty, or at least part of her duty, cannot be put lower than this: where it is necessary and proper for a vessel to remain in this position she must so navigate as not to embarrass or endanger the navigation of up-coming vessels. In other words, I am satisfied that those on board the *Rotorua*, having placed themselves in this way outside the Royal Albert Dock, were taking the view that it was for any up-coming craft to keep out of their way. They were actually—and for a proper purpose—in those circumstances, in the way of up-coming vessels, and up-coming vessels have a right to expect of vessels so close that they will do their best not to embarrass them; that they will not allow themselves to fall at an angle across the river, other than a slight angle which may be necessary to ride steadily; and that if they do so fall that they will notify to the up-coming vessel that they are either in such circumstances at the time that they cannot extricate themselves, which they can notify by the appropriate four short blasts, or that they are drifting across to one side or the other, which can equally be notified under the rules. I am satisfied that the *Rotorua* did nothing at that time, and that she did nothing at that time because she was keeping a very bad look-out and never realised that she was embarrassing the pilot of the up-coming *Colorcrete*.

Now I have to deal with the *Colorcrete*. I think that is really the most difficult part of this case. The *Colorcrete*, on the facts as proved, and on her own story, appears to have picked up the *Rotorua* in a position which, although not anxious at the distance at which she was when she saw her—nearly half a mile—was still not a position of comfort and safety. As she proceeded, the *Colorcrete* eased her engines at one stage to allow one of the up-coming tugs on her starboard side to pass her in safety, and found the lights of the *Rotorua* still in a somewhat embarrassing position before her. In other words, as she went up, the position, instead of clearing, developed into a position of anxiety. The master, Connelly, frankly confessed that he was throughout under the impression that she was a down-coming vessel and was going over to the southward, and it was for that reason that he seems to have felt that what would otherwise have been a position of considerable anxiety could be regarded without great anxiety. He said to himself: "This vessel obviously is going to clear at any moment, because she is going over to the southward."

I cannot see why, even if he was embarrassed by what the people on the *Rotorua* were doing, apart from the fact that she was falling to the northward, it was a thing which was by any means unusual or unexpected. Vessels are very often placed in that position and they must lie and wait their turn, and why the master of the *Colorcrete* should have determined in his mind that the *Rotorua* was a down-going vessel I am at a loss to imagine. Faced with this position, he did nothing to clear his position; and he might have done it by blowing his whistle and signalling to those on the *Rotorua* that he was going to do what was a perfectly natural and proper and wise manœuvre, pass port to port. On the contrary he held on—it is true at very low speed, because he was not capable of making much speed, but he held on—without any notification at all. Eventually, owing to the further falling of the *Rotorua*, he found himself in a position in which he had to take very drastic action to avoid her, and he put his wheel hard-a-starboard. He managed to clear the leading barge, but he very naturally got his craft in such a position that they were something like half athwart the river, and in that position the *Fawn* struck the *Rotorua*.

On any interpretation of the rules, without bringing in any question of seamanship, whether it is right or whether it is wrong to act as he did, at that moment he had an imperative duty to let the vessel in front of him know what he was doing. But even then he never sounded his whistle at all; he never gave any notification of the fact that he was taking this sudden and drastic action.

In defence of that position, Mr. Hayward put forward two contentions, and they are worthy of serious attention. "Yes," he said, "if you look at it as simply one vessel approaching another, it is hard to defend, but you must remember that she was one of three. The *John Wilson* had gone up, and I was only the third in the line. You cannot put upon me quite so heavy a burden in those circumstances as you would if I had been alone in the river encountering the *Rotorua*."

I have considered that argument, but I cannot feel that that is any defence. It is some mitigation, but it is not a defence. There is nothing to show—indeed, I think all the evidence is the other way—that either the *John Wilson* or the *Ditto* had to take any helm action at all for the *Rotorua*. They passed up fairly easily because the *Rotorua* had not been falling off to the extent that she did when the *Colorcrete* came in view of her. The *Colorcrete* is not entitled in the face of obvious danger to say: "Well, somebody else passed her in safety and therefore I will"; and as I have pointed out, the position of the *Colorcrete* was not quite *in pari passu* with the other two. This was a laden barge towing three other laden barges, and as Mr. Bateson says: "Those on board my ship could not know that she was a slower mover in any question of helm action than the two vessels that had gone before, and could not know that her action was restricted by the weight of her tow." I think she ought to have been all the more ready and anxious to acquaint the other vessel with what she was doing, so as to let the other vessel know what the position was in which she found herself.

Mr. Hayward's other defence was not so formidable. He said that anyhow the *Rotorua* was on her wrong side. Again, I do not think he meant to press that as a sort of technical point. He meant to put it in this way, and in this way it has force: "Being on the wrong side she ought to have been on the look-out, and I was entitled to suppose that she was. In other words, I was entitled to suppose that she was carrying out the duty that has been stated this morning, namely, to be navigating herself so as not to embarrass up-coming vessels. I was entitled to suppose that she would be, as it were, more alert to up-coming vessels because they would be coming up in their right water and not in their wrong water."

In that way the point has force. But, again, it seems to me that it is not really forcible when you come to appreciate that there was quite a substantial interval of time during which this anxiety on board the *Colorcrete* must have been growing. Therefore I cannot regard that lack of wisdom as a merely venial offence. I think it is a grave offence, and I think it may have had a very substantial effect in causing this collision. It is not without significance that when those on board the *Rotorua* at long last did awaken to the fact that there was a tug and tow approaching her in difficulties, the man forward blew his pea-whistle to indicate to the pilot that he should go astern; and the pilot instead of doing the natural thing in the circumstances, going astern with both engines in

order to go farther up river and give the approaching vessel more room to avoid him, did just exactly what he would have done if the truth had been that his head had been falling to the northward. He took the one step which would open the gate. In other words, he put only the starboard engine astern. If one wanted any confirmation of one's estimate of the credibility of the witnesses there is some confirmation there. The starboard engine was put astern, and I have no doubt it was put astern for that very reason: that the way to assist the *Colorcrete* was to open the gate which was closing.

With these facts as a basis of argument, Mr. Bateson made, it seems to me, the wholly extravagant claim that on these facts the *Colorcrete* was alone to blame. I hope I did my best to appreciate that argument, but it seems to me to give the go-by to all the known law on the subject. An attempt was made in the case of *The Volute* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129) in the House of Lords to summarise once and for all the law of contributory negligence in Admiralty. With deep respect one may, I think, say this: that the attempt, however well-intentioned, was not wholly successful, but I think it results from that decision—and I have always so taken it since that date—that the *Davies* v. *Mann* doctrine, which was there very fully considered in its application to Admiralty cases, can very seldom be applied to the circumstances at sea. To put it in its simplest possible form, the donkey is not hobbled, and the negligence—as has been said over and over again in this court, and in the Court of Appeal—of the original offender is generally continuing. Indeed, it is impossible to draw what is called in that case "a clear line." It is impossible to say when the original negligence ended, if ever.

In this case I find it wholly impossible to draw a clear line and to say that the negligence of the *Rotorua* was not always continuing until the last moment. The passage in which the matter is summed up in *The Volute* is where Lord Birkenhead says this (at p. 144 of (1922) 1 A. C.): "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 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* 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."

I would not have stayed to examine this point so minutely had it not been put forward in all seriousness and apparently in all earnestness as being a strong point in the case. For my part, I do not think the point is arguable here at all. Mr. Bateson tried to suggest, and indeed asserted more than once in argument, that the *Colorcrete* was always able to avoid this collision up to the last moment. Again, I fail altogether to understand what that means. It was part of his case that the *Colorcrete* is a slow moving vessel, rather lacking in power, and he says that it was owing to her late action that this collision happened. It seems difficult to say of a vessel of that sort, encumbered as she was, that she should be able to take action which would avoid the collision with the *Rotorua*. She had no reason to suppose that the *Rotorua* was going on in the circumstances or farther to the northward than she already was. Driven from that, Mr. Bateson said: "No, she could always have gone to the southward." It is quite true that the master, Connelly, when faced with the fact that the water was open to the southward, admitted that it was. But he had no duty to go to the southward. Captain Birnie advises me, and I accept it to the full, that that course would have been just as dangerous as the one he took. His craft would have been no less across the tide if he had attempted to make a sudden movement to the southward than they were by his attempt to make a sudden movement to the northward. It seems to me that the argument is quite unintelligible and the claim seems to be almost an absurdity.

What is the right amount of blame to apportion between these two vessels? No doubt the *Rotorua* was the original offender. It was the *Rotorua* that put the *Colorcrete* in the initial difficulty, but the *Colorcrete* was also an offender in not apprising the *Rotorua* of what she intended to do at an earlier stage. I think she was not only wrong in not whistling under the rule when she took action, but I think she was to blame in seamanship in not taking earlier action and apprising the *Rotorua* at an earlier time. In that I am fortified by Captain Birnie, who agrees with me that that fault in such circumstances is not a venial one and that seamanship did require and demand of the *Colorcrete* that she should do her best to awaken the *Rotorua* to the difficulties that the *Rotorua* was creating.

The proportions of blame, therefore, that I find are that the *Rotorua* should pay two-thirds and the *Colorcrete* one-third of the damages, costs being awarded in the same proportion.

Solicitors for the plaintiffs, *Ince, Roscoe, Wilson,* and *Glover.*

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

February 20, 21, *and* 25, 1936.

(Before BUCKNILL, J.)

The Clan Colquhoun. (*a*)

Collision in Tilbury Main Dock—Tug and tow—Negligence — Contract (Port of London Authority's Towage Conditions) — Damage arising "in the course of and in connection with the towage" — Port of London Dock Bye-laws, 1928, *bye-law* 19*—Regulations for Preventing Collisions at Sea, art.* 29.

This was a claim brought by the Port of London Authority, the owners of the twin-screw steam tug B., *against Clan Line Steamers Limited, owners of the twin-screw steamship* C. C., *for damage sustained by the* B., *which arose out of a collision between the* C. C. *and the* B. *in Tilbury Main Dock. The plaintiffs alleged that the collision was solely caused by the negligence or breach of statutory duty of the defendants, and they also claimed that the defendants were liable under the towage contract. The defendants, whilst admitting the contract, denied negligence or breach of statutory duty, and by a counterclaim for the damage sustained by the* C. C. *alleged that the collision and damage were solely due to the negligence or breach of contract of the plaintiffs. The* C. C. *had a cruiser stern, and each of her propellers had four blades, which projected about* 2*ft. outside the counter. The propellers were about* 17*ft.*

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

from the stern. The C. C. *was in charge of a dock pilot, and the* B. *of her mate as acting master.*

The case for the plaintiffs was that the B. *was in Tilbury Main Dock waiting to assist the* C. C. *from the lock to her berth. The* C. C. *had the* S., *another tug belonging to the plaintiffs, towing ahead, and the* C. C. *was assisting with her own engines as she came ahead into the dock. The* B. *went towards her and got her port bow along the starboard side of the* C. C. *just forward of the mainmast. The* B.*'s starboard engine was working at slow speed ahead when she threw a heaving line on board the* C. C. *She then waited for the tow rope to be made fast, and, while so waiting, those on board the* B. *noticed that the* C. C. *was still working her starboard engine and that the port quarter of the B. was being drawn under the counter of the* C. C. *The* B. *accordingly sounded a succession of short blasts and put her starboard engine full speed ahead in an effort to throw her stern clear, but the* C. C., *having failed to stop her engine, holed the* B. *below the water line with her moving propeller, causing so much damage that the* B. *had to be beached to prevent her sinking in deep water. The plaintiffs charged those on board the* C. C. *with keeping a bad look-out, working the* C. C.*'s engines without the previous consent of the dock master, improperly working her starboard engine, failing to heed warning sound signals, proceeding at excessive speed, and failing to comply with bye-law* 19 *of the Port of London Dock Bye-laws,* 1928, *and art.* 29 *of the Regulations for Preventing Collisions at Sea. The plaintiffs further contended that the tug* B. *was supplied, in pursuance of a written towage contract in the form of the Port of London Authority's Towage Conditions, under clause* 4 *of which the defendants undertook "to bear and pay for any loss or damage to any . . . tug . . . occurring in the course of and in connection with the towage . . . which may arise from or be occasioned by . . . collisions . . . whether such causes, perils or other things have been caused or contributed to by the negligence, default or error of judgment of any officers or servants of the Port Authority whatsoever." The plaintiffs contended that by virtue of the above words the defendants were liable.*

The defendants' case was that the C. C. *was entering Tilbury Main Dock through the New Lock entrance. Boards were displayed on the poop rails on either side of her with the following words in large letters upon them: "Notice.—Twin screws. Keep clear of the blades." The* C. C. *had the tug* S. *ahead, and with her own engines working at "Slow" was making about one or two knots through the water. A good look-out was being kept on board of her. When the* B. *came alongside and passed a hand-line on board, those on board the* C. C. *hailed the* B. *and warned her not to drop down towards the propellers. As, however, the* B. *was seen to be dropping aft she was again hailed not to drop further astern because of the propellers. The hand-line was then thrown overboard and the* C. C.*'s starboard engine was stopped as soon as possible, but the* B.*'s port quarter struck the propeller before it had stopped revolving, doing considerable damage. In support of their counterclaim, the defendants alleged that the* B. *was guilty of a bad look-out, that she failed to keep clear of the* C. C. *and of her starboard propeller, that those on board the* B. *failed to heed the visible and audible warnings given by the* C. C., *and that the* B. *did not use her engines so as to keep moving ahead with the* C. C. *The defendants further said that the towage contract had not begun to be performed, as the tow rope had not been passed to or by the* B. *They alleged breach by the plaintiffs of the towage contract, "in that they failed to exercise due diligence properly to man the said tug, in that her master was absent and a deckhand was in charge."*

In their reply the plaintiffs denied breach of contract and said that the B. *was in command of her mate as acting-master; that the said mate was a man of considerable experience, who had had charge of the* B. *on frequent occasions; and that, in any event, if there were such a breach as alleged, it did not cause or contribute to the collision and damage.*

In the course of his cross-examination, the mate of the B. *admitted that, in manœuvring the* B., *he had assumed that the* C. C. *was a single-screw steamship, and that if he had known that the* C. C. *was a twin-screw steamship he would have acted differently.*

Held, (1) *that the accident was wholly due to the improper way in which the* B. *was handled, by reason of the ignorance of her acting master about the position of the* C. C.*'s propellers. In his Lordship's view, the mate ought to have known before he came alongside the* C. C. *that she had twin screws. Because he did not realise that the* C. C. *had twin screws, he went alongside in a manner which would have been proper for a single-screw ship, but in which he would not have come alongside had he known there were twin screws. On the other hand, there was no evidence of such general incompetence as to say that the* B. *was improperly manned. As for those in charge of the* C. C., *the judge found that they acted as soon as they could reasonably be expected to act in the circumstances.* (2) *That bye-law* 19 *of the Port of London Bye-laws did not apply to the* C. C. *at the time in question, but that, if the bye-law did apply, there had not been any breach of it by the defendants because, on the facts, the* C. C. *had used her engines with the plaintiffs' consent. If he was wrong about this, and the* C. C. *did commit a breach, then the damage was caused partly by the negligent navigation of the* B. *and partly by the breach of the bye-law; but in view of his findings it was not necessary for him to decide*

whether the defendants would be liable for damage contributed to by a breach of the bye-law. (3) *That clause* 4 *of the towage contract (which requires the owner of the ship "so being towed" to pay for any damage through collision with the Authority's property, whether or not such collision was caused or contributed to by the negligence of the Authority's servants) contemplated that clause* 1 *of the contract (dealing with the times at which towage was to be deemed to commence and end) had been complied with, and that in a case of this kind the court ought not to interpret the contract in such a way as to entitle the Authority to recover damages from the ship in respect of damage to the Authority's property brought about through the negligence of the Authority's servants if any other reasonable interpretation could fairly be put upon it; that clause* 1 *could be interpreted as meaning that towage in the case of towage by two tugs should commence when the tow rope had been passed to each of the two tugs contracted for, and that on that interpretation the terms of the contract did not entitle the plaintiffs to recover damage, and did not protect them from liability for the negligence of their servants in charge of the* B. (4) *That the defendants were accordingly entitled to succeed on the claim and counterclaim with costs.*

DAMAGE by collision.

The plaintiffs were the Port of London Authority, owners of the twin-screw tug *Beam* (168 tons gross) and also of the tug *Sirdar*. The defendants were the Clan Line Steamers Limited, owners of the cruiser stern twin-screw steamship *Clan Colquhoun* (7941 tons gross). The collision occurred between the *Beam* and *Clan Colquhoun* in Tilbury main dock at about 8.35 a.m. on the 16th May, 1935, at a time when the *Beam* was about to make fast to the *Clan Colquhoun* and the *Sirdar* was already fast and towing, ahead.

The facts sufficiently appear from the headnote, but at the hearing the following were the contentions put forward by counsel.

It was argued on behalf of the plaintiffs that, assuming, contrary to the plaintiffs' contention, that the *Beam* was negligent, the plaintiffs were nevertheless entitled to recover under clause 4 of the towage contract which was as follows: "The owner or owners of and/or the person or persons interested in the ship, vessel or craft so being towed or transported hereby agree and undertake to bear and pay for any loss of or damage to any of the Port Authority's property (including the tug or tugs engaged in such towage or transport) or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes, perils or other things, viz.: Perils of the seas, rivers or navigation, collisions . . . whether such causes perils or other things have been caused or contributed to by the negligence default or error of judgment of any officers or servants of the Port Authority whatsoever. . . ." According to clause 1, which provided as follows: "For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped," the towage commenced when the tow rope had been passed to or by the *Beam*. The contract was for two tugs, but at the time of the accident, although the tow rope had not been passed to the *Beam*, the *Sirdar* was fast and was actually towing. The towage therefore had commenced. The collision occurred both "in the course of and in connection with" the towage, and the present case could therefore be distinguished from *The Carlton*; 18 Asp. Mar. Law Cas. 240; (1931) P. 186, 194), where the accident was held not to have occurred "in connection with" the towage. The whole cause of the collision was the improper working of the *Clan Colquhoun's* engines in breach of bye-law 19, the terms of which were as follows: "No person shall work or cause to be worked the propelling engines of any ship in the dock for any purpose except with the previous consent of the dock master and at such time and place and in such manner as he shall approve. Penalty 5*l*." "Such consent is only given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines and will indemnify and save harmless the Authority and its officers against all claims in respect of such damage." Under clause 19, even if permission was given to work the engines, the defendants were responsible and were bound to indemnify the plaintiffs against all claims in respect of damage caused by such working. Although the bye-law was often disregarded, it could only be broken at the ship's risk. The present case was a complete *Davies* v. *Mann* case. Notwithstanding any negligence by the plaintiffs, those on board the *Clan Colquhoun* had full opportunity to take action to avoid the collision, and, having failed to take such action in due time, they were alone to blame for the whole damage.

Counsel for the defendants said that the contract of towage had never become operative, as only one of the two tugs contracted for had been made fast. He indicated the abuses which might arise if any other interpretation were placed upon the contract. Referring to *The Carlton* (*sup.*) he said that the facts in this case were stronger in the defendants' favour than they were in that case, where it was held that the damage was not "in connection with towage." He further submitted that on the facts the defendants were entitled to succeed on the allegation that the tug was not properly manned. As to the alleged breach of the bye-laws, he contended that they were merely rules of conduct and could not apply to vessels navigating through the dock. They had to use their engines in order to reach their berth. If the plaintiffs were right, even the engines of tugs could not be used without permission first being obtained and the plaintiffs had not proved that the *Beam* had the dock master's permission to move her engines at any particular time or place or in any particular manner. The *Clan Colquhoun*, moreover, had been ordered by the dock master to start her engines in order to leave the lock. It was not negligence on the part of the *Clan Colquhoun* to have disregarded a rule which the Authority making the rule itself disregarded and let everybody else disregard.

The following cases were referred to by counsel for the defendants; *The Age* (1923 Ll. L. Rep. 172), where it was held by Hill, J. that tugs which are making fast to a ship necessarily take upon themselves the main burden of keeping clear, and *The Glengarry* (1926, 25 Ll. L. Rep. 374), in which

the above decision was cited with approval by Lord Fleming in the Court of Session.

Reference was also made to *Spaight* v. *Tedcastle* (4 Asp. Mar. Law Cas. 406 ; 1881-2, 44 L. T. Rep. 589 ; 6 App. Cas. 217).

His Lordship took time to consider his judgment, which he delivered on the 25th February.

H. G. Willmer, for the plaintiffs.

R. F. Hayward, K.C., for the defendants.

Bucknill, J.—In this case the plaintiffs, the Port of London Authority, are the owners of the steam tug *Beam*. The defendants and counter-claimants are the owners of the steamship *Clan Colquhoun*. The *Beam* is a twin-screw tug of 91ft. in length, and at the material time was in charge of a man called Porter. The *Clan Colquhoun* is a twin-screw vessel of 450ft. in length and has a cruiser stern. Each propeller has four blades, and the extreme tip projects about 2ft. outside the counter. Each propeller is about 17ft. from the stern.

The collision occurred at about 8.34 a.m. on the 16th May, 1935, in Tilbury Main Dock, near the new lock entrance. The weather was fine and clear ; there was no wind and no tide. The *Beam*, which was under contract to make fast and tow the *Clan Colquhoun*, was struck three blows on her port side aft by the revolving starboard propeller of the ship.

The material facts, as I find them, are as follows. When the *Clan Colquhoun*, which was bound into Tilbury Main Dock from the lock, cleared the lock entrance, the *Beam*, which was then lying off the southern side of the new entrance, proceeded to her and fell alongside her starboard side abaft amidships. The ship at this time had the Port of London Authority's tug, *Sirdar*, fast ahead towing her, and the ship was also using her main engines, which were working at slow ahead. The ship was making about two to three knots. The ship was exhibiting the following notice in large lettering on the poop rails on both sides : "Notice. Twin screws. Keep clear of the blades."

In my judgment, Porter ought to have known before he went alongside the ship that she had twin screws. He saw that the ship was using her own engines, but there would not be sufficient swirl of water clearly to indicate that the ship had twin screws. Because he did not realise that the ship had twin screws he came alongside her in a way which he thought proper if she had been a single-screw ship, but which he would not have done if he had known that she had twin screws.

Having come alongside the ship on more or less the same heading as the ship, with his port engine working ahead and his starboard engine stopped, and in a position in which his stern was not more than 30ft. forward of the revolving starboard propeller, he then stopped his port engine and put his starboard engine slow ahead, and one of the tug's crew threw a heaving line on to the ship's deck. There was a very short delay on the part of the ship's crew in taking hold of the heaving line, and then one of her crew picked it up and carried it aft in order to make it fast to the end of the ship's tow rope, which was lying all ready for use on the ship's poop.

While this was being done Porter allowed the *Beam* to fall astern towards the ship's stern and to get dangerously near the revolving starboard propeller. The ship was under slight port wheel and her stern was tending to come towards the tug. As soon as the tug started to draw dangerously near the propeller of the ship the second officer of the ship, who was on watch aft, hailed her to go ahead and keep clear of the propellers, and almost immediately afterwards telegraphed to the bridge to stop the engines, and this was done, but before the starboard propeller was in fact stationary it struck the tug three blows with three different blades. A second or two before the first blow the tug sounded a series of short blasts to indicate that she was in difficulties.

On these facts each side has blamed the o her for the accident. In my view the accident was wholly due to the improper way in which the tug was handled by reason of the ignorance of her master about the position of the propellers of the ship. In consequence the tug was improperly allowed to drop back along the ship's side. I think that the tug could, without any difficulty on her part, have kept clear of the propeller up to a very short time before the accident if her master had been so minded. In my view those in charge of the ship acted as soon as they could be reasonably expected to act under the circumstances.

It is true that the pilot of the ship on the bridge and the second officer aft saw that the tug came alongside in a position in which it was necessary for her to be very careful if she was to keep clear of the starboard propeller. But I think that the pilot and the second officer were entitled to expect the *Beam* to take the necessary steps to keep clear of the propeller. The *Beam* is a twin-screw tug with powerful engines, and there would have been no difficulty in keeping the tug clear of the propeller after she had come alongside the ship if her master had wished to do so, and which he would have done if he had been aware of the position of the propeller. Looking back, no doubt, it seems that it would have been a wise precaution for the pilot of the ship to have stopped the engines as soon as he saw the tug come alongside. This was an act which the pilot said it was unusual for the tug to do, and the pilot said that the tug was "too far aft for my liking," to quote his own words. But I do not think that he was negligent not to stop the starboard propeller at once. As Hill, J. remarked in *The Age* (17 Ll. L. Rep. 172, at p. 173) : "Tugs which are making fast to a ship necessarily take upon themselves the main burden of keeping clear." I think that, apart from a possible breach of bye-law No. 19, the plaintiffs have failed to establish that the navigation of the ship was negligent.

I have now to consider the point made by the plaintiffs as to the alleged breach of bye-law No. 19. The existing Port of London Dock Bye-laws were confirmed by the Minister of Transport on the 20th September, 1928, and bye-law No. 19 is in the following terms : "No person shall work, or cause to be worked, the propelling engines of any ship in the dock for any purpose except with the previous consent of the dock master, and at such time and place and in such manner as he shall approve. Penalty, 5*l*. Such consent is only given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines and will indemnify and save harmless the authority and its officers against all claims in respect of such damage."

Bye-law No. 2 gives certain definitions and states that a "Dock" means any dock of the authority and any part of a dock, and any basin, lock, cut, or entrance connected therewith, and includes the quays, wharves, wails, jetties and piers of such dock. "Dock master" means the dock master of such premises, "and shall include his and their

duly authorised deputies and assistants," and "Ship" means every vessel not propelled by oars which is intended to go to sea, or which is intended to carry passengers for profit or pleasure.

It was argued on behalf of the Port of London Authority that at the time of the collision the ship was admittedly using her propelling engines, and that no consent of the dock master had been obtained; that the ship had, therefore, committed a breach of the bye-law, and that the damage to the tug was caused by this breach.

On this bye-law the following questions arise: Firstly, did the bye-law apply to the *Clan Colquhoun*, which was navigating in the dock with the permission of the Port of London Authority? Secondly, if the bye-law did apply, had the defendants obtained the previous consent of the dock master to use the propelling engines of the ship? Thirdly, can it be said that the mere breach of the bye-law affords a cause of action to the plaintiffs to recover the amount of the damage caused by the breach?

So far as the *Clan Colquhoun* is concerned, on this particular morning the course of conduct by the parties had been as follows. The owners of the ship asked the Port of London Authority to supply two tugs to tow the vessel from lock to berth on certain terms. In pursuance of this request two tugs, the *Sirdar* and the *Beam*, were detailed for the towage. In accordance with the usual practice, the *Sirdar* made fast ahead and towed, and the *Beam* was preparing to make fast astern. The *Beam's* job was to assist the ship to make a right-angled turn under port wheel into her berth in the East Branch Dock. From the entrance lock to the ship's berth is roughly about 1000yds.

When the ship was in the entrance lock and the inner gates were open, the dock master sounded a signal of two short blasts, which is the usual signal for the ship to come ahead on her main engines. The ship's engines were then put ahead with the knowledge of the dock master, and the ship steamed out of the lock. After she had been going ahead on her engines for about two minutes the *Sirdar* made fast ahead, and the ship continued to work her engines slow ahead until the collision, which occurred about two minutes after the *Sirdar* made fast. It was proved on behalf of the ship, and not disputed on behalf of the Port of London Authority, that it was the universal practice of ships of the Clan Line, and indeed of all ships navigating through the dock as this ship was doing on this occasion, to use their main engines to assist in the towage, and that no complaint about such use had ever been made by the Port of London Authority. Porter, the acting master of the *Beam*, admitted that there was nothing unusual in the *Clan Colquhoun* using her engines, and that it was usually done.

In my view, bye-law No. 19 did not apply to the *Clan Colquhoun* at the time in question. If bye-law No. 19 applied, I think that the ship did not commit a breach of it because the previous consent of the dock master to use the engines was given. If the *Clan Colquhoun* did commit a breach, then the damage was caused partly by the negligent navigation of the tug and partly by the breach of the bye-law. It is not necessary for me to decide the nice question whether the defendants would be liable to the plaintiffs for damage contributed to by a breach of the bye-law, and whether in such a case as this sect. 1 of the Maritime Conventions Act, 1911, would apply, and that the liability should be apportioned.

The next point that arises is as to the construction of the towage contract. The Port of London Authority contended that by the terms of the towage contract the owners of the ship agreed to pay for any damage to any of the Port Authority's property (including the tug or tugs engaged in such towage or transport) which might arise from collision, whether such collision was caused or contributed to by the negligence of any officers of the Port Authority.

The first point made on behalf of the ship was that the Port of London Authority could not claim the benefit of the protection and indemnity terms in the towage contract because at the time of the accident these terms had not come into operation. The point arises by reason of clause 1 of the towage terms, which is as follows: "For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped."

It was argued by Mr. Hayward, on behalf of the ship, that admittedly the tow rope had not been passed to the *Beam* at the time of the collision, and therefore the towage had not commenced, and that the protection and indemnity terms only apply to a collision occurring in the course of the towage.

It was admitted on behalf of the Port of London Authority that this contention would be sound if the towage was to be done by the *Beam* alone, but Mr. Willmer argued that in this case the towage was to be done by two tugs, and that the towage commenced when one of the tugs, namely, the *Sirdar*, had started towing. Clause 1, to which I have referred, says that the towage must be deemed to have commenced when the tow rope has been passed to the tug. But in this case the contract is for towage by two tugs. In such a case does the expression "the tug" mean each of "the two tugs" or does it mean "either of the two tugs"? The terms, taken as a whole, appear to contemplate the engagement of the two tugs. The view that the words "the tug" in clause 1 mean "each of the two tugs" in this case is borne out by clause 2. Clause 2 says that during the towage the masters and crews of the tugs shall cease to be under the control of the Port Authority, and shall become subject in all things to the orders and control of the master of the ship. But if the towage starts when one of the two tugs makes fast, how can the second tug be under the control of the master of the tow if that tug is at the other end of the dock and is making her way to the ship to be towed?

Again, clause 4, which is the protection clause, refers to the owner of the ship so being towed paying for damage to any of the Port of London Authority's property (including the tug or tugs engaged in such towage). Here, again, I think this clause contemplates that the towage by the two tugs shall have started, namely, that the tow rope has been passed to each of the two tugs. It is to be noticed that the owners of the *Clan Colquhoun* asked the Port of London Authority to supply two tugs to tow the ship "upon the terms and conditions endorsed hereon." If the owners of the ship consider that two tugs are needed for the task, it seems unreasonable to hold the ship liable for damage done through the negligence of the Port of London Authority's servants when only one tug is fast and towing. On the other hand, if clause 1 of the terms should be read in this case to mean: "The towage or transport shall be deemed to have commenced when the tow rope has been passed to or by either of the two tugs," then the plaintiffs are in this difficulty. At the time of this accident only the *Sirdar* was towing ahead, and the damage

to the *Beam* did not occur in connection with the towage of the *Sirdar*.

In a case of this kind I think the court ought not to interpret the clause in question in such a way as to entitle the Port of London Authority to recover from the ship in respect of damage to the Port of London Authority's property through the negligence of the Port of London Authority's servants, if any other reasonable interpretation can fairly be given to the clause in question. If the Port of London Authority wishes to impose terms on the owner of the tow which entities the Port of London Authority to recover damage done to their property through the negligence of their own servants from the owner of the tow, I think that the terms must be perfectly clear as to their meaning. In my view, clause 1 can fairly be interpreted as meaning that the towage shall be deemed to have commenced when the tow rope or ropes have been passed to each of the two tugs asked for by the shipowner. Until this has been accomplished the ordinary provision of the common law applies to the rights and duties of each party.

I therefore hold that the terms and conditions in this case do not entitle the plaintiffs to recover their damage and do not protect them from liability for negligence of their servants in charge of the *Beam*.

Having regard to the view I have already expressed as to clause 1, it is not necessary for me to decide the point as to the manning of the tug, but my finding of fact may be desirable on this point in case I am wrong in law as to clause 1, and I therefore give it. By the terms of the contract of towage, to which I have referred, was a proviso [in clause 5] to the following effect:

Provided always that such [collision] has not resulted from any breach of the Port Authority . . . of the obligation referred to in clause 3 hereof but the burden of proof of any such breach shall be upon the . . . owners . . . of the ship . . . so being towed.

The operative part of clause 3, so far as this case is concerned, is in the following terms: "The Port Authority . . . shall be bound before and at the beginning of the towage to exercise due diligence . . . properly to man . . the tug."

It is to be noted that the burden of proving that the tug was improperly manned is on the shipowners. The defendants' contention on this part was that the tug at the time in question was in command of Porter, who was a deckhand. Porter was called before me as a witness and he appeared, in himself, to be quite a competent man. He has been about sixteen years in the service of the Port of London Authority, and has been employed in tugs all that time. Before this accident he had frequently assisted the regular tug-master in berthing and unberthing ships, and the master in 1933 reported to the Port of London Authority that Porter was fit to take command in an emergency, in the following terms: "In answer to your memorandum *re* A. Porter, deckhand, I am now satisfied that he could take charge in case of emergency." Porter did, in fact, take command of the tug on one occasion when the master was away, and on that occasion one of the ships which he assisted, the *City of Athens*, struck the dock wall. The pilot of the ship complained to a Port of London Authority official that the collision was due to the fault of the tug. Porter said it was not his fault, and there the matter ended so far as the evidence before me went. Porter admitted that he had never before manœuvred the tug when making fast to a twin-screw vessel.

In my view the defendants have failed to discharge the burden of proving that the tug was not properly manned, in that Porter was incompetent to act as master of the *Beam*. Porter had taken charge of the tug because the regular master had been taken ill the day before. Porter knew the locality and knew the tug and the kind of work she had to do, and the Port of London Authority had no reason to think that he was unfit to be in charge of the tug. The accident on this occasion was due to the fact that he was not aware that the ship was a twin-screw ship. I think that he, and through him the Port of London Authority, were to blame for his handling of the tug, which was due to this lack of knowledge on his part, but apart from that, I do not find that he handled the tug in such a way as to show that he was unfit to be her master.

I therefore pronounce judgment for the defendants on the claim and counterclaim, with costs.

Solicitors: for the plaintiffs, *J. D. Ritchie*; for the defendants, *Coward, Chance*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

February 28 *and March* 2, 1936.

(Before Lord ROCHE, SCOTT, L.J., and EVE, J.)

Tynedale Steam Shipping Company Limited v. Anglo-Soviet Shipping Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Construction—Ship "prevented from working"—Accident putting out of action winches in forepart of ship.

A special case was stated for the opinion of the High Court by arbitrators, involving the construction of a clause in a charter-party in the form known as Baltime. By the charter-party, which was dated the 4th May, 1934, the steamship H. *was hired by the respondents (charterers) from the appellants (owners) for a period of four months. The material clause (clause* 10*) was as follows: "In the event of loss of time caused by . . . damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service. . . . In case of accident to cargo causing detention to steamer, time so lost and expenses incurred shall be for charterers' account even if caused through fault or want of due diligence by owners' servants." The arbitrators found that while on a voyage from Archangel to Liverpool the ship encountered exceptional weather, whereby part of the deck cargo was washed overboard and the foremast was broken. She was towed to a temporary berth, where the broken mast was cut away and where unloading was begun by means of shore cranes. She was*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

then taken to her permanent berth, where she discharged the cargo in the afterpart by means of her own winches, but the cargo in the forepart could not be so discharged owing to the absence of the foremast. It was, therefore, necessary to discharge that part of the cargo by floating derricks, and expense and delay were thereby incurred. The questions for the court were : (1) *Whether the owners were entitled to hire for the period during which the loading time had been exceeded, and* (2) *whether the owners or the charterers were to pay for the extra cost of unloading. The owners contended that the ship had not been "prevented from working" within the meaning of clause* 10, *because it was only part of the ship which could not be unloaded, and therefore she was only "hindered" and not "prevented" from working, and was not off hire. The charterers said that the work of the ship when in port was to unload, and that the loss of the foremast had prevented her from performing that work.*

Held, by Goddard, J., that the ship was off hire for the period of delay, and that the extra expenses must be borne by the owners. A ship is prevented from working when she cannot unload part of her cargo without outside assistance. This ship unloaded part of her cargo with her own winches, but ultimately reached a stage when she could unload no more except by means of the floating derricks. When that stage was reached she was prevented from working within the meaning of the charter-party. The owners, The T. Steam Shipping Company Limited, appealed.

Held, (1) *that the owners were not liable for the extra expenses incurred by the charterers in unloading, as under clauses* 2, 3, *and* 12 *of the charter-party there had been no breach of the engagement of the owners to take all reasonable steps to make the winches effective again* (Giertsen *v.* George V. Turnbull and Co., 1908, *S. C.* 1101 ; 45 *Sc. L. Reporter* 916), *the clauses binding the owners to maintain the vessel in an efficient state, but not to keep it in that state. There was an allegation that under clause* 8, *the agency clause, the charterers as the agents of the owners had incurred this extra expense, but that could only be a claim for money paid for or at the request of the shipowners, and it had been found that there was no express request, and there was nothing upon which any such request could be implied.* (2) *That the contention that an interference with the working was not "preventing the working of the steamer" within the meaning of clause* 10 *was not good, by reason of the decision forty-five years ago in* Hogarth *v.* Miller, Brother, and Co. (7 *Asp. Mar. Law Cas.* 1 ; 64 *L. T. Rep.* 205, *at pp.* 206, 208, 209 ; (1891) *A. C.* 48, *at pp.* 53, 54, 60, 63, 64), *and Scrutton on Charter-parties, 7th edit., pp.* 325, 326, *art.* 146. *Upon the true construction of the charter-party and upon the facts found, the shipowners' right to be paid hire ceased in respect of the time occupied in discharge of the cargo. The ascertainment of the net loss was foreign to clause* 10 *as drawn, and was negatived by a decision of this court in* Vogemann *v.* Zanzibar Steamship Company (1908, 7 *Com. Cas.* 254).

Appeal allowed on the question of the extra expenses ordered by Goddard J. to be paid by the shipowners and dismissed on his decision that the shipowners' right to be paid hire ceased in respect of the time occupied in discharge of the cargo.

Appeal for leave to appeal to House of Lords adjourned until such time as the appellants had decided to carry the appeal there.

APPEAL from a decision of Goddard, J. (18 Asp. Mar. Law Cas. 558 ; 153 L. T. Rep. 332).

The facts are stated shortly in the headnote, and are fully set out in the judgment of the Master of the Rolls.

Le Quesne, K.C. and *Cyril T. Miller*, for the appellants.

A. T. Miller, K.C., *H. I. P. Hallett*, K.C., and *Stephen Chapman*, for the respondents.

The arguments are clearly shown in the judgment of Lord Roche.

Lord Roche.—This is an appeal from a decision of Goddard, J. The matter came before the learned judge in the form of a special case stated by arbitrators under sect. 9, sub-sect. (1) (*a*), of the Arbitration Act, 1934. That Act provides for the means whereby such a case as this is can reach this court. Under the former Arbitration Act, until it was supplemented by this Act of 1934, a case of this nature, which is what is called a consultative case, could not reach this court, but now under the Act it is provided that, by the leave of the judge, which was granted in this case, a consultative case may reach this court, and so this case has reached this court, it has here been very fully argued and very ably argued, and we are in a position now to give our decision.

The arbitration was one between the Tynedale Steam Shipping Company Limited, who were the owners of a steamship called the *Horden*, which was chartered by the respondents, the Anglo-Soviet Shipping Company Limited, under a time charter. The time charter contained a provision for what is called the cesser of the time hire, and it contained a large number of other provisions which I shall have to more specifically refer to. What happened is found in the special case, and is detailed in a protest which is appended to the special case, and which may be referred to as containing the true facts of the case.

I will now indicate quite generally what the material clauses are before considering them in detail or stating the facts. The material clauses are that the owners of the ship are to provide what I may call winch power for the purpose of discharging the ship. The winch power necessarily includes for its efficiency a derrick to be swung or worked by the winch. In this case the derricks are affixed to the masts, which are no longer masts in the sense of being necessary for navigation, but they are necessary for the discharge. The cesser clause provides that if there is a breakdown of machinery, damage to hull or other accident preventing the working of the steamer and a loss of time results from that, then time hire is to cease. That being the general nature of the stipulations in the charter-party, one can now state shortly the facts as found by the arbitrators, and they are

that when the vessel was returning from a Russian port and proceeding to Liverpool laden with a cargo of timber, owing to weather and heavy squalls striking the vessel the deck cargo was affected, there was a heavy list to starboard, and some of the starboard deck load fell overboard. In the course of that happening there was severe damage to the mast. Under those circumstances, the vessel could proceed all right as regards finishing her voyage, but when she got into port, she could in substance only discharge half of the vessel at a time. The forward part of the vessel could not be discharged at all by her own winches owing to this accident, and shore or floating craft had to be hired and were hired by the charterers in order to carry out the discharge at the port. Those, of course, had to lie between the vessel and the quay, with this result, that when she lay alongside the quay for discharging the aft part of the cargo she could not discharge the forward part of the cargo because the floating derricks and cranes could not get between her and the quay. When, on the other hand, the forward part was discharging by means of the floating cranes between the vessel and the quay, she could not discharge the aft part because the aft part could not be alongside, as was necessary for the purpose of discharging.

So the finding in the case on this point is that the discharge at the fore-end was impossible by reason of there being no mast. In pars. 13 and 14 of the case the arbitrators found what I have said as regards the discharge. Under those circumstances, two disputes arise between the parties. The first is, that the charterers say that hire ceased at the time they wanted to discharge, and she could only discharge half the ship at a time, that is to say, quite inefficiently. The shipowners contend that so long as she was efficient or able to discharge, however slowly, in that condition, the cesser hire clauses under its terms was not in operation. The charterers also contended that the expense of hiring the shore crane, or floating craft, should fall upon the shipowners, and not upon themselves. The learned judge has found both those points in favour of the charterers, and has held that hire ceased at the time of discharge, and that the charterers, are entitled to recover the sum of 90*l.* odd for the cost of hiring the floating cranes.

I will deal with the second point first, because it is so much the easier of the two, in order to get it out of the way. The learned judge has apparently held that the charterers were entitled to recover this sum from the shipowners because of the stipulation in clause 3, line 40, on the second page of the charter-party: "The steamer to be fitted and maintained with winches, derricks, wheels and ordinary runners capable of handling lifts up to 3 tons," and so on. It must be, I think, that the learned judge was persuaded to hold that there was some breach of that stipulation on the part of the shipowners, and that the sum of 91*l.* in question should be recovered by way of damages. As to that, it is sufficient to say that in my judgment there is no doubt that the stipulation with regard to the winches and with regard to the ship generally, in clause 2 of the charter-party, that the owners are to "maintain her in a thoroughly efficient state in hull and machinery during service," do not constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services. On the contrary, there is a very wide exception clause, namely, clause 12 of the charter-party: "Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused, even if caused by the neglect or default by owners' servants." The engagement of the shipowners is this, that if accidents happen, or events arise to cause the ship to be inefficient, or the winches to be ineffective and out of action, they will take all reasonable and proper steps that reasonable men could to put them back again. There is no evidence whatever, indeed, the findings of fact are to the contrary, that there was any such breach of that obligation on the part of the shipowners. If any authority in support of that interpretation of the clause were necessary, I think it is to be found in a decision of the Inner House in Scotland, in the case of *Giertsen* v. *George V. Turnbull and Co.* (1908) S. C. 1101; 45 Sc. L. Reporter 916). The headnote in the Scottish Law Reporter on this point of that case is as follows: "Held, (1) that an article in a charter-party binding the owner 'to provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service,' placed the expense of maintaining the vessel in an efficient state on the owner, but did not bind him to keep the vessel in that state." That is sufficient to dispose of that point on the ground on which the decision was based in the court below. But before this court, Mr. A. T. Miller has sought to support the judgment on that point by a different line of argument. He has said that the expense of providing the winches and derricks is thrown, under the charter-party, upon the owners of the ship. By another clause of the charter-party, namely, the agency clause, clause 8, it is provided: "Captain to be under the orders of charterers as regards employment agency or other arrangements." He said that the charterers as agents of the ship duly authorised under that clause, caused this machinery to be hired, and that the hire having been effected by persons authorised to be agents of the shipowners, the shipowners ought to pay the bill. That clause about agency has a well-known and much more limited content than that argument implies. The stipulation that the charterers' agents are the agents for the ship means, with regard to customs, and matters of that sort; it certainly does not give authority to the charterers' agents to hire machinery to do work if it be the work of the ship, without asking the shipowner, or the master, anything about it. Here there is an express finding in the case to the following effect, in par. 21: "All the discharging arrangements were carried out by the charterers' agents Messrs. L. W. Moreland and Co., and neither the shipowners nor the master interfered in any way either with the arrangements or the performance of the discharge." The whole case is quite consistent with this view, that the charterers wanted their cargo and wanted it badly, and provided perfectly businesslike means for getting it sooner than they would have done had they let the shipowners discharge piecemeal, prepare the derrick, and then proceed with the discharge. This claim put under this head can only be a claim for money paid for, or at the request of, the shipowners. Under those circumstances, there is a clear finding that there was no express request, and it seems to me that there is no material whatever upon which the request ought to be, or can be, implied. For that reason the judgment on that point is, in my opinion, erroneous and must be reversed.

With regard to the second point, namely, the cesser of hire. The argument of Mr. Le Quesne, which he put before us perfectly clearly and very fully, was that this ship was partly efficient and that the clause in question as to the cesser of hire,

which I had better now read, only relates to complete or total prevention of working the ship. The clause is as follows: "In the event of loss of time caused by dry docking or by other necessary measures to maintain the efficiency of steamer or by deficiency of men or owners' stores breakdown of machinery damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service." He says that the words are "preventing the working of the steamer," and that an interference with the working is not a prevention, and that the most that happened here was that the ship discharged half as fast as it would have done or thereabouts if there had been no damage. There is one fatal objection to that argument, and that is it has come about forty-five years too late. In the year 1890 this clause, which I am unable in any way to distinguish from the present, came up for decision in the Court of Session in Scotland and by the House of Lords on appeal from the Court of Session. The case I refer to is the case of *Hogarth* v. *Miller, Brother, and Co.* (7 Asp. Mar. Law Cas. 1; 64 L. T. Rep. 205; (1891) A. C. 48). I say that the language of that clause cannot in my view be distinguished from the language of the clause in this case. The only difference was that the word "stopped" occurred in that case instead of the word "preventing" in this case. I am unable to find any other distinction. Lord Halsbury, the Lord Chancellor (64 L. T. Rep. at p. 206; (1891) A. C. at pp. 53, 54), says this: "That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, 'That in the event of loss of time.' That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates." Then he reads the clause again. "The language is consonant with what I have indicated to be the general intention of the parties in entering into this part of the contract. In the first place, it is 'in the event of loss of time,' and then the parties proceed to show that that contingency which is to give rise to the actual operation of the clause is, that the working powers of the vessel are interfered with, and 'the working of the vessel is stopped for more than forty-eight consecutive working hours,' and upon that there is to be a cesser. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely"—then he reads them, amongst others "breakdown of machinery"—"the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: 'until she be again in an efficient state to resume her service.'" Having read those words from Lord Halsbury, it is just necessary, I think, or convenient to state again what was in question in *Hogarth* v. *Miller*. In *Hogarth* v. *Miller* the vessel had broken down at sea. She went into a port of refuge and then waited to see whether she could repair. During that waiting period there is no question but that the vessel was off hire. Then a tug was hired, and she went on her way crippled with the aid of the tug, and she could not have got home without it. The shipowners contended that she was working an engine and helping the tug. She was not stopped altogether, she was working. The argument was presented, I think, very much as Mr. Le Quesne has presented it here. We have not so full a representation of Mr. Finlay's argument as we have knowledge of Mr. Le Quesne's argument, but I think it was substantially the argument we have heard to-day. That was the argument which as regards the voyage was rejected by the majority of the Lords who gave judgment. With regard to another part, namely, the discharge when the vessel in that case got to the German port which was her port of discharge, although she was unable to steam she was fully able to discharge as fast as she would have discharged had the accident not happened. It was held that there she was on hire, because she was efficient for the service which was required of her. That is the converse of this case. The mast being damaged did not prevent or hinder the *Harden* steaming, but it did hinder or prevent her discharging in the sense that prevention was construed in the House of Lords in *Hogarth* v. *Miller* (*ubi. sup.*) as preventing discharge or the working of the ship happening in accordance with the contract. That is the full point, it seems to me, between the parties in this case, as it was between the majority of the House in the case of *Hogarth* v. *Miller* and the dissenting Lord Bramwell. Let me go a little further into the judgments in order to make good my point. Let me say that I do recognise that the facts in *Hogarth* v. *Miller* were in a sense different to those in this case. It was held that the ship could not have got to a port without a tug. Mr. Le Quesne says in this case they could have discharged slowly and did discharge slowly, but they did discharge. I am afraid that the answer to that part of the case is that it is a finding of fact. There is a finding of fact here that discharge of the forward part of the ship was impossible by the ship herself by means of her winches and derricks. Lord Watson in *Hogarth* v. *Miller, Brother, and Co.* (7 Asp. Mar. Law Cas. at p. 4; 64 L. T. Rep. at p. 208; (1891) A. C. at p. 60), in dealing with the matter says: "The first question which arises is this: Was the vessel, when she started under tow for Harburg, in an efficient state to resume her service within the meaning of the contract? I have no hesitation in answering that question in the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery."

Then when he comes to the second part of the case, namely, the discharge at Harburg, and dealing with her efficiency for that purpose, what he says is this (7 Asp. Mar. Law Cas. at p. 4; 64 L. T. Rep. at p. 208; (1891) A. C. at p. 60): "It appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam-winches were in perfect order, and it humbly appears to me that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes

contemplated at the time by the contract, and required by them, they must, in terms of the contract, pay the stipulated hire." Then the noble Lord goes on to examine the facts which, if the view contended for by the appellants were right, would have been wholly unnecessary to consider, namely, whether the discharge was slowed up, and he decides that it was not slowed up. Therefore, his previous conclusion is justified, that she was in a thoroughly efficient state for all purposes contemplated at the time of her being chartered. Lord Bramwell dissented in a very characteristic and vigorous fashion and although Mr. Le Quesne sought to persuade us that the noble Lord was really only differing about the finding of fact it is abundantly clear from the language that he used that he thought himself differing *in toto* from the other noble Lords in the matter of construction, because he says: "My Lords, I cannot help thinking that most undue importance has been attached to the word 'efficient.'" Then he repeats that (7 Asp. Mar. Law Cas. at p. 5; 64 L. T. Rep. at p. 209; (1891) A. C. at p. 63): "It seems to me, as I have said before, I am afraid more than once, that an undue importance is attached to the word 'efficient.' I think it is an example of 'qui haeret in literâ haeret in cortice.'" That is what he said about it. Lord Herschell's opinion on this point is of importance, because his opinion was delivered after the opinion of Lord Bramwell. He says (7 Asp. Mar. Law Cas. at p. 5; 64 L. T. Rep. at p. 209; (1891) A. C. at p. 64): "I do not lay any special stress upon the word 'efficient' in the phrase 'efficient working of the vessel.' If the word 'efficient' had been left out and the word 'working' had been the only word there, I think I should have come to the same conclusion as that at which I have arrived." Then he says why, and in effect he says this, that you must contemplate what voyage or voyages were intended and what methods of propulsion were contemplated as the means of propulsion to be employed. Converting that into the language necessary for the present purpose, you are to consider in the matter of discharge what means of discharge were contemplated. Answer: The winches and the derricks. Were those means of discharge available? Answer: No; half of them were not. It seems to me that it follows from that reasoning that the vessel was not fit or able to work for the services required and stipulated for by the initial words of the charter-party, and under those circumstances two results follow. It was the duty of the owners then to put her back into an efficient state in hull and machinery for that purpose. Under clause 2, and under clause 10, events had happened which put into operation the cesser of hire clause. I need not read it again, but reference to the judgment of Lord Morris in *Hogarth* v. *Miller, Brother, and Co.* (*ubi sup.*) will show that the noble Lord took the same view as the other Lords who formed the majority of the House. That being the state of authority in the year 1891, reference has been made, and rightly made, to a most authoritative work, namely, the work of Scrutton on Charter-parties. For this purpose, reference can only properly be made as an authority to the judgment in *Hogarth* v. *Miller*. The late Scrutton, L.J. was responsible for the earlier editions of that work, and with the greatest respect to the other living authorities there never has been a greater authority on this branch of the law than the Lord Justice. In every edition, we have been told, from the sixth onwards until the last for which he was responsible, which is the eleventh, that is to say, from the sixth edition, which is in 1910, until the eleventh, which is in 1923, substantially these words have stood as part of the text of that well-known and rightly esteemed work. I am reading from the seventh edition, at p. 325, under art. 146. The articles are always the same whatever the edition, but the pages alter. At p. 325 this paragraph occurs after setting out the facts of *Hogarth* v. *Miller* (*ubi sup.*): "Held, that no freight was payable from the Canary Islands to the Elbe, as the ship was not in an efficient state; but that hire was due for the time during which she was discharging cargo at the port on the Elbe, as she was efficient for that purpose, though not for proceeding to sea as a steamer." Be it noted as the ship was wholly broken down she was not in an efficient state for her service. Then the note goes on: "Hire ceases as soon as time begins to be lost by a stipulated cause; it has not been decided whether, if damage prevent the working for more than twenty-four hours, hire ceases from the beginning or end of the period: probably from the beginning." Then follows a passage as to something which had not been decided, but which has since been decided, at p. 326: "Hire begins again, not when the ship is in the same position as when she broke down, but when she has been repaired, and is again efficient to resume her service. The charterer may, therefore, have to pay twice for part of the voyage. The ordinary clause does not provide for payment of *pro rata* hire for a ship partly efficient, as when a steamer, broken down, completes her voyage under sail, nor for the return of prepaid hire, in respect of that portion of time already paid for, during which the ship remains inefficient; it is advisable to modify the clause to meet these points." That is the highest possible authority to show what was thought and recognised as being the meaning and effect of the decision in *Hogarth* v. *Miller* (*ubi sup.*). I should say, to avoid misconception, that that stands in every edition down to the present day, but inasmuch as the editors of those later editions are fortunately still living, the only use of that is to show that nobody has yet found a decision to the contrary of that doctrine, which, I think, was laid down in *Hogarth* v. *Miller*, and which Scrutton, L.J. thought was laid down by *Hogarth* v. *Miller*.

It is really sufficient, I think, to dispose of this case to indicate the reasons why I think on this part of the case the learned judge was right and why the appeal fails. There are two matters to be added. We must only answer the questions put by the arbitrators, and it is important in answering them not to be ambiguous. The first question is: "Whether upon the true construction of the charter and upon the facts as herein found the shipowners are entitled to hire for the vessel in respect of the time occupied in discharge." It will be noted that the note in Scrutton on Charter-parties, to which I have already referred, says this, that if the hire has already been paid for part of that period then the charter cannot be effective. I do not know of any recent discussion of that matter, but I see no reason why that statement should not be regarded as correct. However that may be, if any part of this period is covered by hire already paid in advance, nothing that I am saying must be taken to indicate any view that the charterer may get it back again. The answer that I give is this, that upon the true construction of the charter and upon the facts as here found, that is to say, found in the case, the shipowners' right to be paid hire ceased in respect of the time occupied in discharge, that is to say, they should get no further than that during the continuance of that period. That answer is really sufficient

to dispose of the argument which was developed by Mr. Le Quesne in reply, namely, that there should be a sort of assessment of the amount of time lost by reason of the inefficiency, and for that net loss of time so ascertained hire should be deemed to cease. With regard to that it is sufficient to say that I regard every word which I have read from the judgments of Lord Halsbury and the other noble Lords who formed the majority as negativing that argument, which in my view is opposed to the proper construction of the clause, that construction being a stipulation that if certain events happen then *ipso facto* hire is to cease and is not to begin again until that state of affairs has ceased to exist. The ascertainment of the net loss is something foreign to the clause as drawn. In my judgment it is also opposed to that argument, which was negatived by a decision of this court in the case of *Vogemann* v. *Zanzibar Steamship Company* (7 Com. Cas. 254), where the shipowner had the advantage of the construction which I regard as the true construction, inasmuch as he (the charterer) was made to pay for time when the ship, after being inefficient and after having repairs and become efficient again, was spending time in getting back to that position on the voyage which she left to proceed to the port of refuge, that is to say, the shipowner got paid although time was being lost during that period owing to the breakdown ; inasmuch as the events which led up to and constituted a claim for hire ceased, hire began to run again.

I think that deals with all the points in the case. After the other members of the court have given their judgments we had better deal with the question as to costs and hear what counsel may say upon that point.

Scott, L.J. — I agree with the whole of the judgment delivered by Lord Roche, and with a little hesitation only add one or two observations. In regard to the claim for the 90*l.* odd for expenses incurred by the charterers in consequence of the breakdown of the ship's gear, the charter-party quite clearly prevents a recovery from the shipowner on the ground that they are damages for breach of charter, because the exception clause prevents any such claim being made. Mr. Miller's alternative presentation of the argument that the charterers may recover that amount as money paid by request, in my view, quite ignores the limitations of the doctrine of claims for money paid at request. That form of action does not lie unless there is a request or authority expressed or implied. It is quite clear there was no express request or authority here and, therefore, there remains only the question of an implied authority or request. The principles stated on pages 42 and 43 of the Third Edition of Bullen and Leake make it quite apparent that a request will not be implied unless there is an exceptional position of obligation in one form or another upon the plaintiff. Here nothing of the kind can be asserted, and consequently you get to the position stated on page 43 of Bullen and Leake, which is this : "Where the defendant is not liable to anyone but the plaintiff himself, so that the payment by the plaintiff does not exonerate the defendant from any liability, the plaintiff, having been compelled to pay, must sue the defendant specially on the contract between them." I, therefore, agree that on that claim the shipowner is under no liability. As regards the major part of the charterers' hire, I, as I have already said, entirely agree with the judgment delivered, but I do feel myself that the decision in the House of Lords in *Hogarth* v. *Miller, Brother, and Co.* (7 Asp. Mar. Law Cas. 1 ; 64 L. T. Rep. 205 ; (1891) A. C. 48) did leave open *qua* decision the argument that has been addressed to the court here by Mr. Le Quesne, although I also agree with Lord Roche that the opinions expressed in that case go a very long way towards making the argument of Mr. Le Quesne impossible. Mr. Le Quesne submitted to us that in that case the House accepted as a principle that hire had ceased by reason of prevention within the meaning of the charter before the vessel reached the port of refuge at Las Palmas and before the voyage home in the time subsisting commenced. He said, therefore, the House was not considering what caused the charter hire to cease, but what entitled the shipowner to say the right to charter hire had re-attached. That argument had at first its attractions, but on further reflection, apart from the *obiter dicta*, to which we have to pay the very greatest possible attention in this court, which fell from their Lordships in the House of Lords, I do feel this very strongly, that from a commercial point of view the distinction between what causes the charter hire to go off and what causes it to come on again is, to the commercial man, a distinction which is rather apt to worry him, and I am very loth to construe an ordinary commercial clause in a way that is not simple to the commercial mind, if the clause can properly be interpreted in a simple way, and this clause I think can, for this reason : the clause provides that in the event of loss of time caused by damage to hull or other accident preventing the working of the steamer, then hire for a minimum length of time is to cease until the steamer is again in an efficient state to resume the service.

As Lord Roche has said, the word "again" indicates the former state of the ship and the latter state of the ship ; the state before she went off hire, and the state to which she must have returned before she goes on hire again are intended to be the same, and if one turns to clause 1 of the charter-party in which, following on the description of the ship which is given at the outset of the charter, it is laid down that the ship must be "in every way fitted for ordinary cargo service," and if one has in mind the provision in clause 2 : "Owners are to maintain her in a thoroughly efficient state in hull and machinery during service," and that in clause 3 : "The steamer is to be fitted and maintained with winches, derricks, wheels and ordinary runners capable of handling lifts up to three tons" —having all those three express provisions of the charter in mind, I think that the stress of clause 10 is on the words "the steamer," meaning the contract steamer, the steamer of the kind described in this contract, which is to be maintained in the manner expressly stated in the contract, and that when, in substance, the steamer has ceased to be a steamer with those qualifications, then the charter hire goes off and will not re-attach until the steamer is again a steamer with those qualifications, subject always to this, that the qualifications necessary for work in port are not the same as the qualifications necessary for work at sea, as was pointed out by the House of Lords in *Hogarth* v. *Miller, Brother, and Co.* (*ubi sup.*). If you take that view it is a simple interpretation of the clause from the point of view of the ordinary commercial man. I am very much impressed by the fact that the late Scrutton, L.J. quite clearly has taken that view, and has repeated it in a series of editions of his book for which he was personally responsible, over a long period of years, and that is a book which is known by all shipping lawyers in this country.

All these common forms of charter are forms that are worked out with the assistance of the best shipping lawyers in London, in the light of works like that of the late Scrutton, L.J., and when you get a charter like the Baltime Charter of 1920, which this is, one may assume it has been thought out on the lines of decided cases. It is very undesirable, therefore, to depart from the line of decisions, unless it is absolutely necessary on account of the wording of the particular instrument compelling such a departure.

For those reasons I agree with the judgment already delivered.

Eve, J.—I also agree entirely with the judgment pronounced by my Lords. I should like to know in what form the order is to go. It seems to me there are two questions for our decision. I do not quite see what is the answer to the second question.

Lord Roche.—I should suggest that the form of order should be that the appeal be allowed, and that the order below be reversed. I should like to see if my Lords and counsel agree to this form; that the order of the court below be varied, that question (*a*) be answered that "the shipowners' "—not simply in the negative—"right to receive payments on hire cease in respect of the time occupied in discharge"; that question (*b*) be answered in this way: "The additional costs of discharge, &c., are for the account of the charterers." The costs of discharge in the question are not quite right, because in the court below the costs of discharge, the subject-matter of question (*b*), are for the account of the charterers. I think it would be better to leave out the "&c." and say: "The additional costs of discharge, the subject of the question, are for account of the charterers." Is that agreeable?

Le Quesne.—With regard to (*a*)? I apprehend if the order is drawn up in that form, it would hardly be possible for us to ask the arbitrators to go into those matters relating to the Gladstone Dock, of which I spoke. They have not gone into them yet. If it is your Lordships' intention that they should not do so, I quite agree that this form of words is right. If your Lordships wish to leave it open to my clients, with those facts before them, I should ask that the form with regard to (*a*) should keep more closely to the words of the question. The question only asks what is to happen on the true construction of the charter and upon the facts as herein found.

Lord Roche.—That is what I mean, "upon the facts as herein found." I only meant to alter the words, "are entitled to hire for the vessel in respect of the time occupied in discharge," into "shipowners' right to receive payments for hire." In order to keep open, without deciding it, what I have already referred to, as to what would happen if they had already paid some of it. That is all I was dealing with. That is all the case asks in respect of the time of discharge. I meant to cover everything which is the subject-matter of that question after discharge beginning wherever she was. If she was waiting for discharge, then, as I understand the question, neither the question nor our answer has anything to do with the case. That is open to you as it was open before.

Le Quesne.—Those words on the facts as found in the case will be included in the order?

Lord Roche.—Yes.

Le Quesne.—As regards costs, I submit in view of the order your Lordships are making, I am entitled to recover some costs in respect of this appeal.

After discussion.

Lord Roche.—The court has considered this matter and thinks that the proper order with regard to costs should be that each side should pay their own costs in the court below and divide the costs of the special case. That order is perhaps a little favourable to the shipowners and, therefore, we think that although the shipowners clearly had to come here to alter the judgment of the court below and, therefore, might presumably be thought to be entitled to the major portion of the costs, if not the whole of the costs, subject to certain deductions of costs, yet that should not be done, and we think that the proper order would be that the owners should have one-third of their costs of this appeal.

Le Quesne.—Each side pays half the costs of the special case.

Lord Roche.—Yes, half the costs of the special case. Each side pays their own costs in the court below, but you get one-third of your costs here because you have had to come here.

Le Quesne.—My clients may wish to take this matter further, and in the event of their wishing to do so, they will not be at liberty to do so, as your Lordships are aware, without the permission of this court.

Lord Roche.—I do not know what the present practice is. My view is this. I am not refusing you leave, but I have been asking my Lords whether Greer, L.J. and the other Lords Justices are still of the same opinion as they were when I was sitting here as a member of this court, namely, that when there is a request made for leave to appeal, that leave to appeal should be reserved until such time as it is known whether you desire to appeal.

Scott, L.J.—Of course, it must be done with reasonable despatch.

Lord Roche.—In case I am not here, I wish the other Lords Justices to know what my view about this is. I think that what should be done is that you should discuss with your clients whether they desire to appeal and then come back here with their decision. Mr. Hallett, we wish to wait and find out what is the view of Mr. Le Quesne's clients with regard to having leave to appeal, and then, when he has found out what their view is, then he will come back to this court, which will be composed differently from what it is now. I shall probably not be here myself. It is difficult to get the same court. You will not object to Mr. Le Quesne making his application for leave to appeal to Scott, L.J. and Eve, J.?

Hallett.—I shall not object to that, my Lord.

Appeal dismissed on the main question, but allowed as to the decision that the charterers were entitled to recover 90l. for cost of hiring floating cranes.

Solicitors for the appellants, *Sinclair, Roche*, and *Temperley*, agents for *Botterell, Roche*, and *Temperley*, Newcastle-on-Tyne.

Solicitors for the respondents, *Pettite, Kennedy, Morgan*, and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

January 29, 30, 31, *February* 3, 4, 5, *March* 5, 6 *and* 25, 1936.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Pass of Leny. (*a*)

Damage to oil tanker at berth—Loss of freight resulting from inability to load—Negligence and (or) breach of warranty and (or) contract of wharf owners having control of adjacent berth — Charter-party — Vessel "to proceed to Boston (Lincs) or so near thereto as she can safely get (safely aground)"—Damage to berth — Negligence of ship — Improper mooring.

This was an action for damages instituted by the owners of the tanker P. of L. *against the owners and managers of an oil wharf at Boston (Lincs) and of the berth adjacent thereto, and against the charterers of the* P. of L. *under a charter-party which provided,* inter alia, *that the* P. of L. *was "to proceed to Boston (Lincs) or so near thereto as she can safely get (safely aground)" in respect of damage alleged to have been sustained by the* P. of L. *at the said berth, and of the loss of freight resulting from the vessel's inability to complete her loading thereat.*

Against the first defendants, the plaintiffs alleged negligence and breach of contract and (or) warranty, contending (a) *that the first defendants had improperly invited the* P. of L. *to occupy the said berth when they knew or ought to have known that it was not safe for the* P. of L. *to lie in, and* (b) *that by so inviting the* P. of L. *for reward, they had impliedly warranted that the said berth was safe and fit for the* P. of L. *to occupy. As to the second defendants, the plaintiffs said it was agreed by the charter-party that the ship should proceed to Boston or as near thereto as she could safely get (safely aground) and there load her cargo, and that by ordering the* P. of L. *to the said berth the second defendants had expressly and (or) impliedly warranted that the* P. of L. *could lie safely aground in the said berth; that in fact the said berth was unsafe for the* P. of L. *to lie in, and that therefore the second defendants had committed a breach of the said warranty.*

Both defendants denied liability, and the first defendants counterclaimed for damages in respect of damage done to their berth and to their mooring lines, alleging that the said damage was due to the negligence of those on board the P. of L., *in that they had moored the vessel improperly and in an improper position.*

The court found that the P. of L. *was moored to the wharf, which had a jetty and piling, under the general directions of the first defendants; that she lay with a slight angle out forward from the jetty and that this was not corrected; that after the ship took the ground she had a slight list to starboard; her forward part gradually slipped away, and her forward moorings, and later one of her wires aft, parted so that she pivoted on her stern and lay aground at a substantial angle to the jetty, whereby she sustained serious bottom damage; that as regards the berth, work had been done upon it during July to clear it for the* P. of L.*; that the previous history of the berth had not given the first defendants any warning that such an accident would be likely, and that the first defendants had warned those in charge of the ship that she was lying in an improper position.*

Held, on the above findings: (1) *that, although a ship lying at an angle when moored would be more likely to slip than if tight up, and a careful master ought to manage his mooring ropes so as to keep the ship parallel and close up to the jetty, the mere fact that the vessel took the ground with a slight angle outward did not indicate negligence on the part of those in charge of her;* (2) *that the accident was caused by the inability of the berth to hold up the ship as she lay slightly angled out, and that, as the first defendants did not warrant the safety of the berth and took all reasonable steps to make it safe, they were not liable;* (3) *that the second defendants, as charterers, had no more knowledge about the fitness of the berth than the plaintiffs, and that they had given no express warranty, and that no warranty could be implied from the terms of the charter-party, that the berth was safe.*

The plaintiffs' claim against both defendants and the first defendants' counterclaim were dismissed, no order being made as to the costs.

DAMAGE AT BERTH.

The plaintiffs were the Bulk Oil Steamship Company Limited, of London, owners of the oil tanker *Pass of Leny* (795 tons gross). The first defendants were the Port of Boston Oil Wharves Limited, owners and managers of an oil wharf at Boston, Lincolnshire, and of a berth adjacent thereto. They were also the shippers of a cargo of petroleum which was to have been loaded on board the *Pass of Leny*. The second defendants were Robert Rix and Sons, charterers of the *Pass of Leny* under a charter-party entered into between them and the plaintiffs and dated the 11th July, 1935, by which it was agreed, *inter alia*, that the *Pass of Leny* should "proceed to Boston (Lincs) or as near thereto as she can safely get (safely aground)" and there load a part cargo of about 600 tons of petroleum for carriage to Guiness Wharf, River Trent. By clause 6 it was agreed that the steamer would load "at a place . . . reachable on her arrival, which shall be indicated by charterers and where she can always lie afloat or safely aground."

The plaintiffs' case was that on the early morning of the 16th July, 1935, the *Pass of Leny* (a steel screw tanker of 795 tons gross) was berthed at the said wharf under the directions of the first defendants and was properly moored alongside the said

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

wharf with moorings out both forward and aft. As the tide fell, the *Pass of Leny* took the ground, but, whilst loading was in progress, her forward moorings parted as a result of the unsafe condition of the berth, and the vessel slid away from the wharf towards the river bed and sustained damage, with the further consequence that she was unable to complete her loading. The plaintiffs contended that the berth was unsafe in that its outer edge was unsupported by piles and that mud had been allowed to accumulate upon it. They charged the first defendants with having improperly invited the *Pass of Leny* to occupy the said berth when they knew or ought to have known that it was not in a safe condition for her to lie in, and with having committed a breach of warranty that the berth was safe to be implied from such invitation ; with failing to make or maintain the said berth in a safe condition, and with having failed to warn those in charge of the *Pass of Leny* either that the berth was not safe or that they had not taken reasonable steps to ascertain its condition. Against the second defendants the plaintiffs contended that by ordering the *Pass of Leny* to the said berth they had committed a breach of an express or implied warranty in the said charter-party that the *Pass of Leny* would lie safely aground thereat. Both defendants denied liability, alleging negligence against the plaintiffs in respect of the manner in which the *Pass of Leny* was moored. The first defendants counterclaimed for damage to their berth and mooring lines.

The evidence is fully reviewed in the judgment. In argument on behalf of the second defendants, counsel referred to the recent decision of Branson, J. in *West Ltd.* v. *Wrights* (*Colchester*) *Limited* (1935, 51 Ll. L. Rep., p. 105), in which a charter-party clause almost similar to that here in question was considered.

K. S. Carpmael, K.C., *J. V. Naisby*, and *E. E. Addis* for the plaintiffs.

Lewis Noad, K.C. and *W. L. McNair* for both defendants.

Bucknill, J.—In this case the plaintiffs are the owners of the steamship *Pass of Leny*. The first defendants are the Port of Boston Oil Wharves Limited, who at the material time were the occupiers and had the control and management of an oil wharf and of the berth adjacent thereto in the port of Boston. The second defendants are Messrs. Robert Rix and Sons, who were at the material time the charterers of the *Pass of Leny*.

The claim of the plaintiffs is in respect of damage suffered by them in consequence of the *Pass of Leny* slipping off the berth alongside the wharf of the first defendants, at a time when the ship was loading a cargo of petroleum from the pipe-line on the jetty of the wharf in pursuance of a charter party dated the 11th July, 1935, and made between the plaintiffs and the second defendants.

The basis of the claim against the first defendants was that the berth was unsafe for the ship to take the ground upon, and that the first defendants improperly invited the *Pass of Leny* to occupy the berth when they knew or ought to have known that the berth was unsafe for her to lie upon, and that they in fact had not taken all reasonable care to maintain the berth in a safe condition and to prevent danger to the *Pass of Leny* when lying aground in it.

The basis of the claim by the plaintiffs against the second defendants was that by the charter-party it was agreed that the ship should proceed to Boston or as near thereto as she could get (safely aground) and there load her cargo, that the second defendants ordered the ship to the wharf of the first defendants and thereby warranted that it was a place where the ship could safely ground, and that the berth alongside the wharf was in fact unsafe for that purpose and that there was therefore a breach of the warranty.

The first defendants made a counterclaim against the plaintiffs in respect of damage to their berth and mooring lines which was done when the accident to the ship occurred.

The *Pass of Leny* is an oil tanker of 795 tons gross, 190ft. long, and 30ft. 6in. in beam. She has a flat bottom and is built to take the ground in the course of loading and discharging. The wharf in question runs approximately east and west in the river at Boston, the western end being the up-river end, and it has a jetty and piling. The wharf and berth were made to the order of the first defendants in 1934. The berth as finally constructed had a breadth of 30ft. The vertical face of the jetty towards the river has a slight rake from the river, so that its face at berth level is about 1ft. 10in. nearer the centre of the river than its face at the level of the deck of the jetty. Outside the berth the ground falls away to the middle of the river. The river is tidal and the berth is uncovered at every low water except when there is considerable fresh water coming down in the river. During the summer of 1935 there was never any such fresh water. The tide deposits mud on the berth to an amount of about 1in. to 2in. a tide. This mud tends to collect at the lower or eastern end of the berth, where the natural slope of the river bank makes a sort of wall projecting out and above the scooped out level of the berth.

After completion of the jetty and berth, the plaintiffs sent several of their ships to the jetty, and they lay in the berth aground in safety and discharged their cargoes. Some of these ships were similar in size and shape to the *Pass of Leny*. The *Pass of Leny* was, in fact, the first vessel of the plaintiffs to arrive light at the jetty for the purpose of loading her cargo. The last vessel which used the berth for loading or discharging cargo according to the list supplied to me was the *Pass of Balmaha*, a ship of very similar dimensions to the *Pass of Leny*. She was there in April, 1935, about three months before the *Pass of Leny's* arrival. After the departure of the *Pass of Balmaha*, a sailing barge, which had been converted into a houseboat, lay on the berth for a few days at a time over a period of about two months.

At the hearing of this case there was an acute and remarkable conflict about the incidents of the day on which the accident to the *Pass of Leny* arose. I think that the main reason for this conflict is that, on the 16th July, no one who was present on the jetty or on the ship thought that any damage had been done, and at the trial no one really remembered much of what in fact had taken place on the 16th.

I have found it difficult to come to a conclusion on some of the material facts, but after considering all the evidence and its relative values I have come to the following conclusions. The ship arrived off the jetty in charge of a Trinity House pilot. On the jetty at the time there were Mr. Storey, the manager of the first defendants, Mr. Hearl, Mr. Gooding, and one or two others. The ship came alongside the jetty heading upstream with her port side to the jetty. The ship had no appreciable list to starboard. The tide was flood and a little before high water. The ship was drawing about 4ft. 9in. forward and 11ft. aft. Two lines

from the ship fore and aft were taken ashore by Mr. Lee, a boatman usually employed by the ships in this kind of work at this jetty, and the *Pass of Leny* was brought alongside. Mr. Storey gave some instructions to those on the bridge that he wished the ship to be moored so that her pipe-line was opposite the pipe-line on the jetty from which the cargo was to be pumped into the ship. The flexible hose on the jetty was already fast to the lower or eastern pipe-line on the jetty. The after-part of the ship was securely moored to the jetty by means of mooring ropes from the ship's port and starboard quarters to bollards ashore. A manilla breast rope belonging to the jetty was also made fast on the ship's port side aft, and secured to a bollard ashore. The ship was moored in the berth under the general directions of Lee, and when moored her stem was about abreast of the upper end of the jetty, and the pipe-line was about abreast of the eastern pipe-line on the jetty. The ship was kept in this position against the drain of flood by means of the aft mooring ropes, which were hove taut.

For some reason or other which has not been explained by those on the ship, the ship, when moored, had a slight angle out forward from the jetty, and this angle was never corrected. The angle was not much. The distance of the ship's side from the deck of the jetty in the way of the ship's pipeline, after the ship had been moored and discharge started was, I think, about 5ft., whereas it should have been about 2ft. out if as close alongside as possible. To that extent the ship was not lying parallel to the jetty, because her stern was hove in as close to the jetty as possible.

The loading of cargo first took place in No. 3 tank. Shortly afterwards the ship took the ground aft in the same position as I have stated. After the ship took the ground her forward part very gradually slipped away from the jetty, and at about 12.35 p.m. one of the wires leading from the ship's port bow parted. Very shortly before this wire parted, the hose connections ashore and on the ship had been disconnected. By this time the ship had taken in several hundred tons of her cargo of petroleum. In a short time after the first wire parted, the rest of the forward moorings parted, and also one of the after wires. The ship then slowly slipped across the berth, pivoting on her stern, which also moved forward a little and away from the jetty, and the ship eventually took up a position in the river indicated by the photographs and lay aground at a substantial angle to the side of the jetty.

In consequence of the ship slipping in this way damage was done to the ship's bottom and also to the berth itself. When the tide made, the ship was hove back alongside the wharf, and she started to take in cargo again. Later on, loading was stopped and the ship left the jetty short of some of her cargo. It was agreed between the master and Mr. Storey that under all the circumstances it would be unsafe for the ship to take the ground again on the berth.

There is one other matter which I must deal with, as alleged to have occurred during the morning of the 16th July, and that is the question of warnings which were said to have been given by Lee and Storey to those in charge of the ship that the ship was lying in an improper position. On this sharply contested issue I accept the evidence of Lee that he gave no warning and of Nicol that he received no warning. I find that during the morning after the ship had taken the ground, Storey pointed out to the second officer that the ship was in a very unsatisfactory position, and I accept in substance Mr. Storey's evidence as to that warning.

On these facts I have, first, to decide whether the plaintiffs have established that the berth was not in a safe and proper condition for the ship to lie upon. If a vessel properly moored slips off her berth, the mere fact of her slipping tends to prove that the berth was not fit for her to lie in safety. The width of the berth, as I think, was not more than 30ft. at the western or upper end, and the beam of the ship is 6in. more than 30ft., and, therefore, it is clear that if the ship is at an angle to the berth on grounding, she must be more likely to slip than if she is tied tight up to the berth at her stem as well as her stern.

One of the questions which has perplexed me in this case is whether on my findings of fact I ought to hold those in charge of the ship negligent for allowing this ship to ground with this very slight angle out. I have consulted the Elder Brethren on the point whether a careful shipmaster would guard against and be able to prevent the ship taking such an angle to the berth when aground. I think, and their advice is, that a careful master ought so to manage and adjust his mooring ropes as to keep his ship as far as practicable parallel to the jetty and close to it when she takes the ground. But the mere fact that the *Pass of Leny* took the ground, as I have found, with a very slight angle outwards, does not in itself indicate negligence on the part of those in charge of the ship. The master, and the officers of the ship, who had never been to this jetty before, did not know how narrow the berth was; moreover, the time between coming alongside and connecting up the hoses was short, and no one on shore, as I find, at the time when the hoses were connected up, suggested that the ship was not properly moored or was in an unsafe position.

Apart from the actual slipping of the ship as evidence of defect in the condition of the berth, the plaintiffs also called two eminent surveyors, Mr. Rolland and Mr. Deacon, who took soundings on the berth on the 9th August, and actually examined the surface of the berth on the 16th August. They found considerable accumulation of mud on the surface and a gradual slope outwards of the berth, which led them to the opinion that the berth at the time of their surveys was not safe for the *Pass of Leny* to lie upon. Assuming that their evidence is accurate and their opinions are correct, I do not think that the unfitness of the berth for the *Pass of Leny* on the 16th July is established. It must be remembered that the berth had been damaged by the *Pass of Leny* on the 16th July, and I do not think that the state of the berth on the 9th and 16th August ought to be taken as accurately representing the state of the berth on the 16th July.

One criticism of the plaintiffs' surveyors about the berth is that there must have been a heavy coating of mud on the berth on the 16th July, and the berth must have had a substantial slope towards the river bed. I think it is a fair answer to this criticism that the soundings taken by Mr. Deacon indicate that at the eastern end of the berth where the *Pass of Leny* did not slip the berth was substantially level, and that the slope of the berth on the 9th August was caused by the *Pass of Leny* dragging herself over it as she slipped on the 16th July.

Having regard to the fact that the *Pass of Balmaha* sat in safety on the berth three months before the accident, and having regard to the fact that work on the berth was undoubtedly done during July, as referred to by Mr. Storey and his

foreman, Mr. Hearl, in order to clear it for the *Pass of Leny*, I do not think that the plaintiffs have established their point that there was such an accumulation of mud on the berth on the 16th July as to make the berth unfit for the ship to lie upon, or that the berth then had a substantial slope outwards towards the river.

The second criticism made against the berth is that it was unsafe for the *Pass of Leny* because its outer edge was unsupported by piles or camp sheeting. My view about the slipping of the ship on the 16th July is that the *Pass of Leny* took a slight list to starboard as the cargo was pumped into her and that as the weight on her starboard side increased, the outer edge of the berth gradually gave way, causing her to list more and more to starboard until she broke down the edge of the berth and slipped across the berth and bodily into the river. My conclusion is that the accident was caused by the inability of the berth to hold up the ship with the slight angle out that she had.

I have now to consider whether on these facts either of the defendants are liable. As regards the first defendants, I hold that they are not liable. They did not warrant the safety of the berth. They took in my view all reasonable steps to make the berth safe for the *Pass of Leny*, and the previous history of the berth did not give them any warning that such an accident as this would be likely to happen. They did not know that the berth was unfit for the *Pass of Leny* to load her cargo thereon while aground, nor ought they to have known it. If in fact the *Pass of Leny* had been tied as tight up to the jetty, head and stern, as possible, the accident would probably not have happened.

As regards the alleged liability of the second defendants, the material words in the charter-party are that the ship shall proceed to Boston or as near thereunto as she can safely get (safely aground) and there load, &c. By clause 6 it is agreed that the steamer will load at a place or at a dock or alongside lighters reachable on her arrival, which shall be indicated by charterers, and where she can always lie afloat or safely aground. I do not think that the berth can fairly be described as a place where the *Pass of Leny* could always lie safely aground and load her cargo. In my view there was a substantial element of risk about the operation. I have therefore to decide whether these defendants warranted that the berth was one where the ship could so lie safely aground.

Now, I think that in this case there was clearly no express warranty. Ought such a warranty to be implied? This seems to me to turn on the question whether under the circumstances it would have been a reasonable demand for the plaintiffs to make and a reasonable promise for the charterers to give. I do not think it would have been reasonable. The charterers had no more knowledge, and no more means of knowledge, about the fitness of the berth than the plaintiffs had. On the contrary, they had less means of knowledge in this case, for the plaintiffs, in fact, sent a representative to inspect the berth in April, 1934, with a view to advising the first defendants about it. It is true that they did so on the specific understanding that no responsibility was accepted by them, and that (as they wrote to the first defendants) "Any information we have been able to give does not in any way waive any of the conditions of charter-party, under which the steamer may be fixed."

Again, on the 22nd September, 1934, they wrote to the first defendants to say that "Although Mr. Hicks has given you advice to the utmost of his ability, this in no way places any responsibility on to us, and the responsibility for giving the steamer a safe berth still rests with the owners of the installation." These letters protect the legal rights of the plaintiffs against the first defendants, but so far as the charterers of the ship are concerned I think it may fairly be said that the plaintiffs knew as much about the fitness of the berth for their vessel as the charterers did. Mr. Hicks was called as a witness at the hearing, and did not suggest that the berth in his opinion required piles or camp sheeting to make it fit and proper for the *Pass of Leny* to lie upon aground. He said that when he saw the berth in 1934 he thought it was suitable except for some stones on the outside of the berth, which were removed. Moreover, the plaintiffs had sent several ships to this berth, and they had had ample opportunity of seeing and noting its character.

I therefore hold that no such warranty as to the fitness of the berth was expressly or impliedly given by the second defendants and that the plaintiffs' claim against both defendants fails. I have already dealt with the alleged negligence of the plaintiffs, which I find has not been established. I therefore dismiss both claim and counterclaim.

Mr. *Noad* asked that such costs as were proper with such a result should be allowed.

Bucknill, J. said he thought that the fair order to make was that each side should pay their own costs.

Solicitors for the plaintiffs, *Ingledew, Sons*, and *Brown*.

Solicitors for both defendants, *Hair* and *Co.*

KING'S BENCH DIVISION.

Tuesday, March 31, 1936.

(Before BRANSON, J.)

Boag v. Standard Marine Insurance Company Limited. (*a*)

Marine insurance—Policy on cargo—Further policy on increased value of cargo—Total loss—Payment in full under both policies—General average—Claim to salvage by both underwriters—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79.

Cargo owners insured goods up to their original value with an insurance company. The goods increased in value during the voyage and the cargo owners then insured the increased value with Lloyd's underwriters.

The ship grounded and the cargo was jettisoned, and both insurers paid the cargo owners as for a total loss and took letters of subrogation from them. On a general average statement being prepared, a sum of money became payable to the cargo owners in respect of their jettisoned goods. The original insurers claimed the whole of that sum. The excess value insurers claimed a rateable proportion of it.

Held, that the original insurers were entitled to the whole of the sum recovered, on the grounds, first, that the insured had no claim to any part

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

of it, and the increased value underwriters could have no greater rights than their insured; and, secondly, that there was no evidence that the taking out of increased value policies was so general that the original insurers must be deemed to have contracted on the basis that such a policy would come into existence.

INTERPLEADER issue tried on an agreed statement of facts.

Bodey, Jerrim, and Denning Limited were the owners of part of the cargo of a ship on a voyage from Mediterranean ports to the United Kingdom. The c.i.f. value of their goods was 635*l.* 18*s.* 1*d.* at the date of shipment, but owing to an increase in the value of the commodity concerned, the value on reaching the United Kingdom would have been 699*l.* 14*s.* 8*d.* They had insured the goods up to the original value with the defendants, and at a later date they insured them with the plaintiff and other Lloyd's underwriters for a further 215*l.* in respect of the increased value.

The ship ran aground during the voyage and, in order to refloat her, part of the cargo, including Bodey, Jerrim, and Denning Limited's goods, was jettisoned and became a total loss. Bodey, Jerrim, and Denning Limited claimed under their policy against the defendants as for a total loss, and the claim was admitted and paid, and the defendants took from them a letter of subrogation. Bodey, Jerrim, and Denning Limited then claimed against the plaintiff and his fellow underwriters as for a total loss on the increased value policy, and that claim was also paid in full and a letter of subrogation given. A general average adjustment was prepared, and under it Bodey, Jerrim, and Denning Limited became entitled to be paid 532*l.* 4*s.* 8*d.* in respect of the jettisoned goods.

The defendants, as cargo underwriters, claimed under their subrogation rights to be entitled to the whole of that sum. The increased value underwriters claimed to be entitled to a part thereof, namely, 127*l.* 2*s.* 11*d.*, being the proportion of the general average allowance applicable to the increased value policy. The defendants had no knowledge of the existence of an increased value policy until after they had paid for a total loss.

By the Marine Insurance Act, 1906, s. 79, sub-s. (1):

> "Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

C. T. Miller for the plaintiff.

W. L. McNair for the defendants.

Branson, J.—The point to be decided is whether the company is entitled to the whole of the 532*l.* 4*s.* 8*d.* arising as salvage in respect of the cargo insured by them or whether the underwriters of the excess value policy are entitled to a proportionate part of that sum.

The case for the company is that, having covered the cargo for the whole of its value as agreed between them and their assured in their policies of the 19th September, 1934, and having paid that amount on a claim for a total loss, they became entitled under sect. 79 of the Marine Insurance Act, 1906, to take over the interest of the insured in whatever remained of the subject-matter, and that they exercised that right by accepting the cargo owners' letter of subrogation on the 3rd November, 1934. If the dispute were one between the company and their assured, the company would clearly be entitled to succeed on the authority of the *North of England Iron Steamship Insurance Association* v. *Armstrong* (3 Asp. Mar. Law Cas. 330; 21 L. T. Rep. 822). The criticisms of some of the dicta in that case do not affect it in its application to the present one, because even if the company recovers the whole of the 532*l.* 4*s.* 8*d.*, it will still receive less than the amount paid out by it, which was 635*l.* The *ratio decidendi* both of the *North of England* case and of *The Thames and Mersey Marine Insurance Company* v. *British and Chilian Steamship Company* (6 Asp. Mar. Law Cas. 200; 114 L. T. Rep. 34; (1916) 1 K. B. 30), in which Scrutton, J. (as he then was) followed it, was that the amount fixed by the policy as the value of the subject-matter insured was conclusive between the parties to the contract of insurance, so that the assured could not be heard to say that the amount recovered as salvage was based upon a higher value and that he was his own insurer for the excess.

This being admittedly the position as between the company and the assured, the question is whether the underwriters can have any greater right against the company than their assured has. If they can, it must have arisen by operation of law, for the assured had, on the 3rd November, by taking payment as for a total loss from the company, and by giving the company a letter of subrogation, divested himself of all his interest in the salvage. The argument for the underwriters is that, just as the right of contribution between insurers who have separately issued policies covering the same assured in respect of the same adventure and interest arises independently of any contract between them, so there is a correlative right in each insurer to subrogation which is unaffected by any contract between any insurer and the assured. No authority is to be found for this proposition in the case where the original policy was a valued policy, but it is based upon the analogy of the position created by over insurance by double insurance. Equity, it is urged, decrees that each insurer shall contribute rateably to the sum recoverable by the assured, and equity should equally provide for them to share rateably in any salvage. I think the suggested analogy fails in a case like the present. No right of contribution arose as between the company and the underwriters which could form the basis of any right to share in the salvage.

Next, it is contended on behalf of the underwriters that as soon as a contract of insurance is entered into there arises a right to subrogation in the event of a total loss being paid, that such right is inchoate only until the loss is paid, and so where successive policies have been effected each policy gives rise to an inchoate right, all of which rights crystallise as from the time of the casualty causing the loss, and so are all equally valid. It seems to me that this contention is unsound. It depends upon the theory that subrogation arises by operation of law and independently of anything done between the parties. Whatever might have been said for this theory before the Act of 1906, the language of sect. 79 is conclusive to show that subrogation is not effected as a matter of course. If it were, an insurer, having paid a total loss, could sue in respect of the subject-matter in his own name, which, so far as I know, has never

been allowed. The true view appears to me to be as stated in Phillips on Insurance, vol. 2, par. 1715, where the learned author, quoting from Estrangin, says: "'Any convention between the owner and freighter cannot affect the rights of the insurer under an abandonment.' The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right."

If there had been evidence that it was so usual nowadays to take out excess value policies that underwriters must be taken to subscribe original policies under an implied condition that the assured might do so, the matter would have been different. But there being no such right expressly reserved, and no evidence to justify its implication, I think the underwriters fail to show that the company is not entitled to the whole of the 532*l.* 4*s.* 8*d.* There will be judgment for the company with costs and a declaration that the company is entitled to the whole of the 532*l.* 4*s.* 8*d.* deposited with the trustees, and an order that the trustees should pay that sum to the company.

Judgment for the defendants.

Solicitors for the plaintiff, *Botterell* and *Roche*, agents for *Weightman, Pedder,* and *Co.*, Liverpool.

Solicitors for the defendants, *Ince, Roscoe, Wilson,* and *Glover.*

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 25, 26, 27 *and April* 1, 1936.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Eisenach. (*a*)

Salvage of German ship off Dover — Salved value—Rate of exchange—Effect of frozen mark credits in Germany — Award — Bail.

By two actions, which were subsequently consolidated, the D. Harbour Board (the owners) and the master and crew of the steam tug L., *on the one hand, and the owners, masters, and crews of the salvage vessels* S. *and* G., *on the other hand, sued the owners of the steamship* E. *(belonging to the Norddeutscher Lloyd, of Bremen), her cargo and freight for salvage remuneration. The services were rendered about nine miles S.W. of Dover, in bad weather and heavy seas, on the 30th and 31st August,* 1935, *after the* E. *had been in collision with H.M.S.* Ramillies, *and was drifting on to the Goodwin Sands in a seriously damaged condition. The value of the cargo on board the* E. *was agreed at* 30,000*l.*, *and there was no freight at risk, but the value of the ship was in dispute. After the vessel had been safely brought into Dover she underwent temporary repairs there and was subsequently towed to, and repaired in, Bremen. The cost of the repairs was agreed at* 7000*l. She was then sold by her owners to Bulgarian buyers for about* 600,000 *marks, and it was contended on behalf of the plaintiffs that her sound value was that sum converted into sterling at the current rate of exchange of* 12.2 *marks to the £, namely, roughly* 50,000*l.*, *from which the cost of repairs, namely,* 7000*l.*, *had to be deducted, leaving* 43,000*l. as her salved value. The defendants maintained that she was worth no more than* 21,000*l. The defendants further alleged that in the case of sales by Germans to foreigners the official rate of exchange of* 12.2 *did not apply, and that such sales were always effected at a rate of exchange which was governed by the particular financial relations existing at the time between the German Government and the Government of the country to which the purchaser belonged. Such transactions were conducted through the medium of the Reichsbank, and the purchasing foreigner used frozen mark credits in Germany belonging to his nationals. Such marks had no particular value in sterling since, owing to the German restrictions on the purchase of foreign currencies, they could not be used for the purchase of sterling.*

Held, that the salved value, i.e., *sound value less cost of repairs, was the value of the ship at the time, when, and place where the services ended—in the present case on the* 31*st August,* 1935, *at Dover. By German law, the owners of the* E., *having regard to the nature of the transaction with the Bulgarian buyers, were obliged to spend the proceeds of the sale of the* E. *in building new tonnage in Germany, and were not allowed to convert them into sterling, even had they been able to do so. The evidence showed that the proceeds could not have been converted into sterling at* 12.2 *marks to the £, or anything like it. In transactions of this kind, the relative value of the mark to the £ was a fluid and uncertain matter, and there was no relevant standard by which the proceeds in marks of the sale of the ship could be converted. On the basis that it would cost the owners of the* E. *roughly one-and-a-half million marks to build a ship like the* E. *to-day in Germany, if they received about half a million marks for the* E. *from the buyers the ship would be worth to them, roughly, one-third of the price of a new ship. The cost of building a ship like the* E. *in England would, on the evidence before the court, be somewhere between* 82,000*l. and* 93,500*l. His Lordship accordingly thought that* 30,000*l. less* 7000*l.*, *the cost of repairs, namely,* 23,000*l.*, *would be a proper sum to take as the salved value of the vessel. This, with the* 30,000*l. agreed in respect of the cargo, would give a total salved value of* 53,000*l.*

Held, further, that on the above figures and on the facts proved in regard to the actual salvage services, the proper amounts to be awarded to the salvors respectively were 7000*l. to the* L., 3500*l. to the* S., *and* 650*l. to the* G.

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

Bail in the sum of 15,000*l. had been demanded in respect of the* S. *and the* G., *but although his Lordship had only awarded a total of* 4150*l. to these two tugs, he declined to pronounce the bail excessive.*

SALVAGE.

The plaintiffs in the first action were the Dover Harbour Board (owners) and the master and crew of the steam tug *Lady Duncannon* (181 tons gross). The plaintiffs in the second action were the Bugsier Reederei-und-Bergungs-Aktiengesellschaft, of Hamburg, owners of the salvage tug *Simson* (341 tons gross), and the Union de Remorquage et de Sauvetage à Hélice, of Antwerp, owners of the salvage tug *Goliath* (354 tons gross), and the masters and crews of these two latter tugs. The defendants were the Norddeutscher Lloyd, of Bremen, owners of the steamship *Eisenach* (4159 tons gross). The *Eisenach* had been in collision off Dover with H.M.S. *Ramillies*, and as a result had been seriously damaged in her forward parts. She was badly down by the head, had lost an anchor and was drifting, in bad weather and heavy seas, towards the Goodwin Sands. The two actions, which were brought by the plaintiffs in each case for salvage remuneration in respect of services alleged to have been rendered to her on the 30th and 31st August, 1935, were subsequently consolidated.

The case for the plaintiffs in the first action was as follows: The *Lady Duncannon* is a steel twin screw steam tug of Dover, of 181 tons gross and 63 tons net register, and has a displacement of 574 tons, is fitted with independent engines of 95 h.p. nom., working up to 800 i.h.p., and is 95ft. long. She was specially constructed under Lloyd's special survey for towage purposes, and is fully equipped with every appliance to render her a towage instrument of the highest class. She is supplied with rocket apparatus for establishing connection with vessels in distress and for saving life, and is fitted with a 10-in. fixed centrifugal pump, and in addition 8-in. steam and 6-in. motor pumps are always kept ready to be placed on board. She is also fitted with wireless. She is manned by a crew of eleven hands all told, including two wireless operators, and is of the insured value of 20,000*l.* The tugs belonging to the Dover Harbour Board are kept in constant readiness to proceed out to sea at any moment night or day throughout the year in any weather to render any assistance which may be required by vessels in distress. There are three crews of eleven men each to work the two tugs, one crew being kept as a relief, and each crew has forty-eight hours on duty and twenty-four hours off, so that a crew is always kept on board of each tug. A full head of steam is always maintained, and when in harbour one of them is always kept alongside the Prince of Wales Pier connected up with the telephone. These plaintiffs said that at about 9.20 p.m. on the 30th August, 1935, when the *Lady Duncannon* was lying at the Prince of Wales Pier, Dover, she received orders to proceed at once to the assistance of the steamship *Eisenach*, which had been in collision with H.M.S. *Ramillies* in a position about nine miles S.W. of Dover. The *Lady Duncannon* immediately cast off her moorings and proceeded through the western entrance of Dover Harbour at 9.30 p.m. The weather at the time was stormy: the wind S.W., a fresh gale, with heavy rain squalls: and the tide was running to the W.S.W. with a heavy sea. The *Lady Duncannon* proceeded at full speed, but shortly afterwards such heavy seas were breaking on board as to render it impossible for her crew to move about the deck, and owing to the danger of the bridge being washed away she was compelled to ease to half speed. After reaching a position some three or four miles S.W. of Dover those on board the *Lady Duncannon* observed the search-lights of the *Ramillies* and steered towards them. As the *Lady Duncannon* approached about 11 p.m. the *Eisenach* was made out about a mile distant from the *Ramillies* and in a position with Folkestone Light bearing N.N.W. and Dover N.E. The *Eisenach* was lying stopped athwart the wind and tide broadside to the sea and heading about N.N.W. The *Eisenach* had sustained extensive damage to her port bow, in which there was a large gaping wound, and No. 1 hold and the spaces forward thereof were open to the sea. She was well down by the head, and the boss of her propeller showed out of the water. The *Lady Duncannon* manœuvred close to the *Eisenach* and hailed her, asking if she wanted any assistance, but received no reply. At about 11.30 p.m., therefore, the *Lady Duncannon* inquired by wireless whether the *Eisenach* required any assistance, and at about 12.27 a.m. on the 31st August a reply was received that the *Eisenach* would take her assistance as soon as those of her crew who had been taken off by the boats of the *Ramillies* had returned on board. By this time the tide had turned and was running to the E.N.E. with a force of about two knots, and with the fresh S.W. gale and squalls was setting the vessel rapidly towards the South Goodwin Light-vessel. At about 1 a.m., in response to a message from the *Ramillies*, the *Lady Duncannon* agreed to take the remainder of the crew of the *Eisenach* on board the tug if required. They were, however, kept on board the *Ramillies*, and shortly afterwards, having been informed that the *Eisenach* wanted a pilot to enter Dover, the *Lady Duncannon* sent a wireless message to this effect to the harbour-master at Dover. At about 1.35 a.m., when the *Lady Duncannon* was midway between the *Ramillies* and the *Eisenach* and about a quarter of a mile distant from each of them, she received a message to go to the *Eisenach*, and was thereupon requested to make fast to the vessel. The *Lady Duncannon* was accordingly manœuvred close to the starboard quarter of the *Eisenach* and, although the operation proved difficult in the weather conditions prevailing and called for very skilful handling of the tug, the *Lady Duncannon* was finally made fast, and at about 1.50 a.m. the towage began. By this time the *Eisenach* had been driven into a position about one mile east of the South Goodwin Light-vessel, with the South Foreland Light-vessel and the South Goodwin Light-vessel in line bearing west and about one mile from the south end of the sand, on which very heavy seas were breaking. As soon as the *Lady Duncannon* was fast, she turned the stern of the *Eisenach* round to the S.W. and towed astern in order to keep the vessel off the sand towards which she had been rapidly driving under the combined influence of wind and tide. The tide was increasing in force and setting N.E. directly on to the south end of the sand and, in the weather conditions prevailing, the *Lady Duncannon* was unable to hold the *Eisenach*, although she succeeded in keeping her clear of the south edge of the sand, and shortly afterwards orders were received from the *Eisenach* to tow S.W. The South Goodwin Light-vessel now bore W.S.W. distant about 2¼ miles, and the course of the *Lady Duncannon* was altered in accordance with the orders received. The two vessels, however, were found to be drifting more rapidly towards the sand on this new course and the *Lady Duncannon* thereupon altered

her course to S. in an attempt to keep clear of the Calliper Sand towards which the two vessels were rapidly being driven. Shortly afterwards the course was altered to S.S.E. in an endeavour to edge the *Eisenach* outside the Calliper Sand and to bring the wind and tide on to her port side and to set her up and off the sand. The engines of the *Eisenach* were put slow astern, but as soon as the engines started the stern of the *Eisenach* canted to port towards the sand, bringing the *Lady Duncannon* broad on her starboard side and the two vessels rapidly drove perilously close to the sand. The *Lady Duncannon* hailed the *Eisenach* to ease her engines and thereafter succeeded in towing the stern of the *Eisenach* round to the S.E. again until the vessels were about a mile outside the Calliper and all clear of the sand in a position with the South Goodwin Light-vessel bearing W. by S. and the East Goodwin Light-vessel N.E.½E. After clearing the Calliper the *Lady Duncannon* steered S.W. by S., bringing the wind and tide a little on the port quarter of the *Eisenach*, and the vessels gradually drifted in a north-easterly direction, passing safely about a mile to the eastward of the East Goodwin Light-vessel. The gale began to moderate to a fresh to strong breeze and the tide commenced to decrease in force, and at about 5.35 a.m. the *Lady Duncannon*, although she was unable to make any headway, found that she was able to hold the *Eisenach* in a position about two miles N.E. of the East Goodwin Light-vessel. At about the same time the steam tug *Simson*, with which vessel the *Lady Duncannon* had been in wireless communication, also came to the assistance of the *Eisenach*. The *Simson* was expeditiously made fast on the port quarter of the *Eisenach*, and at about 5.45 a.m. also commenced to tow. The two tugs were able to make some progress and a course was set towards Dover. At first only slow progress could be made and the first two miles took about an hour and a quarter. The operation of towing the disabled *Eisenach* stern first proved one of considerable difficulty, but the tugs continued to make progress and off the South Foreland pilots boarded the *Eisenach* and the *Simson*. At about 10.15 a.m. the flotilla arrived outside Dover and the tug *Goliath* came up and was made fast ahead of the *Eisenach* to assist in steering the vessel into the harbour. The harbour entrance was safely negotiated at about 10.30 a.m., and the *Eisenach* was asked if she could let go her starboard anchor. The reply received was, "We don't know but we will try," and accordingly the *Lady Duncannon* was ordered to hold the *Eisenach* in position until she could let go her anchor or until there was sufficient water for her to go alongside the Prince of Wales Pier. At about 11.10 a.m. those on board the *Eisenach* succeeded in letting go the starboard anchor, and after the *Eisenach* had been turned head to wind the *Lady Duncannon* was cast off and ordered to return at about 2 p.m. In accordance with the orders received, at about 2 p.m. the *Lady Duncannon*, assisted by the *Simson*, towed the *Eisenach* to the Prince of Wales Pier, where she was safely moored at about 3.10 p.m. and the services terminated. These plaintiffs alleged that by means of these services the *Eisenach* and her cargo were rescued from almost certain total loss and were placed in safety. She had sustained extensive damage to her port bow as the result of the collision which had carried away her port anchor and hawse-pipe and her starboard cable was jammed in the chain locker. She was being rapidly driven straight towards the southern edge of the Goodwin Sands, from which she was only about a mile and a half distant. She was down by the head and had she touched the sands must have swung round with her head to the wind and tide, thus exposing the wound in her port bow to the heavy seas which were breaking on the sands. The No. 1 hold of the *Eisenach* was open to the sea, and had the vessel lain head on to the sea the bulkhead between Nos. 1 and 2 holds would probably have given way. Had the bulkhead given way the subsequent salvage of the vessel would have been rendered impossible. But for the services of the *Lady Duncannon* the *Eisenach*, which, although she could work her engines, was completely helpless, would have been ashore on the Goodwins before other assistance could have got to her. The southern part of the Goodwin Sands towards which the vessel was driving is composed of quicksand in which a vessel either rapidly makes a bed for herself or on which she breaks her back. These plaintiffs further alleged that after the *Eisenach* had been manœuvred clear of the sands and her drift checked, the subsequent towage to Dover even in the somewhat moderated weather conditions called for careful handling on the part of the tugmasters, particularly when entering the harbour; that while rendering the services the *Lady Duncannon* and those on board of her ran grave risk. Heavy seas were breaking over the tug causing danger not only of damage to the vessel but also of loss of life or serious personal injury to her crew. While fast to the *Eisenach* close to the Goodwin Sands there was very grave danger of the vessel touching the ground forward. Had she done so she would have been set round rapidly by the gale and tide, dragging the *Lady Duncannon* with her, and either capsizing the tug or carrying her ashore. The *Lady Duncannon* also ran risk of collision with the *Eisenach*.

The case for the plaintiffs in the second action, the owners, master and crew of the *Simson*, and the owners, master and crew of the steam tug *Goliath* was as follows: The Bugsier Salvage Company, owners of the *Simson*, maintains at considerable expense a large and highly-equipped fleet of salvage vessels which are stationed permanently under steam throughout the year at various points along the German coast and in the Baltic Sea and on the Scheldt and on the Atlantic seaboard and are kept exclusively for salvage purposes. It also owns a fleet of special lighters of large capacity for salvage work, and extensive warehouses for storing and if necessary reconditioning salved cargo. It has its own repair shops capable of dealing with any temporary repairs that may be necessary during salvage work, and it also maintains special wreck-raising plant and pontoons. It has at various places in Germany a large stock of salvage apparatus of every sort and description which is always at hand and ready for immediate use whenever required. Private wireless stations are maintained and permanently manned, which keep its headquarters in constant touch with the various salvage vessels, by means of which it is able to obtain the earliest possible information of vessels requiring assistance and is able to dispatch salvage vessels when required with a minimum of delay. The cost of maintaining the salvage vessels which are kept permanently on station during the year 1933 amounted to the sum of £127,296, and although by reason of the continuance of grave depression in shipping and fierce competition necessity forced the company to reduce its salvage stations and to keep expenses to a minimum, it nevertheless, in 1934, had to spend 85,253*l.* in addition to its annual expenditure of about 25,000*l.* in the maintenance of salvage lighters, lifting pontoons and other wreck-raising craft.

The annual cost of maintaining the *Simson* alone amounted in 1934 to 8606*l*. The *Simson* is a steel screw salvage tug of 341 tons gross, 127ft. long and 27ft. in beam, fitted with engines of 1000 i.h.p., giving a speed of eleven-and-a-half knots, and carrying a crew of fourteen trained hands, including a diver. She was built and is specially equipped for salvage work. The *Simson* is fitted with wireless and a wireless direction finder, and included in her special equipment are two 5-in. electric pumps and one 4-in. motor pump complete with suction and delivery hoses. Her fire-fighting equipment includes a special chemical foam fire extinguisher requiring skilled handling, together with the necessary chemicals, smoke helmets, &c. In addition to two sets of diving equipment she has a large outfit of carpenters' and blacksmiths' tools with the necessary material for stopping leaks and executing repairs, and in addition to powerful towing hawsers and warping wires is fitted with a line-throwing gun and pistol. Her value is 30,000*l*. The Union de Remorquage et de Sauvetage à Hélice owns a fleet of up-to-date salvage vessels and tugs. Its salvage vessels are maintained at stations on the River Scheldt, and the Union maintains private wireless and telephone stations. The *Goliath* is maintained for salvage work only and is stationed at Flushing. She is a steel screw salvage tug of 354 tons gross and 68 tons net register, fitted with engines of 1200 i.h.p., and carries a crew of thirteen hands. Her equipment includes portable and fixed salvage pumps, one of which—a duplex pump—has a pumping capacity of 300 tons per hour and another is a powerful fire-extinguishing pump. She is fitted with automatic towing gear, wireless and a searchlight. Her value is 25,000*l*. On the 30th August, 1935, at about 7.20 p.m., while the *Simson* was on station in Harwich, her wireless operator picked up information that there had been a collision nine miles west of Dover, the name of one of the vessels being *Ramillies*. He was unable to get into communication with the *Ramillies*, and accordingly, without delay, the *Simson* hove up anchor and at 7.40 p.m. proceeded at full speed to proffer her services and render any assistance which might be necessary. The wind was S.S.W., force 6, with heavy rain squalls at intervals and poor visibility. Shortly afterwards the *Simson* received from her owners' Hamburg office wireless information that the *Eisenach* had been in collision near Dover and was in need of assistance. Fruitless attempts were made to get into wireless communication with the *Eisenach*, and it was afterwards ascertained that at this time her crew had been taken on board the *Ramillies*. At 11.6 p.m. a wireless message was picked up from the *Eisenach* giving her position as about abreast of Folkestone and at 11.49 the *Ramillies* had wirelessed that the *Lady Duncannon* had been engaged by the *Eisenach*. As the *Simson* continued on her way the wind increased to a moderate gale with heavy rain squalls reaching gale force, raising a heavy sea in which the *Simson* rolled and pitched heavily and shipped much water. During the night the *Simson* maintained wireless communication, and at about 1 a.m. on the 31st August the *Eisenach* inquired at what time the *Simson* would arrive. In answer to a message sent by the *Simson* at 2.32 a.m. the *Eisenach* reported that she was in tow of the *Lady Duncannon* east of the South Goodwin Light-vessel, and drifting quickly to the north-east with her No. 1 hold full of water. The *Simson* continued on at full speed, and at about 3.45 a.m. arrived off the South Goodwin Light-vessel, having run through the Downs and then, with the aid of her wireless direction-finder, proceeded north and east, and at about 4.45 a.m. arrived near by the disabled *Eisenach*. The *Eisenach*, at high speed, had been rammed nearly head-on by the battleship *Ramillies*, whose stem, with great violence, had ripped open her port bow from the forecastle to far below water, and from near the stem nearly as far aft as the bulkhead between Nos. 1 and 2 holds, pushing her stem to starboard over 3ft., killing four and injuring several other members of her crew, wrecking her forepart so badly that the rape seed cargo which was in No. 1 hold fell and (or) was washed out of it, exposing the after-bulkhead, which was leaking, to the force of the seas and the battering effect of the wreckage. The forepeak and No. 1 tank were also open to the sea. The *Eisenach*, showing "not under command" signals, was much down by the head, and the tug *Lady Duncannon*, towing from her stern to the southward, could not keep her stern on to the sea or to control her in the rough sea and strong tide, and both vessels were drifting to leeward. Meanwhile, the *Goliath*, on station at Flushing, keeping wireless watch and with full steam up, at about 7.35 p.m. received information of the collision, and that the *Eisenach* was in need of assistance nine miles from Dover. The *Goliath* at once put to sea, and steamed at full speed throughout the night towards Dover Straits against a west-south-westerly gale with heavy rain and low visibility. On her arrival near the *Eisenach* the *Simson*, by carefully manœuvring as near as possible to the *Eisenach*, was able to pass a line by which her powerful hawser of 60 fathoms of 16-in. manilla and 75 fathoms of 5-in. steel wire were hauled on board the *Eisenach* and made fast on her port side aft. When the hawser had been made fast the *Simson*, carefully taking the strain, set a course of S.W. by W. with the *Lady Duncannon* towing in the same direction with a much shorter scope of hawser. The wind was blowing with heavy rain squalls and bad visibility. Both the tugs and the disabled vessel pitched and rolled in the heavy seas which broke over them. The *Eisenach*, being necessarily towed stern first, sheered heavily to port and starboard, subjecting the hawsers to very great strain, and in spite of the efforts of the powerful salvage tugs a speed of about two knots only could be attained. In spite of being held stern to sea heavy seas surged in and out of the gaping hole in the port bow of the *Eisenach*, subjecting the weakened after-bulkhead of No. 1 hold to very great strain. The master of the *Eisenach*, who had heard of the *Goliath's* approach, asked the master of the *Simson* to engage her, and the *Simson* wirelessed the *Goliath* to hurry. At about 7.45 a.m. the flotilla arrived about two miles to the southward of the South Goodwin. By this time the tide had turned, and the effect of wind against tide was to raise very heavy seas. Shortly before 9 a.m. the *Goliath* arrived, and was requested by the master of the *Eisenach* to make fast on the starboard bow. The *Goliath* accordingly manœuvred as close as possible to the *Eisenach*, and, owing to her heavy sheers and the weather conditions, experienced considerable difficulty in making fast, but at the third attempt a line was passed and the *Goliath's* heavy towing hawser of 30 fathoms of 10-in. manilla and 30 fathoms of 3-in. wire leading through her starboard hawse pipe was made fast on the starboard bow of the *Eisenach*. Meanwhile, pilots had boarded the *Eisenach* and the *Simson*, and the flotilla continued towards Dover Harbour with the *Eisenach* as before stern first. The *Goliath* was of great assistance, but nevertheless in the strong current and high wind and sea the greatest care and skill had to be exercised in order to

control the *Eisenach*, which just before reaching the mole sheered heavily towards the land. The salvors, however, were able to check the sheer in time and at about 9.37 a.m. succeeded in bringing the *Eisenach* safely through the harbour entrance. Thereafter careful manœuvring was still necessary to avoid a large liner at anchor, but shortly before 10 a.m. the *Eisenach* was safely manœuvred to an anchorage and there dropped her starboard anchor. The salvage tugs then cast off their hawsers and hove them in. Owing to the heavy swell running in the harbour the *Simson* and *Goliath* were unable without damage to lie alongside the *Eisenach* and they accordingly anchored close by and stood by with their pumps and divers in readiness for immediate use. It having been decided to take the *Eisenach* alongside the pier, her anchor was hove up at about 12.45 p.m., and with the *Simson* towing aft and the *Lady Duncannon* towing forward, with the *Goliath* standing by, succeeded in placing her safely alongside the east side of Prince of Wales Pier, where she was made fast at 2.45 p.m., and the services of the salvors were dispensed with. Thereafter the *Simson* arrived back on her station at Harwich at 8 p.m. on the 2nd September and the *Goliath* at Flushing at about 3 a.m. on the 1st September. In performing these services, which were extremely difficult and required powerful tugs and great skill and experience in their handling, the salving tugs were subjected to great strain, and they and their crews were exposed to considerable risk of collision and damage. The task of safely manœuvring stern first the badly sheering *Eisenach* through the entrance to Dover Harbour in the conditions prevailing was particularly difficult and dangerous. But for the arrival of the *Simson* and the exertion of her great power the drift of the *Eisenach* towards the South Falls could not have been stopped nor could she have been kept stern to sea. The services of the *Goliath* were essential in getting the *Eisenach* safely into Dover Harbour. Except for the *Lady Duncannon* no other tugs were available at the time and the services of the *Simson* and *Goliath* were only so promptly available on account of the enterprise of their owners in keeping them at great expense through long periods of idleness in a state of efficiency and readiness immediately to proceed to the rescue of distressed ships and their crews. In the course of their work the salvors frequently have to perform long and expensive journeys in bad weather without any remuneration, and occasionally to perform arduous, difficult, and expensive salvage services for which on account of the depressed values of ships and cargoes adequate reward is often impossible. By reason of these services the *Eisenach* was rescued from a position of grave peril and brought into a position of safety. Owing to the exposure of her bulkhead to the heavy seas and the heavy strain upon it the *Eisenach* could not anchor at sea nor use her engines, and being so down by the head her steering gear was of little if any use. Her No. 1 tank, which was open to the sea, extended under the after bulkhead of No. 1 hold and partly under No. 2 hold. While rolling and pitching in the heavy sea the bulkhead was subjected to great strain from the seas which surged in and out of the remains of No. 1 hold. The strain was greatly increased when the *Eisenach* sheered and the bulkhead might have given under the strain even during the salvage operations. It was leaking and weakened and would have got progressively weaker. If it had given way the ship would have sunk and been totally lost. Even if the bulkhead continued to hold out the ship's pumps might have been choked by the grain cargo, and even if they had continued to function the ship's draught would have continued slowly to increase as the grain in No. 2 absorbed water, so that the danger of total loss would have been increased progressively. Until taken under control the *Eisenach* in her unmanageable condition was a danger to shipping in a crowded fairway and drifting helplessly might well have grounded on one of the shoals in the vicinity.

The defendants' case was the following: The *Eisenach* is a steel-screw steamship of Bremen, of 4159 tons gross, 2535 tons net, 360ft. in length, 51ft. in beam, and fitted with triple expansion engines of 1800 i.h.p. Although fitted with accommodation for carrying a few passengers, the *Eisenach* is not a passenger vessel nor is she habitually used as such. At the time of the services the *Eisenach* was on a voyage from the Black Sea to Hull, laden with a cargo of 4171 tons of rape seed and managed by a crew of thirty-nine hands all told. The draught of the *Eisenach* on leaving Brest, her last port of call, was 20ft. forward and 19ft. 3in. aft. At about 7.33 p.m. on the 30th August, 1935, the *Eisenach*, when in a position about nine miles to the south and west of Dover, came in collision with H.M.S. *Ramillies*, the stem of the latter striking the port bow of the *Eisenach* and causing serious damage thereto. In consequence of the collision the forepeak and No. 1 hold of the *Eisenach* were holed and rapidly filled to sea level. Three members of the crew of the *Eisenach* were fatally injured and one was missing. Most of the remainder of the crew climbed on board the *Ramillies* while the vessels were still in contact, being invited to do so by those in charge of the *Ramillies*, whose bows were kept in the wound for that purpose. The weather at the time of the collision was overcast with rain squalls; the wind was S.W., force 6; and the tide was setting to the southward and westward of a force of about 1½ to 2 knots. On boarding the *Ramillies*, the master of the *Eisenach* requested the captain of the *Ramillies* to signal for a tug. Shortly afterwards, as it was ascertained that some of the crew were still on board the *Eisenach* and as it was now seen that the *Eisenach* was in no danger of sinking, the master and certain of the crew of the *Eisenach* returned on board in company with a detachment from the *Ramillies*, who assisted in the work of rescuing the injured men. These men were found to be imprisoned in the wreckage of the forecastle of the *Eisenach*, and the work of freeing them even with the assistance of the detachment from the *Ramillies* proved exceedingly difficult and occupied a period of several hours. Eventually all the injured men were released and were thereupon transferred on board the *Ramillies* for medical attention. In the meantime, although the tide continued to run in a south-westerly direction, the *Eisenach* and the *Ramillies* drifted slowly before the wind to the eastward and northward, and at about 11.40 p.m. reached a position five miles 212 degrees true from Dover. The *Lady Duncannon* had shortly before arrived in the vicinity, but as some of the crew of the *Eisenach* were still on board the *Ramillies* and the *Ramillies* was still standing by, the *Lady Duncannon* was merely requested to stand by for the time being. Meanwhile, the tide turned and began to set in a north-easterly direction. The weather remained about the same, but the wind veered to W.S.W. and continued to blow at force 6. At about 1.30 a.m. on the 31st August, more of the crew of the *Eisenach* having returned from on board the *Ramillies*, the latter having satisfied herself that the *Eisenach* was safe with the assistance of the *Lady Duncannon*,

proceeded on her voyage to Portsmouth with the three injured men on board, together with seven other members of the crew of the *Eisenach*. After the departure of the *Ramillies* the *Lady Duncannon* was requested to make fast aft on the *Eisenach* so as to hold her stern into the wind. With the tide setting in the same direction as the wind the *Eisenach* had drifted past the South Foreland and reached a position with the South Goodwin Light-vessel bearing 274 degrees true distant about a mile. The *Eisenach* was heading to the N.W. and with the wind and tide on her port beam was drifting well clear past the southern edge of the Goodwin Sands. Connection was established with the *Lady Duncannon* without difficulty by means of a heaving line which was caught at the first attempt, and at 2.5 a.m. the towing hawser was made fast and the *Lady Duncannon* commenced to tow. After the *Lady Duncannon* had towed the stern of the *Eisenach* into the wind, the engines of the *Eisenach* were at 2.26 a.m. put dead slow astern, and with the aid thereof and with the *Lady Duncannon* towing astern, the stern of the *Eisenach* was kept into the wind. The *Lady Duncannon*, however, was not sufficiently powerful to make any progress against the wind and tide and, although the engines of the *Eisenach* were kept working astern at various speeds until 5.38 a.m., she continued to drift to the northward and eastward with the *Lady Duncannon* still fast to her until the vessels reached a position with the East Goodwin Light-vessel bearing 218 degrees true distant about two-and-a-half miles. In the meantime, the *Eisenach* had been in wireless communication with the *Simson*, and at about 4.2 a.m. the *Eisenach* had sent her first wireless message to the *Simson* engaging her assistance. At about 5.30 a.m. the *Simson* arrived and was requested to make fast astern and to assist the *Lady Duncannon* to tow the *Eisenach* to Dover. Connection was established with the *Simson* without difficulty by means of a heaving line, and at about 5.40 a.m. the towing hawser of the *Simson* was made fast, and thereupon both tugs commenced to tow the *Eisenach* stern first towards Dover, the engines of the *Eisenach* being stopped at about the same time. By this time the wind had dropped to about force 4, but the tide was still setting to the northward and eastward and in consequence thereof the progress of the towage during the first hour was necessarily slow. The towage, however, proceeded without incident, the two tugs having no difficulty in controlling the *Eisenach*. The East Goodwin Light-vessel was passed at 6.48 a.m. and thereafter as the tide turned and began to set to the southward and westward progress was accelerated. The South Goodwin Light-vessel was passed at 8.55 a.m., and at about 9.45 a.m., as the vessels were approaching Dover, a pilot boarded the *Eisenach* to take her into the harbour. In the meantime the wind had again freshened to about force 6. To assist the *Eisenach* through the narrow entrance to the harbour it was decided to take the assistance of the *Goliath*, which had in the meantime come up and was accompanying the flotilla. Accordingly, when the vessels were just outside the entrance to the harbour, the *Goliath* was hailed to make fast ahead so as to assist in steering the *Eisenach* through the entrance. The *Goliath* made fast without any difficulty at about 10.20 a.m., and thereafter, with the *Lady Duncannon* and the *Simson* towing astern and the *Goliath* fast ahead and her own engines working as required, the *Eisenach* safely passed through the entrance stern first without incident. At about 10.45 a.m. the *Eisenach* dropped her starboard anchor, whereupon all three tugs cast off. Those on board the *Eisenach* had previously expressed some apprehension lest the starboard cable might be jammed in the locker, but this proved not to be the case and the anchor was in fact let go without any difficulty. Later in the day the anchor of the *Eisenach* was hove up, and with the assistance of the *Lady Duncannon* and the *Simson* she proceeded to the Prince of Wales Pier, where she was finally moored. The draught of the *Eisenach* on arrival at Dover was 23ft. 10in. forward and 16ft. 2in. aft. The *Eisenach* remained in Dover Harbour until the 28th September, during which time her cargo was discharged and certain minor temporary repairs were executed at a cost of 38*l.* 10*s.*, after which she proceeded to Bremen in tow of two tugs for permanent repairs. The temporary repairs executed were for the purpose of enabling the *Eisenach* to be towed stern first to Bremen and consisted in the temporary lashing of the rudder, the reversal of the side-light screens and the temporary shoring up of the No. 2 bulkhead to compensate for the removal of the support afforded by the cargo in No. 2 hold. Apart from the discharge of the cargo and the aforesaid temporary repairs the *Eisenach* was in the same condition when she proceeded to Bremen as she was at the time of the services, and the voyage to Bremen was in fact accomplished without danger or incident.

The defendants admitted that the plaintiffs rendered useful services, but denied that the *Eisenach* was ever in any serious danger. Though the damage sustained by the *Eisenach* through the collision with the *Ramillies* was serious, it was of a completely local character and resulted only in the flooding of the forepeak and No. 1 hold. The bulkhead between Nos. 1 and 2 holds was entirely undamaged by the collision or by the water in No. 1 hold and was never in any danger of giving way. The bulkhead is of unusually strong construction, in addition to which it was provided with ideal uniformly distributed support by the homogeneous cargo in No. 2 hold. The defendants admitted that the No. 1 tank extended under No. 2 hold for one frame space, but said that no danger to the *Eisenach* arose therefrom. They further denied that the *Eisenach* was helpless or unmanageable. The engines of the *Eisenach* were undamaged and were at all material times available for use and were in fact used with good effect for a considerable period. Though the *Eisenach* was down by the head the defendants denied that the boss of her propeller was ever at any material time exposed as alleged or at all or that the power of her propeller was ever materially reduced. The *Eisenach* was never in any danger of drifting on to the Goodwin Sands. Before the *Lady Duncannon* made fast the *Eisenach* was drifting clear to the southward of the Goodwin Sands. If the *Eisenach* ever had been in any danger of driving ashore she could readily have avoided doing so by working her engines astern if necessary. When the *Simson* made fast the *Eisenach* was well to the eastward of the Goodwin Sands and drifting away therefrom. The defendants denied that the *Eisenach* was in a crowded fairway or that she was ever a danger to shipping. While admitting that the services were well rendered, the defendants denied that they were such as to involve any difficulty or danger to the tugs. The *Eisenach* needed nothing more than ordinary towage assistance, and the services rendered called neither for the exercise of any special skill nor for the use of any of the salvage equipment with which the respective tugs are alleged to be fitted. The services were of comparatively short duration, and after the arrival of the

Simson were performed in moderating weather and mostly on a favourable tide.

The value of the cargo on board the *Eisenach* had been agreed at 30,000*l.* and there was no freight at risk. There was, however, a dispute as to the value of the vessel. The cost of repairs was agreed at 7000*l.*, but whilst the plaintiffs put her salved value, namely, her sound value less the cost of repairs, at 43,000*l.*, the defendants maintained that the sound value of the *Eisenach* was not more than 21,000*l.* and they called evidence of sales of similar vessels at the period in question in support of that figure. The *Eisenach* had since been sold to a Bulgarian steamship company for 600,000 marks. Counsel for the defendants contended that when transactions between Germans and other nationals take place, they must, by German law, be conducted through the medium of the Reichsbank. The purchasing foreigner uses frozen credits in Germany belonging to his compatriots (in the present case, they would be frozen Bulgarian marks) and the Reichsbank credits the seller with marks. He said that this was a result of what is known as the "clearing" system, and that as a result there were in Germany at the present time dozens of kinds of marks. Germans, moreover, cannot buy foreign currencies except with a permit from the German Government. Frozen marks have no particular value in sterling because they cannot be used for the purchase of sterling. When paying a debt to a German, on the other hand, no Englishman would think of paying it in sterling at the official rate of 12.30 or thereabouts. There would be a process of bargaining to see what proportion of the debt could be paid in English frozen marks in Germany and the sterling equivalent would depend on the particular value of those marks at the time. In all probability the amount for which the *Eisenach* was sold to her Bulgarian buyers could be obtained for little over 20,000*l.*, and similarly it would have been impossible for the German seller to obtain sterling for the proceeds of the sale at the rate of 12.30 to the £. Furthermore, in a case like the present, the Reichsbank would intervene and would only authorise the sale at all upon the seller undertaking that the proceeds would be used for the construction of replacement tonnage in Germany and would actually be spent in Germany. Evidence of German banking experts was then called in support of the above contentions.

The facts of the actual salvage services and counsel's arguments in regard thereto appear fully from the learned judge's reserved judgment which was delivered on 1st April.

K. S. Carpmael, K.C. and *J. V. Naisby*, for the plaintiffs in the first action, the owners, master, and crew of the *Lady Duncannon*;

Lewis Noad, K.C. and *R. F. Hayward*, K.C. for the plaintiffs in the second action, the owners, masters and crews of the tugs *Simson* and *Goliath*.

H. G. Willmer and *Peter Bucknill* for the defendants.

Bucknill, J.—This is a claim for salvage by the owners, the masters and crews of three vessels, the *Lady Duncannon*, the *Simson* and the *Goliath*, against the owners of the steamship *Eisenach* and her cargo and freight.

The *Lady Duncannon* is a steel twin screw steam tug of 181 tons gross register, fitted with engines of 95 h.p. nom. and 800 i.h.p. She is fitted with wireless, a rocket apparatus and a powerful salvage pump, and her owners incur considerable expense in maintaining her with a full head of steam night and day with a crew always ready to go to the assistance of vessels in distress. The *Lady Duncannon* carries a crew of 11 hands and her insured value is 20,000*l.* The *Simson* is a steel screw tug of 341 tons gross register, fitted with engines of 1000 i.h.p. and carries a crew of 14 hands, including a diver. The *Simson* is fitted with wireless and a wireless direction-finder, and with special salvage pumps, diving and fire-fighting equipment, and other modern salvage appliances. The *Simson's* value is said to be 30,000*l.* Her owners are the Bugsier Salvage Company, who maintain a highly efficient fleet of salvage vessels and gear at great expense. The *Simson* is normally maintained on station for salvage work only. The *Goliath* is a steel screw salvage tug of 354 tons gross, fitted with engines of 1200 i.h.p., and carries a crew of 13 hands. The value of the *Goliath* is said to be 25,000*l.* The *Goliath* is fitted with powerful salvage pumps and wireless, and is maintained at considerable expense for salvage work only.

The *Eisenach* is a steel screw steamship and at the time of the services, belonged to the Norddeutscher Lloyd Steamship Company. The *Eisenach*, which was built in Germany in 1922, is 4159 tons gross and 6515 tons deadweight capacity and has passenger accommodation for 13 passengers. Her speed is said to be about 11 knots. At the time of the services, the *Eisenach* was bound from the Black Sea to Hull, with a cargo of rape seed. The value of the cargo is agreed at 30,000*l.* There was no freight at risk.

There is a dispute between the parties as to the salved value of the *Eisenach*. The salved value is the value of the ship at the time when and the place where the services ended. In this case the services ended on the 31st August, 1935, in Dover Harbour. The salved value of the *Eisenach* may be taken as the sound value less the cost of repairs. The dispute is as to the sound value. The repairs cost about 7000*l.* The plaintiffs say that the sound value was 45,000*l.* The defendants say that the sound value was 21,000*l.*

The plaintiffs' figure of 45,000*l.* is based on the fact that shortly after the services, while the ship was being repaired at Bremen, she was sold by her owners to some Bulgarian buyers for a net figure of about 550,000 marks. The plaintiffs say that this figure of 550,000 marks should be converted into sterling at the rate of 12.2 marks to the £, which produces a figure of about 45,000*l.*

On the other hand, the defendants say that this figure of 550,000 marks is not satisfactory evidence of the value of the ship to her owners and that in any case the rate of exchange should not be 12.2. The figure of 21,000*l.* put forward by the defendants as the sound value of the *Eisenach* is their estimate of the market value of the ship if sound at the time when the services ended.

The court has to assess the pecuniary benefit conferred by the salvors upon the owners of the salved property, and in order to make this assessment, fixes, as one of the essential factors in that pecuniary benefit, the value of the property to the owners at the time of the service. It may be said with accuracy that the sound value of the *Eisenach* to her owners at the time of the service was the figure of 550,000 marks, credited to them as the proceeds of the sale of the ship. But the nature of the transaction with the Bulgarian buyers was such that the owners of the *Eisenach* were obliged by law to spend the proceeds of sale on building new tonnage in Germany. They were

not allowed by their law to convert the proceeds of sale into sterling, even if they had been able to do so. In any case, I do not think, having regard to the evidence which was placed before me, that they could have converted this sum into sterling at the rate of 12.2 to the pound, or anything like it.

Now, the judgment of this court is in sterling, and in order to assess in sterling the pecuniary benefit received by the owners of the salved property the value of the salved property to the owners must also be fixed in sterling. The difficulty of arriving at the salved value in sterling of the *Eisenach* is that the ship is a German ship, and the relative values of the mark and the pound sterling appear to be, on the evidence, in a very fluid and uncertain state, so far as transactions like the sale and purchase of a ship are concerned. I do not think there is any reliable standard by which I can convert this sum of 550,000 marks into sterling. I therefore have to look at the other evidence before me as to the value of the *Eisenach* to see what assistance it provides.

One fact which emerged in the evidence is that it would cost the owners of the ship, roughly, one-and-a-half million marks to build a ship like the *Eisenach* to-day. Comparing marks with marks, if the owners received, roughly, half-a-million marks for the ship from the buyers, it appears that the ship was worth to them about one-third of the cost price of a new ship. The cost in sterling to build a new ship like the *Eisenach* was given in evidence by the plaintiffs before me as 93,500*l.*, and by the defendants as 82,000*l.*

Fixing the value of the *Eisenach* on the basis of the cost of building a new ship like her, I think the sum of 30,000*l.* would be a proper sum to take as her sound value when the services ended. This figure of 30,000*l.* is rather less than the figure of 33,500*l.*, which the plaintiffs suggested would be the market value of the ship, based on the cost price of 93,500*l.* less 5 per cent. depreciation per annum for each of the thirteen years of the *Eisenach's* age.

The market value of the ship, based on the sales of other vessels is the usual method of assessing the value of the ship. But in this case the evidence is that if the ship had been lost to her owners, it would have been difficult for the German owners to replace her by purchase from any foreign owners in the open market, because of the shortage in Germany of foreign exchanges wherewith to pay the purchase-price. Also, there is really no comparable sale of a like ship about the time of the salvage as a guide to the market value of the *Eisenach*, if sold, for instance, by the Admiralty Marshal. Such evidence as was put forward indicated to me that the ship, if so sold, would probably fetch something in the neighbourhood of about 29,000*l.* Ships belonging to the Norddeutscher Lloyd are known to be thoroughly well built and well maintained. My view, also, is that to the German owners of the *Eisenach* the vessel was worth rather more than her market value, because of the difficulty which they would have of replacing her by purchase abroad.

Having regard to all these considerations, and doing the best I can with the material at my disposal, I think that a fair sound value to put on the ship at the time when these services ended is 30,000*l.* From this sum has to be deducted 7000*l.*, cost of repairs, which gives a salved value of 23,000*l.* The total salved values are, therefore, 53,000*l.*

There was not much dispute as to the actual facts of the salvage services, but much dispute as to the proper inferences to be drawn from these facts. The crucial point in the case, in my opinion, was the danger that the *Eisenach* was in of drifting on to the Goodwin Sands, and the value of the services in saving her from this danger. The material evidence as to this stands thus. The *Eisenach* was not, as I think, in any way capable of taking any effective action by herself to keep away from the sands. The *Eisenach* sustained very serious damage forward in consequence of her collision with the *Ramillies*. Her forepeak, No. 1 tank and No. 1 hold were full of water, and her stem was badly distorted and fractured. The bow plating on the port side, for a distance of 44ft. abaft the stem, was practically carried away. The double bottom floors and tank top plating on the port side of No. 1 tank were severely damaged and were partly carried away.

The actual damage by contact with the *Ramillies* stopped short of the watertight bulkhead between No. 1 and No. 2 holds by about 43ft., but the tremendous force of the blow started some rivets in this bulkhead which were leaking, and caused some small damage to cargo in No. 2 hold. The blow also caused damage to a bilge pipe from hold No. 1 to hold No. 2, and also on the starboard side of the ship tore adrift two air pipes in No. 1 tank (after end) and forward end of No. 2 tank. The port anchor and cable were carried away, and the windlass was badly strained. The port side main deck plating from the stem to No. 1 hatch and the main deck beams from the stem to No. 1 hatch, were badly buckled and in part carried away.

In consequence of the collision the trim of the *Eisenach* was nearly 8ft. by the head, her draught on arrival at Dover being 23ft. 10in. forward and 16ft. 2in. aft. The collision caused the death of three of her crew who were imprisoned in the wreckage, and another of her crew was missing. After the collision her master and most of the remainder of the crew climbed on board the *Ramillies*, but later on the master and some of the crew, with a detachment of the crew of the *Ramillies*, went back on board the *Eisenach*, and set to work to release the injured men from the wreckage. When the *Lady Duncannon* arrived off the *Eisenach* about 11 p.m., the *Eisenach* was lying broadside to wind and tide and heading about N.N.W. and was in a position approximately eleven miles to the south-west of the South Goodwin Light-vessel, which marks the South Sand Head of the Goodwin Sands.

The weather at this time was bad. The South Goodwin Light-vessel at midnight of the 30th August records W.S.W. gale, force 7 to 8, with squalls, overcast, rain and rough sea. At this time the tide was running to the north-east, high water at Dover being at 1.18 a.m. (B.S.T.) on the 31st August.

After the *Lady Duncannon* arrived she stood by, and at 12.27 a.m. on the 31st August received the following wireless message from the *Eisenach*: "As soon as crew on board take your assistance." At about this time H.M.S. *Ramillies*, which had been standing by, went away. Shortly afterwards the *Eisenach* wirelessed the *Lady Duncannon* to come alongside, and at 1.50 a.m. the tug made fast to her starboard quarter and started to tow astern to keep the vessel clear of the sands.

There is very little difference between the pleaded position of the first plaintiffs and the defendants as to the position of the *Eisenach* when the *Lady Duncannon* made fast. The *Lady Duncannon* puts the South Goodwin Light-vessel as one mile W. mag. or 259 degrees true. The defence puts the South Goodwin Light-vessel as

about one mile distant bearing 274 degrees true. I accept the evidence of the master of the *Lady Duncannon* on this point.

It will be seen, therefore, that in approximately three hours the *Eisenach* had drifted nearly twelve miles towards the sands, and was now about abreast of the South Sand Head. The question is, what would have happened to the *Eisenach* after 1.50 a.m. if the *Lady Duncannon* had not made fast? My view is, and it accords with the advice given to me by the Elder Brethren, that but for the towage assistance of the *Lady Duncannon*, the *Eisenach* would almost certainly have drifted on to the Goodwin Sands.

The evidence of the master of the *Lady Duncannon* was that after he had been towing for some time the South Goodwin Light-vessel bore W.S.W. and that the vessel was drifting towards the sands. In this position the ship would be very close to the edge of the sands. No evidence was called by the defendants to contradict this evidence. In support of this evidence there is that fact that at 3.20 a.m. the *Eisenach's* engines, which had been put astern after the tug made fast, were worked faster astern and the tug was asked to tow more south-east. Also I think that the drift of the *Eisenach* from her pleaded position when the *Lady Duncannon* made fast to her pleaded position about the time when the *Simson* came up indicates the danger of her drifting on to the sands. The line between these positions, which are stated in the defence, passes close outside the South Goodwin Buoy and close to the eastern edge of the sands. If that was the line of drift which the vessel made with the *Lady Duncannon* towing her away from the sand and the vessel using her engines astern, I think it seems probable that her drift would have been substantially more towards the sand without these two factors.

The chart states that at the South Goodwin Light-vessel the tide runs 29 degrees true at high water and continues to run in that direction for four hours. But the Elder Brethren advise me that close to the sands the tide sets straight on and over them, and this is borne out by the statement in the Channel Pilot (12th edit., 1931), Part I., at p. 261: "Vessels are cautioned, when passing eastward of the sands, to give them a wide berth, as the tidal stream sets with considerable strength north-westward and over them at times."

It is true that the weather records show the wind blowing from W.S.W. at midnight and at 3 a.m. at the South Goodwin and East Goodwin, but the wind was squally and I do not think that this entry counteracts the positive evidence as to the ship's drift. I think, therefore, that there was imminent risk of the ship drifting on to the sand, and that the *Lady Duncannon* succeeded in preventing her going ashore. After the *Eisenach*, in tow of the *Lady Duncannon*, had passed up to the northward of the East Goodwin Light-vessel, I think that imminent danger of the ship going ashore on the sands had passed.

At about 5.45 a.m. (B.S.T.) the *Simson*, which had come out from her station at Harwich and had come up to the ship shortly before, made fast to her port quarter and started to tow in company with the *Lady Duncannon* towards Dover. At this time, in my view, the *Lady Duncannon* was barely holding the *Eisenach*, which was then about two miles north-east of the East Goodwin Light-vessel. Until the tide turned to the south-westward the *Lady Duncannon* and the *Simson* made slow progress, but afterwards better progress was made. The *Eisenach* was a difficult tow, and sheered heavily in the rough sea. The wind was still blowing a gale from the south-westward.

At about 10.15 a.m., after the two vessels had been towing together for four-and-a-half hours, and after the *Lady Duncannon* had been towing in all for about eight-and-a-half hours, the *Eisenach* was brought outside Dover Harbour. In the meantime, a Trinity House pilot had boarded the *Eisenach* off the South Foreland.

At about 10.15 a.m. the *Goliath*, which had come from her station at Flushing, made fast to the starboard bow of the *Eisenach* to assist in steering the vessel stern first into the harbour. This was difficult work on account of the wind and tide, and the heavy sheering of the *Eisenach*, but the work was safely carried out by the three tugs after about half an hour's work. The ship was then towed to a safe anchorage, and the services ended, except for a short service in towing the ship alongside the pier the same day.

The services rendered by all the three vessels were, in my view, of considerable value to the *Eisenach* and her cargo. It is necessary now to consider the services of each separately. In the case of the *Simson* and the *Goliath* their services were enhanced by the damaged state of the *Eisenach*, the high wind and rough sea, and the fact that these vessels are maintained solely as salvage vessels. The strong wind and high sea, and the damaged state of the ship, made the services difficult and required strong power in each tug and skilful handling by her crew.

As regards the damaged state of the *Eisenach*, the plaintiffs claimed that there was danger of the bulkhead between Nos. 1 and 2 giving way if she had touched the sands or had dropped her starboard anchor and had got head to the sea. I do not think that the strength of this bulkhead had been seriously impaired by the collision, or that there was danger of its giving way unless the vessel had grounded on the Goodwin Sands and had remained there for one low water, when, having regard to her damaged condition and the weather prevailing, and the dangerous nature of the sands, I think she would almost certainly have become a constructive total loss.

As regards the services of the *Simson*, I do not think that when she came up the ship was in any serious danger of drifting on to the Goodwin Sands. The ship was then about two miles from the edge of the sands and was tending to drift away from the sands. She also had the *Lady Duncannon* fast to her. But the ship needed powerful towage assistance to get her to Dover, and it was imperative under the circumstances that she should be taken there as soon as possible. I do not think it likely that the *Lady Duncannon* could have got the ship to Dover without the assistance of the *Simson*. It must be remembered that the *Simson* had come from her station at Harwich, and the *Goliath* from her station at Flushing, and that, as salvage, they should receive the generous compensation which this court always gives to vessels of that class.

I have already dealt with the services of the *Lady Duncannon*. She was first on the scene, and owing to the public-spirited policy of her owners in keeping her always ready, she went to the *Eisenach* promptly and before any other vessel capable of rendering assistance could reach her. Her presence and power, and the skill of the crew, enabled her, while towing alone at the *Eisenach*, to keep the ship from grounding on the southern and eastern edge of the Goodwin Sands. If the *Eisenach* had not received this assistance she would have grounded on the sands on a falling tide, and in the high sea and strong wind would have sustained such damage that I doubt whether she could have been refloated. If she had been

refloated the damage to the ship and cargo and the amount of salvage which would have been payable would have been very heavy indeed.

In my view, the services were such as to put all the salvage vessels in some risk; and when the *Lady Duncannon* and the *Eisenach* were close to the sand, and the *Lady Duncannon* was towing at the *Eisenach* in the darkness, if the tow rope had parted then and had fouled one of the propellers of the *Lady Duncannon*, she would have been in considerable danger.

The services were short, and the salvors incurred very little expense in rendering them. The *Eisenach* had the use of her engines, and although short-handed had an efficient crew on board. She had the use of her wireless, and no doubt other powerful assistance would soon have come to her aid. Considering all the circumstances, I think the proper award to make is as follows: *Lady Duncannon*, 7000*l.*; *Simson*, 3500*l.*; and *Goliath*, 650*l.*; making a total of 11,150*l.*

Solicitors: for the plaintiffs in the first action, the Dover Harbour Board (owners) and the master and crew of the *Lady Duncannon*, *Mowll* and *Mowll*, agents for *Mowll* and *Mowll*, of Dover; for the plaintiffs in the second action, the owners, masters, and crews of the tugs *Simson* and *Goliath*, *Constant* and *Constant*; for the defendants, *Stokes* and *Stokes*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 10, 11, 12, 13, 16, 17, 19, *and May* 15, 1936.

(Before SLESSER, GREENE, and SCOTT, L.JJ.)

Kulukundis v. Norwich Union Fire Insurance Society (*a*).

Insurance (Marine) — Policy — Insurance on freight—Stranding of vessel—Abandonment to salvors—Temporary repairs in excess of repaired value—Claim for loss of freight.

The plaintiffs, who were the owners of the Mount Taygetus, *claimed under a freight policy dated the 22nd November*, 1933, *from the defendants on the basis of total loss of freight. The sum in question was 865l., part of a total sum insured of 8000l. The policy, which was in respect of the carriage of grain from four free loading ports on the West Coast of South America to four United Kingdom ports, was subject to the Institute Voyage Clauses—Freight—and it provided by clause 5 that "in ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship (25,000l.) shall be taken as the repair value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." The vessel completed her loading of cargo on the West Coast of South America and started on her voyage, but shortly afterwards while in the Straits of Magellan she suffered casualty and went ashore. Fourteen days later she was taken off by a salvage company who agreed with the master on terms of "No cure no pay," that for this service 11,000l. should be paid in the event of success, a further claim not exceeding 9000l. to be the subject of arbitration. The hull underwriters and the plaintiffs agreed to abandon the voyage on the terms that the underwriters should pay the plaintiffs 7500l., and the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end and some 100 tons of cargo were jettisoned. The cargo owners accepted the notice and their underwriters paid as on total loss of cargo. Repairs to the vessel were then carried out by the salvors to enable her to proceed to a Continental port, and she sailed for Rotterdam with 4250 tons of her original cargo and there she was sold by the salvors for breaking up and was, in fact, broken up. The plaintiffs' claim, as amended, under the freight policy was that they had been prevented in a business sense from performing the freight contract by perils of the sea on the ground that when the agreed figures in the case were considered no prudent owner, if uninsured, would in the circumstances have incurred the expense of repairing the vessel so as to make it possible to complete the contracted voyage and deliver the cargo. The agreed figure, on a basis of temporary repairs, was 19,161l., including the release of the salvors' lien, whereas at the highest all the plaintiffs could hope to get was 6500l., the value of the temporarily repaired ship, together with the net freight of 5278l. if that could be properly included, and a contribution by the cargo owners towards the cost of repairs of 7201l., making 18,979l. in all, a sum less than the necessary expenditure.*

Held, per Slesser and Greene, L.JJ., that the plaintiffs were entitled to recover as for a total loss of chartered freight upon proof that the cost of temporary repairs to the vessel, sufficient to enable her to carry her cargo to its destination, would have exceeded her repaired value; and per Scott, L.J. on the ground that on the facts in evidence there had been an actual commercial loss of the vessel within the meaning of the charter-party, or alternatively on the ground that in the circumstances known to the assured at the time their decision to treat it as an actual loss was justified under the charter-party contract and under the policy.

APPEAL from a decision of Porter, J.

The plaintiffs' claim was for a total loss of freight under a policy issued by the defendants. The facts, which are sufficiently summarised in the headnote, are fully set out in the judgment of Slesser, L.J.

Porter, J. held that the plaintiffs' claim failed.

The plaintiffs appealed.

Willink, K.C. and *Cyril Miller* for the appellants.

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

Le Quesne, K.C. and *W. L. McNair* for the respondents.

Cur. adv. vult.

Slesser, L.J.—The facts material to a determination of the present appeal are as follows :

The plaintiffs were the owners of a steamship called the *Mount Taygetus* ; they claim under a freight policy dated the 22nd November, 1933, from the defendants on the basis of total loss of freight. The voyage insured is expressed in the policy to be from Liverpool " to any port or ports in the Bristol Channel, whilst there and thence to Rio de Janeiro whilst there and thence in ballast (via Magellan) to grain ports on the West Coast of South America whilst there and thence (via Magellan) to any port or ports in the United Kingdom and (or) on the Continent of Europe (not north of Hamburg inclusive) and (or) in the Mediterranean and (or) Adriatic Seas or held covered. With leave to call touch and (or) stay as required."

The sum in question here is 865*l.*, part of a total sum insured of 8000*l.* The subject-matter covered by the policy is the carriage of grain, &c., of the amount of 7000 to 8000 tons under a charter-party dated the 2nd November, 1933, from four free loading ports on the west coast of South America to four United Kingdom ports. The policy was subject to the Institute Voyage Clauses —Freight—and contained the familiar clause that " in ascertaining whether the vessel is a constructive total loss, the insured value in the policies on ship shall be taken as the repair value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account " which clause was recently considered in relation to a freight policy in the case of *Carras* v. *London and Scottish Assurance Corporation* (154 L. T. Rep. 69 ; (1936) 1 K. B. 291). The insured value on the hull policy was 25,000*l.* The charter-party, which I have mentioned, contained the exception that the steamer was to be in no way liable for perils of the sea.

The steamer completed her loading of cargo on the west coast of South America on the 16th December, 1933, and sailed for the United Kingdom from a fourth port, where she bunkered, on the 19th December. On the 23rd December, while in the Straits of Magellan, she suffered casualty and went ashore on Memphis Rock. There she remained until fourteen days later, when she was taken off by the Magellanes Salvage Company. By then the steamer was brought under her own steam to Magellanes, arriving on the 13th January, 1934. The salvage company had agreed with the master on terms of " No cure no pay " that for this service 11,000*l.* should be paid in the event of success, a further payment claimed not exceeding 9000*l.* to be the subject of arbitration.

On the 5th February, 1934, the hull underwriters and the plaintiffs agreed to abandon the voyage on the terms that the hull underwriters should pay the plaintiffs 7500*l.*, and the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end, and some 100 tons of cargo were jettisoned, and the cargo owner accepted the notice and their underwriters paid, as on total loss of cargo.

Repairs to the vessel were then carried out by the salvors to enable her to proceed to a Continental port, and she sailed for Rotterdam in May, 1934, with 4250 tons of her original cargo. At Rotterdam she was sold by the salvors for breaking-up, and was, in fact, broken up.

The claim of the plaintiffs on the policy, as for a total loss of freight, was originally advanced in a manner different from that which has been argued in this court, for, in the pleadings, the plaintiffs contended that they had suffered a total or constructive total loss of the freight because either the steamship cargo had become a total or constructive total loss by a peril insured against and was abandoned to underwriters on cargo who accepted notice of abandonment and that the venture was terminated at Magellanes, and with the assent of underwriters on hull, the plaintiffs on the 5th February, 1934, through their master abandoning the steamship to the salvors or, by way of amended plea, it was contended that the venture contemplated by the charter-party was frustrated.

On neither of these grounds did the plaintiffs found their present appeal, but rather upon the footing that the freight was lost by perils of the sea which, they now contend, if proved, is sufficient for their purpose. This change of front, they say, has been occasioned, at any rate in part, by the decision in this court in *Carras* v. *London and Scottish Assurance Corporation* (*sup.*), which decided that when it was clear from the facts that a freight contract between the shipowners and the charterers was discharged by perils of the sea, it was not material to consider whether the vessel was a constructive total loss, though the question to be solved might involve the ascertainment of some facts which would fall to be determined when a claim was based on a hull policy. We thought, having regard to all the circumstances, that the appellants should not be precluded from arguing this appeal on the ground which they now advance, and the court admitted an amended statement of claim to enable them so to do.

This amended ground upon which the appellants contend under the charter-party and freight policy that the shipowner has been prevented in a business sense from performing the freight contract by perils of the sea is that when the agreed figures in the case are considered, it appears that no prudent man, if uninsured, would in such a state of things as is here disclosed, incur the expense of repairing the ship so as to make it possible to complete the contracted voyage and deliver the cargo.

The only cost of repairs which was agreed between the parties before and at the trial was " temporary repairs to enable the voyage to be completed," and it is contended by Mr. Le Quesne that such an agreed basis of cost of repair is not a right criterion, but that the cost of repairs sufficient to put the ship back into the position in which it was before the casualty, or, at any rate, a cost sufficient to effect permanent reparation should be the sum to be taken into account as part of the necessary expenditure as the result of that casualty, and that, against that, should be set the value of the ship so fully repaired ; no consideration to be given to the sum which would be earned in freight by the contracted voyage. He points out that neither by agreement nor by evidence was the cost of such full repair to the ship determined before the learned judge, and that it is not possible nor right that, at this stage, such an inquiry should be entered into. On the other hand, if the cost of repairs, sufficient for the voyage, which have been called " temporary repairs," are to be taken as the only necessary element in considering whether a prudent uninsured owner would incur them there can be no doubt, on the agreed figures, that no prudent uninsured owner would have ordered such repair.

The sum which the shipowner would have to expend on a basis of temporary repair, including the release of the salvors' lien, would be 19,161*l.*; whereas, at the highest, all he could hope to get would be 6500*l.*, the value of the so temporarily repaired ship, together with the net freight, if that be properly included, of 5278*l.*, and, at the most, a contribution by the cargo towards the repair of 7201*l.*, making 18,979*l.* in all, a sum less than the necessary expenditure. If the freight be excluded from the benefit of his repair, and if the cargo's contribution be assessed on the value of the cargo in January, at the time of the casualty rather than in May, the sum to be credited to the shipowner would be only about 1200*l.*; if the freight be included and the cargo estimated as in January, the sum would be 16,476*l.*—in any event, therefore, the temporary reparation would not be commercially practicable. The proportions attributable to this particular cargo produce a similar result.

In these circumstances, excluding all matters which have now been decided in this court in *Carras* v. *London and Scottish Assurance Corporation* (*sup.*), the question for determination, though a difficult one, lies within the narrow compass—what has to be decided is whether, in making the computation, the cost of repairs sufficient to complete the voyage are to be the subject of consideration or the costs of repairs sufficient permanently to restore the ship regardless of the specific obligation of carriage.

In my view, when the matter is fully considered, it emerges that this question has already been decided by authority. To quote the speech of Lord Chelmsford in *Rankin and others* v. *Potter and others* (2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. 142; L. Rep. 6 H. L. 83), also a case of freight insured, where it was stated that the cost of repairs were those necessary to make the ship seaworthy and enable it to bring home its cargo) 29 L. T. Rep. at p. 161; L. Rep. 6 H. L. at p. 155): "A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. . . . The only question is whether, by the perils of the sea, the ship was so damaged . . . during the term of the policy as to be rendered incapable, unless sufficiently repaired, of performing the voyage . . . for which she was chartered." And again, later, he refers to "an admission stated in the report of this case in the Court of Common Pleas, that the cost of repairing the vessel so as to make her seaworthy for carrying a cargo to England, would have exceeded the value of the ship when repaired," and gives judgment upon that assumption. Lord Hatherley speaks to the like effect (29 L. T. Rep. at p. 164; L. Rep. 6 H. L. at p. 163), in agreement with the views of Brett, J. and Blackburn, J. (29 L. T. Rep., pp. 145, 149; L. Rep. 6 H. L., pp. 104 and 117).

In the whole of the authorities, which are so fully discussed by my brother Greene that I do not mention them in detail, I can find no suggestion of any standard of the extent of repair on a freight policy, whatever may be the case of hull policy, other than that stated by Lord Chelmsford and the other learned lords and judges in *Rankin and others* v. *Potter and others* (*sup.*), namely, that of sufficient repair to perform the voyage for which the ship was chartered. In *Moss* v. *Smith* (9 C. B. 94), where action was brought both on a policy on ship and on chartered freight, Maule, J., at p. 103, speaking of the freight policy, said: "The only loss in question here is a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged—considering the damage to be irreparable in the view I have mentioned, and which I take to be well established—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning," the test being whether the vessel could be commercially repaired so as to bring home the whole or part of the cargo. And at p. 106 in the same case Cresswell, J. said: "Now what is the contract of the underwriter? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured, would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight."

Wilde, C.J., at p. 109, speaks of the "known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur"—he refers to the evidence on behalf of the plaintiffs—"of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage." These dicta all indicate that, in freight insurance, the temporary expenditure necessary to earn the freight—that is, to complete the voyage—is the true criterion.

In *Assicurazioni Generali and Schenker and Co.* v. *The Steamship Bessie Norris Company Limited and Browne* (7 Asp. Mar. Law Cas. 217; 67 L. T. Rep. 218; (1892) 2 Q. B. 652), Lord Esher, M.R., speaks (67 L. T. Rep. at p. 219; (1892) 2 Q. B. at p. 658), of "the cost of the repairs necessary to enable the ship to complete the voyage contracted for." And Bowen, L.J. (67 L. T. Rep. at p. 220; (1892) 2 Q. B. at p. 660), of the vessel "being put into a condition fit for the performance of her voyage."

In the light of these weighty and almost unanimous dicta, I do not find it necessary to go further into this matter. Had I to decide the matter free from past authority, looking at the substance of the contract, which is to carry the freight, I should have come to the same conclusion as have so many learned judges, but in this case I feel that I can rest securely, apart from any fresh consideration, upon clear and binding authority.

This appeal succeeds, with costs here and below.

Greene, L.J. (read by Slesser, L.J.).—The substantial question which arises for decision upon this appeal is whether the appellants are entitled to recover as for a total loss of chartered freight, upon proof that the cost of temporary repairs to the vessel, sufficient to enable her to carry her cargo to its destination, would have exceeded her repaired value; or whether, in the absence of proof that the cost of permanent and complete repairs would have exceeded the repaired value of the vessel, the appellants are bound to fail. In so stating what appears to me to be the substantial question in issue, I do not forget the argument which was addressed to us on behalf of the appellants, that the test to be applied is a more fundamental one than a mere comparison between the cost of repair and the value of the repaired vessel,

and involves, or at any rate permits, a general inquiry as to what a prudent uninsured owner would have done in the circumstances, an inquiry upon which other matters of evidence may be relevant in addition to the factors of cost and value. Upon the view which I take of this case, it is not necessary to decide whether or not this argument is well founded.

In this judgment I use the phrase "cost of repairs" as including the cost of freeing the vessel and her cargo from the salvors' lien and other expenses necessary to be incurred to enable her to proceed on her voyage, as to which there is no dispute, less the estimated general average contribution to be made by the cargo. There is a subsidiary question whether for the purpose of the calculation the shipowner should be debited with the freight which would have been earned, and, if so, whether it should be the gross freight, including the portion prepaid, or only the unpaid portion of the freight less the cost of earning it. I will deal shortly with this subsidiary question at the conclusion of my judgment.

It is remarkable that there should be no authority directly covering the question whether permanent or temporary repairs are to be taken as the test in such a case as the present. The reason may well be that in many cases the distinction is in practice an academic one. If a vessel, when temporarily repaired, is worth less than the cost of the temporary repairs, it is likely that her value, if permanently and completely repaired, would be less than the cost of so repairing her, particularly if to that cost is added the cost of the temporary repairs necessary to enable her to reach a port where she can be permanently and completely repaired. Moreover, in former times, if a vessel suffered serious sea damage at a distant place, the repairs necessary to enable her to reach home would in many cases have been of necessity repairs of a permanent and complete nature. But in the present case the distinction is of vital importance, and the question falls directly to be decided.

Upon the principle recently reaffirmed by this court in *Carras* v. *London and Scottish Assurance Corporation* (*sup.*), a shipowner, in which expression I include a charterer by demise, is entitled to claim against his freight underwriter as for a total loss of freight, if the vessel suffers such sea damage as will free the shipowner from his obligation under the contract of affreightment to carry the cargo to its destination, provided, of course, that the cargo is not in fact carried either by the shipowner himself or by abandonees of ship so as to earn the freight. There may be, perhaps, a further exception where transhipment, although optional to the shipowner, is a reasonable and practicable course. But for the purposes of this judgment I can disregard these exceptional cases, which do not affect the principles involved.

Where the damage can be repaired and no question as to the cost of repairs arises, no difficulty is presented, although in discussing the principles involved I shall have to examine this case. The difficulty arises where the cost of repairs would be so unreasonable as to justify the shipowner in refusing to incur it, in which case the vessel is said to be lost in a commercial sense.

In considering this question of commercial loss in a case between shipowner and freighter, it appears to me that nothing but confusion results if it is treated as the same question as that of commercial loss as between shipowner and hull underwriter, that is, constructive total loss of ship. It may or may not be the case (I know not) that as a matter of history the conception of commercial loss first appeared in cases between owner and hull underwriter, and that it was afterwards applied to cases between owner and freighter and owner and freight underwriter. Whether this be so or not is, in my judgment, immaterial. The rule that a shipowner is entitled to be freed from his obligations to the freighter, if the vessel is lost in a commercial sense, is now well established, and it cannot in my judgment be treated as the same rule, or a branch of the same rule, as that which applies between owner and hull underwriter. It stands on foundations of its own, and its scope and effect must be ascertained accordingly.

There is, indeed, a fundamental difference between the circumstances in which the two rules operate. In the case of shipowner and freighter the rule as to commercial loss operates to excuse the shipowner from performance of a contract. The shipowner's obligation under that contract is to carry the cargo to its destination. If the ship is damaged and yet capable of repair, it is his duty to repair it. The rule as to commercial loss in cases where it applies, operates to free him from this duty. Whether it be a rule of construction or a rule under which a term is implied in the contract of affreightment, it is a rule which excuses the shipowner from what is *primâ facie* his duty, and its scope must in my judgment be determined with reference to this fact. The importance of this will appear later.

In the case of constructive total loss under a hull policy, on the other hand, no question of the duty of the shipowner to carry the cargo arises. The contract here is a totally different contract, and there seems to be no ground in logic for assuming that the facts, which will constitute a commercial loss for the purposes of the one contract, are necessarily the same as those which will constitute a commercial loss for the purposes of the other. If there are analogies between the two cases, they are analogies and nothing more, and must not be allowed to distract the mind from what, as it appears to me, is the correct method of examining each rule, namely, to examine it with reference to the particular type of contract of which it forms part. I will now proceed to the best of my ability to examine in this way the rule as to commercial loss as between owner and freighter. As a necessary preface to this examination I must first of all offer some observations as to the effect of sea danger in general upon the contract of affreightment.

In the first place, the damage to be considered is damage which will excuse the owner from performance of the contract of affreightment. The duty of the shipowner under the contract of affreightment is to convey the cargo to its destination by all reasonable means. Under the relevant exception in the contract, he is excused from performing this duty if, and only if, he is prevented from performing it by a peril of the sea. The means by which he is to perform the duty of carrying the goods is the named vessel, subject to the right in certain circumstances to carry the goods by another vessel. If the ship is so injured by a peril of the sea that she is incapable of carrying the goods to their destination, and cannot by any amount of repair be made fit to do so, the owner will in general be discharged from his obligation under the contract. I say in general, because I can conceive of cases where this result would not follow. For example, if the ship broke her back on a rock at the entrance to her port of discharge and could not be got off, so that she was incapable of carrying the cargo into port, but circumstances were such that the cargo could be

unloaded into lighters and brought to port, it may well be that the owner would be bound under his contract so to bring them. Mr. Le Quesne, who appeared for the respondents, agreed that this would be so, and I may point out in passing that if this view is correct, the case would be one where, although the vessel would be a total loss for the purposes of a policy on hull, there would be no loss of freight under a policy on freight, since the sea damage would not in fact have been sufficient to excuse performance of the contract of affreightment and so cause the owner to lose the freight.

In the next place, it appears to be clear that in the case where the only question is as to the damage to the ship, and no question arises as to the cost of repairs, the test (apart from exceptional cases such as that just mentioned) must be, is the damage such that the ship is incapable of carrying the goods to their destination? There may be cases where the vessel may remain or be made a seaworthy ship for the voyage, but cannot be made capable of carrying the particular cargo in question. The facts in *Doyle* v. *Dallas* (1 M. & Rob. 48) suggest a case where this might happen. There the vessel, which had been chartered to carry a cargo of hides from Buenos Aires to England, suffered damage at Buenos Aires which necessitated stripping her of her copper. Being a teak vessel, she could be, and was, repaired sufficiently to enable her to proceed to England with some sort of cargo, but in order to enable her to carry the hides it would have been necessary to re-copper her, which apparently could not be done at or near Buenos Aires. The vessel was not lost, either actually or constructively, and it was so held in the action, where the claim was on a hull policy. But upon the facts the owners would have been entitled to be discharged from their liability under the charter-party, and they could have recovered under a freight policy. Here, again, I point out in passing that in such a case there would be no constructive total loss of ship under a hull policy, but there would be a total loss of freight under a freight policy. The case is the converse of that referred to above.

I may summarise what I have said by saying that in my judgment, in cases where the only question is the possibility of effecting the necessary repairs and the question of the cost of repairs does not arise, (1) the shipowner is not excused from performing his contract, unless he can show that owing to sea damage the ship cannot be considered a ship for the voyage and for the cargo in question, in the sense that she cannot be put into a condition to complete that voyage with that cargo; (2) even when he can show this, he may yet not be excused if, upon the facts of the case, it is possible to get the goods to their destination by reasonable means, *e.g.*, lighters as in the example taken above. I do not include under this head transhipment and carriage by another bottom, as this is optional to the shipowner. (3) If he can show that the ship cannot be considered a ship for the voyage with that cargo, he is entitled to be excused, even though the ship may be repaired so as to be a seaworthy ship fit to carry a different cargo for that or a different voyage.

If the propositions which I have ventured to formulate are correct, it follows that in considering the effect of the actual damage, quite apart from any question of the cost of repair, the test by which the position is to be judged is the test of the voyage. And this is, I think, the logical conclusion from the fact that the contract of affreightment is concerned, and concerned only, with the voyage in respect of which the rights and obligations of the parties under the contract arise.

So far I have been discussing the position which arises where repairs to the vessel are or are not possible, without there being any question as to the cost of the repairs; and the conclusion to which I have come is, that the shipowner's duty under the contract of affreightment is, whenever it is practicable to do so, to effect such repairs as may be necessary to enable the vessel to carry her cargo to its destination, no more and no less. If the repairs necessary for this purpose are permanent and complete repairs, those are the repairs which must be carried out. If, on the other hand, temporary and incomplete repairs will be sufficient for the purpose, those are the only repairs which the contract obliges the shipowner to effect, since the completion of the voyage is the only matter with which the freighter is concerned.

But the duty to effect the necessary repairs, to enable the vessel to carry the cargo to its destination is not an absolute duty. It is subject to this qualification (which for the moment I will state in quite general terms), that if the cost of the repairs is unreasonably large the shipowner is excused from executing them, and is entitled to treat his obligation to carry the goods to their destination as discharged by a peril of the sea. Another way of describing this result is to say that the shipowner is entitled to treat the vessel as lost in a commercial sense, through a peril of the sea. If it were not for the fact that this description has the support of authority, I should myself have been inclined to avoid the use of the word "lost," since it appears to me that it is a word which tends to confuse the issue. In particular, it tends to obscure the fact that, as between owner and freighter, the real question is as it appears to me, not is the vessel "lost" in some absolute sense, but is she "lost for the voyage so far as regards the goods to be carried"; if she is not lost for the voyage so far as regards those goods, there can, I think, be no reason in principle why the shipowner should be excused.

The *primâ facie* duty of the shipowner to the freighter being, as I have pointed out, to effect such repairs (whether permanent and complete or only temporary, as the case may be) as will enable the vessel to carry the cargo to its destination, the question whether on commercial grounds of expense he is to be excused from performing this duty ought, in my judgment, on principle to be determined by reference to the cost of the repairs which, on the facts of any individual case, are the repairs which *primâ facie* he ought to do. The freighter is not entitled to call on the shipowner to effect repairs beyond what the contract demands in the circumstances of the case. He is, in the case supposed, claiming that the shipowner is bound to repair; the shipowner is seeking to excuse himself by saying that the cost of the repairs demanded by the freighter is so unreasonable as to justify the shipowner refusing to execute them. On this basis it appears to me logically to follow, once the principle of the exception based on unreasonable cost is admitted, that the only repairs, the cost of which it is relevant to examine, are those repairs which, on the facts of the case, the freighter is *primâ facie* entitled to require the shipowner to carry out. If, in order to carry the cargo to its destination, permanent and complete repairs are necessary, it is the cost of those repairs which must be considered. If, on the other hand, temporary repairs are sufficient for the purpose, the cost of those temporary repairs is the matter to be considered, and the cost of permanent and complete repairs is irrelevant.

I will illustrate my view by contrasting two cases.

(1) If temporary repairs will suffice to get the cargo to its destination and the cost of such repairs would be less than the value of the vessel, I do not see why on principle the shipowner should be excused from carrying out those repairs, merely because he can prove that the cost of permanent and complete repairs would exceed the value of the vessel as so repaired; in other words, the vessel in the case stated ought not to be treated as commercially "lost" for the purpose of the voyage, although on one view of the law relating to insurance on hull she may for the purposes of a hull policy be commercially "lost." As an example, I may take the case of a vessel which suffers a serious casualty close to her port of discharge. It may well be that the repairs necessary to enable her to complete the short remaining distance will be less than her value for breaking up purposes, but that the costs of making her a really seaworthy ship would far exceed her repaired value. I can see no reason in principle why the shipowner should be able to say, in such a case, that he is not bound to effect the repairs necessary to get the ship with her cargo to her destination.

(2) If, on the other hand, the shipowner can prove that the cost of effecting temporary repairs sufficient to get the cargo home would exceed the repaired value of the vessel, I do not see on principle why the freighter should be able to call upon him to execute the repairs, merely because he can prove that when the vessel reached her port of destination and was permanently and completely repaired, her value would exceed the total cost of the repairs. What may happen to the vessel after her arrival at her port of destination and delivery of her cargo, what the cost of subsequently restoring her to her original condition may be, or her value when restored, are matters with which the freighter is not concerned, and I do not on principle see why they should be taken into consideration.

Before turning to a consideration of the authorities which bear upon the question under discussion, I will summarise the conclusions to which my examination of the principles has led me. (1) In all cases where repair is possible, the *primâ facie* duty of the shipowner under his contract of affreightment is to carry out such repairs to the ship (whether temporary or permanent and complete, as the case may be) as may be necessary to enable her to carry the cargo to its destination. (2) This duty is not affected by the fact that as between the shipowner and his hull underwriter, if any, the case may, or would, be one of constructive total loss of ship, a fact which is not relevant to the consideration of the duties of the shipowner under the contract of affreightment. (3) The shipowner is excused from the duty to carry out the appropriate repairs (whether temporary or permanent and complete, as the case may be) if he can prove that the cost of doing so would exceed the repaired value of the vessel. (4) A consideration of the cost of repairs, which are not the appropriate repairs in the particular case, is irrelevant.

I now turn to a consideration of what are admittedly the three leading authorities on this branch of the law. The case of *Moss* v. *Smith* (*sup.*) was decided by the Court of Common Pleas in 1850. The action was brought by mortgagees of a vessel of 716 tons against underwriters on two policies of insurance. The first was a voyage policy on the ship valued at 12,000*l.*, at and from her port or ports of loading on the Pacific to her port or ports of discharge in the United Kingdom. The second was a policy for 1,000*l.* on chartered freight valued at 4,000*l.*, at and from Sydney, New South Wales, to Pacific ports to the port or ports of discharge in the United Kingdom. The charter-party was for a voyage from South America to the United Kingdom with a cargo at a freight of 3*l.* 10*s.* a ton. After loading her cargo, the vessel began her voyage home, but suffered considerable sea damage and put back to Valparaiso. Surveys were made by surveyors "who estimated the repairs that would be necessary to proceed to England with her entire cargo," together with expenses of unloading and reloading, at 3,710*l.* 5*s.*, "which would exceed the value of the freight but would be less than the value of the ship when repaired." On the advice of the surveyors the vessel was sold for 1,734*l.*, and the cargo was delivered at Liverpool by other vessels at a freight of 4*l.* 15*s.* and 5*l.* per ton. The purchaser repaired the vessel at an expense of about 240*l.*, and sent her with a cargo to Hamburg, where she duly arrived. The plaintiffs claimed under each policy as for a total loss by perils of the sea, the allegation under the count upon their freight policy being that the ship was wholly lost, and that thereby the plaintiffs lost the freight.

The direction given by Wilde, C.J. to the jury as stated in the report was (1) as to the count upon the hull policy that if the damage was such "that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired" there would be a total loss of the ship, (2) as to the count upon the freight policy if the vessel "might have been repaired within reasonable time, so as to be enabled to bring home the whole of the cargo, there had been no loss of any part of the freight; and that, if she might have been repaired so as to be able to bring home a part of the cargo only, the plaintiffs would be entitled to cover for a partial loss on freight." Further light is thrown on the meaning and effects of the summing-up by various passages in the judgments. I may refer in particular to the words of Cresswell, J. at p. 106, and those of Wilde, C.J. (who was the trial judge), at pp. 107, 108 and 109.

The direction on the first count was not challenged by the appellants. As to the second count it was argued that Wilde, C.J. had misdirected the jury because he "incorrectly applied to the freight, the same test as to repairs, which he had applied to the ship" and that the plaintiffs were entitled to recover by reason of the fact that the cost of the repairs necessary to enable the vessel to reach her port of discharge would have exceeded the freight payable under the charter-party. It is, I think, clear from the report that Wilde, C.J. in his direction to the jury applied the same test as to repairs in the case of the freight policy as he had applied in the case of the hull policy. In his direction on the second count he uses the word "repaired" in the same sense as he had used it in the direction on the first count; and in the direction on the second count he introduces the matter of "reasonable time" and does not expressly refer to a total loss of ship or freight. The reason for this is, I think, that in his view if the jury had found a total loss of ship on the first count this would in the circumstances of the case have necessarily entitled the plaintiffs to judgment on the second count, whereas if the finding on the first count was for the defendants there could be no question of a total loss of freight, unless, at any rate, the repairs would have taken so unreasonable a time as to cause a frustration of the adventure.

The decision in the case affirmed the correctness of the direction to the jury and negatived the plaintiffs' contention that the freight was lost because the cost of repairs would have exceeded the amount of the freight. The question which arises in the present appeal did not arise in that case and was not directly discussed. It is to be observed that on the facts of that case the vessel was on any view clearly not a constructive total loss and as clearly she was not commercially lost for the purposes of the freight policy. It is, I think, true to say that on the evidence in that case (in reference to which the summing-up—and I may add the judgments—are to be read—see per Maule, J. at p. 101) the same facts negatived both constructive total loss of the ship and total loss of freight. But I cannot read the decision as authority for the proposition that facts sufficient to negative a constructive total loss of ship are always necessarily sufficient to negative a total loss of freight; or the proposition that a total loss of freight cannot be established unless the facts are such as to establish a constructive total loss of ship. In the circumstances of the case both claims were negatived by the same state of facts, a thing which may well happen in many if not most cases which arise in practice. But however that may be, it is to be observed that no evidence was given as to the cost of permanent and complete repairs, the surveyors' estimate being an estimate of the repairs "necessary to enable the vessel to proceed to England with her entire cargo," namely, 850 tons of guano and a quantity of dollars and whalebone, in contrast to repairs recommended by officers of one of Her Majesty's ships as being sufficient to enable the vessel to bring home about 500 tons of cargo. It may very well be the fact that the repairs necessary to bring a vessel of 716 tons from Valparaiso round Cape Horn to England in the year 1844 with her entire cargo would have been the same thing as permanent and complete repairs but the report does not so state. In the direction to the jury the repairs referred to are such "as to enable her to perform the voyage." Maule, J. at p. 103, says: "However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost." Cresswell, J. says (at p. 106): "But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract," the contract being the contract of affreightment. The same learned judge proceeds: "The courts of law have also engrafted this qualification upon the contract, that, if the damage which results from a peril of the sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract." In this latter passage the repairs referred to clearly in my view are repairs of the same kind as those referred to in the earlier passage, namely, repairs which will render the vessel "competent to continue her adventure." Wilde, C.J. at p. 107, interprets the finding of the jury (arrived at after his own direction) as follows: "The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight," and on p. 108 he says of his own direction: "The jury were told that if the cost of repairing the vessel so as to enable her to earn the freight would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight." These passages in my judgment show that the court in that case clearly had in mind as the true test for the purposes of a contract of affreightment (and consequently for those of a policy on freight) that of repairs sufficient to enable the vessel to complete the voyage with her cargo.

The next case is that of *Rankin and others* v. *Potter and others* (*sup.*) decided by the House of Lords in 1872. The policy was effected in respect of freight payable under a charter-party made while the vessel was on an outward voyage to New Zealand, under which a cargo was to be carried on the homeward voyage from Calcutta to England. The policy covered the vessel while on the outward voyage to New Zealand and in port there and the risk covered by the policy in effect was that the vessel would during the period covered by the policy be so injured by a peril of the sea as to prevent her arriving at Calcutta in a fit and proper condition to earn the freight. The vessel was damaged on arrival at Bluff Harbour in New Zealand but eventually temporary repairs were effected which enabled her to reach Calcutta where she was surveyed.

It is important to see what the evidence was as to the estimated cost of repairs. It is to be found on p. 85 of the report, and is as follows: "The surveys and estimates showed that if the repairs really necessary to make the ship seaworthy, and enable it to bring home a cargo, were executed, they would exceed the value of the ship when repaired; and one paragraph of the case (para. 24) stated, 'It is admitted that the sea damage which the ship sustained in New Zealand, during the time covered by the policy, was such as would have justified an abandonment and claim for a constructive total loss.'" I need not examine the opinions of the judges in detail, but I may point out that Brett, J. (29 L. T. Rep. at p. 145; L. Rep. 6 H. L. at p. 104) and Blackburn, J. (29 L. T. Rep. at p. 149; L. Rep. H. L. at p. 117) clearly to my mind treat the repairs necessary to enable the ship to complete the voyage as the true test. In the present case, Porter, J. thought that Blackburn, J. in the passage just referred to had applied a wrong test for constructive total loss of ship. Whether or not he was right in so thinking is a question on which I do not propose to embark. But so far as regards the test in the case of a freight policy, Blackburn, J.'s opinion is quite clear and in my humble judgment quite correct. He says: "The question between the assured and the underwriters on the chartered freight is, whether the damage can be so far repaired that the ship can be at Calcutta, seaworthy for a voyage round the Cape of Good Hope, without expending on it more than it would be worth," thus taking the cost of repairs necessary to complete the voyage as the true test. Moreover, whether or not Blackburn, J.'s view as to the position under a hull policy be correct, the contrast which he draws between the two cases does to my mind show that he would not have accepted the proposition that a freighter is entitled to call upon the shipowner to execute the repairs, if it appears that the vessel is not a constructive total loss for the purposes of a real or imaginary policy on hull.

Lord Chelmsford, in his speech, if I read it correctly, takes the same view as to the standard of repairs. He points out (29 L. T. Rep. at p. 161; L. Rep. 6 H. L. at p. 154) that having regard to the special nature of the policy the question was "whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable

her to be tendered to the charterer in the terms of the charter-party as being 'tight, staunch, and strong and every way fitted for the voyage' to England." The damage was in fact suffered in New Zealand, the extent of the damage and the cost of the necessary repairs were not ascertained until the survey was made at Calcutta where, as Lord Chelmsford says (29 L. T. Rep. at p. 161; L. Rep. 6 H. L. at p. 154), "a survey disclosed the extensive nature of the injuries which she had sustained in New Zealand, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired." On p. 161 of 29 L. T. Rep. and L. Rep. 6 H. L. at p. 155, he says: "A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy it seems to me that the only question is whether, by the perils of the sea, the ship was so damaged at New Zealand during the term of the policy as to be rendered incapable, unless sufficiently repaired, of performing the voyage from Calcutta to England, for which she was chartered." Again he says (29 L. T. Rep. at p. 163; L. Rep. 6 H. L. at p. 159): "If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight not by the perils of the sea but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, but what must be regarded, in relation to it, as the total destruction of the ship by which it was to be earned." I venture to call attention to the concluding words of this paragraph. The words "in relation to it" mean, I think, in relation to the freight, and if this construction be right Lord Chelmsford is saying that in a case between owner and freight underwriter the question is not the abstract question "must the ship be regarded as totally lost," but "must the ship be regarded as totally lost in relation to the freight," a distinction which I have already ventured to point out in words of my own.

Lord Hatherley (29 L. T. Rep. at p. 165; L. Rep. 6 H. L. at p. 164) says: "It is farther admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole value of the ship." It is true that he adds: "in other words, when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing"; and that he thus appears to treat the relevant state of facts for the purpose of the freight policy as being the same as the relevant state of facts for the purpose of the hull policy. There is also a passage in Lord Chelmsford's speech which suggests that he took the same view. Both the noble and learned Lords are referring to the statement of facts on page 85 of the report which I have already quoted. But whether or not these observations are to be treated as authority for the view that the relevant state of facts in such a case as that then before the House was the same for both purposes is to my mind immaterial. What is I think material is that each of them treated the fact that the cost of repairs necessary to complete the voyage would have exceeded the repaired value of the vessel as sufficient to produce a total loss of the freight.

The third case is that of *Assicurazioni Generali and Schenker and Company* v. *s.s. Bessie Morris Company Limited and Browne* (*sup.*), commonly referred to as the "Bessie Morris" case. That was a case between shipowner and charterers. The vessel was found to have been capable of being repaired so as to carry what was left of her cargo to London, her port of destination; she was in fact repaired temporarily at Gibraltar, her port of refuge, and carried a cargo from Oran to Garston. No question as to commercial loss of the vessel arose, nor indeed could it have arisen in view of the circumstances that she was in fact repaired; but it appears from the judgment of the Master of the Rolls, Lord Esher (67 L. T. Rep. at p. 219; (1892) 2 Q. B. at p. 658), that the repairs (which, as already stated, were temporary repairs) were executed at a cost "very far less than the value of the ship," and he adds, "and that being so, no reasonable shipowner, having regard to his own interests, would have failed to do the repairs." In the passage immediately preceding, the Master of the Rolls states the law as follows: "If she had been got off as a mere wreck, as explained by Maule, J. in *Moss* v. *Smith* (*sup.*), and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfilment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other voyage. But, in fact, the ship was got off, and she was taken to Gibraltar, where she could be repaired. What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But, as Maule, J. said, in the case to which I have referred, the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. In the present case the ship was repaired at Gibraltar, and the cost consisted of the expenses of the salvage of the ship and of the repairs necessary to bring her to London. We know that she was repaired sufficiently to enable her to reach Liverpool by a voyage longer than that provided for by the charter-party, at a cost of 750*l.* in addition to the expenses of salvage."

Bowen, L.J. also applies the test of the voyage

He said (67 L. T. Rep. at p. 220 ; (1892) 2 Q. B. at p. 659) : "The shipowners' contract was that they would fulfil the specified voyage, unless they should be prevented by the perils of the sea. Their only excuse for the non-performance of the voyage would be, that its performance was prevented by the perils of the sea. The ship went aground ; but, in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea, she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it. In the present case, so far from the ship being unnavigable, or having been treated as such, she was repaired, and was put into a condition fit for the performance of her voyage." In this passage I read the words "for that purpose" as referring to the completion of the voyage. Again he says (67 L. T. Rep. at p. 220 ; (1892) 2 Q. B. at p. 661) : "In the present case, the answer to the contention of the shipowners is that the ship never was unnavigable, that she never was incapable of performing her voyage."

I read these repeated references to the repairs necessary to enable the vessel to complete the voyage at their face value. I see no reason to disregard them or to attempt to explain them away. In my opinion, they confirm the view which on principle appears to me to be the right one, as explained in the earlier part of this judgment.

I do not propose to burden this judgment, which is, I fear, already too long, with an examination of other authorities. In so far as there may be in other cases indications of a view different to that which (if I have rightly construed them) is to be found in the three authorities which I have discussed, I am content to follow the latter. Nor do I propose to embark on a discussion as to the standard of repairs which ought to be taken into account for the purpose of constructive total loss as between owner and hull underwriter. Any such discussion would, in my judgment, be irrelevant as well as confusing. But before leaving this branch of the case I wish to say that, although the decision in the *Carras* case did not cover the point raised in this appeal, I find nothing in the judgments which is in any way inconsistent with the view which I have expressed. The point was in terms left open by Slesser, L.J. and myself, while the reasoning of the Master of the Rolls, in my respectful opinion, lends support to the conclusion which I have formed. I should perhaps add that one sentence in my own judgment in that case, as reported, appears to suggest that I had formed the view that in the case of constructive total loss under a voyage policy on hull, the appropriate repairs to be considered are not such repairs as would be necessary to make the vessel navigable for the voyage in question. I refer to the second paragraph on the left-hand column of p. 142 in 53 Ll. L. Rep. I would have expressed my meaning better if I had said that on one view of the law this would be so since, as appears elsewhere in the judgment, I had no intention of expressing any considered view upon the question what standard of repairs was appropriate to consider in such a case.

The only other matter to which I wish to refer is the question whether the shipowner is to be debited with some, and, if so, what amount in respect of freight. On the figures the position is as follows : The cost of repairs (in the sense in which I have used that expression) was 19,161*l.* The estimated repaired value of the ship, on the basis of January values, was 6250*l.*, and on the basis of May values, 6500*l.* The estimated general average contribution by cargo was, on the basis of January values, 4698*l.*, and, on the basis of May values, 7201*l.* If the value of the vessel and the contribution by cargo be deducted from the cost of repairs, the result is January values 8213*l.* May values 5460*l.* The total gross freight was 8000*l.*, of which 548*l.* had been paid in advance, leaving 7452*l.* at risk. The cost of earning this 7452*l.* was estimated at 2174*l.*, leaving 5278*l.* as the net freight remaining to be earned. It will be seen, therefore, that if the shipowner were debited with the whole of the gross freight, namely, 8000*l.*, on on the basis of the January values he would have incurred a loss of 213*l.*, whereas, on the basis of the May values, he would have benefited by repairing the vessel and completing the voyage to the extent of 2540*l.* As, in my opinion, the right values to take on the facts of this case are the January values, the question whether the shipowner ought to be debited with some, and, if so, what amount in respect of freight, does not arise, and I do not express any opinion upon it.

Scott, L.J.—This case raises for decision certain questions of principle left open by Parliament when it passed the Marine Insurance Act, 1906. It is said on what seems to be good authority that the distinguished lawyers who settled the drafting of that Bill were unable to agree upon the law as to insurance of freight, and that that is why the Act says so little about it. Be that as it may, we have enjoyed the privilege of a full review of all the decisions closely or remotely bearing upon loss of freight and of listening to very careful and illuminating arguments from all four counsel. But in the end the result seems to depend on rather simple principles and conclusions affecting first the interpretation of the policy, and secondly its application to the agreed facts.

The precise point for decision is not in my view concluded by any of the decided cases, although there are many passages in the judgments in which the path of judicial reasoning has come near to it, and some in which the language used seems actually to cover it. But in no case was the mind of the court directed to the present point as the issue for adjudication and there does not seem to me sufficient certainty or unanimity of opinion to warrant a decision as upon authority without explicit reliance upon first principles. I therefore propose to approach the problem upon what I conceive to be the principles applicable. In the analysis of marine insurance cases it is often difficult to keep interpretation and application wholly separate and the present is no exception ; but so far as practicable it is helpful to clear thinking to endeavour to do so. It is also important not to forget that most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy. We have all got into the mental habit of thinking of it as substantive law, particularly since its codification in statutory shape ; but the Act has made no difference in the essence of the legal problem—as is made plain by sects. 1, 30, 87, 91 (2) and the "Rules for Construction of Policy" contained in the schedule. It is, as it always was, primarily a problem of interpretation ; the Act merely fixes the interpretation which it requires the court to be put on the old form of policy unless the special terms of the particular contract vary it. I emphasise the point, because on a difficult question such as that in debate in the present case it seems to me helpful to keep the

interpretation aspect prominently in mind and to remember that we are trying to determine what was the intention of the parties in respect of loss of freight as disclosed by their written contract, and especially in respect of the events and conditions in which the right to payment for a loss of freight should become operative. The force of the above consideration is accentuated where the claim is for a total loss of freight, as the Act does not vouchsafe the specific aids to interpretation in the case of freight that it does in the case of ship and cargo; see especially sect. 60 on constructive total loss. In this appeal we are only concerned with total loss, actual or constructive, as we are not asked by the appellants to deal with any claim for a partial loss.

The first question in this appeal is one of pure interpretation—"what does the contract provide as to the events in which the insurer undertakes to pay the insured sum?" The archaic words of our ancient form of marine policy, set out in the Schedule to the Act, and embodied in the policy sued on, afford little guidance in the way of description or explanation as to the circumstances which the insurer agrees shall constitute a loss for which he has to pay. Indeed the statutory form is inapt to cover freight at all, although it is habitually used by Lloyd's for insurance of freight by adding written or typed words to the printed form, regardless of grammar, so as to bring in that subject-matter. The policy in the present case is not wholly in the statutory form; it is entitled as a "cargo and freight" policy, and it excludes the usual words of hull insurance; but it is very nearly in common form, and certainly contains nothing to indicate a different construction to that of the statutory form with the words "on chartered freight and/or freight" added in ink or type in such a place as to show that that was to be the subject matter of the insurance. There is, however, at this stage of English legal history no room for doubt that the primary bargain intended by the policy before us is simply this: "We the insurers agree that if the assured suffers a total loss of his chartered freight by perils of the sea, we will pay him the whole sum insured"; and if that be a correct paraphrase of the policy language, it is plain that our decision as to whether such a loss has happened in the present case or not will depend chiefly on the correct interpretation of the words "loss of his chartered freight." The second question in the appeal—whether assuming a loss of the chartered freight that loss was by perils of the sea, is also in part one of interpretation. In truth, apart from authority, this appeal depends almost entirely on ascertaining the true purport of the contractual bargain; once that is put into plain English, the broad lines of the application of it to the facts, I think, become clear enough. But the questions of interpretation are not easy, and the surrounding circumstances have to be looked at. There is no doubt on the evidence that the insurance was effected by the assured in order to cover their lump-sum freight of 8,000*l.* payable to them under the charter-party of the s.s. *Mount Taygetus*, dated the 2nd November, 1933; or that the contract cargo was loaded; or that the vessel sailed on the contract voyage. Accordingly the words "chartered freight" in the clause typed into the chief of the attached slips under the head of "Interest insured," must mean the assured's right to earn and receive that particular freight under and in accordance with the terms of that charter-party. We do not know the date of the slip but there is no doubt that the policy of the 22nd November, 1933, attached to that marine adventure and no other; and no question as to whether any bill of lading freight or any mere expectation of freight is covered by the policy arises for our consideration. In the result the words "and/or freight" which follow the words "chartered freight" never became operative, and on the facts before us may be treated as irrelevant surplusage. Thus the sole subject matter of the insurance was the prospective right to receive payment of the 8000*l.* on due delivery under the charter-party at the contract destination of the contract cargo, or such substantial part of it as should survive the excepted perils of the voyage; and the contingency against the happening of which the insurance gave protection was the risk of the assured, as shipowner under the charter-party, being prevented by perils of the sea from earning that freight by the carriage to destination of the cargo or such part of it as would entitle him to the 8000*l.* freight in the ship named in the charter-party. The policy does not say in terms that it is the earning of the freight by the named ship, the *Mount Taygetus*, which is insured, but the whole insurance is expressed to be in respect of the *Mount Taygetus* and that ship and no other was the subject of the charter-party to which the policy, for the purpose of defining the subject of the insurance contract, implicitly refers where it describes the interest insured as "chartered freight." It is necessary to bear these considerations in mind, as they dispose of an argument addressed to us, with which I will deal in a moment, on the general right of a shipowner under a contract of affreightment to tranship cargo into another vessel, carry it to contract destination in the substituted vessel, and then exact payment of the contract freight on the cargo so delivered. In origin this right of transhipment was probably grafted on to the contract of affreightment by the law merchant as an incident already attached by commercial usage; see per Martin, B. in *Hickie* v. *Rodocanachi* (28 L. J., Ex. 273). It was not made the subject of express stipulation in the common forms of either charter-party or bill of lading so far as I know, but it has for long been treated as an implied term of every contract of affreightment (unless, of course, the express terms of the contract should happen to be inconsistent with it). It has, however, always been regarded by our courts as a liberty allowed to the shipowner and not as an obligation imposed on him. The rule is sufficiently stated in Scrutton on Charter-parties, at pp. 314–6, art. 103, and the cases there cited; also see *Hansen* v. *Dunn*, 11 Com. Cas. 100, per Kennedy, J. at pp. 102–3.

It was urged by counsel for the respondents that if a shipowner can tranship and so earn his freight under his contract of affreightment, he is precluded as against his insurers from alleging a loss of freight under his contract of affreightment, even although the particular ship named in both contracts as the carrying vessel may have been prevented by a peril insured against from completing the voyage. On the facts of the present case we understood counsel on both sides to agree that another vessel could not have been procured for less than 7,000*l.*, but in spite of that and certain substantial further expense involved in transhipping the remaining sound cargo, it was contended by counsel for the respondents that the appellants could in the present case have transhipped and were therefore precluded in law from alleging a loss of the chartered freight by perils of the sea. The respondents' general argument as to the proper interpretation of any policy of freight insurance in common form was also founded

partly on the implied right of the shipowner under his contract of affreightment to tranship, it being urged that in every case the onus rested on the assured to prove not only that completion of the voyage in the contract vessel was physically or commercially impossible, but that transhipment was in the existing circumstances impossible. For both reasons it is necessary to deal with this contention. The answer to it is, I think, plain. In the first place, even apart from the insurance position, transhipment is under the contract of affreightment, as I have already said, a privilege or liberty of the shipowner, and not a duty. In the second place, whatever the position may be under the contract of affreightment by itself, the insurance policy on chartered freight is concerned only with the named ship; the insurance is against inability to carry to destination in that ship. This is a basic term of the insurance contract; and I think it limits the ambit of discussion upon loss of charter-party freight to performance by the ship named in the policy; in other words, it is an implied term of the insurance contract, that the assured's right of transhipment under his contract of affreightment is to be ignored by both parties. At any rate, that is the meaning, in my view, of the policy before us.

Except in clauses 4 and 5 of the attached "Institute Voyage Clauses—Freight," the policy does not incorporate or depend on, or refer to, any other contract of insurance, whether on hull or on any other subject-matter of insurance, whether effected by the shipowner, or any anyone else, for example, the cargo owner. And for the purpose of this judgment it is unnecessary to discuss the effect of those two clauses, as the Court of Appeal has recently considered them in the case of *Carras* v. *London and Scottish Assurance Corporation* (*sup.*) and decided that they are irrelevant to such questions as we have to determine in the present case. The judgments of the court in that case are, of course, binding on us in the present case, but the reasoning on which they are based covered so much of the ground which we have to traverse here, that I desire to add for myself that I not only recognise the binding effect of the actual points of decision there reached, but agree with the reasoning and the opinions incidentally expressed in the judgments of that case, and therefore repeat no part of them; they throw much light on the legal questions involved in or germane to this case. The results of the application of the *Carras* principles here are that no other policy has for present purposes any relevance, that no question of constructive total loss of ship in the proper insurance sense of that expression is germane to the present discussion, that this policy must be construed and applied on the footing that the plaintiffs were otherwise wholly uninsured, and that the ordinary test of the prudent uninsured owner is applicable within its proper limits.

The plain meaning of the policy being that a loss of the chartered freight will take place and the insurer's obligation to pay the insured amount will arise, if the assured is prevented by perils of the sea from earning the freight due under the charter-party, the test of loss under the policy is relegated to the charter-party contract, save that as I have already pointed out, the policy makes it impossible for the insurer to rely upon the assured's common law liberty under his charter-party of transhipping; the insurer cannot oppose that defence to a claim of prevention by sea damage caused to the named ship.

In considering a total loss of a lump-sum freight it is necessary to bear in mind that where the charter-party provides for a lump-sum freight, a failure of the shipowner to deliver a part of the cargo does not of itself deprive him of his right to be paid the whole of the lump sum, at any rate, assuming a substantial part of the cargo to be delivered, and the cause of partial failure to have been an excepted peril (see art. 140 of Scrutton on Charter-parties). The insurance against loss of chartered freight in this case therefore meant that the assured as owners of the *Mount Taygetus* were covering themselves against the risk of their being prevented by perils of the sea from carrying any appreciable part of the cargo to destination in that named ship.

The ultimate question for our decision being whether the assured did suffer a loss of their freight by perils of the sea, the test imposed by it is conveniently expressed in terms which closely reflect the particular circumstances out of which the controversy has arisen. Substituting the objective for the subjective—"prevention caused" for "loss suffered"—the issue may without change of meaning be stated quite simply: "Were the assured prevented by the strandings and other events described in the agreed statement of facts from carrying the remaining sound cargo to Europe in the *Mount Taygetus*, and were those events the proximate cause of prevention?" The test of "prevention" as of "loss" is, of course, commercial as well as physical, as was judicially explained in *Assicurazioni Generali and Schenker and Co.* v. *Steamship Bessie Morris Company Limited and Browne* (*sup.*), applying the principles in *Moss* v. *Smith* (*sup.*), and *Rankin and others* v. *Potter and others* (*sup.*). That is not because prevention under a contract of charter-party is for all purposes or always the same thing as a loss under a contract of insurance, but because all commercial contracts must be interpreted in the light of commercial common-sense if effect is to be given to the commercial intentions of the parties; and when a business man thinks or speaks of "prevention" or "loss" in such a context, he has in mind commercial as well as physical causes and criteria. We may therefore read this policy as saying: "If you, the assured, are prevented in a commercial sense by perils of the sea from carrying in the *Mount Taygetus* to Europe enough of the contract cargo to earn the chartered freight we agree to pay a total loss." I state the bargain thus without reference to physical loss as, on the facts of the present case, the assured cannot say that they were prevented by physical causes, for more than half of the cargo was in fact carried to destination in the *Mount Taygetus* after temporary repairs, although at the instance of and by the salvors, and not by the assured.

The main difficulty in arriving at the correct interpretation of "commercial prevention" in the question so framed arises from the legal necessity of observing the principle of the law of contract, that the prospect of a contract proving financially unprofitable, however certain the prospect may be, is not of itself prevention, and is no ground for release from the obligations of the contract. A shipowner may have made an unwise bargain, or the contract may have proved more expensive in performance than he had anticipated; but neither fact entitles him to claim that he is in a commercial sense prevented from carrying out his promise. The law says simply that if he has made what proves to be a bad bargain that is his misfortune, but that it does not afford him any excuse for non-performance; and that is because such a release would not be, in accordance with the

contract, correctly interpreted (see per Earl Loreburn in *Tennants (Lancashire) Limited* v. *C. S. Wilson and Co. Limited* (116 L. T. Rep. 780 ; (1917) A. C. 510). The contractual duty of the shipowner to the cargo owner to repair the ship when damaged at his own cost and regardless of the profit and loss account of the voyage as stated by Kennedy, J. in *Hansen* v. *Dunn* (*sup.*), at p. 110, is a mere illustration of the general principle. This principle, in my view, rules out the contention that the cost of temporary repairs by itself constitutes any test. The rule expressed in cases like the *Bessie Morris* that in commercial contracts commercial prevention is equivalent to physical prevention, has therefore to be harmonised with this rule of holding a man to his contract, though it be financially to his own let or hindrance. Both rules are fundamental and the solution must transgress neither. The way of escape from the antimony, in my view, lies in a third principle of the law of contract—that a contract may be intended by both parties to be dependent for their mutual benefit upon some basic condition—such as the continued existence or availability of a particular thing, or state of affairs, so that if the condition fails the contract is discharged, or, at any rate, becomes unenforceable : *Taylor* v. *Caldwell* (3 B. & S. 826) or *Jackson* v. *The Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 235 ; 31 L. T. Rep. 789 ; L. Rep. 10 C. P. 125), or *Bank Line Limited* v. *Arthur Capel and Co.* (14 Asp. Mar. Law Cas. 370 ; 120 L. T. Rep. 129 ; (1919) A. C. 435) ; and see also *Re an Arbitration between Comptoir Commercial Anversois and Power, Son, and Co.* (122 L. T. Rep. 567 ; (1920) 1 K. B. 868), per Bankes, L.J. (122 L. T. Rep. at p. 572 ; (1920) 1 K. B. at pp. 886–887) ; Scrutton on Charter-parties 13th edit., at p. 110 and following pages, and the cases there cited. The basic condition under the charter-party here (at any rate, with the shipowner's common law liberty of transhipment excluded from it by the policy restriction of the venture to performance by the *Mount Taygetus* alone) was the continued existence and availability of the *Mount Taygetus* throughout the voyage. If the *Mount Taygetus* should be at any time during the contract voyage rendered by sea perils incapable of completing the voyage within a reasonable time so as to earn the freight, then whether the incapability was physical or commercial, the basic condition of the contract would be broken, and the charter-party contract *ipso facto* discharged, as Lord Sumner said in *Bank Line Limited* v. *Arthur Capel and Co.* (*sup.*) ; or, at any rate, each party would have the option of treating the contract as at an end. On that footing it is clear that, if the ship as a merchant ship employed in a shipowner's business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the cost of repair, the ship would be commercially lost and the basic condition would be broken ; the charterer's right to insist on carriage of the cargo to destination, and the owner's to insist on payment of freight, would both lapse. The view that one of the ways, perhaps the main way, in which an actual loss of freight may happen under a freight policy is through the ship ceasing to exist or be available for the earning of the freight seems to be almost indicated by the language of sect. 3, sub-sect. (2) (*b*), of the Act ; it is at least in harmony with it. On that footing delivery in the *Mount Taygetus* at the destination defined by the charter-party of enough cargo to earn the lump sum freight having been prevented by perils of the sea, there would be an actual total loss of freight under the policy.

The first question logically in the appeal is, therefore, whether the facts in evidence are sufficient to establish a commercial loss of the *Mount Taygetus* judged by the charter-party criterion. It was urged by the respondents that no evidence was led by the assured as to either the vessel's repaired value or the cost of permanent repairs ; and that such evidence was essential to prove a commercial loss of ship, whether as a constructive total loss under a hull policy, or as a commercial loss of the carrying vessel under a contract of affreightment. But the issue is a jury question, and, in my view, precise figures on that comparison are only required if the two figures are likely to be near each other, and in this case I cannot see that they were. The fact that the salvors, when they got the *Mount Taygetus* to Europe and realised the cargo, sold the ship to be broken up, raises a presumption that they thought they had no better market for her, and that to repair her would not pay. The terrible slump in shipping values which still prevailed at the time is common knowledge. I, therefore, draw the inference of fact that the cost of permanent repairs, added to the net cost of temporary repairs and other costs to be incurred in getting the vessel to the port of repairs, as shown on pp. 54–6 (but including the ship's part of the liability for full salvage claims, that is, the arbitration claim of 14,600*l.* as well as the 11,000*l.*, with contributory values assessed as in January, 1934), would certainly have exceeded the market value of the ship when repaired. But there are two further aspects. The first is the salvor's lien, reducing the value of the ship to the owner by the figure at which that lien would ultimately be assessed after arbitration. The second is the value of the wreck which, in considering the comparison in terms of business prudence, has also to be brought in. If so, the conclusion of fact seems to me to be lifted altogether out of the region of doubt. But even if we assume the possibility of a doubt remaining as to whether, on the facts subsequently known, the assured have quite discharged the onus of proving a commercial loss of their ship, it is important to bear in mind the legal principle, that in a commercial adventure men must know where they are, and be free to take and act on immediate decisions in the light of the facts as known to them at the time, assuming reasonable assurance that they have taken all possible steps to obtain the necessary information (see per Scrutton, J. as he then was, in *Embiricos* v. *Reid and Co.* (12 Asp. Mar. Law Cas. 513 ; (1914) 111 L. T. Rep. 291 at p. 293 ; (1914) 3 K. B. at p. 54), a case where he was dealing with restraints of princes in regard to a charter-party in which he cited the views of Lush, J. in *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268 ; 26 L. T. Rep. 361 ; L. Rep. 7 Q. B. 404) and of Lord Gorell in *The Savona* (1900, P. 252, at p. 259) and said : "Commercial men must not be asked to wait till the end of a long delay to find out from what, in fact, happens whether they are bound by a contract or not ; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds." Lord Tenterden, C.J. directed the jury, in *Doyle* v. *Dallas* (1 M. & R. at p. 54), a claim for constructive total loss on a hull policy, in the following terms : "The only question is, whether this amounts to a total loss ? The ship is not bodily and specifically lost ; but circumstances may have occurred which, according to the law established in cases of marine insurance, are equivalent to a total loss. I think

the circumstances in this case will have that effect, if, at the time of the sale, that measure, on the sound exercise of the best judgment, appeared most beneficial to all parties. It is not enough that the owner acted honestly in the sale, and intended to do for the best; the underwriters are not liable unless he formed a correct judgment, that is to say, the best and soundest judgment which could be formed under the circumstances which then existed. Nothing less than this, in my opinion, will make a total loss while the ship continues in existence." Although the jury in that case found against the plaintiff, the acceptance by Lord Tenterden of the right of the assured to treat the vessel as totally lost, if he honestly came to that conclusion on the information which then existed, embodies the same principle as that expressed by the late Scrutton, L.J. On this principle I think the assured here were in fact entitled to treat the *Mount Taygetus* as lost both on the 28th December, 1933, when they gave their notice of abandonment in London, and on the 5th February, 1934, when everybody concerned, other than the underwriters on freight, decided that the adventure must be abandoned, and the ship relinquished to the salvors. The dominant facts in the minds of the assured on those dates must have been, first, the salvage position, a lien on ship and cargo for 11,000*l.* certain, and a further claim, which, on the 27th January, they had put at 14,500*l.*, on the terms of the agreement dated the 27th December, 1933, which is at p. 65 of the papers; and, secondly, the very grave degree of damage involving, as the Master cabled, an impossibility of restoration to seaworthiness. In the course of the argument there was much discussion as to whether the voyage rather than the ship was the basic conception to which a loss under a freight policy must be related. It was also said by counsel for the respondents that even if the loss of the carrying ship was (as I think) the dominant condition of the assured's right to recover, in considering whether there was such a loss of ship under the charter-party, the amount of freight receivable should be deducted from the cost of repair side of the comparison before the commercial result could be seen. On this question many passages from judgments were cited to us *pro* and *contra*, including the much discussed second sentence in the advice of Blackburn, J. to the House of Lords in *Rankin and others* v. *Potter and others* (2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. at p. 148; L. Rep. 6 H. L. at p. 117). If I am right in what I have already said in favour of the appellants it is not necessary in the present appeal to determine that question of law; but I feel bound to say that it seems to me very difficult to bring in the value of the freight receivable at destination on the assets side of the account without treating the pecuniary outcome of the voyage as the criterion of loss of freight; and that, in my view, is to transgress the principle that a man cannot get out of his contract merely by showing that its result will be financially unfavourable to himself. I recognise that there are many phrases in the old cases—and some in later cases—about loss of the voyage, or of the venture, or fitness of the ship "to complete the voyage," or equivalent words, and many references to freight, but I do not think the trend of actual decisions or even of judicial opinion has been to treat the profitable or unprofitable probabilities of the voyage after a casualty as a test for loss of freight under the policy.

On the other hand, it may well be that even excluding the operation upon the contract venture of mere delay (which is made an inadmissible consideration in the present policy by clause 7 of the Institute Clauses), the principle of *Jackson* v. *Union Marine Insurance Company Limited* (*sup.*) and the frustration decisions of the House of Lords during and after the War have a proper application in a case where it can be shown that although the ship is not "lost," the whole basis of the adventure has been destroyed by a peril insured against; and it may in special circumstances be possible to establish such a case without at the same time transgressing the principle that a contract does not cease to be binding merely because it is, or has become, unprofitable. Indeed, in the present case the information conveyed by cables to the assured in London certainly seemed to invite the inference that the whole adventure had been destroyed; and apart from Institute Clause No. 7 I might have been prepared to apply that inference here. As it is, I express no opinion—even as to the effect of that clause—preferring to rest my judgment on the actual commercial loss of the ship within the meaning of the charter-party, or alternatively on the ground that in the circumstances known to the assured at the time, their decision to treat it as an actual loss was justified under the charter-party contract and under the policy.

The preceding part of this judgment (except the second paragraph on the first page) was written by me without having read the judgments of my learned brethren, but I have now read them and realise that although we all reach the conclusion that the assured are entitled to our judgment, my brethren reach it by a different route to mine. Both their judgments express the view that the present position is covered by authority, not, it is true, by actual decision of the precise point, but by such deliberate expressions of opinion and of reasoning in *pari materia* that we ought to follow the line of thought so indicated. Had I taken this view of the judicial passages on which they chiefly rely I should have felt bound to follow their lead, but I do not. In particular I am not satisfied that the distinction was in those cases being consciously drawn by the various judges whose words they cite between the two wholly distinct legal positions which I have endeavoured to state, namely (*a*) no release of the shipowner from the obligation of his contract through his freight contract having by the operation of excepted perils become unprofitable—even ruinously so—and (*b*) the failure of a basic condition of his obligation, such as occurs when by the like perils either the carrying ship is lost, physically or commercially, and so rendered unavailable for performance of the contract of affreightment according to its terms, express or implied, or the whole adventure is frustrated. (*a*) leaves the shipowner still bound by his duty to deliver the cargo at destination—he cannot say that he is "prevented" by the perils from carrying out his contract or that he has thereby "lost his freight"; he has simply to repair his ship at his own cost and stomach his pecuniary loss as best he may. (*b*), on the other hand, releases him from his contract and entitles him to say: "I have lost the power of carrying out my contract by reason of the contract ship being no longer available, or the frustration of the adventure; impossibility of performance has supervened by the failure of a basic condition of the contract; the contract is at an end or at any rate I am released from my contract obligation in accordance with, and not in breach of, my contract, free to act upon the actual business position in accordance with my business interest and to say to my insurer I have, in the commercial sense of my policy, lost my freight."

In particular, in descriptive expressions to be

found in the decided cases about the condition of the sea-damaged ship, I do not think that "fitness to complete the voyage" is always intended to mean a condition of less effective repair than that required to restore the ship to a condition of permanent fitness broadly similar to its pre-casualty state.

I agree with both by brethren that the informal statement of salvage and general average expenses jointly prepared by the distinguished average adjusters on the two sides may be treated as a statement of the cost of repairs, and expenses incidental to repair, from Magellanes to the point of delivery of cargo at contract destination; and that in the estimate of commercial loss of ship it is all relevant. I also agree with their conclusion that the prudent owner, party to the charter-party, would on those figures certainly have decided not to prosecute the adventure further if he was free to choose. But I do not accept the position that those figures standing alone satisfy the insurance test of loss of freight, or loss of either ship or adventure as working a loss of freight in the insurance sense. So to treat them seems to me to be equivalent to taking a profit and loss account of the voyage, and to concluding that there is a loss of freight under the policy, because the charter-party voyage had proved unprofitable. I cannot see any way out of that legal difficulty unless there has been either loss of ship absolutely and not merely relatively to the voyage, or loss of the adventure by frustration. In the present case, as I have already said, I am satisfied that the ship was lost, basing my conclusion upon the inference which although the issue, as I see it, was not fully discussed in the court below, I think we are entitled as a Court of Appeal, in the circumstances of the present case, to draw from the facts which are beyond dispute. Had I felt any doubt upon the right inference to be drawn, I should have proposed that the case should be sent back for further consideration; but no further evidence is, so far as I can see, available which could alter the position of fact already made clear. This being so, I think it is our duty to draw our own inference and not to send the case back.

In the middle of his judgment Greene, L.J. states as his conclusion of law, four propositions. With the first two I agree wholly and without qualification; constructive total loss of ship is in no way the criterion of a commercial loss of the chartered ship within the meaning of the charter-party. But in his third and fourth propositions he expresses the view that in a case like the present where the repairs necessary to carry the contract cargo to destination fall far short of the repairs necessary to restore the ship to substantially what she was before the casualty, able to keep her class and to be an effective unit in the shipowner's commercial fleet, the cost of the "temporary" repairs brought into an account such as that appearing on pp. 54–56 of our document will turn the balance and produce a loss of the voyage, and therefore of the freight within the charter-party contract or at least within the freight insurance contract. From that view I feel bound, with diffidence, but definitely, to dissent for the reasons which I trust I have made clear in the earlier part of my judgment.

I have read with care all the cases cited to us, and a good many more; and a good deal of the text-books on and round the subject, but I do not think it necessary or useful to discuss them in detail.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: for the appellants, *Ince, Roscoe, Wilson,* and *Glover*; for the respondents, *Waltons* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 27, 28; *May* 7 *and* 19, 1936.

(Before LANGTON, J., assisted by Trinity Masters.)

The Genua. (*a*)

Collision near Beachy Head in fog—Damaged vessel beached at Dover under harbour-master's directions—Whether further damage by beaching consequence of collision—Exercise of "ordinary nautical skill," the test—Apportionment of blame for collision: four-fifths and one-fifth—Measure of damages—Costs.

This was a claim brought by the owners of the British steamship Grainton *against the owners of the German steamship* Genua *for damages in respect of a collision between the two vessels which occurred, in foggy weather, on the evening of the 21st June, 1935, in the vicinity of Beachy Head. After the collision, the* Grainton, *which was badly holed, was taken to Dover with the help of a tug, and was there beached, to save her from sinking, at a spot opposite the Custom House, to which she was directed by the harbour-master. She took the ground well, but afterwards became buckled and the plaintiffs included in their claim against the defendants the consequential damage sustained by the* Grainton *as the result of having to be beached. The plaintiffs' case was that the* Grainton *was proceeding up the Channel, on a voyage from Venice to the Tyne, in ballast. The weather had become foggy, and she was sounding fog signals. When those on board her heard long blasts from a vessel apparently some distance away and bearing on the port bow, the wheel of the* Grainton *was starboarded. Shortly afterwards the* Genua *came into sight about a quarter of a mile away on the port bow, and the wheel of the* Grainton *was again starboarded, but, as the* Genua *appeared to be shaping to cross the course of the* Grainton *at high speed, the* Grainton's *engines were ordered full astern, and her wheel was put hard-a-port. Immediately afterwards, the* Genua *struck the* Grainton *a very heavy blow on the port side, doing so much damage that the* Grainton *had to obtain salvage assistance and it became necessary to beach her, whereby the* Grainton *sustained further damage. The* Grainton *charged the* Genua *with negligently and improperly altering her course to port and failing to pass the* Grainton *portside to portside. The defendants alleged that the* Genua, *whilst proceeding down the Channel with engines working at half-speed, and sounding signals for fog, heard on her starboard bow the signal of the* Grainton. *The* Genua *stopped her engines and further signals were exchanged.*

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

Some time afterwards, the Grainton *came into sight bearing on the* Genua's *starboard bow, and apparently about on a parallel course to that of the* Genua *and in a position to pass the* Genua *starboard to starboard. The* Grainton *was then observed to swing suddenly to starboard, whereupon the engines of the* Genua *were put full speed astern and her wheel hard-a-starboard, but the* Grainton, *coming on at high speed, with her port side struck the stem and port bow of the* Genua, *doing damage, for which the defendants counterclaimed. As to the damage sustained by the* Grainton *through beaching, the defendants denied that it was a consequence of the collision, or that it was unavoidable. It was contended at the hearing that the* Grainton *had been beached in an improper place.*

Held, that, although the Genua's *negligence in two or three respects had contributed to the collision, as that vessel was, however, not proceeding at full speed in the fog and did not fail to stop her engines on hearing the signal of the* Grainton, *her navigation was certainly much less blameworthy than that of the* Grainton, *which "did nearly everything wrong," and that, accordingly, the blame would be apportioned as to four-fifths on the* Grainton *and one-fifth on the* Genua, *the costs (except as mentioned below) to follow the proportions of blame.*

Held, further, as to the consequential damage, on the authority of The Metagama (29 *Ll. L. Rep., pp.* 76, 253), *that, the Elder Brethren's advice being that there was no lack of ordinary nautical skill on the part of those in charge of the* Grainton *in beaching her where they did, the plaintiffs succeeded on that point, and were entitled to have the costs of that issue.*

The Metagama (29 *Ll. L. Rep., pp.* 76 *and* 253, et seq. (*H. L.*), *followed.*

DAMAGE by collision and subsequent beaching.

The plaintiffs were Messrs. R. Chapman and Son, of Newcastle-on-Tyne, owners of the steamship *Grainton* (6341 tons gross). The defendants were the owners of the steamship *Genua* (1980 tons gross), of Hamburg. The plaintiffs claimed damages against the defendants in respect of a collision which occurred between the *Grainton* and the *Genua*, in the English Channel on the evening of the 21st June, 1935, in foggy weather, and, further, in respect of damage sustained by the *Grainton* as a result of having had to be beached in consequence of the said collision. The defendants, in their defence, alleged that the collision was due to the negligence of the plaintiffs, and they counterclaimed for the damage sustained by the *Genua*. They denied that the damage sustained by the *Grainton* through beaching was a consequence of the collision.

The facts as found by the learned judge and the contentions of counsel appear fully from the reserved judgment, which was delivered on the 19th May. Upon the question of liability for consequential damage, his Lordship dealt at considerable length with the opinions of Lords Haldane, Dunedin, and Shaw, as to what they regarded as being the established law on the subject, in the case of *The Metagama* (29 Ll. L. Rep., at p. 253, *et seq.*).

K. S. Carpmael, K.C. and *H. L. Holman*, for the plaintiffs.

R. F. Hayward, K.C. and *H. G. Willmer*, for the defendants.

Langton, J.—This is a case of a collision in fog between an English and a German steamship, and the case has been of some importance by raising very clearly a point as to consequential loss by stranding. Mr. Carpmael, the leading counsel for the plaintiffs, has put at my disposal the very clear statements of the law on this matter to be found in the case of *The Metagama* (29 Ll. L. Rep. 76, 253), which have not, I think, received the attention in this country that they clearly merit. As I have founded my judgment upon the law as stated in that case in the House of Lords, I will refer later to the case in some detail.

Dealing with the major issues in the case they concern the responsibility for a collision in fog. The collision happened off Beachy Head, and if it were necessary to find the place of collision with precision I should prefer the defendants' place to the plaintiffs'. Throughout this case their evidence was far more accurate, and their navigation was certainly less blameworthy than that of the plaintiffs. Therefore, if it became necessary to find the accuracy of the one or the other, the German place would commend itself to me rather than the English.

The English vessel, a vessel called the *Grainton*, is a large steamer of 6341 tons gross and 423ft. long. She was on a voyage from Venice to the Tyne, in ballast, and was proceeding up Channel on a course of 82 deg. true. The German vessel, the *Genua*, was a much smaller vessel of 1980 tons gross and 296ft. long, and was on a voyage to Cartagena, bound down Channel on a course of S. 66 deg. W. true. This course was attacked by counsel for the plaintiffs, but if established it means that the original courses were converging at an angle of 16 deg.

In order to meet the general convenience, the evidence of the German ship's witnesses was taken first, and such witnesses as it was thought necessary or prudent to call on behalf of the British ship were taken subsequently.

On the main issue—namely, the navigation of the two vessels prior to collision—my view, I think, may be summarised by saying that, so far as I can resolve the matter, the British ship—the *Grainton*—did nearly everything wrong, and the German ship did a great many things right and only two or three things that were wrong. I think it is only fair in those circumstances to deal with the English ship's navigation first, because both my assessors and I take the view that, given a ship which has behaved with such flagrant and avowed disregard of the Collision Regulations and of all seaman-like prudence, as the *Grainton* behaved in this case, the other vessel is entitled to ask the court (as Mr. Hayward did not omit to do) to consider her navigation with more than usual sympathy.

The *Grainton*, in a state of fog, in which she does not claim to have seen the *Genua* at a greater distance than a quarter of a mile, was proceeding at her full speed of ten-and-a-half, possibly eleven, knots. The statement of claim upon her behalf makes melancholy reading, and, taking the statement of claim and the master's evidence together, the following amazing story emerges. She was sounding her whistle for fog (and I hasten to say that in her favour, because throughout the whole proceeding it appears to be the only matter which

could be established in her favour), but although she heard the *Genua's* whistle, as she says, fine on her port bow, she did not stop or even ease her engines. Instead of complying with the rules she took no further notice of this signal which she heard except to sound a reply. Having heard another blast from the *Genua*, still on the port bow, she still omitted to stop or ease, and added to her offending by starboarding her wheel 10 deg., and although not in sight of the *Genua* she advertised her action by sounding a short blast. She claims to have had time to steady her helm on the new course of 92 deg., but still she had taken no timely steps to deal with her speed unless the somewhat shadowy claim to have rung "stand by" (which is not recorded by the log and was afterwards abandoned in the evidence) can be counted to her credit. Even when the *Genua* came in sight at a quarter of a mile the first intention of Captain Simpson, on board the *Grainton*, seems to have been to try to clear by speed and helm, for his first order was again to starboard 10 deg., and another helm signal was blown, and when he had realised the appalling nearness of the *Genua*, then in sight, seeing that he could no longer ignore that fact, he did, at long last, stop and reverse his engines. That he did reverse his engines seems to be everybody's case and also that he succeeded in arresting some part of his ten-and-a-half or eleven knots.

It came as something more than a shock to me—as it would to anyone in constant travel on the water—to hear the author or creator of this historical chapter of error observe in the witness-box that he did not know at the time that he was doing anything wrong. We must take what solace we can from his later admission that he is not now in the same state of blissful ignorance. If, after hearing and reading this judgment, he still remains in any doubt as to his mistake, the fault will no doubt be mine, due perhaps to a lack on my part of the power of vivid and energetic expression. Such navigation as that was, of course, more than enough to cause a collision, and many a ship has had to pay the whole bill in an even more dangerous collision than the present for a much lighter offending. Indeed, to use a commercial expression, one might say that it would be in the nature of a bonus to the owners of the *Grainton* if any fault could be found on the part of the other vessel in this matter.

Mr. Carpmael, with his usual courage, carried the war into the enemy's territory by attacking their whole credibility, their course, and every feature of their navigation. I own that, for my own part, I should not have been unhappy if I could have found that the whole of that attack was unjustified. Unfortunately, however, the German witnesses left upon me a most unhappily disturbing impression. Not only was one of their important documents—the log—palpably doctored, but they were in conflict over matters of evidence which one would have thought could hardly have been the subject of conflict, and they left upon me a most clear and distinct impression that they were concealing something and, possibly, a great deal.

In order to test their story it is convenient, I think, to establish first some of what I may call the outside factors which usually provide one with an efficient check on evidence. To begin with, the angle between these vessels at the time of collision fortunately was not at all in dispute. The angle was something like 56 deg.—about five points. Secondly, I have the assistance of the surveyors, Mr. Scott and Mr. Rogers, on the subject of the speed at the moment of impact. I was very much impressed with Mr. Scott's evidence on that matter, and the conclusion at which I have arrived is this, that there was some substantial speed upon the *Genua* at the moment of collision which, I would say, was in the neighbourhood of four knots. I think, of course, the major speed was upon the *Grainton*, which started when the vessels were in sight with a speed of 10½ knots and did not probably manage to reduce to lower than seven.

Those, I think, upon the evidence of the surveyors, are the respective speeds of the vessels, and, working backwards, one has to ask oneself, how was it that the *Genua* came into collision with the *Grainton* with anything like that speed? Again, her evidence supplies nothing trustworthy at all. Her master consistently claimed that she was stopped at the time of the collision, but, demonstrably, she certainly was not stopped at all at the time of the collision. Even Mr. Rogers could not find any argument which would support such a theory. Also it seemed to me clear from her log that she had put her engines ahead at some time after stopping them. I think I can accept her evidence that she stopped upon hearing the *Grainton's* whistle, because it seems to me a most unnatural and unlikely thing for anyone to invent that they stopped and then went on again. We are all too familiar in this court with a vessel which claims to have stopped her engines when she did not, but it is a new class of invention altogether to come into court to say "I stopped and then went on again," when in truth and in fact there is no substance behind the claim. But I have to ask myself, how did she get into collision with some substantial speed if she had got herself down by stopping to a reasonably slow speed?

Now, starting for a moment at the other end, Mr. Carpmael says you cannot get this collision upon the story of the German vessel—her course must be wholly wrong, and she has not told the court any of the truth at all. I think I have no reason to take so drastic a view of the German case in order to produce this conclusion. The courses of the two vessels, if the German course be accepted of S. 66 deg. W., were crossing at an angle of some 16 deg. It is admitted on behalf of the *Grainton* that she altered 10 deg., and altered it to start with before the *Genua* ever came into sight. It is the case for the *Grainton*—perhaps the only possible relieving feature in her case—that she did manage to get some of her way off before the collision, and the Elder Brethren advise me that, light ship as she was, and in that trim, Mr. Hayward's point is a good one that the *Grainton* did swing round very quickly indeed; and, therefore, it is unnecessary to find—and I do not find—that the *Genua* contributed to this collision by any helm action on her part. This five-point angle can be very well accounted for (as Mr. Hayward accounted for it) by a 10 deg. alteration of the *Grainton* and her swing under her reversed engines.

That being so, what was the *Genua* in fact doing? Going back to her navigation, one is struck by the fact that her account of the visibility off the Royal Sovereign is strangely and widely at variance with the records of the light-vessel itself. As regards her speed, having reviewed her evidence and tested the matter in every way I can, I think her speed through the fog was probably seven knots, which, although too fast for an atmosphere of this obscurity, is not much too fast if you take into account the fact that she was a comparatively small handy vessel and a vessel of considerable power. Proceeding then at this speed (which was

just too fast in the circumstances) I find that she did stop her engines, and did, to a certain extent, at any rate, have herself in hand to deal with the emergency in front of her. But having, up to that time, made very little offending against the regulations, she proceeded to put her engines ahead, and put them so ahead in order to get not merely steerage way but such speed as would enable her to deal with what she was then beginning to think of as an impending emergency. Just how long she put her engines ahead before the other vessel came in sight I do not pretend to be able to determine, but it is her own case that she did, and I am satisfied that she did, or she would not have been found in collision with as great a speed as she undoubtedly had.

When the *Grainton* came in sight those in charge of the *Genua* appear again to have acted with imprudence. Again, it is almost impossible to reconcile their evidence with the pleaded story, the pleaded course and the statements of the witnesses. According to the pleading, the *Grainton* appeared to be on a course approximately opposite to that of the *Genua* and in a position to pass well clear starboard to starboard. It is claimed on behalf of the *Genua* that accordingly the engines of the *Genua* were kept working slow ahead, and the story proceeds that "after a short time, however, the *Grainton*, which was proceeding at high speed, instead of keeping her course and passing clear, suddenly and without sounding any whistle signal commenced to swing to starboard, causing imminent danger of collision." That is quite a clear picture as it stands, but it was not a picture which was in any way reproduced in evidence by any of the witnesses who gave evidence before me. The master and the mate put the *Grainton* on sighting in various positions and at varying angles, but both of them put her in such a position that she certainly was not on the course that anybody in the wildest flight of imagination could describe as "approximately opposite." The master, I think, put the *Grainton* in such a way that she would just have cleared the stern of the *Genua*, and the mate put her somewhat more dangerously still. When, however, the look-out man came, his evidence seemed to have no relation at all to any question of going clear, because his immediate appreciation of the position on seeing the *Grainton* was that she was coming dead towards him. On the navigation of the *Grainton*, as I have found it, I cannot see how she ever could have been on a course which would either justify the suggestion that it seemed, or could seem, to a competent seaman, "approximately opposite." Therefore, I have been driven to the conclusion that what the *Genua* did was to continue ahead, although she realised that the *Grainton*, at that moment, was shaping for her. Whether she thought the *Grainton* had such speed that she would be able to avoid her in any event, again I cannot determine, but I cannot shut my eyes to the fact that this continuance of the *Genua* ahead—a continuance which, again, is to be derived from her own story—was a factor in this collision.

Now, in these circumstances, we have, as I say, the *Grainton*, an English ship, which has done practically everything wrong, and I have to consider—and consider very carefully—what apportionment of responsibility I should make. I feel to the full that the *Genua*, although her action—and her negligent action in this case—did contribute to the collision, is being hardly treated when one measures her offending against that of the *Grainton*. The *Genua* was not proceeding at full speed; she did not fail to stop her engines; she did not in fact act as a person who either disregards, or does not know, the elementary rules of the sea, but she is not free—not altogether free—from blame for this collision. During the five-and-a-half years that I have sat here I have never yet, I think, apportioned less than one-fourth of blame, as I feel a difficulty in bringing the fraction to any finer point, but I think in this case it would be fair to say that the *Grainton* is four-fifths to blame, and the *Genua* one-fifth.

Now, that leaves what is really the interesting point of this case, namely, the consequential damage. After the collision the *Grainton*, which had been struck on the port side just abaft her bridge, was in need of some form of rescue. Her Nos. 2, 3, and 4 holds filled pretty rapidly to the water level, and, unfortunately, owing to a broken pipe in No. 1 hold, the water began to percolate from No. 2 into No. 1, and, so far as the master could judge at the time, was percolating faster there than he was able to deal with by means of the pumps. To his assistance came tugs from Dover, and Lloyd's agent, and a Trinity House pilot—one of the Cinque Ports pilots—Mr. Maltby. The master took counsel with Mr. Maltby and with Lloyd's agent, and upon their advice, and with the assistance of Mr. Maltby, decided to beach the vessel in Dover Harbour in a situation, speaking generally, which is known as good beaching ground, and is recommended, and was, I think, recommended second-hand in this case by the harbour-master, Captain Iron. The vessel was beached upon a place that could be verified, and was subsequently verified by Mr. Rogers, who gave evidence on behalf of the defendants. That place may be shortly described as a little to the eastward of the Customs House, and with the stem of the vessel (and I think Mr. Rogers measured it) 122ft. from the supporting wall. Mr. Rogers made it 122ft. from the concrete of the wall to the stem of the vessel.

Now, various questions were mooted as regards this beaching, but, in the end, the issue was narrowed to a perfectly clear and simple issue, and that was, whether this vessel was properly or improperly beached in the position actually selected; that is to say, the question as to whether they were right or wrong to beach her went by the board, and the whole point at issue between the parties was as regards the selection of this particular spot.

Now, the candour with which this part of the case was dealt with made it very simple to bring this issue to a fine point, and to deal with what, in other circumstances, might have been a troublesome subject. Mr. Scott, on behalf of the plaintiffs, made the most candid admissions—first, that it was not possible to get the buckling which this vessel—the *Grainton*—subsequently got in this place upon a perfectly flat bottom. Further, he said: "I agree that the vessel as placed was not supported in the way of the collision damage. I agree," he said, "that she sagged to the extent of 3ft. while on the beach at Dover."

The vessel was badly damaged by the collision, but not, as it would appear, very expensively damaged. By reason of being placed in this position on the beach where the collision damage was unsupported by a flat bottom, the expense of the damage was enormously aggravated. Therefore, it is very understandable that this point has been pressed with the greatest insistence. Indeed, the question becomes very insistent in view of Mr. Scott's very fair and candid admissions. He did not attempt to dispute that this grave aggravation of the damage was caused by the actual position in which she was placed. If a

practically flat bottom had been selected this damage could never have been done.

Now, first of all, it becomes material to get the law upon this matter perfectly clear. I say this with some contrition, because at an early stage in the case Mr. Carpmael asked for some greater precision as regards this issue than appears in the pleading, and I ruled against his contention. Par. 4 of the defence says: "The defendants specifically deny that the damage sustained by the *Grainton* through beaching was a consequence of the collision as alleged in the statement of claim or at all, and they further deny that such damage was unavoidable." I do not myself understand, now that the matter has been thrashed out, why no application was made for particulars, but, in order that the matter may no longer remain in obscurity, I will cite from the decision of the House of Lords in *The Metagama* (*sup.*), opinions which seem to me to make it perfectly clear that the onus of such an allegation is upon the defendants. The defendants cannot succeed in a case of this kind unless they are in a position to allege and to prove negligence on the part of the plaintiffs in dealing with their damaged vessel. I think there has been for some time some haziness with regard to this position in the law, but a consideration of these opinions leaves me with no doubt at all that that is the proper legal position.

In *The Metagama* case, the damaged ship (a ship damaged by collision) was in the Clyde, and although she assumed various positions on various banks of the Clyde, in the end the point which had still to be debated in the House of Lords was the one simple question as to whether those in charge of the vessel were negligent or not in failing to use their engines to keep the vessel stern first on the ground, and it is a little important in considering this case (and the facts are rather involved) to remember that that was the crucial question which was debated in their Lordships' House. Lord Haldane, who occupied the Woolsack on that occasion, deals with the matter in these terms at p. 253: "But I do not agree that it has been proved that there was such a *novus actus* assuming the form of negligence"—I would at once stress that point: "A *novus actus* assuming the form of negligence"—"on the part of those in charge of the *Baron Vernon* in not using the engines. Negligence was not established in the other particulars alleged against those in charge. Apart from the question of not using the engines there were three other allegations of negligence made against those in charge of the *Baron Vernon* when in the first position on the north bank. It was alleged at the trial that they should have obtained the assistance of tugs; next, that the steamship should have had her moorings out; and thirdly, that she should have filled her aft ballast tanks. If, contended the appellants, these precautions had been taken, the steamship would have remained in position No. 1, and could have been easily and inexpensively salved. But on these three allegations the Lord Ordinary, after hearing the evidence, negatived them and found the facts in favour of the respondents. It is only in the averment of negligence in not using the engines that he decided against the respondents; and the learned counsel for the appellants are stated in the judgment of the Lord Justice-Clerk to have abstained from challenging the judgment against them on the other grounds referred to."—It will be observed that throughout that first part he speaks uniformly of negligence, and only negligence, as founding, for the purposes of a case of this class, what is sometimes a little unhappily called a *novus actus interveniens*.—"I therefore turn at once to the crucial question in the case: was there fault in those responsible for the ship in reference to the use of her engines when she was on the north bank? Now this is a question of evidence, and in weighing the evidence in order to draw the proper inferences, there are certain principles which have to be kept steadily in view. When a collision takes place by the fault of the defending ship in an action for damages the damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created. Further, what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things, which extends to the reasonable conduct of those who have sustained the damage and who are seeking to save further loss. These propositions were laid down and applied by Lindley, L.J. and his colleagues in the Court of Appeal in the *City of Lincoln* (62 L. T. Rep. 49; 15 Prob. Div. 15). They are in accordance with what was said in 1857 by Dr. Lushington in *The Pensher* (Swab. 211). It follows that the burden lies on the negligent ship to show by clear evidence that the subsequent damage arose from negligence or great want of skill on the part of those on board the vessel damaged."

I will pause there for a moment to say that, for my own part, I would wish that Lord Haldane had omitted "great want of skill," but it may be useful when one comes to deal with a question of seamanship: "It is their duty to do all they can to minimise that damage, but they do not fail in this duty if they only commit an error of judgment in deciding on the best course in difficult circumstances."

Then he goes on to deal with the *City of Lincoln* and with the H.M.S. *London* (109 L. T. Rep. 960; (1914) P. 72) in illustrating his proposition, and concludes this passage by saying: "The burden of showing that the chain of causation started by the initial injury had been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action and not merely to action on an erroneous opinion by people who have *bonâ fide* made a mistake while trying to do their best, which is all that is shown to have happened in the present case. This seems to me to be the standard in the light of which we must examine the evidence of what occurred in the position on the north bank."

And then, at the conclusion of his opinion, after dealing with the whole of the facts, he says (at p. 255): "The conclusion at which I have arrived is based on the principle which requires the appellants in a case such as this to discharge the burden of proof, and also on a survey of the evidence."

Lord Dunedin gives the next opinion, and he was at variance with Lord Haldane and the majority upon the actual question as to whether there was negligence or not on the part of those in charge of the *Baron Vernon* in not working their engines astern, but he was not, I think, at all at variance upon the principle laid down by Lord Haldane. At p. 256 he says this: "I shall now say a few words on the law of the case, as to which I believe there is no substantial difference

of opinion. The *Metagama*, having been in fault for the collision, is liable for the damage occasioned thereby, and if the ship with which she collided sinks subsequently to the collision, she is, if no more is to be said, liable for that sinking. That is what Dr. Lushington said in the cases of *The Mellona* (3 Wm. Rob. 7) and *The Pensher* (Swab. 211). But it is always the duty of the person who is damaged to do his best to minimise his loss. This is really the same thing as to say that if he might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as arises directly from the act complained of. In many cases the question is stated as to whether after the original fault which started matters there has been a *novus actus interveniens* which was the direct cause of the final damage. *Novus actus interveniens* may be the act of a third party, so that in this case I think the best way of stating the proposition is: was the pursuer guilty of such negligence after the collision as to make that negligence the direct cause of the final damage?"

Now, here again there is no question as to the act of a third party. The master of the *Grainton* was still in charge of his vessel and he acted—elected to act—upon the advice which he received, so I think again one can exclude this somewhat ambiguous expression of *novus actus interveniens* and say that in this case the proposition for which the defendants must contend is this: that the plaintiffs were guilty of such negligence after the collision as to make that negligence the direct cause of the final damage. Lord Dunedin proceeds (at p. 257): "Now, here the negligence alleged is the failure to use the engines to maintain the vessel's position on the north bank. Whether this failure to use the engines was negligence is a question of fact." And it is on that question of fact that he and Lord Phillimore differed from the majority.

Now, Lord Shaw, who formed part of the majority of the House with Lord Haldane and Lord Blanesburgh, also deals with this legal aspect of the matter. At p. 260 he quotes from Lord Chelmsford's judgment in *The Flying Fish* (Br. & Lush. 436). He says: "As to the law, the judgment of Lord Chelmsford in the case of *The Flying Fish* still remains of outstanding authority." He then says: "Lord Chelmsford himself puts the general question in this form: 'Taking the whole of the evidence on both sides into consideration, can it be said that the conduct of the captain of the *Willem Eduard*, after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill and a gross neglect of duty?' It is quite possible to excise the word 'gross' as going beyond the necessities of the proposition, but when that is done there remains a large ground in law, as I think there is in reason, for a court of law refraining from blame, in cases of urgency and emergency, when a variety of courses may occur to the mind of those in charge. This is especially so where the interest of such persons is all in favour of saving the vessel, if that is humanly possible. I am of opinion that the Second Division came to a sound conclusion in declining to attribute such blame. Whether there was error in judgment—a point upon which I have great doubt—it is not necessary to determine, but that there was culpable, or anything sufficiently approaching, culpable negligence on the part of the pilot or the captain, I disbelieve."

I do not think it is necessary for me to cite any passage from Lord Phillimore's or Lord Blanesburgh's opinions, because they do not differ at all from the law which is laid down by the other Lords.

It is a very simple question of fact in this case which has to be determined. As Mr. Hayward pointed out, there were no circumstances of urgency or emergency such as existed in the *Metagama* and the *Baron Vernon*. Whatever else was happening the *Grainton* was not sinking quickly. But these expressions of urgency and emergency are, after all, expressions indicating degree, and, in considering this point, the Elder Brethren and myself have borne in mind that, although there may not have been an actual emergency, the captain of this vessel had not got unlimited time in which to make up his mind as to what was the proper course to pursue.

Now, that being the law on the matter, I have put to the Elder Brethren in the first place (and it is, I think, in the first place for them) whether there was any failure in ordinary nautical skill—which seems to me to be the appropriate way of dealing with this question from a nautical standpoint—in placing the *Grainton* upon this place. On that they have answered me that in their view they are quite clear there was no failure of ordinary nautical skill in so acting. Now, in so far as it is a matter for me to translate that into terms of negligence, I have no hesitation at all in saying that their advice (which I most unhesitatingly accept) indicates no negligence in this case. It is clear that the defendants, in order to succeed, must show that the plaintiffs have been guilty of negligence. They would show that if they could show that the master of the *Grainton*, in taking the action which he did, had been failing in ordinary nautical skill—in other words that he had been either an unduly ignorant or an unduly careless master of the ship, and if so had acted with negligence or carelessness. I think the defendants in such a case are entitled to have ordinary nautical skill, and that test was clearly accepted by counsel on both sides. Mr. Carpmael did not claim that he should have shown less than ordinary nautical skill. So armed with the opinion of the Elder Brethren, I am quite satisfied that there was no negligence in this case in placing the vessel exactly where she was placed on that particular day. That is not to say that I do not think that the point is not an important one, or is not an insistent one, but it is, I hope, a perfectly clear finding that there was no negligence on the part of the *Grainton* in this matter.

If I were to add reasons for this I should probably weaken the opinion I have received, nor can I give all the reasons that have determined the Elder Brethren in giving me their advice, but I may say for my own part (and I think they are with me in this) that the facts which I certainly have taken into account are these. The leakage in No. 1 hold was at the moment one of unascertained amount and was a disturbing factor—not an urgent or emergency factor, at least at the time of the decision to beach, but it was a factor in the situation. The master sought and obtained advice from the competent authorities and particularly as to the selection of this spot. Not only was he in the hands of a competent Cinque Ports pilot, but in addition to his duty as a pilot it appeared that the pilot happened to bathe every day in the summer time in this part of Dover Harbour, and was thus particularly acquainted with the bottom level in that locality. The master had also, at secondhand, the harbour master's recommendation that this spot off the Customs House was an appropriate and happy spot for beaching. Moreover, the master and his advisers had behind them the experience

of some years. Other vessels had been beached on that spot—not, it is true, in this position so far up on the beach, but in this line where this beaching was attempted. The grounding, again, had to be effected in darkness and without an opportunity of measuring the exact extent of the damage, or appreciating exactly how a strain might come over the weakened portion of the vessel. All those matters appear sufficiently obvious after the event, but one has to put oneself in the position of the master and pilot who were dealing with a situation which could not be ascertained with anything like the accuracy that it can now be ascertained.

Finally, there is a tidal stream running across this beach and (as I think was not observed by counsel) running under a viaduct of the adjacent mole. This the Elder Brethren think may have increased the difficulties in beaching, and possibly also made it desirable to take the ground firmly as soon as possible.

In fact, dealing with the case from afterwards, it seems to be one in which even if an error was made and one can class it as such (though I do not so find), it was an excusable error owing to the circumstances that the *Grainton* happened to be a vessel in ballast, and though weighted by a considerable load of adventitious water, was, in fact, a lighter draught ship than any which had recently been beached in that vicinity.

That, I think, concludes all that it is necessary to say upon that point, and upon that point of consequential damage the defendants fail.

On the question of costs, his Lordship directed that the costs should follow the proportions of blame, with the exception that, the plaintiffs having succeeded upon the issue as to whether the further damage occasioned by the beaching of their vessel was a consequence of the collision, they should have the costs of that issue.

Solicitors for the plaintiffs, *Middleton, Lewis*, and *Clarke*, agents for *Middleton* and *Co.*, of Sunderland.

Solicitors for the defendants, *Stokes* and *Stokes*.

KING'S BENCH DIVISION.

Tuesday, May 19, 1936.

(Before BRANSON, J.)

Moor Line Limited v. Manganexport G.m.b.H. (*a*)

Charter-party—Commencement of lay-days—Loading in regular turn—Ship ready and in free pratique.

A charter-party contained the following provisions with regard to the loading lay-time. By clause 2, "*The steamer . . . shall load in customary manner in regular turn with other steamers loading ore for account of the same charterers . . . a full and complete cargo.*" *By clause* 6, "*Time for loading to count from* 6 *a.m. after the ship is reported, and in free pratique (whether in berth or not) in accordance with Clause* 2."

Held, that the loading lay-time began at 6 *a.m. after the ship arrived at the port and was in free pratique and ready to load, although it was not until some days later that she came on turn.*

CASE stated by an arbitrator under sect. 9 of the Arbitration Act, 1934, which raised a question, on the construction of a charter-party, as to when the ship's loading lay-time began. By clause 2 of the charter-party: "The steamer shall proceed to Nicolaieff . . . and there load . . . in the customary manner in regular turn with other steamers loading ore for account of the same charterers . . . a full and complete cargo. . . ." By clause 6: "Time for loading to count from 6 a.m. after the ship is reported and ready in free pratique (whether in berth or not) in accordance with clause 2. . . ." By clause 10: "Lay-days are not to commence to count before the 10th June, 1934, unless loading sooner commenced."

The ship arrived at Nicolaieff on the 8th June, and on the same day was cleared and in free pratique and notice was given of readiness to load. There was no customary loading berth available on the 8th June, nor on the 10th June, which was the first day on which the lay-days could begin to run. A berth became available on the 18th June, and the ship then began to load. The question in dispute was whether the loading lay-time began (*a*) at 6 a.m. after the ship arrived at the port and was in free pratique and ready to load, or (*b*) not until she came on turn on the 18th June.

Cyril Miller for the charterers.

W. L. McNair for the shipowners.

Branson, J.—This is a case which raises a difficult point on a charter-party, but I do not think I shall get any further light from poring over it any longer. The point is this: By a charter-party made between the parties on the 23rd April, 1934, it was agreed between the Moor Line and Messrs. Manganexport, G.m.b.H., of Berlin, the charterers, that the ship should go to Nicolaieff, or as ordered by clause 36, to which I shall have to refer, "and there load always afloat in the customary manner, in usual turn with other steamers loading ore for account of same charterers, when, where, and as soon as ordered by shipper's agent, a full and complete cargo of ore. . . ."

Clause 5 of the charter provided that the cargo was to be shipped at the rate of 700 tons a day. Clause 6 reads as follows: "Time for loading to count from 6 a.m. after the ship is reported and ready, and in free pratique (whether in berth or not) in accordance with clause 2, and for discharging from 6 a.m. after ship is reported and in every respect ready, and in free pratique, whether in berth or not, in accordance with clause 2. . . ."

Now the ship arrived at Nicolaieff on the 8th June, 1934, and she was cleared and in free pratique on the same day. Notice of readiness to load was also given on the 8th June. There was no customary loading berth available for her when she arrived, nor on the 10th June—before which date her lay-days were not to commence to count—nor until the 18th June when, in fact, loading commenced. From the 8th to the 18th June, the *Eastmoor* was waiting her usual turn, which usual turn for loading actually arrived on Monday, the 18th June.

The question submitted by the arbitrators is whether, having regard to the provisions in the charter-party and in particular to clauses 2 and 6 thereof, the vessel's loading lay-time commences (*a*) at 6 a.m. after she has arrived at the port, is in free pratique, is ready to load, and has given notice of readiness to load, even though she is not in her berth; or (*b*) not until she comes on turn.

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

The contention on the part of the shipowners is that the operative clause in question is clause 6, which says the time for loading is to count from 6 a.m. after the ship is reported and is in free pratique (whether in berth or not). Mr. McNair says that the reference to clause 2 is necessary in order to show where it is that she has got to present herself to load, and provided she gets to Nicolaieff and gives notice that she is ready and in free pratique, then the time for loading commences.

The argument on the other hand is that the provision in clause 2 that she should load in usual turn with other steamers loading ore for account of the same charterers prohibits the commencement of the time for loading until she has got into turn. The charterers' contention, therefore, is that clause 6 must be read subject to the provision in clause 2 as to usual turn with other steamers loading ore for account of the same shippers.

I have been referred to various authorities by counsel on both sides, but I confess that, my duty being to construe this very involved document, I do not feel that I get much assistance from looking at express words in other charter-parties in other collocations, and attempting to give them exactly the same meaning in this charter-party, where the collocation in which they appear is not the same. The difficulty is well illustrated by the reference to the case of *United States Shipping Board* v. *Frank C. Sterick and Co. Limited* (21 Lloyd's List Rep. 173), a decision of the Court of Appeal. Scrutton, L.J., in that case, bewailing the fact that the question had arisen there, said that it could have been made so simple by the use of perfectly well-known words which are repeatedly used in charter-parties. He said (at p. 177): 'If the charterers had said 'ready in berth or in turn'; if the shipowners had said 'whether in berth or not,' there would be no question, and that they knew of the form is apparent from the fact that one of those forms is used in the very charter-party in question in another clause."

This charter-party contains both the alternatives —the alternative which Scrutton, L.J., says would, in that charter-party, have made it quite clear that the shipowners were right, and the one which he said would make it quite clear that the charterers were right. I therefore do not propose to discuss the authorities in this matter, but rather to turn to the document itself and to see how far it is possible to give it a consistent and business-like meaning, with some meaning given to most of the language used.

Approaching it in that way, I look again at clause 2, and upon the face of it it imposes a duty upon the shipowners to go to Nicolaieff as ordered and there load always afloat in the customary manner in usual turn with other steamers loading ore for account of same charterers. Then it goes on: "When, where and as soon as ordered by shipper's agent."

There at once one comes up against words which are either contradictory or tautologous. If "usual turn" means, as one would expect it to mean apart from other language, "when the ship's turn to go alongside the berth arrives," what meaning is to be given to the words "when, where, and as soon as ordered"? I only refer to that as showing that it really is not possible in this particular document to give operative meaning to all the language used. If it is to be said that "usual turn" refers to just that customary turn which ships get when they go into ports, where the ship is stemmed in the order of its arrival in the port and takes its turn alongside the loading berth, in order to give the charter-party the meaning contended for by the charterers one has really to ignore the words "when, where, and as soon as ordered by shipper's agent," and read the words "in usual turn with other steamers loading ore for account of same charterers" as making the obligation of the charterer such that as soon as the ship in question has reached her turn in relation not to all the ships which may be in the port, but to ships which are loading for account of the same charterers, she is to commence her loading. The charterers would have me import into clause 6 not only the express conditions precedent to the commencement of the time for loading which are set out in the clause, to wit, that the ship should be reported and ready and in free pratique (whether in berth or not)—at the port to which she had been ordered, of course —but also that she should have come on turn there as between herself and any other steamers loading for account of the same charterers.

Now this, I think, seems plain, that if the words "in usual turn," and so forth, were really intended to govern the time at which the time for loading was to commence, one would expect to find that set out in clause 6, which is the clause dealing with that very point; but they are not there. In fact, if they could be imported into clause 6 at all they could be imported only by virtue of the words "in accordance with clause 2," which, of course, deals in the main with the place to which the ship is to go in order to receive her cargo. I think a meaning can be given to the words "in accordance with clause 2" without importing into it the further condition precedent that the ship should have come on turn with other steamers loading ore for the same charterers, because it is clause 2 which provides where the ship is to go. And clause 2 also contains—by reference to clause 36 in regard to the voyage to the loading port and set out in type with regard to the loading voyage and the port of discharge—provisions which show that the lay-days may commence before ever the ship has arrived at the port of loading or at the port of discharge at all. In each case there is a provision that if within six hours of arrival at Istambul inwards, or within six days of arrival off Gibraltar outwards, orders are not given as to the port of discharge, lay-days begin to run. It is not surprising to find in a clause which is dealing with the time for loading, and, therefore, the calculation of lay-days, this further reference to clause 2, where that very matter is being provided for.

I think the main thing that moves my mind in choosing this construction is that one would expect to find a provision that time for loading should not commence until the ship is on turn—if that was the intention of the parties—set forth in a clause which is dealing with the time at which loading should commence.

I think, further, that as additional reasons there are these. If the charterers' contention is correct, it seems to me that all that part of clause 6 which deals with the ship being reported and ready and in free pratique (whether in berth or not) becomes otiose, because if the whole matter has to depend on whether she comes on turn—well, that would be a very much shorter, simpler and plainer way of writing out clause 6: "Time for loading to count so many hours after the ship comes on turn." There is an end of the whole matter, but it is not the way in which it has been dealt with in this charter-party.

Another consideration, I think, also tends in the same direction. If one looks at clause 2,

there is very great latitude given to the charterers by "when, where, and as soon as ordered," and something would seem to be necessary to protect the ship. It seems to me that a meaning could be given to the inserted words "in usual turn with other steamers loading ore for account of same charterers" by considering them as a protection to the ship lest by using the liberty given by the words "when, where, and as soon as ordered by shippers' agent," the shipper might stem back this particular ship in order to give preference to another one, keeping this ship upon demurrage because the other one was more expensive or because, for some other reason, the shipper desired to give preference to some other vessel chartered by them.

These words "in usual turn with other steamers loading ore for account of same charterers," could thus be given operation by so altering clause 6 as to make it read, instead of "time for loading to count from 6 a.m. after the ship is reported and ready, and in free pratique (whether in berth or not)" into "time to count from so many hours after the ship is on turn."

Those are the reasons which have led me—I confess with some hesitation, because I think that this charter-party is a very difficult one to construe—to the conclusion that the question which is put to me by the arbitrators should be answered by saying that the vessel's loading lay-time commences at 6 a.m. after she has arrived at the port, is in free pratique, ready to load, and has given notice of readiness, even though she has not got to her berth.

Solicitors: for the charterers, *Sinclair, Roche,* and *Temperley*; for the shipowners, *Constant* and *Constant.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 13, 14, 15 *and* 26, 1936.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Rockabill. (*a*)

Collision in the Mersey—Respective duties of vessel leaving Princes Landing Stage and ship proceeding out of northern entrance of Princes Half Tide Dock into the river—Powers and responsibilities of dock officials—Whether direction given by dockmaster to ship in river entrance to "come ahead" an "order" within sect. 49 *of the Mersey Dock Act,* 1858*—Joint negligence of ship and servants of harbour authority—No apportionment of liability as between joint tortfeasors where one is not a ship—Common law rule, and not sect.* 1 *of Maritime Conventions Act,* 1911*, applicable.*

This was a claim brought by the owners of the Isle of Man steam packet K. O. *against the owners of the* R. *in respect of damage sustained by the* K. O. *by collision with the* R. *in the River Mersey at about* 2.15 *p.m. on the* 17*th September,* 1935. *The* K. O., *which was heading north and stemming the flood tide, had left Princes Landing Stage after discharging her passengers there and was on her way to her anchorage in the Sloyne. Owing to the exceptional force of the wind, which was a west-north-westerly gale, it was necessary for the* K. O. *to go full speed ahead. The* R. *had just come out from the northern entrance of Princes Half Tide Basin into the river and had her engines working at full speed ahead. The owners of the* R. *denied liability and in their counterclaim for damage suffered by the* R. *added the Mersey Docks and Harbour Board as defendants. The negligence alleged against the Mersey Docks and Harbour Board was that they or their servants had failed to keep a good look-out, had ordered the* R. *to let go her rope and come ahead into the river at an improper time, and had failed to give any other order or to take any steps to prevent the collision, and had allowed the* K. O. *to leave the landing stage at that time. The Mersey Docks and Harbour Board denied those allegations and blamed both the* K. O. *and the* R. *for the collision.*

The learned judge found that when the K. O. *cast off from the stage, the* R. *was still in the dock and practically stationary; that if they had kept a better look-out, those on board the* R. *would have seen the* K. O. *start to move; that the dockmaster told the* R. *to come ahead; that the assistant dockmaster, who was standing on the north wall of the entrance and near the river end, failed to report the* K. O. *to the dockmaster as early as he should have done, and that the dockmaster omitted to take reasonable care not to allow the* R. *to go out into the river from the dock at an improper time.*

Held, that the initial blame lay on the R. *for coming out into the river when it was unsafe to do so, his Lordship expressing the opinion that, even if those on the* K. O. *had observed earlier than they did that the* R. *was coming ahead into the entrance, the* K. O. *would not be to blame for continuing on at full speed because once under way the* K. O. *was justified in carrying out her manœuvre.*

Held, further, that the dockmaster's direction to the R. *to come ahead was not a peremptory order such as, by virtue of sect.* 49 *of the Mersey Dock Act,* 1858*, as set out in* The Sunlight (9 Asp. Mar. Law Cas. at p. 509; 90 *L. T. Rep.* 32; (1904) *P.* 100), *the master of the* R. *was bound to obey, but that nevertheless the Mersey Docks and Harbour Board were also liable to the plaintiffs because the failure of the assistant dockmaster to report the* K. O. *to the dockmaster as early as he should have done, and the failure of the dockmaster to take reasonable care not to allow the* R. *to come out into the river from the dock at a time which was improper were acts of negligence which contributed to the collision.*

Held, finally, on the question whether the owners of the R. *could recover against the Mersey Docks and Harbour Board, that they could not, as the common law rule in regard to*

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

joint tortfeasors applied, and not sect. 1 *of the Maritime Conventions Act*, 1911.

DAMAGE by collision.

The plaintiffs were the Isle of Man Steam Packet Company Limited, owners of the steamship *King Orry* (1877 tons gross). The defendants were the Clyde Shipping Company Limited, of Glasgow, owners of the steamship *Rockabill* (1392 tons gross). Both vessels were damaged as the result of a collision between them which occurred on the 17th September, 1935, at about 2.15 p.m., in the River Mersey. The defendants denied liability and in their counterclaim added the Mersey Docks and Harbour Board as defendants, and the plaintiffs subsequently amended their statement of claim for the purpose of making the Mersey Docks and Harbour Board second defendants in their action.

The material facts which emerged from the evidence were as follows: The collision occurred about abreast of the North Island in the entrance to the Princes Half Tide Dock, and a little inside the line of the outside of Princes Landing Stage. The stem of the *King Orry* struck the port side of the *Rockabill* about 40ft. forward of her stern, the angle of the blow being about six points leading aft on the *Rockabill*. At the time of the collision the *Rockabill's* stern was about 100ft. clear of the western exit of the gateway. Shortly before the collision the *King Orry* was lying alongside the Princes Landing Stage heading to the north and to the flood tide. The north end of the stage is about 200ft. to the westward of the outer exit of the dock, and about 700ft. to the southward of a line drawn through the middle of the passage through the northern entrance of the Half Tide Dock, the river at this place running almost due north and south. The *King Orry* had the wind, which was a west-north-westerly gale at the time, on her port beam. She was discharging her passengers, and was about to get under way and proceed to her anchorage in the Sloyne. After casting off from the stage, it was necessary for the *King Orry*, having regard to the exceptional force of the wind, to go full speed ahead, and as soon as her stem was clear of the jetty to turn to the westward. When the *King Orry* started to get under way, one long blast was sounded on her whistle, and it was only when she was clear of the jetty that her master realised that the *Rockabill* was coming out from the northern entrance of the Half Tide Basin into the river. Thereupon another long blast was sounded on the *King Orry's* whistle and her engines were put full speed astern, the master of the *King Orry* waving to the *Rockabill* to come on and cross his bows. The *Rockabill* increased her speed and altered her course to port, but very shortly afterwards the collision happened. At the time of the impact the *King Orry* had one to two knots, and the *Rockabill* about six knots, headway through the water. As to the *Rockabill*, she had come out of the Waterloo Dock into Princes Half Tide Dock stern first. In the Half Tide Dock, she turned round bringing her head from north to about west to square up for the entrance. Having made this turn, a bow rope which she had leading from her starboard bow to a mushroom at the northern lip of the north entrance, was hove upon, and when the *Rockabill* was about squared up for the entrance, the dockmaster, who was employed by the second defendants, called out to the master of the *Rockabill*: "All clear north, come ahead." The engines of the *Rockabill* were put full speed ahead, and her wheel was starboarded and then steadied. The dockmaster ordered the bow rope to be taken off the mushroom, and shortly afterwards to be let go altogether. Shortly afterwards the master of the *Rockabill* saw the hull of the *King Orry* close on his port bow and clear of the Princes Landing Stage, and at about the same time the attention of the dockmaster was drawn to the *King Orry* by his assistant, who was standing on the north wall of the entrance and near the river end. Although the master of the *Rockabill*, on seeing the *King Orry*, gave an emergency repeat order of full ahead and hard-a-ported his wheel, the vessels were very shortly afterwards in collision.

The learned judge took time to consider his judgment, which he delivered on the 26th May, 1936.

F. A. Sellers, K.C. and *H. I. Nelson*, for the plaintiffs, the owners of the *King Orry*.

Lewis Noad, K.C. and *R. E. Gething*, for the first defendants, the owners of the *Rockabill*.

R. K. Chappell, K.C. and *E. W. Brightman*, for the second defendants, the Mersey Docks and Harbour Board.

Bucknill, J.—This case arises out of a collision between the plaintiffs' steamship *King Orry* and the steamship *Rockabill*, belonging to one of the defendants. The second defendants are the Mersey Docks and Harbour Board. In addition to the claims for the damages sustained by the *King Orry* and the *Rockabill*, which are made by and against their respective owners, the owners of each vessel claim damages against the Mersey Docks and Harbour Board, because, as they say, the collision was caused or contributed to by the negligence of the employees of that Board.

These are my conclusions on the material facts.

The collision occurred shortly after 2.15 p.m. British summer time, on the 17th September, 1935, about abreast of the North Island in the entrance to the Princes Half Tide Dock and a little inside the line of the outside of the Princes Landing Stage. The stem of the *King Orry* struck the port side of the *Rockabill* about 40ft. forward of her stern. The angle of the blow was about six points leading aft on the *Rockabill*, the head of the *King Orry* being a little to the eastward of north, and the head of the *Rockabill* being rather more to the southward of west. The river at the place of collision runs approximately north and south. At the time of the collision the *Rockabill's* stern was about 100ft. clear of the western exit of the gateway. There was a gale from the west-north-west at the time, with clear showery weather, and the tide was about an hour before high water and was running to the southward at the place of collision at a force of about two knots.

The *King Orry* is a twin-screw passenger steamship of 1877 tons gross and 300ft. long and 43ft. beam, and runs during the summer regularly from the Isle of Man to Liverpool, always discharging and landing passengers at the Princes Landing Stage. The full speed of the *King Orry* is about 20 knots.

The *Rockabill* is a single-screw steamship of 1392 tons gross register, 271ft. long and 37ft. beam, and is a regular trader in and out of the Princes Half Tide Dock. Her full speed is about 14 knots.

Shortly before the collision the *King Orry* was lying alongside the Princes Landing Stage heading to the north and to the flood-tide. To the

northward of the stage are the two entrances to the Princes Half Tide Dock. The entrances are separated by an island. The north end of the stage is about 200ft. to the westward of the outer exit of the dock, and is about 700ft. to the southward of a line running through the middle of the passage through the northern entrance. This passage is about 200ft. long. The stem of the *King Orry*, when at the stage, was about 200ft. to the southward of the north end of the stage, and was approximately 850ft. from its point of impact with the *Rockabill*. The *King Orry*, which has a good deal of deck superstructure, had the gale of wind on her port beam. She had discharged her passengers, and was about to get under way and proceed to her anchorage in the Sloyne. In order to do this, having regard to the very exceptional force of the wind, it was necessary for her after casting off from the stage to go full speed ahead with her engines, and, as soon as her stern was clear of the north end of Princes Stage and Jetty, to turn to the westward.

When the *King Orry* started to get under way, her master sounded a prolonged blast on his whistle and gave orders to let go the forward ropes and kept the after ropes fast to the stage, and went slow astern on the port engine to throw the ship's head out from the stage. When the *King Orry* was heading a little away from the stage, the aft ropes were let go, and the starboard engine was put half ahead, and very shortly afterwards both engines were put full speed ahead, and the *King Orry* started to move bodily ahead to the northward. When the stern of the *King Orry* was near the north end of the jetty, her starboard engine was stopped, and her wheel was starboarded a little to throw the quarter of the vessel clear of the jetty.

When the *King Orry* was clearing the jetty her master realised that the *Rockabill* was coming out from the north entrance of the half tide basin into the river. As soon as the master of the *King Orry* realised that the *Rockabill* was coming out and that there was risk of collision, he again sounded one long blast and put both his engines full speed astern, and waved to the *Rockabill* to come on and cross his bows. The *Rockabill* increased her speed through the water and altered her course to port, but very shortly afterwards the collision happened. At the time of the collision the *King Orry* had about one to two knots headway through the water, but was about stationary over the ground, and the *Rockabill* had about six knots headway through the water and was being carried down to the southward by the tide towards the *King Orry*.

Turning now to the navigation of the *Rockabill*, the *Rockabill*, which had only a little cargo in her, was bound out from the West Waterloo Dock into the Princes Half Tide Dock, and so out into the river through the northern entrance. She backed out stern first from the West Waterloo Dock into the half tide dock, and then started to turn round in the half tide dock in order to square up for the entrance. This manœuvre required her to turn her head from north to about west in the half tide dock, and was carried out by heaving on a rope from her starboard quarter to a bollard on the quay, and by means of a rope leading from her starboard bow to a mushroom at the northern lip of the north entrance. Having, in due course, made the turn, her bow rope was hove on and she got nearly squared up for the entrance. By order of Bingham, the dockmaster, the stern rope was then let go, and Bingham called out to the master of the *Rockabill*, "All clear north, come ahead," or "Come ahead with her." The engines of the *Rockabill*, which at that time were stopped, were then put full ahead, and her wheel was put to starboard as her head had fallen a little too much to the southward, and when she was squared up her wheel was steadied, and Bingham then ordered the bow rope to be taken off the mushroom, and very shortly afterwards to be let go altogether. I accept the evidence of Henry, the boatman of the *Rockabill*, that the bow rope was not put on to another bollard after it was taken off the mushroom. Shortly afterwards the master, who was watching his vessel's stern to see when it was clear of the wall of the island, preparatory to his starboarding on to his down-river course on getting outside the entrance, turned round and then saw the hull of the *King Orry* close to on his port bow and coming clear of the Princes Landing Stage.

About this time Bingham's attention was also drawn to the *King Orry* by Stafford, an employee of the Dock Board, and also by another man on the island. On seeing the *King Orry*, the master of the *Rockabill* gave an emergency repeat order of full speed ahead and put the wheel hard-a-port and sounded two short blasts, but very shortly afterwards the collision happened. At the time of the collision, as I have already said, the *Rockabill* was making about six knots. There was very considerable conflict as to the whistles sounded and heard by each vessel. Having regard to the gale of wind which was blowing across the river, I think it would be unsafe to found my judgment on any failure by either ship to hear the whistle of the other. Those in charge of the *King Orry* say that they heard no whistle signal at all from the *Rockabill*, and those in charge of the *Rockabill* say they heard no whistle signal from the *King Orry*. I am satisfied that the *King Orry* sounded her whistle a prolonged blast on the two occasions to which I have already referred. As regards the *Rockabill*, I think she sounded one long blast about the time the *King Orry* sounded her second signal of one long blast. I do not think she sounded any earlier signal than this whistle while she was in the half tide dock. As I have said, she sounded a signal of two short blasts in the river very shortly before the collision.

These being the material facts as regards the navigation of each ship, the question now arises as to which of them is to blame. It appears to me that the crucial question in the decision of the case is whether the *King Orry* got under way before the *Rockabill* started ahead from the Princes Half Tide Dock into the entrance. On that question, after weighing and considering all the evidence, I have come to the conclusion that when the *King Orry* cast off from the stage the *Rockabill* was still in the half tide dock and was about squared up for the northern entrance and was practically stationary. I have come to this decision because I accepted the evidence called for the plaintiffs.

Mr. Noad, on behalf of the *Rockabill*, pressed me to regard as conclusive evidence on this point the times given by the engine-room log of the *King Orry*, which he said indicated that the *King Orry* was only under way two minutes before the collision. But these times were not accurately recorded at the moment when the orders were given, and I do not think that they should be taken as mathematical certainties or that they should over-ride the positive evidence which I accept on this point.

On these findings of fact it seems to me clear that the initial blame lay on the *Rockabill* for coming out into the river when it was unsafe for her to do so. I am satisfied that the master of the *Rockabill*, when on the bridge of the *Rockabill*

and squaring up for the northern entrance, could see plainly the masts and funnel of the *King Orry* on the day in question, when she was at her berth at the stage and before she came away. He knew or ought to have known that the *King Orry* was likely to move away after discharging her passengers, and if he had been keeping a good look-out he would have seen her start to move and could and should have stayed safely in the dock or in the northern entrance until the *King Orry*, which was performing a difficult manœuvre, was clear of the entrance. In fact he saw nothing of the *King Orry's* movements until, according to him, there was nothing for him to do but come on and try to cross ahead of the *King Orry*. I find, therefore, that the initial blame for the collision lies on the *Rockabill* for coming out into the river at an improper time and that the *King Orry* was not to blame for coming away from the stage at the time when she did so.

A point was made against the *King Orry* that in any event she was to blame for coming away from the stage at full speed. I have consulted the Elder Brethren on this point, and they agree with the master of the *King Orry* and with Georgesen, the head stageman, and with Bingham, that under the circumstances to come full ahead was the only safe way to clear the stage, and that it was not negligent navigation under the circumstances, always provided of course that they were entitled to expect the *Rockabill* to do the right thing and not come out into the river at an improper time. It was also argued that the *King Orry* ought to have employed a tug to assist her in her manœuvres. This was not pleaded, and I do not think the point has any substance.

If those on board the *King Orry* had been watching the *Rockabill* carefully in the half tide dock they would have observed earlier than they did that she was in fact coming ahead into the entrance. But I do not think that if they had done so they would be to blame for continuing on at full speed as they did. Once they had got under way they were justified in carrying out their manœuvre, which required the full power of their engines, and they were justified in expecting the *Rockabill* not to hamper their manœuvre by an unnecessary and improper exit into the river across their course. The Elder Brethren have also advised me to this effect.

I therefore find the *Rockabill* alone to blame for the collision.

A more difficult question, as it seems to me, arises as to the legal position of the Mersey Docks and Harbour Board in this matter.

It was argued on behalf of the *Rockabill* that the dockmaster ordered the ship to come out into the river, and that her master was bound to obey such order by virtue of the provisions of sect. 49 of the Mersey Dock Acts, 1858, which are set out in *The Sunlight* (9 Asp. Mar. Law Cas. at p. 509; 90 L. T. Rep. 32; (1904) P. 100). It was said on their behalf that if the master carried out an order of the dockmaster which he was bound to obey, not only would the owners of the *Rockabill* be exempt from liability *in personam* for damage caused by the obedience of her crew to such an order, but also the *Rockabill* would be exempt from liability *in rem* for damage caused by the *Rockabill* through compliance with such an order. It is not necessary for me to consider the question of the liability of the *Rockabill in rem* in such a case, for I am satisfied that no such order was given. The order to "come ahead" was not a peremptory order to go full speed ahead at once into the river, and was not taken as such by her master.

The material facts so far as the Mersey Docks and Harbour Board are concerned in this case are shortly these. Mr. Bingham, the experienced dockmaster of the Waterloo system of docks, was in charge of the work of undocking the *Rockabill*. He had to assist him, amongst others, a man called Stafford, also an experienced employee of the board. In 1930, Bingham had issued certain instructions to his subordinates at this dock, and these instructions were, as I find, drawn to the attention of the master of the *Rockabill* and known by him. The instructions were also well known to Stafford. The instructions were as follows: "When vessels are in the river entrances, and about to enter the river, the officer in charge of the entrance should let the master know if the river is all clear *north* (as the official residences prevent those on board from seeing north), and if it is not clear, what is in the way, and its position. If asked about the southern area they should inform them that they can see south better themselves. They should not order a ship into the river unless absolutely necessary, leaving that to the discretion of the master, unless it is seen that the master is going to create a risk of collision by going out, when he should be ordered to bring his ship up in the gateway until such risk ceases to exist." Bingham, at the material times, as I find, was standing near the mushroom to which the bow rope of the *Rockabill* was fast. Stafford was standing with a megaphone on the north wall near the river end of the north entrance. Stafford in his evidence said that his duty, so far as Bingham was concerned, was to inform Bingham if anything was moving in the river when it was proposed to undock the *Rockabill*, and more especially anything coming in from sea on the north side of the river. Bingham said in his evidence that he expected Stafford to report anything on the move.

On this occasion Bingham blew his pea whistle, which is the customary signal to Stafford to make his report, when the *Rockabill* had squared up for the entrance. Stafford said that he then scanned the horizon including the Princes Stage, so far as he could see it, and reported to Bingham by megaphone: "All clear north." He said in evidence that at the time when he made that report he could see the masts and funnel of the *King Orry* and that she was stationary at the quay so far as he could observe. He said that when he reported "All clear north," that meant there was an element of danger south, and that in this case the element of danger was the *King Orry*, although she was stationary. The conclusion I have come to is that if Stafford had been keeping a good look-out or had performed his duty properly, he would have seen that the *King Orry* was moving from the stage, about the time when he made his report "All clear north," and would have reported that fact to Bingham. In fact Stafford made no report at all about the *King Orry* to Bingham until very shortly before the collision and at a time when a collision as, was I think, inevitable.

The question then arises whether this failure of Stafford to report the *King Orry* entitled the plaintiffs and defendants or either of them to recover their damages from the Mersey Docks and Harbour Board.

The position of the owners of the *King Orry* is not complicated by the question whether their servants were also guilty of negligence which contributed to the collision, for I have found as a fact that they were not negligent. One question which

arises so far as the claim of the owners of the *King Orry* against the Mersey Docks and Harbour Board is concerned, is whether, in the particular circumstances of this case, the employees of the board owed a duty to the *King Orry* to take reasonable care not to allow the *Rockabill* to come out into the river from the dock at an improper time.

In my view, Stafford and Bingham, as employees of the Dock Board, were in fact co-operating with the master of the *Rockabill* in bringing the *Rockabill* out of the dock into the river. This was an operation which, if done carelessly, was likely to cause risk of damage to a vessel navigating in the river close to the entrance of the dock at the time when the *Rockabill* emerged from the north entrance. As I have already said, I find that Bingham did say "Come ahead with her" or "come ahead" to the *Rockabill's* master, and I have come to the conclusion that at the time when he said so and ordered the bow rope to be cast off the *King Orry* was in fact moving away from the Princes Stage and was not stationary as Bingham says she was. Bingham was probably misled by Stafford's failure to report the *King Orry* to him. As I have said, the evidence is clear that Stafford failed to report the *King Orry* until very shortly before the collision, and I think he failed to do so because he was keeping a bad look-out.

Owing to this failure of duty on the part of Stafford, and owing to the failure on the part of Bingham to notice the movement of the *King Orry*, or owing to the determination of Bingham to undock the *Rockabill* regardless of the manœuvres of the *King Orry*, Bingham told the *Rockabill's* master to come ahead with her and directed the bow rope to be cast off, and in compliance the *Rockabill* did come ahead. In doing this Bingham was, in my judgment, negligent in the performance of his part of the operation of undocking the *Rockabill* and his negligence contributed to the collision. On the other hand the master of the *Rockabill* knew that he was expected to look out for vessels coming from the southward himself; and he knew of Bingham's instructions in 1930 and the practice in this dock, and he was not bound to obey the direction of the dockmaster to come ahead if he thought it more prudent to stay where he was. Neither did the direction to come ahead in my view relieve the master of the *Rockabill* from the duty of himself keeping a good look-out, nor did it require him to go at full speed ahead from the time when the order was received until the collision or until it was inevitable. In the result, I think that both the crew of the *Rockabill* and the employees of the Dock Board were negligent and that their negligence contributed to the collision, and that through them their employers are both liable to the owners of the *King Orry* for the damage sustained by her in the collision that resulted from their negligence.

The last question is whether the owners of the *Rockabill* can recover their damage from the second defendants, the Mersey Docks and Harbour Board. In my judgment, they cannot do so, for, as between them and the Dock Board, the rule of the common law and not the rule of the Maritime Law as embodied in the Maritime Conventions Act, 1911, s. 1, applies. The rule of the common law, as I understand it, is that in such a case as this, where the claimants have themselves been guilty of negligence contributing to their own damage, the loss lies where it falls, and they cannot recover from their co-tortfeasors.

I therefore give judgment for the plaintiffs against both the defendants, and I dismiss the counterclaim of the first defendants against the second defendants.

Solicitors for the plaintiffs, *Batesons* and *Co.*, of Liverpool.

Solicitors for the first defendants, *Weightman, Pedder*, and *Co.*, of Liverpool.

Solicitors for the second defendants, *E. A. Moorhouse*, of Liverpool.

House of Lords.

April 23, 24, 27; *June* 11, 1936.

(Before Lords ATKIN, THANKERTON, MACMILLAN, WRIGHT and MAUGHAM.)

Hain Steamship Company Limited v. Tate and Lyle Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Deviation—Stranding of vessel—Contribution in general average—Endorsees of bills of lading—Lloyd's average bond.

F. and Co. and C. D. S. C., both of New York, by separate special c.i.f. contracts, sold sugar to the plaintiffs. For the carriage of the sugar F. and Co. chartered the defendants' steamer T., *and sub-chartered to C. D. S. C. the* T. *to proceed to a port in San Domingo. By the charter-party, the* T. *was to load sugar at two ports in Cuba and at one in San Domingo "as ordered." F. and Co. informed the defendants' agents in New York, S. S. and Y., of the names and order of call at these ports: (1) Casilda, (2) Santiago de Cuba, in Cuba, and (3) San Pedro de Maconis in San Domingo. The* T. *went to Casilda, and there loaded sugar, and was sent on by the local agents of F. and Co. to Santiago, where she loaded more sugar. S. S. and Y. had cabled to the steamer at Casilda directing her to proceed to Santiago and thence to San Pedro de Maconis. This cable never reached the master; it was said that a Cuban postmaster gave it to a coloured lorry driver to deliver but that he had forgotten all about it. S. S. and Y. had, however, dispatched to the master of the* T. *a copy of the charter, which stated that there was a third port of shipment in San Domingo, and this had reached him. The* T. *left Santiago for Queenstown with a claim for dead freight endorsed upon the bills of lading. Shortly afterwards the steamer was recalled by wireless to San Pedro de Maconis in San Domingo, where she completed her loading of sugar. On leaving this port on the eventual homeward voyage, the* T. *stranded and was damaged. All the sugar had to be discharged, and some of it was lost. The plaintiffs were indorsees of bills of lading of the sugar on board the* T. *The sugar under the plaintiffs' contracts was brought to the United Kingdom in another steamer, and to obtain the sugar the plaintiffs*

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

signed a general average bond agreeing with the owners of the ship to pay the proper proportion of salvage in general average or particular or other charges chargeable on their consignment to which the shippers or owners of such consignments might be liable to contribute, and they made the deposit claimed in the action—9,500l. The plaintiffs admitted that they were liable to contribute in general average for the sugar from San Domingo, but denied that liability in respect of the Cuban sugar on the ground that there had been an unjustifiable deviation by the T.

Held, (1) *that although there had been a deviation from the chartered voyage, it had been waived by the charterers;* (2) *that the shipowners could not in the present circumstances claim against the respondents as indorsees of the bills of lading either contribution or freight if they had to rely on the bills of lading alone, but that the terms of the Lloyd's bond which was independent of the bills of lading gave to the shipowners the right they claimed in respect of contribution to the general average charges as against the respondents; and* (3) *that in the circumstances of this case the shipowners' claim for the balance of freight failed.*

Decision of the Court of Appeal (151 *L. T. Rep.* 249) *reversed.*

APPEAL from the decision of the Court of Appeal, reported 151 L. T. Rep. 249, in an action in which the plaintiffs, the present respondents, claimed the return of 9500*l.* deposited by them with the appellants to cover a contribution in general average. The facts which are sufficiently summarised in the headnote are fully stated in their Lordships' opinions.

In the Court of Appeal it was held by Scrutton, L.J. and Slesser, L.J.—Greer, L.J. dissenting—that there had been an unjustifiable deviation, and the defendants, the shipowners, were not entitled to claim protection from the exceptions in the charter-party or its benefit in claiming a general average contribution. The plaintiffs' agreement under the general average bond had been obtained under compulsion. It had been stated to be made without prejudice and without admitting liability for such charges. It was not a question of lien, for the shipowners could not give information to enable the contribution to be calculated, and, further, all provisions in the charter-party or bills of lading had been destroyed by deviation. There would be a declaration that the *Tregenna* deviated, and for the return to the plaintiffs of the 9500*l.*

The shipowners appealed.

Sir *Robert Aske*, K. C. and *Cyril Miller* for the appellants.

H. Stranger, K.C. and *Stephen Furness* for the respondents.

The House took time for consideration.

Lord Atkin.—My Lords, this case arises on an appeal from the Court of Appeal, who reversed a decision of Roche, J. in an action in which the present respondents were plaintiffs and the appellants were defendants. The learned judge gave judgment for the defendants on claim and counterclaim. The Court of Appeal reversed the decision and determined both claim and counterclaim in favour of the plaintiffs.

Tate and Lyle Limited, the respondents, in March, 1930, bought 25,000 tons of Cuban sugar from Messrs. Farr and Co., of New York, on c.i.f. terms. In February they had bought 50,000 tons Cuban and (or) San Domingo sugar from the Cuban Dominican Sales Corporation, of New York, on similar-terms. These sellers are said to be closely associated with Messrs. Farr and Co. In order to perform the contracts, Messrs. Farr and Co., on the 16th July, 1930, chartered from the appellants the steamship *Tregenna* on terms whereby the vessel was to proceed to Cuba and load a full and complete cargo of sugar in bags not exceeding 7770 tons and not less than 7030 tons at one or two safe ports on the north side or at one or two safe ports on the south side, and at one safe port on the south side of San Domingo, as ordered from the factors of the charterers. Freight was to be paid at 13*s.* 6*d.* per ton sterling in New York, as to 50 per cent. in cash on receipt of cable advice of signing of bills of lading and the balance in cash on receipt of cable advice of right delivery of cargo and the net delivered weight ascertained. On the 28th July, 1930, Messrs. Farr and Co., as chartered owners of the *Tregenna*, entered into a charter-party with the Cuban Dominican Sales Corporation whereby it was agreed that the vessel should proceed to San Domingo and there load at one safe port on the south side from the factors of the charterers a cargo of sugar in bags not exceeding 2780 tons nor less than 2040. The provisions as to freight corresponded to those in the principal charter.

The dispute between the parties arises out of events that happened in the course of the voyage of the *Tregenna*. Under the charter-party the charterers named Casilda and Santiago as the two Cuban ports. While the ship was loading at the first port, Casilda, the charterers declared the San Domingo port, San Pedro de Macoris, on the south side of the island, to the owners. The owners sent the necessary cable to the ship at Casilda, but owing to an alleged default of the post office authorities in Cuba it never reached its destination. The ship, after taking in cargo at Casilda, proceeded to Santiago and there loaded that portion of cargo. Having received no orders for a San Domingo port the master indorsed the bills of lading for dead freight, as he had only 4990 tons on board instead of the full and complete cargo stipulated in the charter party, and then cleared for Queenstown, whither he was to proceed for orders. He sailed for Queenstown at noon on the 29th July, proceeding between Cuba and San Domingo northward. The direct route to San Pedro would have been south of the island. Within a few hours all parties, including Messrs. Farr and Co., became aware of the mistake and a radio message was sent to the captain when off the Island of Inagua directing him to proceed to San Pedro. He obeyed orders, taking the shortest route which, from the point he had reached, took him round the north of San Domingo. He arrived at San Pedro on the 2nd August. There the *Tregenna* was loaded with the cargo under the sub-charter, about 2780 tons, under the supervision of Tate and Co., who were Messrs. Farr and Co.'s agents at San Pedro. Bills of lading were given to the sub-charterers. She sailed again from San Pedro on the 6th August, but, while leaving harbour, stranded and received serious damage. The cargo was discharged, and such as was not lost was transhipped by Hain Steamship Company Limited on another vessel, the *Baron Dalmeny*, on bills of lading indicating

Hain Steamship Company Limited as the shippers. It is in respect of this casualty that a general average contribution is claimed by the ship.

The *Tregenna* bills of lading were indorsed and delivered to Tate and Lyle Limited in pursuance of the contracts of sale, with a delivery order indorsed on them addressed to the owners of the *Baron Dalmeny* by Hain Steamship Company Limited, requesting the owners to deliver to Tate and Lyle Limited or order. On the same day, and no doubt as a condition of the release of Hain Steamship Company Limited, Tate and Lyle Limited entered into a Lloyd's average bond on the terms of which, in my opinion, this case turns. By that bond, in consideration of delivery of the goods, Tate and Lyle Limited agreed to pay to Hain Steamship Company Limited "the proper and respective proportion of any . . . general average . . . to which the shippers or owners of such consignments may be liable to contribute in respect of such damage loss sacrifice or expenditure." They duly made the necessary deposit and in due course received the goods. Later they discovered the alleged deviation and commenced this action against Hain Steamship Company Limited to recover so much of the deposit as covers the claim for general average contribution in respect of the sugar shipped at the Cuban ports, *i.e.*, before the deviation. In respect of the sugar shipped at San Pedro, *i.e.*, after the ship had returned to the contract voyage, they admit liability. Hain Steamship Company Limited counterclaim for a declaration that Tate and Lyle Limited are liable in general average in respect of the whole cargo, and also claim the balance of freight or a corresponding *quantum meruit* for freight in respect of the whole cargo. For the balance of freight in respect of the San Pedro shipment Tate and Lyle Limited admit liability, and they have paid a sum into court to satisfy that claim. For the balance of freight on the Cuban shipment, whether on express contract or *quantum meruit*, they deny liability.

At the original trial Roche, J. held that there had not been a deviation and gave judgment for the shipowners. In the Court of Appeal all the Lords Justices were of opinion that there was a deviation. Scrutton, L.J. and Slesser, L.J. held that the effect was to entitle Tate and Lyle Limited to succeed in the action on claim and counterclaim. Greer, L.J. found that the deviation had been waived by Messrs. Farr and Co., the charterers, and that this had the effect of leaving them liable to a general average contribution, which, on the terms of the Lloyd's bond, could be claimed by the ship against Tate and Lyle Limited. They all agreed that there was no claim for freight.

On appeal to this House your Lordships, being of opinion that there appeared to have been a deviation, but that, on the question of waiver, Tate and Lyle Limited might have been led by the state of the pleadings to consider that no such issue was raised, and might, therefore, have further evidence to adduce, allowed an amendment to raise the issue expressly and remitted the issue for report to the King's Bench Division. Evidence on the issue was heard by Branson, J. and your Lordships have his report. I entirely agree with the judgments in the Court of Appeal that in fact there was a deviation from the chartered voyage and I say no more on this topic. Moreover, I see no reason whatever to differ from the report of Branson, J. that the deviation was waived by Messrs. Farr and Co.

My Lords, the effect of a deviation on a contract of carriage by sea has been stated in a variety of cases but not in uniform language. Everyone is agreed that it is a serious matter. Occasionally language has been used which suggests that the occurrence of a deviation automatically displaces the contract, as by the now accepted doctrine does an event which "frustrates" a contract. In other cases, where the effect of deviation on the exceptions in the contract had to be considered, language is used which Sir Robert Aske argued shows that the sole effect is, as it were, to expunge the exceptions clause as no longer applying to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms. I wish to confine myself to contracts of carriage by sea, and in the circumstances of such a carriage I am satisfied that by a long series of decisions, adopting, in fact, commercial usage in this respect, any deviation constitutes a breach of contract of this serious nature. The same view is taken in contracts of marine insurance where there is implied an absolute condition not to deviate. No doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo owner, when the ship has deviated, has become uninsured. It appears to me inevitable that a breach of contract which results in such momentous consequences well known to all concerned in commerce by sea should entitle the other party to refuse to be bound. It is true that the cargo owner may, though very improbably, be uninsured. It is also true that in these days it is not uncommon for marine insurers to hold the assured covered in case of deviation at a premium to be arranged. But these considerations do not appear to diminish the serious nature of the breach in all the circumstances of sea carriage, and may be balanced by the fact that the ship can, and often does, take liberties to deviate which prevent the result I have stated.

If this view be correct, then the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong can get rid of his own contract. Nor does it affect merely the exceptions clauses. This would make those clauses alone subject to a condition of no deviation, a construction for which I can find no justification. It is quite inconsistent with the cases which have treated deviation as precluding enforcement of demurrage provisions. The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say: I am not now bound by the contract whether it is expressed in charter-party, bill of lading or otherwise. He can, of course, claim his goods from the ship. Whether and to what extent he will become liable to pay some remuneration for carriage I do not think arises in this case for reasons I will give later. But I am satisfied that once he elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight any more than by his other promises. But on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting; and if he does this with knowledge of his rights, he must, in accordance with the general law of contract, be held bound. No doubt one must be careful to see that the acts of the cargo owner are not misinterpreted when he finds that his goods have been taken off on a voyage to which he did not

agree. He could not reasonably be expected to recall the goods when he discovers the ship at a port of call presumably still intending to reach her agreed port of destination. There must be acts which plainly show that the shipper intends to treat the contract as still binding. In the present case, where the charterer procured the ship to be recalled to a San Domingo port for the express purpose of continuing to load under the charter, an obligation which, of course, only existed in pursuance of the express contract, and saw that the ship did not receive the cargo stipulated under the sub-charter provided by persons who had no right to load except under the sub-charter, I am satisfied that there is abundant, indeed conclusive, evidence to justify the report of Branson, J. that the deviation was waived by the charterers.

The result is that at the time the casualty occurred and the general average sacrifice and expenses were incurred the ship was still under the charter. In respect of the Cuban sugar the charterers appear to have been at the time the owners of the goods, and I think it clear that on principle the contribution falls due from the persons who were owners at the time of the sacrifice though no doubt it may be passed on to subsequent assignees of the goods by appropriate contractual stipulations. The place of adjustment does not seem to have a bearing on the question against whom the contribution has to be adjusted. It must be remembered that, at any rate so far as the Cuban sugar is concerned, at the time of loss and until transfer of the bills of lading in October, Messrs. Farr and Co. were the only persons in contractual relation with the ship. The bills of lading which they held were in their hands merely receipts for shipment and, of course, symbols of the goods with which they could transfer the right to possession and the property.

It follows that when the *Baron Dalmeny* arrived at Greenock, Hain Steamship Company Limited, who were, through their bills of lading, in possession of the goods, had a claim for contribution against the charterers, and for the reasons given by Greer, L.J. in his admirable judgment, with which I find myself in entire accord, had a lien on the goods for that contribution.

The position of the respondents, Tate and Lyle Limited has to be considered from two points of view: (1) As indorsees of the bills of lading in circumstances in which the rights and liabilities expressed in the bills of lading would devolve on them as though the contract contained therein had been made with them (under the Bills of Lading Act); (2) as parties to the Lloyd's bond.

In respect of the first, in my opinion the fact of deviation gives a bill of lading holder the rights which I have already mentioned. On discovery he is entitled to refuse to be bound by the contract. Waiver by the charterer seems, on principle, to have no bearing on the rights and liabilities which devolve on the bill of lading holder under the Bills of Lading Act. The consignee has not assigned to him the obligations under the charter-party nor, in fact, any obligation of the charterer under the bill of lading, for *ex hypothesi* there are none. A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading. One of the terms is the performance of an agreed voyage, a deviation from which is a fundamental breach. It seems to me impossible to see how a waiver of such a breach by the party to the charter-party contract can affect the rights of different parties in respect to the breach by the same event of the bill of lading contract. I think, therefore, that a deviation would admittedly preclude a claim for contribution arising against parties to a subsisting contract of carriage, though no doubt the claim does not arise as a term of the contract. And as a bill of lading holder is entitled to say that he is not bound by the agreed term as to freight, the ship could not, in the present circumstances, claim against Tate and Lyle Limited either contribution or freight if they had to rely on the bill of lading alone.

(2) On the other hand, the terms of the Lloyd's bond appear in the plainest words to give to the ship the right which they claim in respect of contribution. The consignees agree to pay to the owners the proper proportion of general average charges "which may be chargeable upon their respective consignments" or "to which the shippers or owners of such consignments may be liable to contribute." General average charges were, as I have said, chargeable by way of lien against the sugar, and the shippers were liable to contribute. The obligation is independent of the bill of lading, there is good consideration in the ship giving up a lien which it claims, and giving to the consignees immediate and not delayed delivery. I do not attach any importance in this case to the without prejudice provisions in the third part of the bond, which affect only the deposit and would not, in any case, apply where there was in fact a good claim for contribution against the original shippers. I think, therefore, that the claim of Tate and Lyle Limited, which is directed to recovering the deposit made in respect of the Cuban sugar, fails, and that the ship's claim for a declaration that there is a valid claim for contribution against the deposit succeeds. On the ship's claim for the balance of freight in respect of the San Domingo sugar, I have come to the conclusion that it must fail. That there is no claim on the express contract—the bill of lading—I have already said. An amendment to claim a *quantum meruit* was, however, allowed, and this has occasioned me some difficulty. I am not prepared at present to adopt the view of Scrutton, L.J. that in no circumstances can a consignee, whether holder of a bill of lading or not, be liable to pay after a deviation any remuneration for the carriage from which he has benefited. I prefer to leave the matter open and, in those circumstances, to say that the opinion of the Court of Appeal to the contrary in this case should not be taken as authoritative. In the present case, I find that the balance of freight under the charter-party, and, therefore, under the bill of lading, was to be paid in New York after advice of right delivery and ascertainment of weight. The terms of the cesser clause do not affect this obligation, and consequently the charterer remained and remains still liable for that freight. In these circumstances I am not satisfied that conditions existed under which a promise should be implied whereby the shippers undertook to give to the ship a further and a different right to receive some part of what would be a reasonable remuneration for the carriage. I think therefore, that the claim for freight fails.

Lord Thankerton.—My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack. I have also had an opportunity of considering the opinions of my noble and learned friends, the Master of the Rolls and Lord Maugham, and I desire to express my concurrence in their views also.

Lord Macmillan.—My Lords, I also concur.

Lord Wright, M.R.—My Lords, the principal questions on this appeal are: (1) Whether the

appellants, as owners of the steamship *Tregenna*, are entitled to retain out of a deposit made under a Lloyd's average bond the proper contribution in general average chargeable on certain cargo received by the respondents, as bill of lading holders, at Greenock; (2) whether they are entitled to be paid the balance of freight due in respect of that cargo. The Court of Appeal have, by a majority, denied the appellants' right in either regard. Greer, L.J., however, dissented in respect of the former matter, holding that the appellants' claim on that head was justified.

The *Tregenna* had been chartered by Messrs. Farr and Co., of New York, under charter-party dated the 16th July, 1930, to carry a full cargo of sugar from three ports in the West Indies, two in Cuba and one in San Domingo, as ordered. The difficulties in the case have arisen because, by a curious accident, the master, after loading at two ports—namely, Casilda and Santiago de Cuba—in Cuba 4990 tons of sugar, proceeded direct to Queenstown for orders, in the belief that no order had been given to load at a port in San Domingo. In fact, the charterers had duly given orders for a port in San Domingo (San Pedro de Macoris) to the ship's agents in New York, who had cabled those orders on to the master at Casilda, but a lorry driver in Cuba, who undertook to take the cable from the cable office to Casilda, failed to do so, and the master never got it. He accordingly started direct to Queenstown—indorsing the bills of lading for dead freight. But when the *Tregenna's* departure was cabled to New York steps were immediately taken by cable and wireless to remedy the mistake. The master was notified of the error the day after he left Santiago. He turned back immediately, and proceeded to San Pedro de Macoris, where he duly arrived a little over a day later than if he had gone direct and after having done 265 miles of extra steaming.

Roche, J. held that, in the peculiar circumstances of the case, there was no deviation. I agree, however, with the unanimous judgment of the Court of Appeal, that, as orders had been duly given to the shipowners' agents for the third port, the steamer, in proceeding on a course away from that third port, was guilty of a deviation under the charter-party and the Cuban bills of lading. The questions which then arise are what consequences follow in all the subsequent facts of the case, and how do they affect the respondents.

Save for an unfortunate accident no one, presumably, would have troubled about the deviation. But the *Tregenna*, having completed the charter-party cargo at San Pedro de Macoris, stranded in the harbour almost immediately after starting on her homeward voyage. It is not material to consider if there was negligence, but, on the other hand, it is not possible to say that she would have stranded all the same if there had been no deviation. The *Tregenna* was so damaged by the casualty that the cargo could not be carried on by her. Heavy general average sacrifices and expenditure were incurred at San Pedro for the salvage of the cargo. The shipowners exercised their right to tranship and forward the cargo by another steamer. All the cargo which was saved was thus transhipped by the appellants on to the *Baron Dalmeny*. This vessel, after arriving at Queenstown, proceeded under orders from the respondents, who by that time had become holders of the bills of lading, to Greenock. There the respondents presented the bills of lading and took delivery of the cargo which had been saved, namely, 2724 tons of the Cuban cargo and 2560 tons of the San Pedro cargo. As they had purchased the sugar on "arrived" terms they were not interested in the portion of the cargo which was lost. The appellants, before giving delivery to the respondents, required the respondents to sign a Lloyd's average bond and make a deposit of 9500*l.* in respect of the Cuban cargo. This was done. No question arises in these proceedings, in respect of the sugar shipped at San Pedro, as regards liability either to contribute in general average or to pay freight. But, as already stated, both questions come before your Lordships with regard to the Cuban sugar.

I shall first consider the liability to contribute in general average. At the time of the sacrifice and expenditure the property in the Cuban sugar was in the charterers, Messrs. Farr and Co., who held the bills of lading. As already stated, they had sold the sugar to the respondents on "arrived" terms. The charter-party contained only one provision with respect to general average, which was "general average, if any, to be settled according to York Antwerp Rules, 1924, and where they are not sufficient in accordance with the rules and customs in such matters at the port of destination." I shall consider first the position apart from the fact that afterwards the bills of lading and the property in the goods were transferred to the respondents. Assuming no deviation, the appellants would have a lien on the goods against the charterers for the general average and also a personal claim. The lien would be conditional on the goods being eventually saved. The goods owners would be entitled to claim against their underwriters as for a loss by sea perils. If, however, the loss was due to the fault of the shipowners, they could not, in the absence of appropriate exceptions, claim for the general average loss, on the principles stated by Lord Dunedin in *Louis Dreyfus and Co.* v. *Tempus Shipping Company Limited* (*sup.* p. 243; 145 L. T. Rep. 490, at p. 492; (1931) A. C. 726, at p. 734). I need not repeat what Lord Dunedin there said, following the classical statement in *Steel and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 419; 14 App. Cas. 601; 61 L. T. Rep. 597).

The explanation why the shipowner cannot claim may be that the maritime law excludes the shipowner's right to claim contribution in such a case, or it may be that, though the right is there, it is liable to be defeated by a cross claim by the goods owner for the same amount of damages; thus the claim is not maintainable on the principle of avoiding circuity of action. This also appears to be the effect of Rule D of the York Antwerp Rules of 1924. In my opinion, deviation is a fault within the principles just stated. The casualty and consequent general average loss must be deemed to have been caused by the deviation, since it is impossible to say that the casualty would have occurred if there had been no deviation. In the words of Swinfen Eady, L.J. in *James Morrison and Co., Limited* v. *Shaw, Savill, and Albion Co., Limited* (13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508, at p. 510; (1916) 2 K. B. 783, at p. 795): "[the shipowners] are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not." In the present case, if the *Tregenna* had not deviated she would, presumably, have started earlier on her voyage, and under different conditions of tide, wind, light, and so forth. The only liberty to deviate given by the charter-party was "to deviate for the purpose of saving life and property." The deviation was unjustified.

But the effect of an unjustifiable deviation, such as this, on the shipowner's right to claim the benefit of the exceptions contained in the charter-party

is too clearly established to require citation of authority. I shall only refer to *Morrison's* case (*sup.*), where the loss was due to the King's enemies, and the shipowner was held liable notwithstanding the exception in the bill of lading, and, indeed, the exemption generally accorded by law to common carriers. Thus, in the present case, if the shipowners, having unjustifiable deviated, were to claim for the general average loss as falling within contract exception of perils " of the sea, stranding and other accidents of navigation, even when occasioned by negligence," the goods owners would reply that the shipowners had lost the benefit of these exceptions, and must bear the loss as due to the fault of themselves and their servants, in respect of which they were unprotected by contract. Nor in these circumstances could a lien for general average be asserted. This I understand to be the reasoning on which Scrutton, L.J. based his conclusion that there was no lien for general average in this case.

But Greer, L.J. came to the opposite conclusion, because he held that the charterers had waived the deviation and could not rely on it.

Before this House it was, in the first instance, objected on behalf of the respondents that this issue had not been pleaded, and that relevant evidence had not been taken on it. Your Lordships gave the appellants leave to amend their pleading, and remitted the matter to Branson, J. as the commercial judge, to take evidence and make his finding on the issue. He has reported accordingly. He has taken the law from a definition of waiver given by Parker, J. in *Matthews and another* v. *Smallwood and others ; Smallwood* v. *Matthews and others* (102 L. T. Rep. 228, at p. 231 ; (1910) 1 Ch. 777, at 786) : " Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right of re-entry arises, does some unequivocal act recognizing the continued existence of the lease." Branson, J. held that this principle, there applied to a lease, must equally apply in the case of any breach of a contract by one party thereto which entitled the other to treat the contract as at an end. He then went on to find that the charterers in New York knew of the unjustified deviation at the latest on the 30th July, 1930 (the day after the *Tregenna* sailed for Queenstown), and also knew that she had been instructed to alter course and proceed to San Pedro, and had done so. They might have elected to cancel the charter, but they had sub-chartered the *Tregenna* to the shippers of the San Domingo sugar which the respondents had purchased and did not wish to run the risk of an action by the sub-charterers. They therefore allowed the steamer to proceed to San Pedro and load. Branson, J. held, on these facts, that Messrs. Farr and Co. had waived in fact and in law any right to rely on the deviation, and were not entitled thereafter to treat the contract of affreightment as at an end.

I agree with that conclusion. An unjustified deviation is a fundamental breach of a contract of affreightment. Owing to the peculiar nature of a maritime adventure, in which shipowner and goods owner are jointly concerned, it is a fundamental condition that, in the absence of express liberties, the ship shall proceed by the ordinary and customary route ; any deviation changes the adventure. It has also the serious consequences that it vitiates the goods owner's insurances. This is old law. In the words of Fletcher Moulton, L.J. in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (10 Asp. Mar. Law Cas. 431 ; 96 L. T. Rep. 488, at p. 490 ; (1907) 1 K. B. 660, at p. 669) : "The cases show that, for a long series of years, the courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract . . . and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading." It is on similar reasoning that a voyage policy of insurance is avoided from the moment that the vessel actually deviates. This loss of the insurance is sometimes stated as the reason why deviation is treated so drastically under a contract of affreightment. If that were all, the mischief might be remedied by means of the deviation clause which is now so generally found in policies. But the reason is more fundamental, and is the same in principle in both contracts. The adventure has been changed. A contract entered into on the basis of the original adventure is inapplicable to the new adventure. I shall later have to consider the effect of a deviation with regard to freight. But however fundamental is the condition, it may still be waived by the goods owner. For this purpose the case is like any other breach of a fundamental condition which constitutes the repudiation of a contract by one party ; the other party may elect not to treat the repudiation as being final, but to treat the contract as subsisting, and to that extent may waive the breach, any right to damages being reserved. One party to a contract cannot end it by his wrongful act against the wish of the other party. In the present case the charterers elected to waive the breach, with the result that the charter-party was not abrogated, but remained in force. The appellants were thus entitled to the benefit of the contract conditions, and, in particular, could rely on the exception of perils of the sea, and thus vindicate any lien for contribution to general average and also enforce the charterers' liability in respect thereof.

This would have been the whole position if the charterers had not transferred the bills of lading to the respondents shortly before the cargo arrived at Greenock. The question then arises : What was the effect of the transfer ? The personal liability which had attached to the charterers could not be affected, because the cesser clause did not in the fact operate. But was the lien discharged if, as I think, the respondents, as bill of lading holders, were entitled to rely on the deviation ? Their position, so far as appears from the evidence, is that they took the bills of lading without notice of the deviation. Now it was held in *Leduc and Co.* v. *Ward* (6 Asp. Mar. Law Cas. 290 ; 58 L. T. Rep. 908 ; 20 Q. B. Div. 475) that indorsees of bills of lading were not affected by knowledge on the part of the shippers that the ship intended to deviate. The bill of lading holders to whom the property had passed were held to be entitled to enforce the bill of lading contract according to its terms ; evidence of the shippers' knowledge (which it seems might have, as against the shippers, amounted to a waiver) was inadmissible. In my opinion, that principle applies here. The respondents, as indorsees of the bills of lading, to whom the property passed on the indorsement, were, *primâ facie*, bound by the liabilities resulting from the contract contained in the bill of lading, but were entitled to rely on the deviation which they had not waived ; hence they were relieved from personal liability to contribute to the general average loss.

But, in my judgment, the lien, which is the ordinary consequence of a general average sacrifice, still attached to the goods, though the personal

liability remained the liability of the charterers, who were owners at the time of the sacrifice. It is difficult, as Greer, L.J. remarked, to see how the lien could be discharged by the transfer of the goods from one person to another. The late Judge Carver, in his Carriage of Goods by Sea (4th edit., sect. 443), dealing with the personal liability, observes that difficulties of this kind seldom occur, "since the person ultimately liable is usually an insurer, on a policy which is transferred with the goods, and since the goods are not generally delivered without a sufficient undertaking." Judge Carver observes that "on principle it is difficult to see how a liability already incurred could be held to be transferred from the vendor to the purchaser so as to exonerate the former and make the latter liable. It is not, in this case, necessary to decide the question of personal liability, but, in my opinion, the lien was unaffected by the transfer. In any case the appellants, as shipowners, took the course which is usual, of refusing to deliver without an undertaking from the persons who actually took delivery. This was given in the form of a Lloyd's Average Bond, dated the 13th October, 1930, entered into between the respondents, as consignees, and the appellants, as owners of the *Tregenna*. Under the bond the latter agreed to deliver the cargo (which though delivered from the *Baron Dalmeny* was delivered from the possession of the appellants as still held under the original charter-party) in consideration of the former agreeing to pay to the appellants the proper proportion of any salvage, general average, or other like charges chargeable on the cargo, or to which "the shippers or owners" of the cargo might be liable to contribute in respect of such charges. In accordance with the usual practice a general average deposit was made with trustees, out of which any sums found due on the adjustment of general average were to be made, but the deposit was to be without prejudice, and for the purpose only of obtaining delivery of the goods.

It was for the return of this deposit that the action was brought by the respondents. The appellants counterclaimed for a declaration that they were entitled to be paid the proper amount due on adjustment, and also freight.

In my judgment, the undertaking in the bond is binding on the respondents. The general average contributions were, as I have explained, chargeable, in my opinion, on the goods, though not personally chargeable against the respondents. The appellants gave up their lien in consideration of the undertaking, and I can see no reason why the respondents should not be bound by the bond. If they discharge a liability which is primarily that of the charterers, they may have a right over. The bond has not been attacked as having been exacted under duress of goods; nor could it have been. It is true that it was without prejudice, in the sense that, if there had been no lien and no liability in anyone, it might have been unenforceable; that, however, is not the case here. Indeed, apart from the lien, I find in the bond a promise to pay general average for which "the shippers or owners" of the consignments might be liable. Though it may be that, technically, the charterers were not shippers, and were not owners at the date of the bond, though they were owners when the sacrifice and expenditure were incurred, I think they come within the words of the bond, and, as I have said, were liable personally. These bonds are constantly taken from consignees where not only is the actual amount of the lien unascertained, but the true incidence of the charge is doubtful. Shipowners refuse to give up their lien or deliver the goods without an enforceable undertaking, accompanied by security. As Judge Carver points out, it may not matter to the underwriters whether the owner at the time of the casualty, or the owner at the port of delivery, is the person liable, since generally the policy covers either indifferently. In the present case it appears on the documents, and was indeed stated, that it was the underwriters who were now really concerned.

For these reasons I think the appeal should succeed on this issue, and that the appellants should have a declaration that they are entitled to retain out of the deposit the proper contribution in general average chargeable against the Cuban sugar, when it has been agreed or ascertained. It is stated that the figure arrived at in the average statement of 8269*l.* 14*s.* 9*d.* requires some small correction.

That leaves for consideration the balance of freight on the Cuban sugar delivered, namely, 155*l.* 1*s.* 8*d.* That figure is arrived at by taking the freight on the quantity delivered, namely, 2724 tons, which at 13*s.* 6*d.* a ton, the charter-party freight, amounted to 1839*l.* 4*s.* 2*d.*, and deducting from it the whole amount of advance freight paid on 4990 tons shipped in Cuba, which was 1684*l.* 2*s.* 6*d.* The respondents claim that by reason of the deviation they are relieved from liability to pay any freight at all.

Under the charter-party the balance of freight—that is, the 50 per cent, not payable in advance—was payable in cash at New York on receipt of cable advice of right delivery of the cargo and the net delivered weight ascertained. Clearly, there could be no lien for such freight, but, as the charterers had waived the deviation, and the cesser clause was only to operate on payment of all freight, the charterers remained liable. The average bond imposed no new liability on the respondents so far as this freight was concerned. The express term of the bond was that delivery should be made "on payment of the freight payable on delivery, if any." According to the charter-party no freight was payable on delivery. If the bill of lading contracts applied, no freight was payable on delivery under them. They stipulated that all conditions should be as per charter-party, and that the consignees should pay freight, as per charter-party. I paraphrase the actual words, which differed at the two ports of shipment in Cuba, but, whatever they mean, they do not make any freight payable on delivery.

I have discussed the effect of a deviation in so far as it deprives the shipowner of a right to rely on the contractual exceptions, but a deviation carries wider consequences. I think it is right to say that it abrogates the special contract entirely. By "special" here is meant the express contract: it is thereby intended to reserve the question of there being any implied contract. But in particular the deviation destroys, as I think, the right to claim the contract freight, even if the voyage is completed and the goods delivered at the contract destination. It is curious that there is no express decision on this point. It has, however, been held that a deviation discharges provisions in the contract of affreightment for unloading in a fixed time—*United States Shipping Board* v. *Bunge y Born* (30 Com. Cas. 129; 31 Com. Cas. 118). Freight payable at destination under the terms of the contract must be an *a fortiori* case. But the Court of Appeal have denied the appellants' claim to any freight at all on a more fundamental ground; they have held that, not only is the contract freight gone, but no freight on a *quantum meruit* can be claimed. Scrutton, L.J. stated the proposition

quite generally: "The fact that a volunteer without authority renders services to another man's property does not give him a right to remuneration, or to keep the property unless he gets remuneration. There is no authority on the question, but, as a matter of logic, I think the claim for freight fails." The "logic" involved is also explained by Greer, L.J., who thinks that after a deviation "the goods are being carried unlawfully: the shipowner is throughout in unauthorised possession of the goods of whoever may turn out to be the owner, and must deliver them up to the owner on demand, without payment for a service which neither the shipper nor the owner ever asked him to perform."

During the argument, I was of opinion, like your Lordships, that in the circumstances of this case the claim for freight failed. It was, accordingly, not necessary to hear argument on this important question of principle. It may be reserved for full argument and decision when, if ever, it arises in that simple and abstract form. I merely add a few observations to explain why, as at present advised, I feel difficulty about it.

I have never, in my own experience, heard of a case where a shipowner who has carried goods to their destination but after a deviation has been refused payment of freight. It is different if the goods have been lost after the deviation, as in *Morrison's* case (*sup.*), or if they have been delivered at a port other than the agreed destination. But a sweeping general rule such as the Court of Appeal laid down will, if it be correct, have startling consequences. Let me put a quite possible case: A steamer carrying a cargo of frozen meat from Australia to England deviates by calling at a port outside the usual or permitted route; it is only the matter of a few hours' extra steaming; no trouble ensues except the trifling delay. The cargo is duly delivered in England at the agreed port. The goods owner has had, for all practical purposes, the benefit of all that his contract required. He has had the advantages of the use of a valuable ship, her crew, fuel, refrigeration, and appliances, canal dues, port charges, stevedoring. The shipowner may be technically a wrongdoer, in the sense that he has once deviated, but otherwise, over a long period, he has been performing the exacting and costly duties of a carrier at sea. I cannot help thinking that epithets like "unlawful," and "unauthorised," are not apt to describe such services. It may be that by the maritime law the relationship of carrier and goods owner still continues despite the deviation, though subject to the modifications consequent on the deviation. Nor can I help feeling that the court would not be slow to infer an obligation, when the goods are received at destination, to pay not, indeed, the contract freight but a reasonable remuneration.

The observations of the Court of Appeal certainly go beyond such authority as there is. In *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*sup.*), the shipowners, after a deviation, were held liable for the negligence of stevedores in unloading, notwithstanding the exception in the bill of lading. Fletcher Moulton, L.J. said (1907, 1 K. B. at p. 669): "In what position, then, does he (the shipowner) stand? He has carried the goods to their place of destination, and is, therefore, entitled to some remuneration for that service, of which the owner has received the benefit. The most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all circumstances he would be entitled as of right to be treated even as favourably as this, but in the present case the plaintiffs do not contest his right to stand in that position." I do not think that Fletcher Moulton, L.J. intended to lay down here precise rules of law. *Morrison's* case (*sup.*) shows that the shipowner, after a deviation, cannot claim the protection afforded by law to a common carrier. Nor can there be any question of the agreed freight if what is called the special contract (as distinguished from any implied contract) is displaced. Collins, M.R., said ((1907) 1 K. B. at p. 667): "It may be, no doubt, that, although that condition (so not to deviate) is broken, the circumstances are such as to give rise to an implied obligation on the part of the cargo owner to pay the shipowner the freight . . . from the fact of the carriage of the cargo to its destination."

I may note that in *United States Shipping Board* v. *Bunge y Born* (*sup.*) the goods owner did not contest the shipowners' right to freight, though the ship had deviated and the terms as to demurrage had gone.

I am not expressing any final opinion, because I think the matter does not arise for decision in this case. Here, on any view, in my opinion, all the circumstances point against the implication of an agreement to pay a *quantum meruit* freight. By the charter-party freight was payable by the charterers in New York after delivery. There was no operative cesser clause. It was known to all parties that the charterers were liable throughout for the freight. I can find, at this stage, no hint that any one was thinking that the deviation had displaced the contract. The appellants were entitled to freight from the charterers. In these circumstances the fact that the respondents ordered the ship from the port of call to Greenock, and presented the bills of lading and took delivery in the normal way, without any mention of freight, pointed to the view that freight was no interest of theirs. In fact, they had purchased on "arrived" terms and, as against their sellers, were entitled to delivery "freight free." It is not expressly shown that the appellants were cognizant of the terms of sale, but the terms of the charter-party might be taken to point in that direction, and the charterers asked the appellants to send them "released" bills of lading, so as to obtain payment of the purchase price in London. I am not quite clear of the precise effect of the bill of lading terms, which were in effect "paying freight and all conditions as per charter-party," in a case like this, where the charter-party expressly provided for payment in New York, that is, by the charterers at a date after delivery. But it is, I think, sufficiently clear that, at the time, neither the respondents nor the appellants had any idea of the respondents paying the freight. The appellants were giving up no lien for freight, because they had none. Above all, in the average bond there was an express promise to pay freight, if any, payable on delivery, and I think that this express agreement excludes the possibility of implying an agreement to pay any other freight. It is, in my opinion, clear that no one thought that the bill of lading contract was gone, still less that if it was gone there might be an implied agreement to pay a reasonable freight against delivery. And, finally, in fact delivery was made, so far as the evidence goes, as a matter of course, without any freight being paid at all.

Your Lordships gave leave to amend so as to include a claim for freight *quantum meruit*. The respondents can be liable for such freight, if at all, only on the ground that an obligation to pay it ought to be implied from all the circumstances. As I think, reserving all more general questions, that on any view no such obligations can here be

implied, the claim for freight should, in my opinion, fail, and the appeal under that head be dismissed.

Lord Maugham.—My Lords, I have had the advantage of studying the opinions which Lord Atkin and the Master of the Rolls have just delivered. I agree with the conclusions at which they have arrived, as well as with the reasons which have led them to those conclusions; and I am tempted to add a few observations of my own only because certain questions of great general interest were raised, and elaborately argued, in this appeal, and it may be many years before these questions come again for consideration to this House.

The first question to which I wish to refer may be stated thus: What is the effect of a deviation on the contract of carriage by sea contained in a voyage charter-party? In particular, is the effect the same as if a fundamental condition of the contract had been broken by the shipowner, so that the charterers become entitled to accept the repudiation and to treat the contract as at an end as from the date of the repudiation, or, is the effect, as Sir Robert Aske argued, that the charter-party remains binding except to this extent, that the shipowner is not entitled to rely on the exceptions clause in the charter-party? For my part, after a careful consideration of the authorities, I find it easy to agree with the view expressed by both the noble Lords on this point, for I am unable to see any justification in the law of contracts or anything peculiar in a maritime adventure, which could lead to the conclusion that the shipowner was bound to continue to carry for the charterers but on terms to which he had never agreed. The contract not being severable, it seems to me that the charterer must, when he knows of the deviation, either accept the repudiation by conduct arising from it, in which case the parties are left to rely on the implied contract, if any, which may arise from the circumstances; or to treat the contract as in force, in which case he could only claim any damage proved to have been caused to him by the deviation.

In the second place, I will observe that, holding this view as to the consequences in law of a deviation, the conclusion is inevitable that the party who had a right to complain of the deviation may elect to treat the contract as subsisting. This, as I think, makes it necessary to qualify some remarks which fell from Greer, L.J. in delivering the judgment with the substance of which I am in agreement. The Lord Justice observed that after a deviation the goods are being carried unlawfully, and the shipowner is in unauthorised possession of them. With the greatest respect I do not agree. The breach of a condition contained in a contract of carriage by sea, even so fundamental a condition as that the ship, in the absence of express provision, shall proceed by the ordinary and customary route, does not of itself, that is, without an acceptance of the repudiation by the charterer or other party concerned, abrogate the contract. The shipowner is therefore not a wrongdoer in the normal case if, after a deviation, the master continues (in the absence of a special direction from the owner of the goods) to carry the goods according to the charter-party to the port of destination. The position which arises in such circumstances is plainly one that may give rise to many difficulties, but, in my opinion, they are certainly not so serious as those which are involved in the view that the shipowner is a wrongdoer in continuing to carry the goods to the agreed port.

On the question of waiver, a word which means, in the present connection, an election by the charterers to treat the charter-party as subsisting, I will only add one remark to what Lord Atkin and Lord Wright have said. If the effect of a deviation was merely that for which Sir Robert Aske contended, there would be much more difficulty in holding that there had been a waiver, for it would be almost impossible to give any satisfactory reason why the charterers should elect to give up the right, if they had it, to hold the shipowner to the terms of the charter-party, omitting therefrom the exceptions which were inserted for his protection. On the other hand—accepting the view that the charterers, with knowledge of the facts as regards deviation and its consequences, are not entitled to approbate and reprobate, and that an unequivocal act recognising the continuance of the contract of affreightment makes it impossible for them subsequently to treat the contract as at an end by reason of the deviation—the conclusion as to waiver is inevitable on the facts as found by Branson, J. and in accordance also with the view of Greer, L.J.

As regards the lien on the goods in consequence of the general average sacrifice, a right resting not on the charter-party but on the general maritime law, I will express my opinion in agreement with what has fallen from the Master of the Rolls, that the lien was unaffected by the transfer to the respondents as bill of lading holders. The true construction of the Lloyd's Average Bond, dated the 13th October, 1930, on this view does not seem to me to present any serious difficulty; for I think that the shipowners gave up this lien, and permitted an immediate delivery of the goods subject to it, in consideration of the agreement by the respondents to pay the proper proportion of any general average chargeable on the cargo, or to which the shippers or owners of the cargo might be liable to contribute. It seems to me reasonably clear that the respondents are in these circumstances not entitled to the return of the deposit so far as it related in the proper general average contribution.

Finally, on the general question whether a consignee is liable to pay freight after a deviation which has been treated as putting an end to the contract of affreightment, I would only observe that that question does not now arise for decision. But I am strongly inclined to doubt the correctness of the view suggested in the Court of Appeal. As I have already indicated, I do not agree with the proposition that the shipowner (apart from any step taken by the consignee) ought to be regarded as a volunteer or a wrongdoer, and I am of opinion that a claim on the footing of *quantum meruit* must depend on all the circumstances of the case, including the question whether the goods have been delivered at the agreed port, and without injury or substantial delay. Bearing in mind a well-known adage, and your Lordships' abstention from expressing any final opinion on this matter, I do not propose to express any further view of my own on it. In the present case, the claim for freight on the basis of *quantum meruit* is excluded by the fact that the freight, by the terms of the charter-party, was payable by the charterers in New York after delivery at Greenock. There was, therefore, no lien for freight, and nothing in the Lloyd's Average Bond to make the respondents liable to pay it.

Appeal allowed.

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

Solicitors for the respondents, *Middleton*, *Lewis*, and *Clarke*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, July 27, 1936

(Before Sir BOYD MERRIMAN, P.)

The Holstein. (*a*)

Practice—Writ in collision action in personam *against foreign corporation—Service on English agents—Whether foreign corporation "carrying on business" within the jurisdiction—Writ and service set aside.*

This was a motion by the owners of the steamship H., *a company incorporated under the laws of Germany and the defendants in an action* in personam *brought against them by the plaintiffs, the owners of the Danish steamship* F., *her master and crew, for damages in respect of a collision between the* H. *and the* F. *which occurred in the English Channel in* 1934, *to set aside the writ and the service of that writ which had been effected upon the defendants' English agents in London. The defendants contended* (a) *that the writ was one for service within the jurisdiction, but that the defendants neither carried on business nor resided in this country; and* (b) *that the service of the writ, which had been effected upon the secretary of the English company which acted as the defendants' agents in this country, was bad, because it did not constitute service upon "the head officer, secretary, or treasurer" of the defendant company within the meaning of Order IX., r.* 8, *of the Rules of the Supreme Court. On behalf of the plaintiffs it was stated that there existed between the defendant company and their London agents an arrangement whereby the latter were guaranteed by the former a fixed minimum yearly commission regardless of the volume of business transacted, and it was argued that that arrangement, which was comparable to the payment of a fixed sum such as would be paid for the rent of an office, was evidence which supported the view that the defendants did carry on business in this country. Moreover, although it was admitted that the London agents had no authority to issue bills of lading, they were allowed to issue passenger tickets to persons travelling by the defendants' vessels, and, in the case of at least one of the defendant company's liners, were empowered to dispose of berths. That also, the plaintiffs said, went to show that the defendants carried on business within the jurisdiction.*

Held, that the defendant company did not carry on business within the jurisdiction, because (a) *the evidence showed that, apart from the limited business which they were entitled to transact here on behalf of the defendants, the London agents were obliged for the rest of the business which they transacted in London for the defendant company to refer to their principals in Germany in each case, either by telephone or telegraph, before those principals could be committed to the allotment of cargo space or berths;* (b) *the arrangement in regard to the payment of a minimum commission, in his Lordship's view, amounted nevertheless to remuneration by commission, albeit the commission was guaranteed; and* (c) *it was clear from the facts as proved that the London agents received no contribution whatever towards their rent from the defendants, and that they neither set aside any part of their office nor detailed any clerks specially for the work of the defendant company, but merely did that work as part of their agency business generally.*

The writ and service were accordingly ordered to be set aside, with costs.

The Lalandia (sup. *p.* 351; 148 *L. T. Rep.* 97; (1933) *P.* 56; 44 *Ll. L. Rep.* 55) *followed.*

Thames and Mersey Marine Insurance Company *v.* Societa di Navigazione a Vapore del Lloyd Austriaco (12 *Asp. Mar. Law Cas.* 491; 111 *L. T. Rep.* 97) *distinguished.*

MOTION to set aside writ and service.

The application was made by the defendants, the Sudamerikanische Schifffahrts Gesellschaft, of Hamburg, owners of the steamship *Holstein*, the plaintiffs in the action being the owners, master, and crew of the Danish steamship *Freya*, which had been in collision with the *Holstein* in the English Channel in 1934. The *Holstein* had never since that time returned to British waters and the plaintiffs had accordingly instituted an action *in personam* against the defendants in this country, and had served the writ upon one John M. Dalgleish, the secretary of Messrs. Stelp and Leighton Limited, shipbrokers, of Fenchurch-buildings, London, who acted as the defendants' agents in England. The contentions of counsel appear sufficiently from the headnote.

In the course of his judgment, the learned President, after stating that he considered that the present case was disposed of by the decision of Langton, J. in *The Lalandia* (*sup.* p. 351; (1933) 44 Ll. L. Rep. at p. 56), which he accordingly proposed to follow, referred at some length to the judgment of Buckley, L.J. (as he then was) in the case of *Thames and Mersey Marine Insurance Company* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* (12 Asp. Mar. Law Cas. 491; 111 L. T. Rep. 97). In his Lordship's opinion, that judgment meant that if, on a review of the circumstances as a whole—not those of one particular case or one class of cases—it was the English agency that made the contracts, then the foreign corporation carried on business in this country, but that if the agency merely sold the foreign corporation's contracts, the foreign corporation did not carry on business in this country. The President added that, since that case had been decided—in 1914—circumstances had changed, and, if he might hazard a guess, he would say that in the interval foreign corporations had been careful to make their position perfectly secure both from the inroads of the Inland Revenue and against hostile litigation.

H. G. Willmer, for the applicants on the motion (the defendants in the action).

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

Owen L. Bateson, for the respondents (the plaintiffs).

Sir Boyd Merriman, P.—This is a motion to set aside a writ and the service of the writ on the Hamburg South America Steamship Company, whose head office is in Hamburg, and who are sued by the owners of the steamship *Freya* in respect of a collision at sea. It is common ground that the rules relating to service out of the jurisdiction do not apply. It so happens that the ordinary Admiralty jurisdiction *in rem* has not been available because this particular steamship has not visited these shores since the collision; and it has been sought in those circumstances to serve the Hamburg South America Steamship Company through their agents in Fenchurch-street, London, and it is said that that service is bad. If the Hamburg South America Steamship Company are carrying on business here, or are resident here, or as has been said, for short, in more than one case, "are here," they can be served through these agents in Fenchurch-street. If not, the writ is bad and the service is bad.

Now, I have the facts of this case set out in an affidavit by Mr. John Mitchell Dalgleish, who is secretary of Messrs. Stelp and Leighton Limited, a company which acts as agents for the Hamburg South America Steamship Company. In substance, with the addition of certain photographs elucidating the position of some notices to which reference is made in the affidavit, and with some additional evidence as to what I ventured to call an optimistic inquiry for "the manager" of the Hamburg South America Steamship Company at the office of these agents in London, this affidavit is accepted as setting out the true facts.

It appears that Messrs. Stelp and Leighton Limited act, among other shipping companies, for the Hamburg South America Steamship Company, the head office of which, as I have said, is at Hamburg. It is common ground, or at any rate it is not disputed, that so far as freight is concerned this company, Messrs. Stelp and Leighton Limited, make no contracts whatever on behalf of the Hamburg South America Steamship Company in London—though they do the ordinary duties of shipbrokers, to quote the affidavit, "such as booking and collecting freights and accepting bill of lading option declarations." As regards passenger tickets, though they do issue them, they sign them as agents for the Hamburg South America Steamship Company, and only in that capacity. But one fact has been added to those stated in the affidavit: namely, this, that in respect of the largest liner of the Hamburg South America Steamship Company certain berths are actually allotted in advance to these agents in London and can be disposed of by them without reference to Hamburg. With regard to the whole of the rest of the range of business transacted in London for the Hamburg South America Steamship Company, some reference by telephone or telegraph is necessary before the steamship company can be committed to the allotment of cargo space or berths, as the case may be.

The affidavit goes on to say that this agency in London has no authority whatever to deal with any claims made against the steamship company, no authority to expend any money or incur any liabilities without special instructions; and whenever the shipping company attends a conference in which it is interested in London it sends its own representatives over and does not attend the conference through anybody from this particular agency.

Looked at on the other side, Messrs. Stelp and Leighton Limited pay their own office rent. They have no contribution whatever to that from the steamship company. They are remunerated by a commission. During the last twelve months, it is true, that commission, from simply being a commission on work done, has become a guaranteed commission, but it is still remuneration by commission. No office is set aside for the steamship company. No clerks are specially detailed for the work of the steamship company. And the affidavit states that the company has no residence, office, or place of business, registered or otherwise, at the office of Messrs. Stelp & Leighton Limited. There is no single clerk or officer who is in the employ of the steamship company; neither have Messrs. Stelp and Leighton Limited any interest financially in the Hamburg South America Steamship Company, nor has the Hamburg South America Steamship Company any interest financially in Messrs. Stelp and Leighton Limited.

In a word, Mr. Dalgleish, the secretary of the company, says that Messrs. Stelp and Leighton Limited carries on its own business in Fenchurch-street; it does not carry on the business of the defendants at that address or anywhere, except in the sense that as part of its own business Messrs. Stelp and Leighton Limited act as agents for the defendants in the way I have already described.

I ought to say by way of qualification that in past years, though not at present, there has been one exception as regards the employment of clerks. It appears that in connection with the use of some of their steamships for the tours which are so popular at the present time, the Hamburg South America Steamship Company have sent over, or lent, a clerk to this London office to deal with this particular service. That has not been so in the present year; but it is the only exception to the fact I have stated, that there is no employment at Fenchurch-street of any clerk belonging to the steamship company.

Now, in those circumstances, can it be said that this great and well-known German steamship company carries on its business or is resident in this country or, to put it shortly, is here?

Speaking for myself, I consider that this case is disposed of by Langton, J.'s decision in *The Lalandia* (*sup.*), in connection with similar activities exercised by Messrs. Escombe McGrath and Co. on behalf of the East Asiatic Company Limited. I have carefully considered the facts in this case, and the facts in that, as they are set out very fully in the report, and I cannot see any essential difference between the two. I think that was a perfectly plain case in which the East Asiatic Company Limited did not carry on business in this country, and I think that this is an equally plain case. But in deference to the argument of Mr. Bateson, who has pressed me, as counsel in *The Lalandia* pressed my brother Langton, with a previous decision of the Court of Appeal in the *Thames and Mersey Marine Insurance Company* v. *Societa di Navigazione a Vapore del Lloyd Austriaco* (*sup.*), I will just say a word as to where I think the distinction between the cases lies.

One thing that is quite certain in this line of cases is that ultimately it is a question of fact whether the foreign corporation does or does not reside, carry on business, or exist in the United Kingdom. But of course the decision has to be arrived at with reference to known principles. First of all it is vital to see what are the facts in any given case in which, or upon which, the court has to come to a conclusion one way or another on this not always easy matter.

In the case reported in 12 Asp. Mar. Law Cas. I find, among other things—leaving aside such unimportant and insignificant matters as the use of a particular number or a particular name in the telephone book, to which I do not think anybody really paid very much attention—that in that particular case the firm which was said to be carrying on the business of the Austrian Lloyd was remunerated not merely by a commission for freight arranged and steamer tickets supplied, and was not merely reimbursed for its out-of-pocket expenses for postage, but received 480*l.* a year in addition, which was stated specifically to be for the rent of that part of the premises which was specifically allotted to their business, for the clerks who were separately employed on their business, and for sundry other office expenses. Moreover, in a very special sense, and not merely as a matter of description, the firm in that case were truly the general representatives of the shipping company, for not merely were they remunerated by commission for their own services but they were also remunerated by an overriding commission on the services of all the other people in the country who performed any services on behalf of the Austrian Lloyd. To quote Buckley, L.J.'s words in the judgment, he says (at p. 492): "The facts here are that for ten years (which is a substantial time) at a defined place (namely, 25 and 27, Bishopsgate-street) Messrs. Marcus Samuel and Co. in a separate part of the building, by a separate staff of clerks, and with the use of special note-paper bearing the name of the Austrian Lloyd Company, have issued tickets and made contracts for the carriage of passengers and their luggage and goods by steamers belonging to the Austrian Lloyd Company, and have on behalf of and in the name of the Austrian Lloyd Company, insured" and so forth. He then contrasts that with other agencies such as Cook's and the International Sleeping Car Company, and goes on to say: "The test in each case is to find the answer to the following question: Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case the corporation is and in the latter it is not carrying on business at that place. Marcus Samuel and Co. do the former; Thomas Cook and Son do the latter."

Now, Mr. Bateson in his argument said that passage referred, and could only refer, to the fact stated in that case at p. 491: "In practice the agents were often allotted a limited number of berths on a steamer, but apart from this they could not allot berths and book any freight without telegraphing to the defendants."

Mr. Bateson said that Buckley, L.J. made that circumstance the test and the decisive test—a circumstance which, as he points out, is common with this case on the admission of Mr. Willmer, namely, that though, speaking generally, they have to telegraph or telephone for instructions, in certain cases the agents have berths allotted them which they can dispose of at once. He says that that was what Buckley, L.J. meant by his judgment, that when you once get that circumstance—he did add provided that other circumstances are such as to give room for the implication—it is decisive.

Now, I cannot think that that is what Buckley, L.J. meant in the *Austrian Lloyd* case. I read his judgment as meaning that if, when reviewing the circumstances as a whole, you come to the conclusion that, taking one thing with another, not in one single case, not even in one class of cases, but taking all the circumstances into account, it is the agency in this country which is making the contracts, then you get a case in which the foreign corporation is carrying on business in this country; when on the other hand you find the agency is merely selling the foreign corporation's contracts, then the foreign corporation is not carrying on business in this country. I think he meant exactly the same thing, expressed in slightly different words, as Lord Herschell meant in the well-known Inland Revenue case, *Grainger and Son* v. *Gough* (1896, A. C. 325), with regard to Roederer champagne. The whole question is whether the foreign corporation is trading "with" this country or is trading "within" this country. In the former case it is not, in the latter case it is, amenable to taxation in this country, as exercising a trade in the country.

Speaking for myself, I cannot see that there is any real distinction between the line of reasoning which would lead to the conclusion that the company was carrying on business in this country for the one purpose or for the other purpose.

I do not think Buckley, L.J., in the *Austrian Lloyd* case, was taking as decisive the mere fact that in certain cases, apart from everything else, the agents had the right to make a final booking of passenger berths. If one looks at it as a matter of common sense it cannot be so. There are only a certain number of berths in a steamship. Somehow or other, before a contract is made in London, when corresponding contracts can be made in Hamburg, Paris, and a dozen different places for any given voyage or series of voyages by one ship or another—somehow or other there has to come into play a co-ordinating mind which is able to say that berth A 31 or B 29 has not already been booked for someone; and it does not seem to me to make the slightest difference whether, with regard to the booking of any given berth, the particular agent in Hamburg, Paris, London, or anywhere else has to telephone or telegraph to that particular co-ordinating authority before allocating a particular berth to a particular passenger, or whether, on the other hand, because it is known that a certain number of berths will necessarily be required from London or Paris or wherever the place may be, the company say in advance, with reference to a particular ship, that berths 1 to 50 may be allotted without specific instructions on the agent's own authority. That, taken by itself, cannot possibly make the whole difference whether the foreign corporation is carrying on business within this country, or whether it is on the other hand merely trading with this country. And I think myself that in the *Austrian Lloyd* case, if I had to judge that case as a question of fact, I should consider that by far the most important fact was the fact that to all intents and purposes the Austrian Lloyd company rented an office in this country from Messrs. Marcus Samuel and Co., or at any rate rented part of an office, and employed part of a staff of clerks and paid for them as such; and that having done that they remunerated their representatives not merely for the work they did but for the work anybody else did in this country—in other words, put them in a position of being their *alter ego* in this country. But it is sufficient for me to say there are quite plain distinctions between this case and the *Austrian Lloyd* case decided in 1914.

If I might hazard a guess, just as in the champagne cases—which were originally decided the other way—the facts had changed by the time *Grainger and Son* v. *Gough* (*sup.*) came to be decided, so I should guess that in the interval between 1914 and the year 1933, when *The Lalandia*

(*sup.*) was decided, foreign companies—for precisely the same reason—had decided to make their position perfectly secure from the inroads of the inland revenue as well as from hostile litigants. And that is why, I have no doubt, the facts of this case can, with a few exceptions, be stated in almost the same language as that used in Mr. McGrath's affidavit in *The Lalandia*.

I come back to that case. There is absolutely no distinction between the two cases. This is a perfectly plain case in which there is not the slightest ground for saying that the Hamburg South America Steamship Company is carrying on business in this country. The writ and service of the writ must be set aside.

If I had to hold that the writ was good I would have had to consider that which is now academic, that is to say, whether service on somebody who happens to be the secretary of Messrs. Stelp and Leighton Limited, but who is not himself in any way employed under the Hamburg South America Steamship Company, would have been good, even if the writ itself had been properly made out.

In my opinion this writ must be set aside, with costs.

Leave to appeal was granted.

Solicitors for the applicants on the motion (the defendants in the action), *Bentleys, Stokes,* and *Lowless*.

Solicitors for the respondents (the plaintiffs). *Thomas Cooper* and *Co*.

October 19 *and* 20, 1936.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Curlew. (*a*)

Collision of tug and tow with Battersea Bridge, River Thames, and with other craft moored in the river—Negligence of defendant vessel with which there was no impact—Misleading lights—Defendant vessel dropping down river with anchor on bottom—Anchor held through fouling dredger's moorings—Vessel thus brought up, a vessel "at anchor or moored" within by-law 14 *of Port of London River By-laws,* 1914–1934, *and accordingly not entitled to exhibit lights of a vessel "under way"—Vessel exhibiting such lights, so as to mislead others and cause damage, liable.*

This was a claim by the owners of the tug B. *and the tank barge* H. *against the owners of the sailing barge* C. *for damages in respect of an accident which occurred in the River Thames at about* 5.45 *p.m. on the* 28*th December,* 1935, *and in the course of which the* B. *and the* H. *collided with Battersea Bridge owing, as the plaintiffs alleged, to the negligent navigation of the* C. *by the defendants or their servants. The* B., *with six empty barges in tow arranged in three ranks of two abreast, the* H. *being the starboard barge in the first rank, was proceeding with her regulation navigation and towing lights duly exhibited down river from Shell-Mex Wharf, Fulham, to Shellhaven. The flotilla was about in mid-channel and the* B., *with her engines working at full speed ahead and her wheel slightly starboarded, was shaping to pass through the central arch of Battersea Bridge, when those on board the* B. *observed about* 600 *yards away and bearing a little on their starboard bow the red light of the* C., *which was apparently dropping down the river on the ebb tide and about to pass through the central arch of the bridge. The engines of the* B. *were thereupon put to slow ahead in order to enable the* C. *to clear the arch well ahead of the* B., *and a short blast was sounded on the* B.'s *whistle to indicate to the* C. *that the* B. *intended to pass to starboard of her and to warn the* C. *to sheer away towards the north after clearing the bridge so as to give the* B. *and her tow more room to pass to the southward of her. When, however, the* B. *had got to within a short distance of the* C., *the* C. *suddenly shut in her red light and opened her green and she was observed to be completely blocking the passage through the central arch. It was then realised by the master of the* B. *that the* C., *although exhibiting navigation lights, had in fact fouled with her anchor the breast chain of a P.L.A. dredger, which was lying moored a short distance above Battersea Bridge, and he accordingly hard-a-ported and then hard-a-starboarded the wheel of the* B. *in an endeavour to pass through the No.* 2 *arch which was next to and to the northward of the central arch, and thus avoid colliding with the* C., *but the* B. *and the* H. *collided with the bridge and were seriously damaged, whilst the remaining tows of the* B., *having got out of control, collided with and damaged a number of other craft moored on the north side of the river. The defendants denied negligence.*

Held, the learned judge having found that the reason why the master of the B. *failed to clear No.* 2 *arch was that owing to the sudden action which he had to take he was more to the southward of the exact centre of that arch than he would have been if he had been able to approach it in a normal way and that at the stage at which the tide was the width of the clear waterway available to the* B. *and her tow under No.* 2 *arch was very limited* (1) *that in the circumstances the action of the master of the* B., *when he realised that the central arch was blocked for him by the* C., *was justified and that the* B. *must therefore be absolved from blame;* (2) *that the* C. *was solely to blame for the damage because* (a) *she was negligent in dropping her anchor on the bottom although, as the evidence proved, she had previously been warned not to do so, and* (b) *she misled those on board the* B. *through continuing to exhibit under-way lights after she was no longer a vessel under way, but was by reason of her anchor having become and remained foul of the dredger's breast chain a "vessel at anchor or moored" within the meaning of by-law* 14 *of the Port of London River By-laws,* 1914–1934.

DAMAGE by collision with a bridge, &c.

The plaintiffs were the Union Lighterage Company Limited, of London, owners of the steel screw steam-tug *Bruno* (100 tons gross and fitted with

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

engines of 53 h.p. nom.) and of the tank barge *Hector*, which was one of six empty craft being towed by the *Bruno* down the River Thames from Shell-Mex Wharf, Fulham, to Shellhaven. The defendants were Messrs. Eastwoods Limited, owners of the wooden sailing barge *Curlew* (44 tons register). At the time here in question—*i.e.*, shortly before 5.45 p.m. on the 28th December, 1935, the *Curlew* was lying head up river just above the central arch of Battersea Bridge. The *Curlew's* anchor had become foul of the starboard after breastchain of No. 9 Port of London Authority dredger, moored head up river about in line with the south abutment of the central arch of the bridge and about 100ft. above the fire float, which, in its turn, is moored with its stern about 100ft. above the abutment. The collision occurred in dark but clear weather. The *Bruno* came into violent contact with No. 2 arch and damaged her mast, wheel-house and steering gear; the *Hector's* starboard bow hit the abutment south of No. 2 arch and was damaged; and the remaining tows of the *Bruno* collided with and damaged certain boats lying moored on the north side of the river.

The facts appear fully in the headnote and in the judgment.

The negligence imputed to the defendants by the plaintiffs was that those in charge of the *Curlew* negligently and improperly failed to keep a good look-out; improperly let go their anchor in the vicinity of the moorings of the dredge No. 9; improperly caused or allowed their anchor to become foul of the moorings of the dredger; failed to navigate the *Curlew* with care and caution when passing the dredger; failed to take the proper or any steps to clear their anchor in due time or at all; improperly exhibited the lights for a vessel under way and failed to exhibit the lights for a vessel at anchor, or, alternatively, the lights for a vessel not under command; failed to keep their course and speed and (or) failed to give any warning that they were unable to do so; and failed to comply with by-laws 14, 19, 38, 41, and 42 of the Port of London River By-laws, 1914–1934; and with sect. 278 of the Port of London (Consolidation) Act, 1920; and with art. 4 of the Regulations for Preventing Collisions at Sea (relating, *inter alia*, to the lights to be carried by vessels not under command). In their defence the defendants denied negligence, said that the *Bruno* could and ought to have passed through the centre arch of Battersea Bridge, two other tugs with craft in tow having previously passed the *Curlew* in safety and gone through the centre arch without being impeded by her, and blamed the *Bruno* for improperly and at an improper time altering course to port and attempting to pass through the No. 2 arch; approaching too close to the *Curlew*; proceeding at an excessive speed, and failing to comply with by-laws 39, 41, and 42 of the Port of London River By-laws, 1914–1934.

In the course of his argument counsel for the defendants said that it was doubtful whether in the particular circumstances of this case the *Curlew* could be said to be a vessel "at anchor or moored" and whether she ought to have exhibited the lights prescribed by by-law 14 of the Port of London River By-laws, 1914–1934. But on behalf of the plaintiffs it was contended that it was quite clear that, according to by-law 5, which defines a vessel "under way" as a vessel "not at anchor, or moored, or made fast to the shore, or aground," and includes in that expression "a vessel dropping up or down the river with her anchor on the ground," the *Curlew* would not be said to be a vessel "under way."

H. G. Willmer for the plaintiffs.

Owen L. Bateson for the defendants.

Bucknill, J.—In this case the Union Lighterage Company are claiming against the owners of the sailing barge *Curlew* for damage sustained by their tug *Bruno* and their dumb barge *Hector*. The plaintiffs allege that this damage was caused by the negligence of the defendants' servants in charge of the *Curlew*. The damage was done at about 5.45 p.m. on the 28th December, 1935, and was received when the *Bruno* and the Hector struck Battersea Bridge. There are five arches to this bridge and the top of the wheel-house of the *Bruno* struck the top of the No. 2 arch of the bridge, counting from the north side.

The case made by the master of the *Bruno* was, to put it shortly, that he was coming down the Thames with six empty barges in tow in three ranks. The total length of the flotilla was about 330ft. and its maximum beam was about 49ft. The *Bruno* herself is about 76ft. long and 20ft. in beam. The weather was dark but clear; there was a moderate wind—there was some dispute as to its direction, but I accept the master's evidence that at Battersea Bridge it was south-easterly. The tide was ebb about two hours after high water, of a force of about three knots.

There was a Port of London Authority steam dredger moored head up river about in line with the south abutment of the centre arch of the bridge and about 100ft. above the fire float, which, in its turn, is moored with its stern about 100ft. above this abutment. The dredger was exhibiting the three triangular white lights prescribed by rule 18 for a steam dredger moored in the river, and had four breast chains out—two forward and two aft, port and starboard. The starboard breast chains had about 175ft. on each chain and were laid at an angle on the bow and quarter and were in fact slack at the time.

The *Bruno*, as I find, was coming down the river in about mid-channel at a speed of about seven knots through the water and was shaping to pass through the centre arch, which was the arch normally used by her master, who has been a master of tugs for twelve years. He seldom uses No. 2 arch. As he approached the bridge he saw the red light of a vessel which turned out to be the *Curlew* pretty well in the middle of the centre arch. The master of the *Bruno* thought that the vessel was a sailing barge which was driving down river on the tide, and that she was showing the proper under-way lights for a sailing barge under such circumstances, and he accordingly eased his engines from full to slow in order to follow the *Curlew* down through the centre arch and blew one short blast to indicate to the sailing barge that he was going to pass to the southward of her, and that he wanted the barge to sheer away to the northward after she cleared the bridge and thereby give the *Bruno* more room to pass to the southward of her.

The master of the *Bruno* said, and I see no reason to doubt his evidence, which was given in a straightforward and candid way, that he expected to pass through the centre arch without difficulty after the *Curlew* had passed through. At about the same time as he noticed the *Curlew*, he put his helm amidships, and thereafter kept his tug and tow heading for the centre arch. Shortly afterwards the master of the *Bruno* saw the red light of the *Curlew* shut in and her green light appeared under the centre of the middle arch, and he then realised that there was something wrong, and guessed correctly that the anchor of

the *Curlew*, on which she was dropping down river, had fouled the moorings of the dredger lying just above the bridge. The master of the *Bruno* came to the conclusion that if he continued on his course for the centre arch he was bound to run down the sailing barge, and to prevent this happening he put his wheel hard-a-port and shortly afterwards hard-a-starboard to try to get through No. 2 arch, but he failed to get clear through this arch and the damage was done which is the subject of the action. The reason why he failed to clear this arch was that owing to the sudden action which he had to take he was more to the southward of the exact centre of the arch than he would have been if he had approached it in a normal way. At that state of the tide the width of the clear water-way available for him and his tow under No. 2 arch was very limited.

Now, in this case I have only heard the evidence of the plaintiffs because the defendants, I expect wisely, elected to call no evidence. I accept as accurate the evidence called on behalf of the plaintiffs. I am satisfied that the master of the *Bruno* kept heading for the central arch and intended to go through it until he realised that the *Curlew* was stationary and that he was compelled to depart from this intention by the position of the *Curlew*. I am also satisfied that at the time when he took action to make No. 2 arch instead of the central arch the *Curlew* was lying in the fairway approaching the central arch in such a position as to block that arch for the *Bruno* and her craft in tow.

I have asked the Elder Brethren whether in their opinion the circumstances were such that a careful tugmaster ought to have realised sooner than the master of the *Bruno* realised that he could not make the central arch owing to the position of the *Curlew*, and they say "No." I have also asked them whether in their opinion the master of the *Bruno* took the right action when he did realise that the central arch was blocked for him by the *Curlew*. On this point they advise me that the master of the *Bruno* was justified in trying to make No. 2 arch in preference to the risk of trying to turn head to tide, having regard to the length of his tow and the strength and set of the tide. I agree with this advice, which coincides with my own view on these matters. I, therefore, absolve the *Bruno* from blame as regards her navigation.

I have now to consider whether the *Curlew* was to blame, and if so, whether her negligence caused the damage in dispute. In my view the damage to the *Bruno* was solely due to the fact that the *Curlew* was improperly exhibiting the navigation lights for a sailing vessel under way, and thereby misled the master of the *Bruno*. The evidence before me proved that the *Curlew*, when approaching the P.L.A. dredger, was warned by a watchman on the P.L.A. dredger not to drop her anchor on the bottom, but, notwithstanding this warning, she did so, and in consequence her anchor fouled the starboard aft mooring chain of the dredger.

I think, and the Elder Brethren agree with me, that this was an act of negligence on the part of the *Curlew*. Thereafter the *Curlew* remained with her anchor foul of the anchor attached to this mooring chain of the dredger and thereby remained fast for nearly half an hour before the collision between the *Bruno* and the bridge. Notwithstanding this, the *Curlew* continued to exhibit her under-way lights in breach of the Thames By-laws right up to the collision in question, although she had ample opportunity to take them in. The *Curlew* was certainly not under way within the meaning of those words as defined by the rules.

Mr. Bateson argued that it was doubtful whether the *Curlew* could be said to be at anchor or moored under the circumstances, and whether she ought to have exhibited the light prescribed by rule 14 for vessels at a[illegible] or moored. If it is necessary for me to decide the point, I hold that the *Curlew* was at anchor or moored within the meaning of rule 14, and that she ought not only to have taken in her under-way lights, but she ought also to have exhibited an anchor light, because she was in fact riding to her anchor, which was foul of the mooring chain of the dredger. The Elder Brethren agree with me that under the circumstances the *Curlew* ought to have exhibited an anchor light when her anchor held her.

Judgment was accordingly entered for the plaintiffs.

Solicitors: for the plaintiffs, *Keene, Marsland and Co.*; for the defendants, *J. A. and H. E. Farnfield.*

Supreme Court of Judicature.

COURT OF APPEAL.

December 8, 9, 10, 11, 14 *and* 15, 1936.

(Before GREER, SLESSER, and SCOTT, L.JJ., assisted by Nautical Assessors.)

The Rockabill. (*a*)

Collision in the Mersey—Respective duties of vessel leaving Princes Landing Stage and ship proceeding out of northern entrance of Princes Half Tide Dock into the river—Powers and responsibilities of Harbour Authority—Direction given by dock-master to ship in river entrance to "come ahead," an "order" within sect. 49 *of Mersey Docks Consolidation Act*, 1858—*Both vessels, but not the Harbour Authority, held to blame—Judgment of the court below reversed.*

This was an appeal (a) *by the owners of the* R. *and* (b) *by the M. Docks and Harbour Board from a judgment of Bucknill, J. delivered in the Admiralty Court on the* 26*th May*, 1936 (155 *L. T. Rep.* 461), *by which the plaintiffs' vessel, the* K. O., *was absolved from all blame in respect of a collision which occurred between it and the* R. *in the Mersey on* 17*th September*, 1935, *and both defendants, the owners of the* R. *and the M. Docks and Harbour Board, were held to be liable to the owners of the* K. O. *for the damage which both vessels sustained. The collision occurred in the following circumstances: The* K. O., *which was heading north and stemming the flood tide, had left Princes Landing Stage shortly before* 2.15 *p.m., and was on her way to her anchorage at the Sloyne. Owing to the exceptional force of the west-north-westerly gale then prevailing, the* K. O. *left the landing stage with her engines working at full speed ahead. The* R. *had just emerged from the northern entrance of Princes Half Tide Basin into the river and had her engines*

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

working at full speed ahead when the impact took place.

The plaintiffs had originally proceeded only against the owners of the R., *but the latter, by their counterclaim against the owners of the* K. O., *brought in the M. Docks and Harbour Board as second defendants, alleging that the servants of the Board who had assisted the* R. *out of the northern entrance to the Half Tide Dock into the river, and under whose orders the* R. *had acted and was bound to act under the provisions of sect.* 49 *of the Mersey Docks Consolidation Act,* 1858, *had failed to keep a good look-out and ordered the* R. *to let go her bow rope and to come ahead into the river at an improper time, and had failed to give any other order or to take any steps to prevent the collision, and, further, that they had improperly allowed the* K. O. *to leave the landing stage when they did. All the parties denied their own negligence, and the Harbour Board blamed both the* K. O. *and the* R. *for the collision.*

Bucknill, J. had found that when the K. O. *cast off from the stage, the* R. *was still in the dock and practically stationary; that if they had kept a better look-out, those on board the* R. *would have seen the* K. O. *start to move; that the dock-master told the* R. *to come ahead; that the assistant dock-master, who was standing on the north wall of the entrance and near the river end, failed to report the* K. O. *to the dock-master as early as he should have done and that the dock-master omitted to take reasonable care not to allow the* R. *to go out into the river from the dock at an improper time. On these findings, the learned judge below held that the* R. *was to blame for coming out into the river when it was unsafe to do so, and that the M. Docks and Harbour Board were also liable because both the failure of the assistant dock-master to report the* K. O. *to the dock-master as early as he should have done, and the failure of the dock-master to take reasonable care not to allow the* R. *to come out into the river at a time which was improper, were acts of negligence which contributed to the collision. As to the dock-master's direction to the* R. *to "come ahead," his Lordship held that this was not a peremptory order such as, by virtue of sect.* 49 *of the Mersey Docks Consolidation Act,* 1858, *the master of the* R. *was bound to obey.* (The Sunlight (90 *L. T. Rep.* 32; (1904) P. 100)).

Held by the Court of Appeal (reversing Bucknill, J.), (1) *that whilst the* R. *was to blame for an inadequate look-out between the time when she obeyed the dock-master's order to come ahead and the time when she actually emerged into the river and for not checking her speed, the* K. O. *was also to blame* (a) *for not anticipating in the first instance that when she left the landing stage there would be risk of collision; and* (b) *for not keeping a proper look-out after she had started away from the landing stage. The proportions of blame were assessed at two-thirds on the* K. O. *and one-third on the* R. (2) *Per Greer and Scott, L.JJ., Slesser, L.J. expressing a doubt on this point, that there was no negligence on the part of the servants of the M. Docks and Harbour Board.* (3) *That even if the M. Docks and Harbour Board were negligent, they were at common law (since in their case sect.* 1 *of the Maritime Conventions Act,* 1911, *did not apply) protected from liability inasmuch as both the* K. O. *and the* R. *had been found to blame for the collision. As to the order given by the dock-master to the* R. *to come ahead, this was a direction within the meaning of sect.* 49 *of the Mersey Docks Consolidation Act,* 1858, *which the master of the* R. *was bound to obey:* (The Bilbao, 3 *L. T. Rep.* 338; (1860) *Lush. Adm. Rep.* 149; Reney *v.* Magistrates of Kirkcudbright, 67 *L. T. Rep.* 474; (1892) *A. C.* 264; *and* Taylor *v.* Burger and others, 8 *Asp. Mar. Law Cas.* 364; 78 *L. T. Rep.* 93, *cited*). *The judgment of Lord Wright in* Powell and Wife *v.* Streatham Manor Nursing Home (152 *L. T. Rep.* 563; (1935) *A. C. at pp.* 264 *and* 265) *as to the duty of the Court of Appeal not to reverse, other things being equal, the trial judge when he has had an opportunity of forming an opinion as to the credibility of a witness on a matter in which that credibility is vital and has come to a decision, also referred to.*

DAMAGE by collision.

The appellants were (*a*) the Clyde Shipping Company Limited, of Glasgow, owners of the steamship *Rockabill* (1392 tons gross), and (*b*) the Mersey Docks and Harbour Board. The respondents were the Isle of Man Steam Packet Company Limited, owners of the steamship *King Orry* (1877 tons gross). Both vessels were damaged as the result of a collision between them which occurred on the 17th September, 1935, at about 2.15 p.m. in the River Mersey.

The material facts, as summarised in the judgment of Bucknill, J. (155 L. T. Rep., pp. 463–466), were as follows:

The collision occurred about abreast of the North Island in the entrance to the Princes Half Tide Dock, and a little inside the line of the outside of Princes Landing Stage. The stem of the *King Orry* struck the port side of the *Rockabill* about 40ft. forward of her stern, the angle of the blow being about six points leading aft on the *Rockabill*. At the time of the collision the *Rockabill's* stern was about 100ft. clear of the western exit of the gateway. Shortly before the collision the *King Orry* was lying alongside the Princes Landing Stage heading to the north and to the flood tide. The north end of the stage is about 200ft. to the westward of the outer exit of the dock, and about 700ft. to the southward of a line drawn through the middle of the passage through the northern entrance of the Half Tide Dock, the river at this place running almost due north and south. The *King Orry* had the wind, which was a west-north-westerly gale at the time, on her port beam. She was discharging her passengers, and was about to get under way and proceed to her anchorage in the Sloyne. After casting off from the stage, it was necessary for the *King Orry*, having regard to the exceptional force of the wind, to go full speed ahead, and as soon as her stem was clear of the jetty to turn to the westward. When the *King Orry* started to get under way, one long blast was sounded on her

whistle, and it was only when she was clear of the jetty that her master realised that the *Rockabill* was coming out from the northern entrance of the Half Tide Basin into the river. Thereupon another long blast was sounded on the *King Orry's* whistle and her engines were put full speed astern, the master of the *King Orry* waving to the *Rockabill* to come on and cross his bows. The *Rockabill* increased her speed and altered her course to port, but very shortly afterwards the collision happened. At the time of the impact the *King Orry* had one to two knots, and the *Rockabill* about six knots, headway through the water. As to the *Rockabill*, she had come out of the Waterloo Dock into Princes Half Tide Dock stern first. In the Half Tide Dock, she turned round, bringing her head from north to about west to square up for the entrance. Having made this turn, a bow rope which she had leading from her starboard bow to a mushroom at the northern lip of the north entrance, was hove upon, and when the *Rockabill* was about squared up for the entrance the dock-master, who was employed by the second defendants, called out to the master of the *Rockabill*: "All clear north, come ahead." The engines of the *Rockabill* were put full speed ahead, and her wheel was starboarded and then steadied. The dock-master ordered the bow rope to be taken off the mushroom, and shortly afterwards to be let go altogether. Shortly afterwards the master of the *Rockabill* saw the hull of the *King Orry* close on his port bow and clear of the Princes Landing Stage, and at about the same time the attention of the dock-master was drawn to the *King Orry* by his assistant, who was standing on the north wall of the entrance and near the river end. Although the master of the *Rockabill*, on seeing the *King Orry*, gave an emergency repeat order of full ahead and hard-a-ported his wheel, the vessels were very shortly afterwards in collision.

Lewis Noad, K.C. and *R. E. Gething* for the first appellants, the owners of the *Rockabill*.

R. K. Chappell, K.C. and *E. W. Brightman* for the second appellants, the Mersey Docks and Harbour Board.

F. A. Sellers, K.C. and *H. I. Nelson* for the respondents, the owners of the *King Orry*.

Greer, L.J.—This is an appeal by the owners of the *Rockabill* against the findings of Bucknill, J. in the Admiralty Court, in which he absolved the other vessel—the plaintiffs' vessel—the *King Orry*, entirely from any blame for the collision that happened on the 17th September, 1935, between the *King Orry* and the *Rockabill*, and an appeal by the Dock Board against this finding that the Dock Board could be made responsible either to the *Rockabill* or to the *King Orry* for the results of the collision.

The two ships were of a different calibre, the first was a fast and powerful vessel with twin screws capable of easy manœuvring, and the other vessel was about the same size but with a single screw and not capable of the same power of manœuvring as the *King Orry* was. I accept the learned judge's conclusion that, as a matter of credit, he was, having seen the witnesses, entitled to pay more attention to the evidence given on behalf of the plaintiffs than to that which was given on behalf of the defendants, and the conclusion that we have all come to is that, upon the evidence given by the plaintiffs' witnesses—that is to say, the witnesses for the *King Orry*—it is plain that there was very serious fault on the part of the *King Orry*. We also think, having regard to the advice we have received from our assessors, that some blame was also to be attached to the other vessel, the *Rockabill*, and in the result we have come to the conclusion that the proportion of blame should be as two to one—two to the *King Orry* and one to the *Rockabill*.

Looking at the case of the two vessels, I cannot help thinking that the learned judge did not pay adequate attention to the facts which were proved with reference to the action of the *King Orry*. He says in his judgment: "A point was made against the *King Orry* that in any event she was to blame for coming away from the stage at full speed. I have consulted the Elder Brethren on this point, and they agree with the master of the *King Orry* and with Georgeson, the head stageman, and with Bingham, that under the circumstances to come full ahead was the only safe way to clear the stage, and that it was not negligent navigation under the circumstances, always provided, of course, that they were entitled to expect the *Rockabill* to do the right thing and not come out into the river at an improper time. It was also argued that the *King Orry* ought to have employed a tug to assist her in her manœuvre. This was not pleaded, and do not think the point has any substance." I agree with that conclusion that there was no reason to say that the *King Orry* was wrong in failing to employ a tug, but we are advised that it was quite impossible for her immediately to go full ahead from the place where she was at the landing stage in the second berth. Before she could go full speed ahead she had to get her head well away from the landing stage. Under those circumstances the position of the *King Orry* was this: With the help of Georgeson, the master of the *King Orry* was observing what was taking place in the adjoining Waterloo basin, and if he had exercised the intelligence which I know he must have possessed, Captain Woods ought to have known that the *Rockabill*, instead of having come into the dock backwards, manœuvring to get away from the Waterloo basin, was, in fact, shaping to get out of the dock and to go into the river.

Under these circumstances it seems to me that it is impossible to relieve the master of the *King Orry* from blame in the first instance. There was no reason why he should hurry away from the position which he occupied in his berth at the stage in order to get to the Sloyne, where he would await orders for the next move. And he ought to have anticipated that there was a grave risk of collision if he went ahead without making some further observations as to what was happening to the other vessel. He made none, and instead of that no good look-out was kept on the *King Orry* after he started full ahead. It is clear from the evidence given by the witnesses from the *King Orry* that no adequate look-out was kept after she left the stage, and that he only learnt from the second officer, who was at the wheel, that there was a danger of collision when the risk of collision had, in fact, arisen and when it was impossible to avoid it. He then took what I think was the right course which, if he had taken it a few moments earlier, would have avoided the collision. It is not right to say that it would have been risky for him to have taken that move a second or two sooner because, of course, what happens when a vessel goes astern—puts her engines astern—is not that immediately she runs astern, but she merely puts a break on her forward movement, and that happened in this particular case. But it happened too late: it happened at a time when collision was, in my judgment, inevitable and, therefore, I think the *King Orry* was to blame in two respects. In not anticipating, in the first instance, that when she started there would be a risk of collision, and,

secondly, in not keeping a proper look-out after she started. That is the view which the whole court have adopted from the reading of the evidence in the first instance. I call attention especially to the answer which I think was given in cross-examination by the master of the *King Orry*. He was asked this question in cross-examination by the learned counsel for the Dock Board: "If you knew that that vessel nosing at the entrance was a vessel which intended to come out then and there, would you have left the stage? (A.) No, not if I had any indication from her that she was going to come out, I would not have left." He had no indication from her that she was going to come out, and he admits that if he had really used his engines he would not have left. "(Q.) You did not know what she was going to do? (A.) No. (Q.) You took a chance? (A.) I blew my whistle. (Q.) You took a chance, captain? (A.) Yes." That seems to me to mean that the best he can say is that he did not know whether the other vessel was going to come out, or was not going to come out, but he was willing to risk the chance that she might be coming out, and that accordingly he commenced his manœuvre at a time when he had no certainty whatever that there would not be a risk of collision.

So much with regard to the *King Orry*. With regard to the *Rockabill*, I think there are admissions in the evidence given by the captain of the *Rockabill*, and evidence given by the mate of the *Rockabill*, which lead me to the conclusion, even if we had not had advice on the subject, that the *Rockabill* was not justified in going right ahead in and going out of the channel into the river. We have had the assistance, on this part of the case, of our assessors, and they see no reason to say that the *Rockabill* could not have pulled up in the outer entrance of the channel. But by the time she reached the outer entrance she would only be travelling at the rate of three knots, and the dock-master and the man behind him who were following up were in my opinion in a position to take a rope, if a rope was thrown ashore, and if the *Rockabill* was asking to have a rope. We are also advised that there would have been no real danger to the *Rockabill* in putting her engines astern at that time, and therefore, with the carpenter and his fender, and with the chance of throwing a rope ashore, there was no reason why he should not, at that time, have pulled up his vessel and so avoided the collision. Instead of doing that he accepted the invitation which was thrown out to him by the mate of the *King Orry* to come ahead as fast as he could in order that the blow—if blow there should be—would be lessened by his going as fast ahead as he could. Under these circumstances we think that the *Rockabill* also was part to blame for the collision that happened. Both vessels were keeping an inadequate look-out; both vessels did not realise the danger until it was impossible to avoid it; and both vessels, in our judgment, are liable for the consequences of the collision.

With reference to the conduct of the Dock Board officials my own view is that there was no negligence on their part at all, but that is a matter of comparative unimportance having regard to the fact that, if there was contributory negligence on the part of the two vessels, that would relieve the Dock Board of the consequences of negligence. The reason why I say, in my judgment, that I think there was no negligence is this: the officials of the Dock Board could only see to the north at the time when the order was given to the defendants' vessel to come on, and, having regard to the conversation which the learned judge found had taken place between the master of the defendants' vessel and the dock-master, the order was what I call a conditional order, namely, that they should come ahead, keep a proper look-out at the same time, and if there was any danger towards the south and the west they should take such measures as would be necessary to save the situation. But, as they failed to do that, the responsibility is upon them, and not upon the Dock Board when, as I have said, it is quite immaterial for the purposes of this case whether the Dock Board officials were or were not to blame, because if both vessels were also to blame, then at common law there is a complete defence for the Dock Board.

The result of these observations is that the *King Orry* ought to be held to blame, and the defendants' vessel, the *Rockabill*, ought also to be held to blame. The proportion should be as two to one—two to the *King Orry* and one to the *Rockabill*, and that the Dock Board should succeed in their appeal. I will say a word as to the costs when my Lords have given judgment, and we have such assistance as learned counsel may desire to give us on that question.

Sleser, L.J.—I am of the same opinion.

I do not find it necessary to add anything to what my Lord has said about the liability of the *King Orry*, but I do feel it right to say that I have come to certain conclusions which lead to the same results as those stated by my Lord with regard to the *Rockabill*, but proceed upon a slightly different line. In my view the finding of the learned judge that Bingham said "come ahead" to the *Rockabill's* master did constitute a direction to him to come ahead within the meaning of the Mersey Docks Consolidation Act, 1858, s. 49, which provides that any harbour-master, dock-master, or pier-master may direct the time and manner of any vessels coming into or going out of any dock, more particularly when it is found that that direction to come ahead was accompanied by an order that the bow rope should be cast away. Now it is true that the dock-master's evidence goes to show that the master of the *Rockabill* had said "All clear north," but it must be remembered that his case was that he only said "all clear north" and did not say "come ahead with her"—on which the learned judge has found in favour of the story of the master of the *Rockabill*, that Captain Bingham did use that phrase, and, having used that phrase, coupled with the order to cast off the rope—even after he had been asked by one or two of the seamen whether he really meant that the rope should be cast off entirely, and he said yes—that constitutes in my mind a direction. I do not quite understand the distinction which the learned judge makes in his judgment between an order which he calls peremptory, and an order not so peremptory. I think that this is a clear direction within the meaning of the regulation which, in accordance with the decision in *The Bilbao* (3 L. T. Rep. 338; 1 Lushington Adm. Rep. 149) the master was, under compulsion of statute, to obey. Had the matter remained there I should have found it very difficult to see how the *Rockabill* could have been held responsible for coming ahead as they were directed. The authority of *Reney* v. *Magistrates of Kirkcudbright* (67 L. T. Rep. 474; (1892) A. C. 243) makes it quite clear to my mind that when a direction is given it is not for the master to whom the direction is given to criticise or consider it. It is his business to obey. The same is clear in the later case of *Taylor* v. *Burger*

and another—the case of *The Talisman* (78 L. T. Rep. 93) where the Lord Chancellor said at p. 94: "I adhere to what I said in the case of *Reney* v. *Magistrates of Kirkcudbright* that if it were once supposed that a person acting under the orders of a harbour-master is to exercise his own judgment whether or not the harbour-master's orders are most consistent with prudence, and then refuse to obey the order given, that would lead to very serious consequences indeed." But we have to consider what was the order given. The order given was to come ahead, and between the time the order was given and the time when the stem of the boat was emerging into the open river (when the effects of wind and tide would have made it impossible for the vessel to have arrested its course) —in the interval it was practical, had a proper look-out been kept, to have put the engines astern, and cast off the rope, there being a man walking along, as the evidence shows, ready to act upon that manœuvre. It is, therefore, as far as I am concerned, not because I think that the order originally given was not a direction which would have to be obeyed, but because after that order had been given there remained the duty to keep a good look-out, and the failure to keep that good look-out resulted in an accident which might have been avoided. During that short interval of time when the vessel was passing along the remainder of the channel we are advised by our assessors, and I agree, that the failure during that minute (and it cannot have been very much more) to keep a proper look-out during the passage through the channel amounted to some negligence on the part of the *Rockabill*. It is because I think that that negligence was comparatively slight that I agree in the proportions of blame which are suggested in this case, fixing the greater liability upon the *King Orry*, who, as my Lord says, showed a complete negligence in the matter. It only remains to say that having come to the conclusion that both vessels were negligent, the question of the liability of the Mersey Docks and Harbour Board does not arise at common law. Putting it that way as an economy of statement I do not propose to discuss matters much which, in the result, have proved to be irrelevant. But, in so far as I agree with the opinion indicated on the matter, I would say that, speaking for myself, I am not satisfied that, had the matter been closely investigated, the Harbour Board would necessarily have been acquitted of all liability for negligence. That is my personal opinion but, as I say, it is not necessary in the circumstances to say more, and I have to agree in the judgment which has been given by my Lord.

Scott, L.J.—I agree with the judgments which have been delivered, and I will limit my observations to what the learned judge calls the "crucial" question. I agree with him in so describing it. He says this: "These being the material facts as regards the navigation of each ship, the question now arises as to which of them is to blame. It appears to me that the crucial question in the decision of the case is whether the *King Orry* got under way before the *Rockabill* started ahead from the Princes Half Tide Dock entrance. On that question, after weighing and considering all the evidence, I have come to the conclusion that when the *King Orry* cast off from the stage the *Rockabill* was still in the Half Tide Dock and was about squared up to the northern entrance, and was practically stationary. I have come to this decision because I accepted the evidence called for the plaintiffs." Mr. Nelson, for the *King Orry*, very rightly put his finger on that passage in the judgment as the best piece of the judgment for his case, and urged us to follow the principle laid down in the common law case of *Powell and Wife* v. *Streatham Manor Nursing Home* (152 L. T. Rep. 563; (1935) A. C. 243), and particularly the passage in Lord Wright's judgment, where he has pointed out that where the trial judge has had an opportunity of forming an opinion as to the credibility of the witnesses on a matter in which that credibility was vital and has come to a decision, the Court of Appeal should not reverse the learned judge, other things being equal. We, of course, accept that principle, and anything I say is intended only to be consistent with it. What did the learned judge mean when he said: "I accepted the evidence called for the plaintiffs"? The critical point is that the only evidence called for the plaintiffs directly bearing on the position of the *Rockabill* was the evidence of the two independents —Peacock, the master of the *Grey Point*, and Roberts, the master of the *Coburg*. They are the only two who saw the *Rockabill* at the critical time immediately before she started to pass down the entrance towards the river. Peacock was situated abreast of the *King Orry* before she left the landing stage, about 500ft. from her lying out in the river. His evidence, in my view, contains in its statements plain errors of observation, and it is impossible to accept the judgment of a witness on a matter of observation on one point if he is plainly at fault on others. He says this—he heard long blasts from the *King Orry*. "(Q.) At that time had you seen the *Rockabill* which eventually came into collision? (A.) The *Rockabill* at that time was moving in the West Waterloo Dock. (Q.) What part of the dock? (A.) Coming from West Waterloo into Princes Half Tide Basin." It is quite clear that that is incorrect because the operation of turning in the basin after he had come from the West Waterloo into it must have occupied an appreciable length of time, and must have happened long before, in point of degree, the *King Orry* blew her long blast and cast off her bow rope. That being so, I do not feel justified in accepting his evidence of what he saw. Peacock said this: The *King Orry* moved along the stage and the *Rockabill* was squared up in the Princes Gateway and the *King Orry* proceeded to the north, and when he got to the end of the stage he blew his whistle again. "(Q.) What sort of a whistle? (A.) A long whistle. (Q.) Where about was the *Rockabill*, then? (A.) She was just coming into the Princes Gateway." Now that is, in my view, an absolute impossibility. We were advised by our assessors that at the time when the stem of the *Rockabill* had reached the outer end of the entrance—the river-end of the entrance—she would not have gathered a speed of more than three knots. As I put it yesterday to learned counsel, starting from nothing at the inner end of the entrance that would represent an average speed of a knot and a half through the entrance. She could not possibly have come into collision at all if it was true, as this witness says, that the whistle of the *King Orry* had been blown the second time when she was still in the Princes Gateway just coming into it. In considering probabilities one must remember the comparative speeds of the two vessels. The average speed of the *Rockabill* through the entrance was one-and-a-half knots, taking one minute and twenty seconds to cover the 200ft. length of the entrance. The *King Orry's* speed over the ground, against the tide, was put by her own captain at six knots when she passed the end of the jetty. Six knots represents a speed of 600ft.

in a minute. It is perfectly clear that, had the *Rockabill* been in the position of just entering the east end of the entrance at the time when the *King Orry* blew her second blast, the *King Orry* would have passed down the river and turned outwards to go to her anchorage long before the *Rockabill* reached the place of collision. I, therefore, reject Peacock's evidence as to times when he saw the *Rockabill*, on the ground that his observation and memory, taken together, cannot be accepted as trustworthy.

Now as regards the other witness, Roberts, he was in a bad position to see, because he was right off the starboard quarter of the *Rockabill*, away on the north side of the Princes Basin. He says that the *Rockabill* was squared up before the *King Orry* blew. That piece of evidence, I think, is to be accepted because that he could see. What she did afterwards in the entrance may have been less visible to him because she would be getting more into perspective, but there is no reason, as it seems to me, to doubt that particular answer, and he says this : "When he gets her squared up"—that is, when the captain of the *Rockabill* got her squared up—"I hear a heavy whistle from the southward in the river which I knew was the *King Orry's* whistle, because she has a shriller sound than any of the others." (Q.) "What about its length ? (A) That he blew it ? (Q.) Yes ; was it a short blast or a long blast ? (A.) No, it was a long blast ; he blew for about four seconds—four or five seconds. (Q.) How would her stem be "—that is, the stem of the *Rockabill*—" (A.) Just about entering the north entrance. Then he blows the long blast." Now that long blast, as we know from the other witness, was when he cast off the rope on the orders of the dock-master. That being so, I conclude that the learned judge had no evidence from the plaintiffs upon which he was entitled to say that the *Rockabill* was still in the Half Tide Dock, and only about squared up for the northern entrance. I think the only possible conclusion from the whole of the evidence is that the two vessels started at just about the same time. When I say "started," I mean when the *King Orry* cast off her bow rope, and when the *Rockabill* cast off her bow rope. That being so, the whole basis of the learned judge's assumption of fact, in my opinion, goes. He says : "If those on board the *King Orry* had been watching the *Rockabill* carefully in the Half Tide Dock they would have observed earlier than they did that she was in fact coming ahead into the entrance. But I do not think that if they had done so they would be to blame for continuing on at full speed as they did." Now that, in my view, is a complete *non sequitur*, unless you understand it as meaning that the *King Orry* started appreciably before the *Rockabill* got into the Half Tide Dock, and had got to the point of going full speed with her engines towards the north before the *Rockabill* started, having thrown off her bow rope under the orders of the dock-master.

In my view, for the reasons given by my Lord, and with the additional reasons that I have given on the details of the evidence, the true view is that the two vessels started at the same time. I agree entirely with what both my Lords have said as to the bounden duty of the *King Orry* to have had a good look-out and to have made sure that there was nothing coming out of the Princes Half Tide Entrance before they started at all. *Ex hypothesi* the master knew perfectly well that when he did start he could not stop ; that the only way of getting away from the landing stage with safety to himself and the stage was to go absolutely full speed with his powerful engines. He knew that he had got a gale of wind on his port beam, and he knew that he would have to starboard the vessel slightly with helm and propeller action, and that that would necessarily take him near to the entrance of the Princes Half Tide Dock. He knew further that, once having got out, he had got to go through with it, and that it would be impossible for him to stop because he would have run a very serious risk of his ship being thrown on to the jetty and doing worse damage both to himself and to others. That being so, it was his bounden duty, on those facts alone, to assure himself that there was nothing coming out. In addition to that we must take it that he was aware of the fact—as seems to be the case—that there was no system of communication between the pier-head and the north quay of the Princes Half Tide Entrance.

It is not for a court of law to indicate the way in which an authority like the Dock Board should carry out the executive discretion reposed in it by Parliament under its Act, but I do feel very strongly that the close proximity of the entrance to this Half Tide Dock to the northern end of the landing stage is one where this kind of accident ought to be regarded as always a serious possibility. I cannot help feeling that there ought to be some means of communication either by signal, such as there is in many places, visible from one point to the other, or a regular telephone system. In the absence of any such system—we must take it that the captain of the *King Orry* knew that there was no such system—that it was his duty to find out what the position was is made doubly important, and, having regard, on the one hand, to the impossibility of correcting things once he had started, and that he did start without making any inquiry at all, I entirely agree that that ship ought to be held liable for two-thirds of the total damage.

I only want to say one word about the *Rockabill*. The view I take is that in regard to her starting to go out through the entrance she is completely protected by what I regard as a definite direction from the Dock Board. I follow the principle indicated by Lord Halsbury in the case of *Taylor* v. *Burger and another* (*ubi sup.*), where he says you must not trouble about the particular words used ; you have got to form an opinion as to what the real intention and understanding of the order was. I have not the faintest doubt that in this case the dock-master gave a definite order to this vessel to go out and that that protected the owners of the vessel from any liability for starting out, but it did not protect them, in my view, from failing—as I think they did fail—to have a good look-out on their vessel, from the moment that they did start out pursuant to the order. The Dock Board's duty to the vessel ceased when the bow rope was cast off except and in so far as it was necessary to have somebody available to take a rope from the vessel should she want to throw a line ashore before she left the entrance.

On the north quay they certainly performed that duty because the dock-master, and the man with him, both walked down towards the river alongside the vessel as she went down. But the master of the *Rockabill* had no business to put himself in a position on the ship where he did not have an effective look-out from the moment he started. He had his chief officer on the bow ; he had himself on the bridge ; and the second mate at the wheel ; but he had nobody else on the bridge at all. He said he had to look aft to watch his vessel coming through the narrow entrance. That is a thing he

knew perfectly well he would have to do, or somebody would have to do, and he ought, therefore, to have had somebody to keep a look-out. Had he had somebody on the bridge there is no doubt, in my mind, that he would, within a very small number of seconds, have observed that the *King Orry* was moving, and would have realised what the position was. We are advised by our assessors that it would have been perfectly feasible for a line to be thrown on to the quay, or the island, as the case may be, and for the vessel to have had her engines reversed. *Ex hypothesi*, the vessel was going quite slowly out through the entrance. She did not reach more than three knots when her stem got to the point marked on the chart—what may be regarded as the river end of the entrance. Therefore, starting from nothing, she was going so slowly that a very slight touch of full speed astern would have checked her way immediately, and the wind being practically a head wind, with fenders available, and there to take a line, I am bound to conclude that it would have been perfectly easy for her to stop in the entrance. That being so, as she did not stop she was to blame. I agree with my brethren in thinking that she was only one-third to blame, for this reason, that although, in my view, it was her definite duty to have a look-out I think one must take what I would call a human view of the position, and a human view, I think, means this, that as there was a man who had come from the place where the manœuvre started, as the dock-master was standing on the quay and the order was given definitely "Come ahead," with a movement of the dock-master's arms, indicating come ahead quickly, the master of the *Rockabill*, from all that, would undoubtedly infer that things were safe all round the offing. Consequently the failure to look-out, I think, must be regarded very much from the point of view of time. But before he reached the point going out where it was too late to take action any longer, I think he had time to look round for himself. But for the reason that I think he started of his own independent motion, after the dock-master had ordered him to cast off, and he only had a short time to turn round, I think that one-third is sufficient, and that is what I agree. I do not, myself, think that there is any law in this case beyond what my Lords have indicated.

The Dock Board get off on two grounds: (1) As my Lords have said, because they were not negligent—not a bad ground for giving judgment for them. [Slesser, L.J. made some observation to the learned Lord Justice.] I am afraid I did not catch what Slesser, L.J. said, but he intimates now to me that he did think they were negligent. I will say why I do not think so—it makes no difference in the result. I think that when the dock-master looked before him on the order to cast off, at that moment the *King Orry* had not moved from the landing-stage. It is quite possible that her bow rope had been cast off, but I see no reason to think she had moved. And if she had not moved there was nothing he could see, and *a fortiori*, there was nothing at an earlier point of time that Stafford could have seen in the way of movement of the *King Orry*. That is the only negligence imputable to the Dock Board. But assuming that they were guilty of negligence as found by the learned judge, then I, of course, agree that under the Maritime Conventions Act there is nothing to alter the old common law position of the freedom from liability of the defendant where the accident is contributed to by the negligence of the plaintiff, and I think that as regards both plaintiffs here it is right to treat the accident as contributed to by all three parties if the Dock Board were negligent.

For these reasons I agree with the result of the judgments.

Greer, L.J.—Before I deal with the question of costs I should like to say that I entirely agree with what Scott, L.J. has said as to the desirability of there being some better method than exists, according to the evidence, and so far as we know, of communication between the jetty and the Waterloo Dock.

Chappell.—Your Lordship may take it that the responsible people on the Dock Board will give the closest attention to the observations which have fallen from your Lordships.

Greer, L.J.—We have not had an opportunity of investigating it, but I think it is a matter of grave importance, and ought to be considered by the Dock Board.

Chappell.—If your Lordship pleases.

Leave to appeal to the House of Lords, applied for on behalf of the owners of the King Orry, *was refused.*

Solicitors for the first appellants, the owners of the *Rockabill*, *Weightman*, *Pedder*, and *Co.*, of Liverpool.

Solicitor for the second appellants, the Mersey Docks and Harbour Board, *E. A. Moorhouse*, of Liverpool.

Solicitors for the respondents, the owners of the *King Orry*, *Batesons* and *Co.*, of Liverpool.

December 15 *and* 16, 1936.

(Before GREER, SLESSER, and SCOTT, L.JJ.)

The Kafiristan. (*a*)

Salvage—Lloyd's Standard Form of Salvage Agreement—Whether the owners of salving instrument who are also the owners of a vessel partly responsible for a collision necessitating the salvage services are entitled to salvage remuneration—"Jus ex injuria non oritur."

Appeal from decision of Bucknill, J. dismissed.

This was an appeal by the owners of the steamship E. of B. *and* B. *against a judgment of Bucknill, J., delivered in the Admiralty Court on the 12th November, 1936, and upholding an award made in the form of a special case stated for the court's opinion on a point of law by Sir W. Norman Raeburn, K.C., the appeal arbitrator nominated by the Committee of Lloyd's under the terms of a salvage agreement in Lloyd's Standard Form. The question of law raised for the decision of the court was whether the owners of a salving vessel, who were also the owners of another vessel which it was agreed was partly to blame for a collision with a third vessel, were entitled to salvage remuneration in respect of services rendered by the salving vessel to that third vessel. In*

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

the present case, the E. of B. *had collided with the* K. *in the Gulf of St. Lawrence. The* E. of B. *stood by until the* B., *which was in the same ownership as the* E. of B., *arrived on the scene. At the request of the master of the* K., *the* B. *took the* K. *in tow, and towed her for a distance of* 100 *miles in the direction of Sydney Harbour, after which the* K. *was handed over by the* B. *to a tug, the* F. F., *which towed the* K. *to safety. It was not disputed that the services rendered by the* B. *contributed to the ultimate safety of the* K. *The owners of the* K. *subsequently entered into a salvage agreement in the terms of Lloyd's Standard Form* (" *no cure, no pay* ") *with the owners of the* B., *under which it was agreed,* inter alia, *that the* E. of B. *was* 75 *per cent. and the* K. 25 *per cent. to blame for the collision, that the services were to be regarded as salvage, and that any matter between the parties was to be settled by arbitration. The owners of the* K. *were duly represented both at the original arbitration and before the appeal arbitrator. Upholding the view taken by the original arbitrator, the appeal arbitrator was of opinion that the owners of the* B., *being also the owners of the* E. of B., *were not entitled to any salvage reward, but whereas the original arbitrator had based his opinion upon the fact that the* E. of B. *was partly to blame for the collision which had occasioned the necessity for the salvage services, the appeal arbitrator had made it clear that his award was based on the view that it was immaterial that the* E. of B. *was partially and not wholly to blame.*

Bucknill, J. held, that the fact that the E. of B. *was partly to blame for the collision disentitled her owners, as owners of the* B., *to a salvage reward for the services which the* B. *had rendered, as to grant such an award would be to run counter to a well-established principle of law that no man can benefit by his own wrong.*

Held by the Court of Appeal, affirming Bucknill, J., that upon the authority of the decided cases, from the case of Cargo ex Capella (2 *Mar. Law Cas.* 552 ; 16 *L. T. Rep.* 800 ; *L. Rep.* 1 *A. & E.* 356) *down to the case of the* Owners of the Melanie *v.* Owners of the San Onofre (16 *Asp. Mar. Law Cas.* 479 ; 132 *L. T. Rep.* 567 ; (1925) *A. C.* 246), *the learned judge below came to the only decision that he could come to, and that accordingly the appeal must be dismissed.*

Leave to appeal was granted, Greer, L.J. saying that he would not be sorry (presumably if a higher tribunal did not revise the accepted decisions) to see some statutory provision which would do away with the effect of the cases which had lasted for so long. Scott, L.J. said that the present decision seemed a hardship on the appellants, and suggested as a possible solution, especially in view of the circumstances of modern shipping and of the Maritime Conventions Act, 1911 (*which empowered the court to award different proportions of blame*), *that legislation might be introduced giving the Admiralty judge discretion to give a salvage award, perhaps modified in amount, in circumstances such as those in the present case. The Board of Trade, he said, might investigate the whole question.*

SALVAGE.

The appellants (claimants in the case stated by the appeal arbitrator for the opinion of the court below) were the Canadian Pacific Railway Company, owners of the steamships *Empress of Briton* (42,348 tons gross) and *Beaverford* (10,042 tons gross). The defendants were the Hindustan Steamship Company Limited, of Newcastle-on-Tyne, owners of the steamship *Kafiristan* (5193 tons gross). On the 16th June, 1935, the *Empress of Britain* collided with the *Kafiristan* in the Gulf of St. Lawrence. The *Empress of Britain* stood by until the *Beaverford* arrived on the scene and took the *Kafiristan* in tow with the intention of bringing her to safety in Sydney Harbour. The *Beaverford* towed the *Kafiristan* for 100 miles when the Montreal salvage vessel *Foundation Franklin* (653 tons gross, with engines of 138 nominal horse power), owned by Foundation Maritime Limited, came up and made fast to the *Kafiristan*. The *Beaverford* then cast off and the *Foundation Franklin* completed the towage of the *Kafiristan* to Sydney. On the 13th July, 1935, the appellants entered into a salvage agreement with the owners of the *Kafiristan* in the terms of Lloyd's Standard Form of Salvage Agreement, " no cure, no pay." The salvage arbitration, provided under Lloyd's Standard Form, duly took place in London before Mr. K. S. Carpmael, K.C., who took the view that the owners of the *Beaverford*, being also the owners of the *Empress of Britain*, could have no salvage award if the *Empress of Britain* were to any extent to blame for the collision. The appellants appealed, the appeal being heard before Sir W. Norman Raeburn, K.C., the appeal arbitrator nominated by the committee of Lloyd's. Before the hearing of the appeal an agreement was arrived at by the appellants and the respondents in regard to the proportions of blame for the collision, namely, 75 per cent. on the *Empress of Britain* and 25 per cent. on the *Kafiristan*. The appeal arbitrator, at the request of the parties, made his award in the form of a special case stated for the opinion of the court, the question for the court's decision being whether the fact that the *Empress of Britain* was partly responsible for the collision disentitled her owners as owners of the *Beaverford* to a salvage award for the services rendered by the *Beaverford* to the *Kafiristan*. The appeal arbitrator had awarded that, if the court held that the owners of the *Beaverford* were not entitled to salvage, her master and crew were to receive a reward of 600*l.* (the master 250*l.* and the crew 350*l.* with double shares to the boat crews) together with interest at 5 per cent. per annum, but that if the court decided that the owners of the *Beaverford* were entitled to an award, they should receive a remuneration of 3000*l.*, which should include the 600*l.* which he (the appeal arbitrator) had awarded to the master and crew.

As stated in the headnote, Mr. Justice Bucknill held that the appellants were not entitled to salvage remuneration. He expressed the opinion, however (although his Lordship said it was not his duty to decide the point as it travelled outside the scope of the question submitted to him in the special case), that in the general interest of ships and commerce, the appellants should not be debarred from recovering any part of their expenses incurred in the course

of the salvage services, because if one looked at the case in a general way, to ascertain what was fair and just, the expenses and loss incurred by the appellants as a result of the work done by the *Beaverford* in rendering her services to the *Kafiristan* ought to be considered as part of the general damage arising from the collision and ought to be apportioned between the appellants and the respondents in proportion to their respective degrees of blame for the collision.

This question of expenses was again raised by counsel appearing on behalf of the appellants in the Court of Appeal. He said that it was the respondents' case that as damages these expenses were too remote, but he argued that to have such expenses disallowed, thus causing the owners of a salving vessel to be obliged to bear their own out-of-pocket expenses, would discourage rather than encourage the rendering of salvage services in circumstances such as those in the present case. In their Lordships' judgments the question of expenses was not specifically dealt with.

In the course of the hearing the following cases were referred to: *Cargo ex Capella* (2 Mar. Law Cas. 552; 16 L. T. Rep. 800; L. Rep. 1 A. & E. 356), *The Hannibal* (L. Rep. 2 A. & E. 53), *The Beta* (1884, 5 Asp. Mar. Law Cas. 276; 51 L. T. Rep. 154; 9 Prob. Div. 134), *The Glengaber* (1872, 1 Asp. Mar. Law Cas. 401; 27 L. T. Rep. 386; L. Rep. 3 A. & E. 534), *The Duc d'Aumale* (9 Asp. Mar. Law Cas. 502; 89 L. T. Rep. 486; (1904) P. 60), and *The Melanie* (*owners of*) v. *The San Onoffre* (*owners of*) (16 Asp. Mar. Law Cas. 479; 132 L. T. Rep. 567; (1925) A. C. 246).

Counsel for the respondents were not called upon.

R. F. Hayward, K.C. and *Vere Hunt*, for the appellants.

J. V. Naisby and *G. N. W. Boyes*, for the respondents.

Greer, L.J.—In this case, a collision took place between the steamships *Empress of Britain* and *Kafiristan* on the 16th June, 1935, in the Gulf of Lawrence. The owners of the *Empress of Britain* are also owners of the *Beaverford*, and they were represented at the time of the collision and the subsequent services rendered by the *Beaverford*, by their agents, the masters, and crew of the two vessels. The *Empress of Britain*, being by agreement in fault to the extent of 75 per cent., whereas the *Kafiristan* was only in fault in respect of 25 per cent., I take the view that if this matter were *res integra* there is no rule of justice whereby it can be said that even a vessel at fault ought not to be able to recover for salvage services. It may very well be that a vessel wholly in fault has, at the time that the salvage service commenced, only damaged the other vessel to a very small extent and that by the efforts of the vessel in fault the damage has been sustained only to the small extent which existed at the time that the salvage services were commenced. I can understand the view that in these circumstances the owners of the vessel, though in fault, who had by means of exceptional exertions and exceptional expenses brought the damaged vessel to safety, ought to have been encouraged in doing that which they were under no obligation to do, their only obligation being under sect. 422 of the Merchant Shipping Act to stand by and save life. I think the circumstances might readily be such that a vessel entirely at fault with reference to the collision might very properly be encouraged to render salvage services which would more than wipe out the fault that it had already committed. It does not seem to me, strictly speaking, that that is a case of the owners of a vessel taking advantage of its own wrong. So far from taking advantage of its own wrong, it is trying to set right that which it has done which was wrong.

That position with regard to a ship which is entirely at fault is much stronger in the case of a ship which has only been at fault, since the Act of 1911, in a lesser degree, because the vessel which is only in fault in a lesser degree ought to be, one would think, encouraged to do its level best to reduce the cost to the owner of the salved vessel by exercising exertions for its safety whereby everybody is benefited, not only the salved vessel but the other vessel that will have to pay a larger proportion of the damage under the Act of 1911.

Before 1911, as I have been quite properly reminded, the result, where both were in fault, was that each bore half of the damage; it is only under the Act of 1911, in consequence of an agreement with other nations, that the court was entitled to award different proportions, but I cannot help thinking that that makes no difference to the long accepted rule that in the Admiralty Court a vessel which is either wholly or in part to blame cannot recover in respect of salvage services. I think that is too well settled by a number of cases which have been referred to, beginning with the case of *Cargo ex Capella* (2 Mar. Law Cas. 552; L. Rep. 1 A. & E. 356), and continuing to the other cases, and the way in which those cases have been accepted as cases decided in accordance with sound principles by a number of authorities which my brother Scott, L.J. has referred to. They are set out on p. 257 of Temperley's Merchant Shipping Acts, 4th edit., in these terms:

> "Salvage.—The question whether the statutory obligation to stand by after collision debars salvage claims is discussed in Kennedy, Civil Salvage, 2nd edit., p. 30. The general rule would seem to be (1) that where the ship standing by is in no way to blame, she may rank as salvor if her services are really of the nature of salvage."

Then the cases of *The Hannibal* (L. Rep. 2 A. & E. 53), *The Melanie* (*Owners*) v. *San Onofre* (*Owners*) (16 Asp. Mar. Law Cas. 479; 132 L. T. Rep. 567; (1925) A. C. 246), and *The Beta* (5 Asp. Mar. Law Cas. 276; 51 L. T. Rep. 154; 9 Prob. Div. 134), are referred to, and the learned author continues:

> "(2) Where she has been wholly or in part to blame, no claim can be entertained for salvage services rendered: (*Cargo ex Capella*, 2 Mar. Law Cas 552; L. Rep. 1 A. & E. 356; *The Glengaber*, 1 Asp. Mar. Law Cas. 401; 27 L. T. Rep. 386; L. Rep. 3 A. & E. 534; and *The Duc d'Aumale*, 9 Asp. Mar. Law Cas. 502; 89 L. T. Rep. 486; (1904) P. 60)."

The cases that my Lord has referred to show quite clearly, in my opinion, that that has been accepted in the Court of Appeal and in the House of Lords as a rule which has been established in the Admiralty Court. Decisions which we have heard given necessarily mean that the learned judges and learned Lords who were deciding those cases, did so solely on the ground that the party claiming the salvage was an innocent party, and that their decision would have been quite otherwise if the party claiming the salvage had not been an innocent party, but had been a party in part or in whole responsible for the collision. I, personally, regret that that is the view which prevailed, and I

should not be sorry to see some statutory provision which would do away with the effect of the accepted decisions on the subject.

I do not think I need further refer to the authorities except by saying that *The Glengaber*, which was very much relied upon here, is a very unsatisfactory decision. I cannot myself ascertain from the report whether the liability was confined by the learned judge who decided that case to the owners who were owners of both ships or whether the liability was decided on the ground that it arose as against all the owners of the ship, whether they were part-owners of the vessel that was to blame or whether they were not part-owners of the vessel that was to blame.

In the result, I have no doubt that the proposition which I have put forward has been well established, and well accepted in the Admiralty Court, and in the case of *The Duc d'Aumale* I agree with what has been said by Mr. Hayward, that it did not directly raise the question. Gorell Barnes, J. did in fact say that he accepted the decision in *The Glengaber* case, a decision that a vessel which was wholly to blame for the collision could not recover any salvage. It seems to me that if a vessel which was wholly to blame cannot recover any salvage under any circumstances, then a vessel which could only be responsible for half the damage should be equally in a position of not being able to claim. As I have said, I regret the decision because I cannot help thinking having regard to the fact that salvage is a voluntary operation which a vessel is not bound to engage upon by any rule or law, that it is a matter of regret that vessels are not encouraged, even where they are in fault, to carry on salvage operations.

A great deal has been said in this case about the fact that these were two separate vessels, the salving vessel, the *Beaverford*, belonging to the same owners, being a different vessel from the *Empress of Britain* though in the same ownership, the *Empress of Britain* being to blame for the collision to the extent of 75 per cent., and being, therefore, disentitled to salvage. It seems to me to follow as a matter of course that her owners, who were also the owners of the *Beaverford*, were equally disentitled to claim salvage. It is quite true that for many years for the purpose of convenience the name of a vessel has been treated as the equivalent for the name of the owners of the vessel. I think that is a mere matter of convenient procedure in the Admiralty Court, and to enable the reporter of Admiralty cases to refer to cases by the name of the vessel rather than setting out in full that the litigation was between the owners of vessel *A.* and the owners of vessel *B.*

For these reasons I am satisfied that the learned judge was right in the decision that he came to. It was the only decision that he could come to, and I think it was the only decision that we can come to, though it is possible that a higher tribunal may consider and revise these cases which have lasted for so long.

For these reasons I think that the appeal should be dismissed.

Slesser, L.J.—The principle which is expressed in the maxim "*Jus ex injuria non oritur*" is of general application. It is stated by Lord Mansfield in the case of *Montefioro* v. *Montefioro* (1762, 1 Wm. Bl. 363), that "no man shall set up his own iniquity as a defence, any more than as a cause of action," and in civil law, in the First Volume of Pothier's Traités du Droit, at p. 186, there is a similar expression, which I mention in case it may be said that the civil rather than the common law is applicable to an Admiralty dispute.

In the present case, as my Lord has stated, the vessel which is admittedly the wrongdoer to the extent of 75 per cent. of the blame, the *Empress of Britain*, is owned by the same company, the Canadian Pacific Railway Company, as the ship which seeks to be remunerated for salvage, namely, the *Beaverford*, and as I read the authorities, which seem to me entirely consistent with the principles which I have mentioned, there is no doubt, at any rate of this, that had the ship which sought to be remunerated for salvage been itself a wrongdoer, the principles of law would have prevented that ship from recovering their claim. That is made perfectly clear in the case of *Cargo ex Capella* (2 Mar. Law Cas. 552; L. Rep. 1 A. & E. 356). Doctor Lushington, at p. 357, said, in language which appeals very much to my mind:

> "I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English court."

That authority was quoted with approval by Gorell Barnes, J., as he then was, in *The Duc d'Aumale* (89 L. T. Rep. 486; (1904) P. 60). At p. 74 of L. Rep. he cites as a fortification of the conclusion to which he had there come, that the wrongdoer could not claim remuneration, the case of the *Cargo ex Capella*, and the language which I have cited. As against that, it has been said that we have here to distinguish, by reason of the fact that in the case of *The Duc d'Aumale* and in the case of *The Capella*, the wrongdoing ship was itself claiming salvage, whereas here you have two different ships, albeit in the same ownership; and in support of the proposition that each ship shall be so personified that the doctrine to which I have referred shall not extend beyond the wrongdoing ship so as to affect their owner claiming salvage through another ship, certain passages in the case of *The Glengaber* (1872, 1 Asp. Mar. Law Cas. 401; 27 L. T. Rep. 386; L. Rep. 3 A. & E. 534) have been relied upon. At p. 402 of 1 Asp. Mar. Law Cas. Sir Robert Phillimore speaks thus:

> "I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself and there being no suggestion of any conspiracy—which, of course, would create a totally different state of circumstances—no suggestion of any conspiracy between the two vessels, the one to cause the mischief and the other to assist in remedying it) such a vessel cannot recover salvage reward. I know of no case in which such a suggestion has been put forward, and, therefore, know of no instance in which it has been sustained, therefore I do not uphold it in the present case."

There are certain earlier observations which go to indicate that Sir Robert Phillimore was not perhaps in those observations committing himself to the thing which he there seems to state in such general terms, for he limits it above to those who were not joint owners of the ship. That was, of course, a case of the old system of holding ships by shares and not a case of holding by one incorporation. For myself, I agree with Mr. Hayward that if those words are to be treated in their natural

terms, perhaps extended beyond the facts of that particular case, they do seem to indicate that in the case of Sir Robert Phillimore, expressed in 1872, he would have thought that in the absence of conspiracy the mere fact that the salving vessel belonged to the same owner as the wrongdoing vessel would not disentitle the salving vessel; and that is said after the case of *Cargo ex Capella*, which had already decided in 1876 that where the salving vessel was itself a wrongdoer her owners would be disentitled.

I cannot see that what there is said by Sir Robert Phillimore can be supported here upon principle. The principle here, the owner, who is really the claimant, though suing as owner of the *Beaverford*, has in fact two instruments, one the ship, the *Empress of Britain*, which does the injury, and the other, the *Beaverford*, which endeavours to repair it and charges, or seeks to charge, for that attempt at reparation. I am unable to see, if it be right that the wrongdoer is himself disentitled to claim salvage, what difference it makes that the owner claims salvage through two instruments and not through one instrument, and if there be anything in *The Glengaber* to the contrary—and I am inclined to think there is—then I would say that, very respectfully and very regretfully, that I cannot follow that decision.

It follows, therefore, in my view, that this case falls directly within the authority to which my Lord has called attention, and is consistent with the latter treatment of the matter in the cases to which the Lord Justice has referred arising under sect. 422 of the Merchant Shipping Act, 1894, and its predecessors, *The Melanie* (16 Asp. Mar. Law Cas. 479; 132 L. T. Rep. 567; (1925) A. C. 246) and *The Beta* (5 Asp. Mar. Law Cas. 276; 51 L. T. Rep. 154; 9 Prob. Div. 134).

I have only to refer to one other argument which Mr. Hayward puts to us, which I understand to be this. It was Mr. Hayward's contention that by reason of the operation of sect. 1 of the Maritime Conventions Act, 1911, which enables a court to divide the loss in proportion to the degree in which each vessel was in fault in contradistinction to the earlier rule which had a long history to be found in Marsden's Collisions at Sea, 9th edit., at p. 151, that half damage normally be given when both vessels were to blame, some change had been made in the law which would have the effect of altering the view which the court might otherwise have taken with regard to the *Duc d'Aumale* and the earlier cases. I am unable for myself to understand the contention. Under the earlier law, as I have pointed out, it was always in the power of the court to apportion damages, though the apportionment was by half and half. Later, that power to apportion was widened so that, in the language of sect. 1 of the 1911 Act, it might be "in proportion to the degree in which each vessel was in fault." The alteration, if alteration there was, in principle was one which was made in the seventeenth century. According to Marsden, there having been only one case in the sixteenth century where partial damages were given to distinguish it from the older system in 1614, says the learned author, was the first case of half damages. If any change, therefore, were made in the system of damages the change took place not in 1911 but in 1614, a date which I think is no assistance to Mr. Hayward in the present appeal.

Therefore, I think the appeal fails.

Scott, L.J.—I agree with the judgments that have been delivered, and particularly with the view that the application of the rule barring the owners of a vessel in fault causing the casualty which occasioned the need for salvage, from recovering salvage remuneration, is of too old a standing for this court to call it erroneous. It was indirectly considered by the House of Lords in the case of *The Melanie* (16 Asp. Mar. Law Cas. 479; 132 L. T. Rep. 567; (1925) A. C. 246), and their Lordships seem to me in effect to have assented to it. If the rule is to be modified judicially, I agree that it must be done by the House of Lords. While expressing this view of the legal position, I do feel that the operation of the rule calls for consideration in the circumstances of modern shipping and the Maritime Conventions Act, 1911. Legislation giving the Admiralty judge discretion to give a salvage award in such circumstances, perhaps modified in amount, might be a possible solution. The present decision seems a hardship on the plaintiffs, and it may be in the general interest that the rule should be altered. I venture, therefore, to suggest that the Board of Trade might investigate the whole question.

The appeal was accordingly dismissed.

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

Solicitors for the respondents, *Middleton, Lewis, and Clarke*, agents for *Middleton and Co.*, of Sunderland.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

December 15th and 16th, 1936.

(Before BRANSON, J.)

Scindia Steamships (London) Limited v. The London Assurance. (*a*)

Marine insurance—Insurance against damage to machinery caused through breakage of shaft—Inchmaree clause—Claim for damage to shaft not causing injury to other parts of machinery—Marine Insurance Act, 1906 (6 *Edw.* 7, *Ch.* 41), *s.* 55, *sub-s.* (2) (c).

A policy of marine insurance contained a clause providing that the insurance should cover loss and damage to hull or machinery directly caused through breakage of shafts.

While the tail shaft of the insured ship was being repaired, it broke, through a latent defect in the metal of which it was constructed.

Held, that the damage to the shaft was not expressly insured against nor could it be described as damage to machinery caused through breakage of shaft, and that the underwriters were not liable to make good the loss incurred.

Oceanic Steamship Company *v.* Faber (97 *L. T. Rep.* 466) *applied.*

ACTION tried by Branson, J. in the commercial list. By a policy of marine insurance, dated the 20th January, 1931, the defendants insured the plaintiffs' ship, *Jalavijaya*, against the usual perils of the sea from 17th December, 1930, to 17th December, 1931. The policy contained a clause, known as

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

the Inchmaree clause, which provided as follows: "This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo or the bunkering or taking in fuel or caused through the negligence of master mariners, engineers or pilots or through explosion or bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull."

During the currency of the policy the ship was placed in dry dock by the plaintiffs to effect certain repairs. For that purpose it was necessary to remove the propeller and to draw the tail shaft. While the propeller was being wedged off, the shaft broke, owing to a latent defect in the metal of which it was constructed. By reason of that accident it became necessary to fit a new shaft and propeller to the ship. The plaintiffs claimed to be reimbursed under the policy for costs incurred in repairing the damaged parts. The defendants admitted their liability to pay for the propeller as being machinery damaged through the breakage of the shaft, but they denied that the Inchmaree clause covered loss incurred through the replacing of the shaft itself.

By the Marine Insurance Act, 1906, s. 55, sub-s. (2) (*c*), it is provided as follows: "Unless the policy otherwise provides the insurers are not liable for ordinary wear and tear, ordinary leakage or breakage or inherent vice or nature of the subject matter of the insured—or for any injury to machinery not proximately caused by maritime perils."

Sir *R. Aske*, K.C. and *W. L. McNair* for the plaintiffs.

A. T. Miller, K.C. and *T. G. Roche* for the defendants.

Branson, J.—This case raises a point which has been adumbrated for a number of years. It relates to the proper construction to be put upon the words of a clause called the "Inchmaree" clause in a Lloyds policy. The facts of the case are not in dispute. (His Lordship stated the facts and the issues between the parties substantially as above set out and continued as follows:) The case depends upon the true construction of the clause, which is as follows: "This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging, or handling cargo, or in bunkering or in taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull," and then there is a proviso which does not apply to the present case. The construction of various parts of this clause has been the subject of decisions in the courts; but that of the particular part upon which the plaintiffs first rely has not.

The plaintiffs' case is, first, that upon the true construction of this clause "breakage of shafts" is covered *simpliciter*, and, therefore, that all the plaintiffs have to do here is to say that the tail shaft of their steamer broke, and that for whatever reason that may have happened they are entitled to recover. The defendants say that the plaintiffs cannot properly construe this clause as covering breakage of shafts isolated from all the rest of the subject-matter of the clause, but that they must read the clause as a whole, and that when they do so they will find that no such construction can be put upon it. But the defendants go on to say that even if that be possible construction, still it will not assist the plaintiffs in the present case, because of sect. 55, sub-sect. 2 (*c*) of the Marine Insurance Act, 1906, it being plain upon the proceedings, and the admitted facts, that this breakage arose through the inherent vice of the shaft itself. The facts with regard to the breakage seem to be plain enough. During the operation of wedging off the propeller the shaft was being subjected to an ordinary operation of repair which any shaft of proper strength and construction would be able to sustain without any difficulty, but, owing to what is described as a "smooth flaw extending downwards from the top as the shaft then lay" deep into the metal, involving about one-half of the material, the other half of the shaft remained and was broken. It is said on the part of the defendants that that is the latent defect, and, except under those words of this clause which deal with latent defects, damage caused by latent defects is excluded from this clause by virtue of sect. 55, sub-sect. (2) (*c*) of the Marine Insurance Act, 1906. That seems to me a sound proposition. Where there are in the policy express words dealing with latent defects and an attempt is made to isolate from that portion of the policy certain other words and to say that they ensure against a particular peril *simpliciter*, I think that to those words so isolated the general provisions of marine insurance law, as indicated by the section to which I have referred, must be applied, and that the words so isolated must be read subject to those conditions of the law. But, as a matter of construction, there is a further answer. It seems to me that to try to isolate these words "bursting of boilers, breaking of shafts," from their context and to read them as if they were taken out from their position and written in immediately after the words in brackets "subject to free of average warranty" so that the clause should read "This insurance also specially to cover (subject to free of average warranty) bursting of boilers, breakage of shafts," is to do such violence to the language of the clause that it is not possible to put such a construction upon it. It seems to me that the words must be read in the position and in the context in which they are found. So reading them, one finds that they appear following one set of circumstances introduced by the words "directly caused by," another set of circumstances introduced by the words "or caused through," and themselves introduced by the words "or through." When one looks at them from that point of view it becomes obvious that they cannot be isolated in the way contended for by the plaintiffs. Now the next point that is taken is that if you cannot so isolate them, you may, at all events, read them in the following way: "This insurance also specially covers loss of or damage to hull or machinery through breakage of shafts." It is said that "shafts" are a portion of hull or machinery, being a portion of the machinery and that loss of or damage to machinery caused through breakage of shafts includes the actual breaking of the shaft itself. That, it seems to me, is a forced construction of the language and not the ordinary meaning which, reading the clause as a piece of English prose, one would be inclined to put upon it. It follows other clauses in which obviously the loss or damage happens to be something different from the thing by which the damage is said to be caused. The first clause is "caused by accidents in loading" and so forth; the next is "caused through the negligence of master mariners," and so forth. Both of those clauses obviously envisage, as it seems to me, a state of

affairs in which the main cause produces damage which has an effect on something else; and I see no reason why, when after those two clauses one comes down to the one with which I have particularly to deal, one should read it in any other way. It seems to me, therefore, that the proper reading is that the breaking of the shaft itself is not covered, nor can it properly be said that the breakage of the shaft is a loss of or damage to machinery caused by the breakage of the shaft. The breakage of the shaft is the breakage of the shaft, and if, by reason of the breakage of the shaft the machine is torn to pieces, then one would get damage caused by the breakage of the shaft. But in this case the only damage beyond the damage to the propeller, which has been paid for, is the actual damage which happened to the shaft itself, to wit, the breakage of the shaft. To speak of that as damage to the machinery which the breakage of the shaft has caused, seems to me to produce a confusion both of thought and language, which I think should not be introduced into the construction of a clause of this kind.

I therefore think the plaintiffs fail to establish a right to recover under that part of the clause which relates to breakage of shafts.

The plaintiffs say, further, that there was here a latent defect in the shaft, and that the damage arising from breakage of the shaft is damage which has been caused to machinery, to wit, the shaft, by reason of a latent defect in the machinery, to wit, the shaft. In this case the latent defect had proceeded so far from the ordinary wear and tear and use to which a propeller shaft is subjected, that it actually resulted in a solution of the continuity of the shaft, and it is said by reason of that fact this case can be distinguished from the case of *Hutchins Brothers* v. *Royal Exchange Assurance Corporation* (12 Asp. Mar. Law Cas. 21; 105 L. T. Rep. 6; (1911) 2 K. B. 398). The plaintiffs ask me to say that this curious position arises: That because it is now known that this tail shaft was in such a state owing to its latent defect that had the defect been discovered it would immediately have been appreciated that the tail shaft was only worth what it would fetch as scrap-metal, and because the defect had become so serious that a perfectly ordinary operation had caused the shaft to break in two, the loss is thrown upon the underwriters, and they must not only provide a new shaft, but bear the cost of installing it in the ship. If that is the true construction of the policy, effect must be given to it; but I confess that I think it would be wrong to be astute to find reasons for coming to the conclusion that that was the intention of the parties when they entered into this bargain. It seems to me that, although in this case the latent defect had gone so far as to cause a complete severance of the shaft into two pieces, yet all the considerations which were applied in *Hutchins Brothers* v. *Royal Exchange Assurance Corporation* (*sup.*) apply equally in the present case. What I have said already in regard to the breakage of the shaft, and the necessity of there being some damage caused by the breakage of the shaft other than the breakage of the shaft itself, seems to me to apply also to the case of a latent defect. Damage to hull or machinery caused through a latent defect in the machinery is something different from damage involved in a latent defect in the machinery itself. In the present case, the tail shaft broke owing to a latent defect existing in itself, and, so far as the evidence goes, existing before the underwriters ever came on risk. There is nothing to show that this latent defect developed or came into being during the currency of the policy. The fact that it is spoken of as "an old flaw," whether it had previously been discovered or not, tends to show that it had existed before this policy was taken out. All that has happened is that it has gone on developing, and although the shaft was not subjected to anything in the shape of a peril, but to an ordinary operation of ship repairing, that operation caused its breakage.

For these reasons I think that the construction put upon this clause by the plaintiffs is not the true construction. I have tried to approach the question without reference to authority, dealing with it strictly as a matter of construction and applying to it my own view of what the language means. It seems to me, however, that all that I have done has been to repeat, probably in much less apt language, what was said by Walton, J. in *Oceanic Steamship Company* v. *Faber* (10 Asp. Mar. Law Cas. 515; 11 Com. Cas. 179, at p. 187), where he was dealing, *obiter*, it is true, with these words as to breakage of shafts. Except that I do not myself entertain the doubt that he felt, I adopt everything that he said in relation to the construction of the clause. If he had had to do so, I beg leave to doubt whether he would have remained in any uncertainty after considering the question from the point of view of one who had to give his decision upon it. His judgment has been cited over and over again with admiration. It is true that when *Hutchins Brothers* v. *Royal Exchange Assurance Corporation* (*sup.*) was before the Court of Appeal this particular point was not there referred to. It is true that when *Oceanic Steamship Company* v. *Faber* (*sup.*) went to the Court of Appeal, certain of their Lordships there, having stopped counsel who was going to argue this point before them, proceeded, whilst carefully observing that nothing they were about to say should be taken as any authority to state that they were not convinced of the correctness of Walton, J.'s view of this matter. But that, it seems to me, only leaves it completely open to a judge, who has to find—because it is the point in the case before me—what is the true meaning to be applied to this clause, to express his own opinion unfettered by authority. In my view, therefore, this action fails and must be dismissed.

Judgment for defendants.

Solicitors for the plaintiffs, *Holman, Fenwick,* and *Willan.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

October 29, 30; *November* 2, 3; *and December* 17, 1936.

(Before GREER, SLESSER and SCOTT, L.JJ.)

Admiralty Commissioners v. Owners of M/V Valverda. (*a*)

Salvage services—King's ships, by—Remuneration, for—Statutory prohibition of—Contract to pay remuneration to Admiralty—Contract invalid—No power to waive prohibition—Such

(*a*) Reported by C. G. MORAN Esq., Barrister at-Law.

claims, even under express contract, forbidden—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557, *sub-s.* (1)—*Merchant Shipping (Salvage) Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

By sect. 557, *sub-s.* (1), *of the Merchant Shipping Act*, 1894: "*Where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew, of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved.*"—*By the Merchant Shipping (Salvage) Act*, 1916, *s.* 1: "*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 s.* 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 owners of a motor tank vessel at sea, whose main engines were completely disabled, to assist the vessel, her cargo and freight, signed an agreement with the Admiralty on a form known as "Admiralty Standard Form of Salvage Agreement," which provided that the Admiralty should use such endeavours as they thought fit to salve the crippled vessel and that their remuneration, if the services were successful, should consist of a reasonable amount of salvage, the amount to be fixed by an arbitrator, in default of agreement. The vessel was towed to safety. Three of the five King's ships engaged on the salvage services were not specially equipped with salvage plant and were not tugs. On a claim by the Admiralty for the services of all the ships,

Greer and Slesser, L.JJ. construed the agreement as one for the remuneration of any services rendered. Scott, L.J. construed it as one limited to the remuneration of services claimable by statute—i.e., *the services of commanders and crews under sect.* 557, *sub-sect.* (1), *of the Act of* 1894, *and services of ships specially equipped with salvage plant or tugs under sect.* 1 *of the Act of* 1916.

Held, by Slesser and Scott, L.JJ. (Greer, L.J. dissenting—Scott, L.J. on the hypothesis that his construction of the agreement was wrong)—that the prohibition in sect. 557, *sub-sect.* (1), *was a disabling condition for the general benefit of the public and not in the interest of a limited class*—i.e., *of those persons who might require salvage services. Accordingly, it could not be waived. The claims referred to in sect.* 557, *sub-sect.* (1), *were forbidden, and could not be sued for under contract or otherwise.*

Decision of Branson, J. (18 *Asp. Mar. Law Cas.* 620; 154 *L. T. Rep.* 302; (1936) 1 *K. B.* 724) *reversed.*

Per Greer, L.J.—The Admiralty, before the date of the Merchant Shipping Act, 1853, *were entitled to claim salvage, though it was usual to claim a less remuneration, as the salving vessel was a King's ship.*

Per Scott, L.J.—The remuneration for salvage services to the owners of salvor vessels had never been extended to King's ships to the extent of allowing the Admiralty or the Crown to claim as salvors in ordinary cases of salvage by King's ships.

On this issue, Slesser, L.J. abstained from expressing an opinion.

APPEAL from a decision of Branson, J. on a case stated by an arbitrator (Sir Norman Raeburn, K.C.) appointed under an agreement of the 25th January, 1935, to determine the amount of salvage remuneration payable for services rendered by ships belonging to His Majesty to the appellants' ship *Valverda*.

The Merchant Shipping Act, 1894, s. 557, sub-s. (1), provides as follows:

> "Where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage or risk caused to the ship or her stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew, of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved"

The Merchant Shipping (Salvage) Act, 1916, s. 1, provides as follows:

> "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 facts found by the arbitrator, so far as they are material to this report, were as follows: The *Valverda* was a steel twin-screw motor tank vessel of 8806 tons gross. At the time of the services hereinafter referred to she was on a voyage from Curacao to Land's End laden with 13,246 tons of petroleum. The salved values were as follows: Ship, 68,316*l.*; cargo, 20,000*l.*; freight, 4300*l.*; total, 92,616*l.* On the 21st January, 1935, a fire broke out in the *Valverda's* engine-room, and an S.O.S. signal was sent out for assistance. To that signal a French steamship and also H.M.S. *Frobisher* responded, and the latter vessel reached the *Valverda* on the morning of the 22nd January, and proceeded to take her in tow. The fire was finally extinguished on the 23rd January, but the main

engines were completely disabled. It was therefore decided that the *Frobisher* should tow the *Valverda* to Bermuda, some 800 or 900 miles distant.

On the evening of the 23rd January, the owners of the *Valverda* got in touch with the Admiralty and entered into negotiations which resulted in a written agreement being entered into on January 25th between the Admiralty and Mr. F. G. Young, as agent and on behalf of the owners of the ship, with regard to assisting the *Valverda*, her cargo and freight. That agreement was on a form known as "Admiralty Standard Form of Salvage Agreement," and provided that the Admiralty should use such endeavours as they thought fit to salve the *Valverda*, and that their remuneration, if the services were successful, should consist of "a reasonable amount of salvage," the amount to be fixed by an arbitrator in default of agreement. The terms of the agreement are very fully set out in the judgment of Scott, L.J. (*infrà*). At the time of entering into that agreement the owners of the *Valverda* knew that H.M.S. *Frobisher* and H.M.S. *Guardian* were already on the spot assisting the *Valverda*, and they did not suggest that any distinction should be drawn between the classes of Admiralty vessels participating in the services.

In the result the *Valverda* was safely taken by the Admiralty to Bermuda and placed in a position of safety. Five vessels took part in that operation, namely, H.M.S. *Frobisher*, a cruiser; H.M.S. *Guardian*, a cruiser; H.M.S. *Orangeleaf*, an oil-carrying ship; H.M.S. *Sandboy*, a tug; and H.M.S. *Creole*, a "yard craft." Of these, the *Sandboy* and the *Creole* were tugs or vessels specially equipped for salvage within the meaning of the Merchant Shipping (Salvage) Act, 1916, s. 1. The other three ships were not so equipped.

The owners of the *Valverda* admitted that the Admiralty were entitled to claim salvage remuneration in respect of the services of the *Sandboy* and the *Creole*, but denied that they were entitled to remuneration for the services of the three other vessels. The Admiralty contended that, by virtue of the terms of the salvage agreement, they were entitled to remuneration for the services of all five ships.

The arbitrator held that the Admiralty were entitled to salvage remuneration in respect of all five ships and assessed the amount thereof at 11,000*l.* He further held that the contract of the 25th January, 1935, was not void, as being against public policy, or at all. In the alternative, he held that, if remuneration was only recoverable in respect of the *Creole* and the *Sandboy*, the proper amount was 6500*l.*

Branson, J. held that the decision of the arbitrator was right, and upheld the award.

The shipowners appealed.

Carpmael, K.C. and *Willmer* for the appellants.

G. St. C. Pilcher, K.C. and *Bateson* for the respondents.

Cur. adv. vult.

Greer, L.J.—Before the statute of Queen Anne's reign, 12 Anne c. 18 or 13 Anne c. 21, no private ship or Queen's ship was under any duty to assist vessels in distress. This statute imposed a duty which was to last for three years. This statutory duty was continued for a further period (4 Geo. 1, c. 12) and then repealed (17 & 18 Vict. c. 120, s. 4). It is, therefore, necessary to consider what, if any, was the duty of the King's ships at common law before the Merchant Shipping Act of 1853.

In *The Mary Ann* (1823, 1 Hag. Adm. at p. 158). Lord Stowell in giving his judgment said: "In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop *Arab;* and undoubtedly the parties may fairly claim a remuneration, although the ship belongs to the State, and although there is an obligation upon King's ships to assist the merchant vessels of this country; yet when services have been rendered, those who confer them are entitled to an adequate reward." In *H.M.S. Thetis* (1833, 3 Hag. Adm. 14) a claim was made on behalf of the officers for salvage remuneration, and on behalf of the Admiralty for expenses to the amount of 13,833*l.*, incurred for pay, &c., in H.M. ships *Lightning*, *Adelaide*, and *Algerine*. The Admiralty were separately represented. In giving judgment Sir Christopher Robinson said (3 Hag. Adm. at p. 61): "The claim on the part of the Admiralty for wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented, but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public, in regulating the employment of H.M. ships; and they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and storss to a service of this kind, for eighteen monthe together. I am, however, not called upon to give any opinion on this claim, as it is not opposed but admitted, on the part of the owners and of the Admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service." I regard this case as deciding that the Admiralty are entitled to salvage in respect of the work done by the ship, and in this and subsequent cases, such as *The Lustre* (1834, 3 Hag. Adm. 154) and *The Ewell Grove* (1835, 3 Hag. Adm. 209), the claim is based on the title of the Admiralty to claim salvage. In *The Ewell Grove* (3 Hag. Adm. at p. 225) Sir John Nicholl, after citing the facts, said: "I have, therefore, no doubt as to the title of H.M. steam vessels in cases of civil salvage to remuneration."

There are many cases to the same effect, and it was admitted that down to the Act of 1853 the Admiralty frequently claimed, and were awarded, salvage in respect of such expenses as are referred to in *H.M.S. Thetis*, but they never put forward any claim beyond repayment of their actual expenses, and never claimed salvage in respect of the benefits conferred on the salved vessel by the work the vessel did apart from the claim for expenses. I think it quite unnecessary to go further into the cases that were cited in the course of the argument as to the right of the Admiralty to claim salvage before the Merchant Shipping Act of 1853, repeated in the Act of 1854, and now contained in the consolidating statute. As sect. 557 of the Act of 1894 merely reproduces the provisions of the Acts of 1853 and 1854, I need not cite any of the statutory provisions other than sect. 557. That section provides:

> "(1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be

allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved.

"(2) Any document purporting to give the consent of the Admiralty for the purpose of this section and to be signed by the Secretary to the Admiralty or on his behalf, shall be evidence of that consent.

"(3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs."

It will be observed that this section does not deprive the Admiralty of the legal right which it has to say that its ships shall not be used for salvage services. As pointed out in Kennedy on Civil Salvage (2nd edit. at p. 28): "Voluntariness on the part of the salvor is equally with damages to the thing saved an essential element in the constitution of a salvage service. The salvage of property has been described as the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. 'What is a salvor?' said Lord Stowell in *The Neptune* (1824, 1 Hag. Adm. at p. 236). 'A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship.' It is to be observed that, except in the peculiar case of the passenger on board a vessel in distress, the requirement of voluntariness in the salvor is satisfied by the absence of any contractual or official obligation. There is a universal moral obligation, where life or property is in peril at sea, to render every possible assistance in its preservation. 'It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it.'" The last words are a quotation from Lord Stowell's judgment in *The Waterloo* (1820, 2 Dods. 433).

It is clear from this that neither a private vessel nor a King's ship is under any obligation to perform salvage services. The owners of a King's ship may say without any breach of legal duty: "We are not prepared to undertake salvage services to your vessel. We are afraid you must wait until some other vessel comes along in readiness to proffer voluntary salvage service, but if you will enter into an agreement with us to pay us for the salvage services you require us to render we will render those services." The question for determination here is whether such a contract is made invalid and unenforceable by reason of the express provisions of the Merchant Shipping Acts. In my judgment, the provisions of those Acts do not have that effect. If it had been so intended, I should have expected the section to read: "Where salvage services are rendered by any ship . . . whether under contract or otherwise, no claim shall be allowed. . . ."

In my judgment, when the owners of the *Valverda* were asked to sign the contract which they signed in this case, they were entitled either to sign or to refuse to sign, and if they had refused to sign and the ship had still performed the salvage services, the owners of the King's ship would have been prohibited by sect. 557 of the Merchant Shipping Act, 1894, from recovering anything for any loss, damage, or risk caused to the salving ship such as stores, tackle, or furniture, or for the use of any stores, or other articles belonging to His Majesty. But inasmuch as the Admiralty were under no obligation to perform any salvage services whatsoever, they could sell their freedom from such obligation at whatever price they considered right, provided that they could induce the free agent of the ship which wanted to be salved to agree to the remuneration that they asked. The Admiralty could legally have said: "Our ships are required for other services, and we will not take them away from usual and recognised duties for difficult salvage services unless you agree to pay us £11,000." They could equally have said what they did in this case: "You cannot have the services of the King's ships unless you agree to pay the reasonable remuneration you would have to pay to a private salvor." I have not thought it necessary to state in detail the facts that are so clearly stated in the award, and in the early part of the judgment of Branson, J. As appears above, I think the contract which the owners of the salved ship entered into by their agent is a binding contract between the Admiralty and the owners of the salved vessel.

Another question was raised in the case with regard to the construction of the agreement, that is to say:

"Does the agreement mean that the salvors were only asking for the remuneration which they were entitled to recover, in the absence of agreement, under the Merchant Shipping (Salvage) Act, 1916, s. 1?" In my judgment it is impossible so to read the contract. At the time the agreement was signed the services of salvage tugs were not within the contemplation of the parties, though in fact at a later period such services were rendered. Two of the ships in respect of which the claim is made, namely, the *Frobisher* and the *Guardian*, had been standing by and giving assistance before the date of the agreement. The *Frobisher* reached the ship on the morning of the 22nd January and proceeded to take her in tow. The agreement provides that the provisions of the agreement shall apply to the services rendered before the date of the agreement, the 25th January, as if they had been wholly rendered after the signing of the agreement. It is impossible to avoid the conclusion that the agreement has reference to the services rendered by the King's ships in making fast to the *Valverda* and starting to tow her to a place of safety. Clause 4 of the agreement provides that the remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage. I think that means a reasonable amount of salvage in respect of all the services rendered by Government vessels, and cannot possibly be confined to services rendered by tugs or such other vessels as are within the provisions of the Act of 1916. The agreement went on to provide for payment of actual out-of-pocket expenses in case the efforts of the salving ship were not successful. It seems to me impossible to suppose that the agreement was such as would give a better result to the Admiralty in case of non-success than they would have had in case of success. The claim of the King's ship is, in my judgment, a claim not for salvage services, but a claim for doing these under an agreement, and there is nothing in the Merchant Shipping Act, 1894, which renders such an agreement invalid in law.

Branson, J. in his judgment especially relied on *The Iodine* (3 Not. of Cas. 140) and the judgment of Bankes, L.J. in *The Sarpen* (13 Asp. Mar. Law Cas. at p. 374; 114 L. T. Rep. at p. 1015; (1916) P. at p. 319). With all respect to the learned judge, I do not think the decision in *The Iodine* or the judgment of Bankes, L.J., to which I have referred, afford any authority for the proposition that since the passing of the Merchant Shipping Acts the Admiralty are entitled to claim to be paid for salvage due under express agreement. I think *The Iodine* does confirm the view I have already expressed that the Admiralty before the Merchant Shipping Act of 1853 were entitled to claim salvage, though it was usual to claim a less remuneration on account of the vessel being the property of the King. It seems to me that all that is proved by the many cases cited with regard to the rights of the King's ships before 1853 is that, though they were entitled to make salvage claims, they in fact always confined their claims to out-of-pocket expenses. The actual decision in *The Sarpen* does not touch the present case. The decision was that the salving ship there was not a ship belonging to His Majesty, and that therefore her owners were entitled to recover salvage. I do not think either the decision in *The Sarpen* or the judgment of Bankes, L.J. in that case afford any assistance to the decision of the present case.

Counsel for the appellants relied on *The Matti* (1918, P. 314), but I think it does not bear on the question, as the towage agreement there referred to was not an agreement between the owners of the *Matti* and the Admiralty, but between the owners of the *Nunthorpe*, a private vessel, and the owners of the *Matti*.

There is admittedly no case in which it has been decided that since the Merchant Shipping Act, 1853, the Admiralty as owners, on behalf of the Crown, of a King's ship cannot make a legally binding contract under which, in consideration of the ship's giving salvage assistance which it was not bound to give, the owners of the salved ship promise payment for the salvage services. As there is no express provision that the Admiralty shall perform salvage services, I think there is nothing in sect. 557 of the Act of 1894 which makes it illegal for the Admiralty to agree that if they do that which they are not bound to do, *i.e.*, stand by the ship and tow her to safety, they are to receive remuneration, or which renders a promise to pay for such services made by the owners of the salved ship illegal and void.

For these reasons I agree with the learned arbitrator and with Branson, J. that the Admiralty are entitled to recover the remuneration provided for in the agreement which was freely signed by the agent of the salved ship, who must be taken to have known the law and the provisions of the Merchant Shipping Acts and, notwithstanding those provisions, to have been willing in case the services were rendered to pay in the same way as he would have had to pay a private vessel undertaking the services without an agreement. I am of opinion that the arbitrator's decision and that of Branson, J. should be upheld, and that this appeal should be dismissed with costs; but, as my brethren are of the contrary opinion, the appeal will be allowed with costs.

Slesser, L.J.—In this case I abstain from expressing any view as to the position regarding the efficacy of claims for salvage services rendered by any ships belonging to His Majesty, apart from legislation.

In my opinion, the whole matter which falls to be considered in this case is whether the effect of sect. 557 of the Merchant Shipping Act, 1894 (in effect consolidating the early sections of the Acts of 1853 and 1854) has taken away from the Crown rights which it would otherwise possess and, if it has so deprived the Crown of power to claim for salvage services, to what extent the restriction of rights has been carried; to which must be added the problem whether, notwithstanding the restrictive legislation, a special agreement can be made to pay the Crown as salvor and whether the rights of defendants to seek protection in the statutes from claims can be made the subject of waiver.

The whole legislation which has to be considered for this purpose is now contained in sect. 557 of the Merchant Shipping Act, 1894, sub-ss. (1) and (3), together with sect. 1 of the Merchant Shipping (Salvage) Act, 1916. The language of the relevant section of the 1894 Act is as follows:

> "Sect. 557. (1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved."
>
> "(2) Any document purporting to give the consent of the Admiralty for the purpose of this section and to be signed by the Secretary to the Admiralty or on his behalf shall be evidence of that consent."
>
> "(3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs."

That of the 1916 Act, s. 1, contains the following provisions:

> 1. "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 section five hundred and fifty-seven 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."

In the present case, in so far as services were rendered by ships which fall within the 1916 Act, as specially equipped with salvage plant or as a tug, the appellants admit that under the agreement dated the 25th January, 1935, between themselves and the Admiralty, the remuneration may be fixed by arbitration, and they do not dispute their liability. This covers the two ships the *Creole* and the *Sandboy*, but with regard to the claim for salvage remuneration in respect of the *Frobisher*, the *Guardian*, and the *Orange Leaf*, vessels not within the 1916 Act, they say that the provisions of sect. 557 of the 1894 Act that "no claim shall be allowed for any loss, damage or risk caused to the ship or her stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services," preclude the court from entertaining any such claim; and that, notwithstanding a special agreement, if any, to pay therefor.

It was argued by counsel for the appellants that in so far as these matters are not claimable, the

salvage agreement which has been cited by my Lord of the 25th January, 1935, must be read as applying only to services claimable by statute, that is, the services of commander and crew under sub-sect. (1) of sect. 557 of the 1894 Act, or under the 1916 Act, and that the parties must be taken to have contracted with a knowledge of the existing law. In my view, this contention fails; either there is power in the parties by special agreement to produce a legal relation, notwithstanding the statute, which may deal with all services rendered, or there is no such power. In the latter case, the agreement cannot operate upon the excluded matters. In the former view, if the parties can contract without limitation, there is nothing in the language of the contract to show that any discrimination is made between salvage ships and tugs and the services of officers and men for salvage generally and the other matters dealt with in sect. 557. Their agreement as such is entirely general in its terms and provides for remuneration for any services rendered.

I have, however, come to the conclusion that the learned counsel is right when he says that this court has no jurisdiction to entertain a claim for services which have been mentioned as excluded by the section. The language appears to me to be express in its terms, and I think that he is right when he contends that the learned judge was in error in applying the principles of what is generally known as "contracting out" to this case. It is true, as the learned judge observes, that there are cases where provisions in a statute for the benefit of a particular person or class of persons may be waived by them. *Quilibet renuntiare potest juri pro se introducto.* But though equity may interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, so as to get rid of a waiver created by his own acts, conditions imposed by statutes which authorise legal proceedings to be taken, which are essential to give jurisdiction, cannot be waived nor provisions which, in terms, exclude the right to claim. Conditions precedent to jurisdiction cannot be waived: (per Pollock, B. in *Westmore* v. *Paine*, 64 L. T. Rep. at p. 57; (1891) 1 Q. B. at p. 484). See, for an example of the former class, *Wilson* v. *MacKintosh* (70 L. T. Rep. at p. 538; (1894) A. C. at p. 134), per Davey, L.J. a case of a waiver of an obligation to file a case within a certain time, a decision of the Privy Council; so also, in dealing with a case under the Public Health Act, 1875, where it was alleged that the limit of time for bringing of action had expired, the whole Court of Appeal seem to have been of opinion that the waiver of such a right was possible, though on the facts there was no waiver in that case: (*Midland Railway Company* v. *Withington Local Board* (1883), 49 L. T. Rep. 489; 11 Q. B. Div. 788). The matter is very clearly stated in *Parkgate Iron Company* v. *Coates* (22 L. T. Rep. at p. 658; L. Rep. 5, C. P. at p. 637), where notice of appeal and security was required by statute, where, in the language of Bovil, C.J. such notice "seems to me to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit." The case of *Griffiths* v. *Earl of Dudley* (1882, 47 L. T. Rep. 10; 9 Q. B. Div. 357), cited by the learned judge, is another example of the same principle.

The critical question to be answered in this case is whether the provision in sect. 557 can be waived in the interest of a limited class, as in the present case, by inducing the Admiralty to perform services which otherwise they might not perform or were, at most, under an imperfect obligation to perform by promising to pay them for such services, or whether this section, rightly regarded, is not one of general public provision extending beyond a particular class. Conditions enabling or disabling for the general purpose of the public cannot be waived: (*Attorney-General* of *New South Wales* v. *Bertrand*, 1867, 16 L. T. Rep. 752; L. Rep. 1 P. C. 520; *Re Stapleford Colliery Company; Barrow's* case, 1880, 42 L. T. Rep. 891; 14 Ch. Div. 432). The distinction appears to me to be a valid one to be drawn between statutes dealing with procedure or private rights or limitations which may be renounced, and specific public enactment denying jurisdiction to hear the action.

In the present case I see no reason to assume that sect. 557 is merely inserted for the protection of the class of persons who may receive salvage services from His Majesty's ships. There having arisen in the many cases which have been cited considerable doubt as to the extent of the Crown's right in these matters, I think that the Act of 1853 was concerned unambiguously to declare the law so that all parties, the Admiralty, their officers and men, the owners of ships and the public at large might know the extent of the liability. The very nature of the duties of His Majesty's ships primarily to defend His Sovereignty indicates the public nature of acts which arise from deviations from that duty involved in salvage operations and the like. Moreover, the language of sect. 485 of the Act of 1854 now substantially embodied in the latter part of sub-sect. (1) of sect. 557 of the Act of 1894, a subject matter dealt with in part in 12 Anne, Stat. 2, c. 12 (now repealed), which now, in its final form, limits the rights of officers and men of His Majesty's ships to claim salvage without the consent of the Admiralty, points to the public nature of the legislation. It is *pro publico introducto.*

The discussion before us on public duty does not seem to carry the matter any further, for, if the statute be of general application, public policy clearly requires the observance of its provisions; *privatorum conventio juri publico non derogat.* If it were not for the public purposes, it is difficult to see what policy is served by preventing the Admiralty from claiming remuneration for services which might otherwise, conceivably, not be rendered.

Being of opinion, as I have stated, that the prohibition of the right to claim for the services is general in its nature and not enacted solely for the benefit of those persons who are to receive the services, I come to the conclusion that the legislation is of the kind which cannot be waived, and that this court has no jurisdiction to entertain a claim for the services by the section excluded. Scott, L.J. having arrived at the same conclusion, it follows that, in the opinion of the majority of the court, this appeal succeeds.

Scott, L.J.—This is an appeal by the owners of a salved ship, cargo and freight against a decision of Branson, J. upon a case stated by an arbitrator. It raises questions as to the meaning of sect. 557 of the Merchant Shipping Act, 1894; as to the true interpretation, in the light of that section, of a certain salvage agreement between the Admiralty and the owners of the ship, cargo and freight in a position of present peril; and, if that agreement be interpreted in one way, as to whether certain claims made by the Admiralty in their own interest, *i.e.* on behalf of the Crown, and assessed

by the learned arbitrator at 4500*l*, are, notwithstanding the statute, legally enforceable under the agreement so construed. These three questions of law may be put shortly: (1) What does the agreement mean? (2) What does sect. 557 mean? and (3) Is the apparent scope of the agreement indirectly cut down through the statute making it wholly or partly unenforceable?

It will be convenient, however, before discussing question (1) to begin by quoting in full the only two statutory provisions which have to be considered in the course of this judgment. Sect. 557 is as follows:

"(1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved."

"(2) Any document purporting to give the consent of the Admiralty for the purpose of this section, and to be signed by the Secretary to the Admiralty or on his behalf, shall be evidence of that consent."

"(3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs."

The history of the section is this: The first part of sub-sect. (1) prohibiting certain claims was originally introduced as sect. 39 of the Merchant Shipping Law Amendment Act, 1853 (which is printed in the King's Printer's copy of the statutes after sect. 40). The wording was practically the same as that of the first half of sect. 557, sub-sect. (1), to-day. In the consolidating Merchant Shipping Act of 1854, sect. 39 of the 1853 Act became sect. 484. In the 1853 Act there was nothing equivalent to the second part of sub-sect. (1) and sub-sects. (2) and (3) of sect. 557, but an enactment on the subject of the consent of the Admiralty to proceedings by the commander or crew of Her Majesty's ships on lines similar to those in sect. 557 of the 1894 Act was included in the 1854 Act as sect. 485. In 1894, the substance of sect. 485 was re-enacted in the second half of sub-sect. (1) of sect. 557, although the details as to procedure and proof of consent contained in sub-sects. (2) and (3) of sect. 557 are somewhat different from those in sect. 485 of the 1854 Act. So far as the present appeal is concerned the net result is that the relevant part of sect. 557 originally became law in an amendment Act in the year 1853.

That part of sect. 557 was amended by sect. 1 of the Merchant Shipping (Salvage) Act, 1916. Sect. 1 is as follows:

"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 section five hundred and fifty-seven 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 facts have already been sufficiently summarised by Greer, L.J.; they are clearly and fully stated in the award. For the purpose of construing the agreement (and particularly in view of certain passages in the learned judge's judgment), it is desirable to set out a good deal of it *in extenso*. At the moment of its execution the salvage services had already been started, but nothing turns on that fact, and the clause of the agreement relating to it need not concern us. The agreement was made between an agent for owners of the ship (thereinafter called the master or owner), cargo and freight of the one part and the Admiralty of the other. The relevant parts are the following:—

"Clause 1. The Admiralty agree to use such endeavours as they or their officers may in their absolute discretion think fit to salve or assist the ship *Valverda* and her cargo and freight if any, and the master (or owner) hereby engages the services of the Admiralty for such purposes.

"Clause 3. The remuneration under this agreement for any services rendered shall, unless agreed with the Admiralty, be fixed by arbitration in London, as hereinafter provided.

"Clause 4. The remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage.

"Clause 5. If the services are not successful or beneficial, then the actual out-of-pocket expenses incurred by or on behalf of the Admiralty in the endeavours to salve or assist the said ship and her cargo and freight, together with compensation not exceeding 350*l*. for any loss or damage incurred in such endeavours, shall be the measure of the remuneration payable to the Admiralty under this agreement, but there shall not be included in the said expenses or compensation any charge for the use of any ship or tug belonging to His Majesty.

"Clause 6. The Admiralty shall, after the termination of the services, notify the Committee of Lloyd's of the amount for which the Admiralty may require security to be given.

"Clause 7. Pending the completion of the security as aforesaid the Admiralty shall have a maritime lien on the property salved for their remuneration, and the master (or owner) hereby undertakes not to remove or to permit the removal without the consent of the Admiralty of the property salved or any part thereof from the port of or the place of safety to which the property is taken or at which it is left by the Admiralty on the completion of the salvage services until security has been given to the satisfaction of the committee of Lloyd's. In consideration of this undertaking the Admiralty engage not to arrest or detain the property salved unless the security be not given within fourteen days of the termination of the services or the Admiralty have reason to believe that the removal of the property salved is contemplated contrary to the above undertaking.

"Clause 8. The amount of the remuneration payable under this agreement, and any other question which may arise out of this agreement, shall be referred to the sole arbitration of an arbitrator to be appointed by the Committee of Lloyds."

Before the arbitrator no dispute arose as to H.M.S. *Sandboy* and H.M. yardcraft *Creole*, which fell for all purposes within the 1916 exception to sect. 557 of the Merchant Shipping Act, 1894.

Par. 10 of the award says: The Admiralty contended that by virtue of the terms of the salvage

agreement hereinbefore referred to they were entitled to claim in respect of the services of all five ships. They further contended that apart from the said agreement they would, in the circumstances above set out, have been entitled so to claim.

By par. 12 the learned arbitrator upheld the above contention and awarded 11,000*l.* as a lump sum payable under the terms of the agreement, the question of distribution as between the Crown as owners of His Majesty's ships and the commanders and crews not having been referred to him. The question left to the court in par. 13 was : " Whether upon the facts hereinbefore set out the Admiralty are entitled in law to salvage remuneration in respect of the services of H.M.S. *Frobisher*, H.M.S. *Guardian*, and H.M.S. *Orangeleaf*, and by par. 15 he fixed at 6500*l.*, the figure to which the award should be reduced if par. 13 should be answered by the court in the negative, 4500*l.* thus being the sum at which he assessed the services of the three ships not within the 1916 Act.

Question (1).—What does the agreement mean ? Does its language cover the claims to which par. 13 of the award relates ? Assuming that the agreement was one into which it was open for the parties to enter, the learned judge has held that the arbitrator's interpretation was right if the agreement is to be construed as " an agreement between two parties *sui juris* and according to the meaning of the language used without reference to anything else." By this hypothesis, he intended to eliminate any disability resting by law, either unwritten or statutory, upon the Admiralty, and possibly also upon owners desiring to contract with the Admiralty. On that hypothesis I should concur in his interpretation. But to make the hypothesis at all was, I think, a mistake ; it could not help in the solution of the first question of the case, namely, what is the meaning of the agreement in the light of that legal disability ? Does not the statutory inhibition necessitate an interpretation which will restrict the wide meaning of clauses 1 and 3 to such claims for salvage remuneration as the law, written and unwritten, allows either the Admiralty or the personnel of His Majesty's vessels to make for the use of His Majesty's ships ? On this question of construction it is to be observed that the agreement was on the printed " Admiralty Standard form of Salvage Agreement " which was established in 1917—just after the Act of 1916 came into force. To ships coming within that Act it would be wholly applicable, but when used for His Majesty's ships not of the kind within that Act, difficult questions of interpretation are left open. The agreement does not in express terms say that it is intended to confer on the Admiralty the right to claim, and to impose upon the " master or owner" the correlative obligation to pay remuneration of the kind forbidden by the statute. Nor does the mere fact that the Admiralty are contracting parties throw any light on the problem of construction ; for the agreement covers various services for which the Admiralty could claim on their own behalf ; and, for the rest, the Admiralty were plainly acting in the matter as agents for the commanders and crews of His Majesty's vessels in respect of personal services to be rendered by the latter. What is there then in the language of the agreement to justify our interpreting it as intended to enlarge the Admiralty's rights, either on their own behalf or on behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which, without an agreement, they would have no right ?

Whatever the unwritten law was before 1853, the main provision of sect. 557 has been on the statute book since that year, and is by far the most important of all " surrounding circumstances " which can throw light on the interpretation of the agreement. If it was the intention of the parties to exclude the operation of the statute they could easily have said so. I see no such express words as seem to me necessary to do that. It seems to me to follow that if it is possible to construe the agreement as limited to " allowed " claims that construction must be right. I agree with the learned judge and the learned arbitrator that apart from the legal inhibition the wider meaning of the agreement would be the more natural, but on the whole, although not without doubt, I think that the agreement can, and therefore should, be construed in the narrower sense of an undertaking to pay such salvage remuneration as is not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more. It follows that on this first ground I answer the arbitrator's question in the negative.

But if my interpretation is wrong and that of Branson, J. is right, and for that reason the agreement does expressly cover the banned heads of salvage remuneration, my further questions Nos. (2) and (3) arise (namely, as to the meaning of sect. 557 and as to its effect upon the agreement), and the answers to them may lead to the same practical result, as my answer to question No. 1.

Question (2).—The meaning of sect 557. I do not think that there can be any real dispute about the meaning of the section ; the words " no claim . . . shall be allowed for (*x*), (*y*), (*z*)," are too plain. It is, indeed, conceded on behalf of the Admiralty that the whole of the 4500*l.* of remuneration described in par. 13 of the award falls strictly within the category of claims for remuneration which the section says " shall not be allowed," and that in a salvage action in the Admiralty Division, had there been no agreement, the Admiralty suing as plaintiffs would have failed to get judgment for the 4500*l.* or any part of it. That being so, I think the legal conclusion follows, that the section must be interpreted as meaning that the banned claims are not to be allowed in the King's courts ; and if they are not allowed there, it also follows that no such cause of action can exist.

Question (3).—What is the effect of sect. 557 upon the agreement, if my answer to question (1) is wrong ? Is an agreement made for the express purpose of creating by contract a cause of action for salvage remuneration falling within the statutory ban, enforceable in the courts, notwithstanding the statute ?

This issue was described by counsel as a question whether the parties could contract out of the statute. However it is stated, it turns upon the effect to be given to the words " no claim shall be allowed " as applied to the elements of reward described in the section. Some point was made on behalf of the Admiralty before Branson, J. and before us, in relation to this issue that the agreement should be regarded as " a common law agreement " and not as a " salvage agreement." I am not quite sure what difference in legal consequences it is contended would follow if it were the one rather than the other, but anyhow, I do not think that the agreement is a " common law agreement " : it is expressed throughout in language which preserves the characteristics of Admiralty salvage. This appears particularly in clause 7 in relation to the maritime lien for salvage ; no maritime lien can be conferred by contract, and the clause must accordingly be read as referring to the lien resulting in accordance with

the law of the Admiralty Court, from salvage services recognised by that court as true salvage services. That lien must be the lien which the salvors have acquired by operation of law outside the agreement. For that reason the word "have" in the sentence "Pending the completion of the security as aforesaid, the Admiralty shall *have* a maritime lien" must be read as meaning "retain"—until the security is completed. For the same reason, clause 7 has no application to clause 5, for the true maritime lien attaches only to property salved. It is just an ordinary salvage agreement such as has always been treated in the Admiralty Court as leaving untouched the inherent legal characteristics of true salvage. In that court salvage is none the less salvage that there has been some agreement about it: (see Edwards' Treatise on the Jurisdiction of the High Court of Admiralty (1847), at p. 189). "Such an agreement is no bar to the jurisdiction of the Admiralty Court"; "such agreements are frequently pronounced for and not allowed to be set aside unless under strong and sufficient reasons"; for the Admiralty Court has always a power of its own to reopen such agreements: (see Kennedy on Civil Salvage, 3rd edit. at p. 249). I am not forgetting that, although the right to remuneration for a maritime salvage probably had its origin in the jurisdiction of the Admiralty (see Kennedy on Civil Salvage 3rd edit., at pp. 3 and 4), it was also recognised by English courts of common law. But the common law right differed in two respects—the proceeding was *in personam* and a common law possessory lien took the place of the maritime lien: (see Abbott on Shipping, 4th edit., 1812, at p. 407, the last edited by Lord Tenterden himself; repeated in the 5th edit., 1824, at p. 398). I cannot, however, see that it makes any difference to any question in the present appeal whether it is an Admiralty agreement or a common law agreement which we are asked to construe and enforce.

If I am right in the view I have expressed that sect. 557 abolishes the cause of action for any of the banned heads of remuneration, it is a long step towards two further conclusions, namely, (1) that the King's courts are deprived of jurisdiction to consider these claims; and (2) that a rule of public policy is thereby laid down. That the words "no claim shall be allowed for" express a direction to the courts, before which such claims might have come had no such statutory prohibition been raised, not to allow any claim of the prohibited kind, I cannot doubt. In so far as the courts are so directed, their jurisdiction is affected; and if a court's jurisdiction is taken away it is the duty of the court of its own motion to refuse to entertain an excluded claim. This seems to me the one plain part of the natural meaning conveyed by the express words used. A further direction is, in my view, given to the Admiralty itself and to the personnel of the Navy. But if no claim is to be allowed by either the Lords of the Admiralty, or the personnel of the Navy performing salvage services for salvage remuneration for loss damage or risk caused to His Majesty's ships or other property, or for the use of stores or other articles belonging to His Majesty supplied in order to effect those services, or for any other expense or loss sustained by His Majesty by reason of that service, how are we to escape the conclusion that an agreement which provides for the doing of the very thing which the Act says is not to be allowed, is an agreement to do an unlawful act?

An argument was addressed to us (and also to Branson, J., who accepted it), urging that there is similarity between the words "no claim shall be allowed for," and words of some other statutes where the view has been taken judicially, or at least followed by practitioners and not rejected judicially, that the particular words therein enacted were inserted for the benefit of the party concerned, and are, therefore, to be construed as granting him a privilege, which he may waive on the principle "*Quilibet renuntiare potest juri pro se introducto.*"

To this argument I reply that we have to construe the words of this particular section, and that we have not had any statute cited to us by counsel for the Admiralty which contains precisely the same, or even very similar words, still less a statute so worded which has also been judicially construed in accordance with the argument. The statute upon which most reliance was placed by Branson, J. was the Public Authorities Protection Act, 1893. But there are two distinctions: (1) The words in sect. 1 of that Act are not the same—nor are they similar: they are "Where . . . any action . . . is commenced" it "shall not lie or be instituted unless it is commenced within six months." Those words do not purport to negative the cause of action or make it unlawful to make the claim; they assume the existence of a lawful claim and merely impose a procedural limitation of time for the institution of legal proceedings to enforce it, in order that public authorities may be protected from stale claims. It is thus in essence a Statute of Limitations, as was held in *Gregory* v. *Torquay Corporation*: (see per Pickford, J. 105 L. T. Rep. at p. 140; (1911) 2 K. B. at p. 560; affirmed by the Court of Appeal, 105 L. T. Rep. 886; (1912) 1 K. B. 442). I recognise that the words of that Act, "the action . . . shall not lie or be instituted," *primâ facie* have a superficial similarity to the words, "no claim shall be allowed for" in this Act; but there is no underlying similarity. The whole purpose of that Act was not to prevent claims being put forward, but to ensure that there should be no unreasonable delay in bringing them forward; and that, of itself, is sufficient to justify a wholly different interpretation of the two phrases. Besides, I do not feel sure that if the point had been argued in 1894 the court would have construed the Act as leaving the cause of action still effective after the six months' period if the defendant authority did not raise the defence; it might have taken the view that it was the duty of the court itself to raise the question. There has been such a long and unbroken practice since 1893 of regarding the Public Authorities Protection Act, 1893, as affording an optional defence, that even the House of Lords would now be slow to disturb the accepted interpretation; but for that very reason I think that the prevailing interpretation must be regarded critically if the true meaning of the original words when the Act was first passed is to be sought. In this context it is relevant to recall what Lord Finlay said as Lord Chancellor in *Morris* v. *Baron and Co.* on a similar question—the difference of wording between sect. 17 and sect. 4 of the Statute of Frauds; and between sect. 17 of the statute and the substituted words of sect. 4 of the Sale of Goods Act, 1893 (118 L. T. Rep. at p. 36; (1918) A. C. at p. 11). Lord Finlay, L.C. was not ignoring what Lord Blackburn had said in *Maddison* v. *Alderson* (49 L. T. Rep. at p. 310; 8 App. Cas. pp. 488–9), but nevertheless was still of opinion in 1918 that the words of sect. 17 did make the contract invalid; and if he was right, the history of that section in our courts is a good illustration of how a true original meaning may become obscured in the course of time by an erroneous customary interpretation, accepted and even in the end confirmed judicially—so that it becomes,

as Lord Blackburn said, "communis error and so makes the law." We are not concerned in this case to pursue the point raised by Lord Finlay any more. I only refer to it for the purpose of further discounting the value which attaches to the habit of citing other statutes in order to construe the one calling for interpretation.

The fundamental distinction of the various enactments cited as similar is that there is nothing in the enactment we have to consider to indicate that it is intended for the benefit of anybody. To whom could the maxim I have quoted have been held to apply? Who were the benefited persons who could renounce their benefit? Consider the contrast afforded by the Public Authorities Protection Act, 1893. Parliament made it clear there that the Act was for the benefit of a particular class. Both the short title and long title show that it was an Act for the protection of public authorities. Parliament thus emphasised their protection as the dominant purpose of the Act, and created for public authorities a privileged position of which the beneficiaries could avail themselves or not as they liked—a position to which the maxim is directly applicable.

The respondents relied also on the analogy of the old 17th section of the Statute of Frauds. I have already indicated one reason for rejecting that analogy—the doubt expressed by Lord Finlay, L.C., as to the original meaning of the words of sect. 17. Another difference is that the Act was dealing not with claims but with the form and proof of the contract, the purpose being to protect a particular class of person—namely, purchasers—from frauds.

Reliance was also placed upon *Griffiths* v. *the Earl of Dudley* (1882, 47 L. T. Rep. 10; 9 Q. B. Div. 357), a case upon sect. 1 of the Employers' Liability Act, 1880, where it was held by a Divisional Court that the statutory exclusion of the common law doctrine of common employment from employers and workmen contracts did not prevent the parties contracting out of the Act. It was not an enactment to forbid claims; it was an enactment to confer a benefit on a particular class, by taking away a particular defence against claims. The decision is not *in pari materia* with a statute which, on the one hand, says claims are not to be allowed, and on the other does not purport to confer a benefit on any particular class.

In the result I agree with the views of Slesser, L.J.; I do not think any one of the statutes, on the similarity of which the respondents rely, is really analogous; the cases cited therefore cannot help, and we have to make up our minds on the effect of the words used in this statute.

On that question it is my opinion that the words of sect. 39 of the Act of 1853, repeated in sect. 484 of the consolidated Act of 1854 and sect. 557 of the similar Act of 1894, are capable of only one interpretation: I think they constitute an express prohibition of all salvage claims falling within their ambit, and I feel bound so to hold, although in view of the judgment of Greer, L.J. I do so with diffidence.

However, even if the words are not quite so clear as I think them, and leave any ambiguity, there are certain considerations which seem to me to support an identical interpretation. If a statute dealing with a general question of law contains any ambiguity, it is essential to see what the state of the law was when it was passed. Let us apply that rule to the Act of 1853. Salvage remuneration appears originally to have been given by the Court of Admiralty in this country as a reward to individual salvors, officers and crew and others for personal services, successfully rendered by them at their personal risk, to maritime property, *i.e.*, ship, cargo or freight, in danger either from enemies (including pirates), or perils of the sea; the former being known as a military salvage and the latter as a civil salvage. This is the primary sense of salvage: *H.M.S. Thetis* (per Sir Christopher Robinson (3 Hag. Adm. at p. 48)): "Salvage, in its simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward. It is personal in its primary character, at least; and those who are so employed in the service are those whom the law considers as standing in the first degree of relation to the property and to the proprietors."

It was only at a later stage, some time after our courts had first admitted the general right of personal salvors, that the risk incurred by the owners of a salvor ship used as an instrument in the salvage service, came to be recognised as a separate ground for remuneration entitling its owners to claim. It was as an exception to the general rule that the owner's claim was admitted (see per Lord Stowell in *The Vine*, 1825, 2 Hag. Adm. 1): "The claim of Lieut. Porter is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this rule that not infrequently occurs is in favour of owners of vessels which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed." It is not necessary for the purpose of this judgment to ascertain when this extension was first allowed by the court, but the invention of steam made the steam vessel so efficient an instrument of salvage that its use soon caused the court to give emphatic recognition to the owners' rights as salvors: see *The Raikes* (1824, 1 Hag. Adm. at p. 246), where Lord Stowell referred to them: "This is a case of salvage-service performed by the *Monarch* steam-packet; and it is the first case in which a compensation has been claimed, in this court, for the services of a vessel of this peculiar character; I am therefore inclined to give as much encouragement as possible to similar exertions, on account of the great skill, and the great power of vessels of this description." In 1857, Dr. Lushington in *The Spirit of the Age* (Swabey, at p. 286) said: "We all know that formerly claims of owners of vessels to participate in salvages did not receive very favourable attention from the judges who preceded me in this chair; but since then things are much changed; steamers are able to render important salvage services in which the ship herself is the chief agent. I have therefore departed from the former practice, and have given adequate rewards to the owners of such vessels."

It is unnecessary to refer in further detail to the cases upon the grounds for remunerating the owners of salvor vessels; the history of the law is sufficiently stated in Kennedy on Civil Salvage, 3rd edit., Ch. 2, and particularly at pp. 81–5. But this enlargement of the scope of salvage remuneration does not seem, as far as I have been able to trace, ever to have been judicially extended to the King's ships—at least to the extent of allowing the Admiralty or the Crown to claim as salvors in ordinary cases of salvage by the King's ships. The first approach to such an extension which I have been able to find was in 1833, in

H.M.S. Thetis, to which I have already referred (3 Hag. Adm. 14). That was a wholly exceptional salvage. H.M.S. *Thetis*, a frigate of forty-six guns, had sunk in a rocky cove on the Brazilian coast with a treasure of 810,000 dollars on board. Extraordinary salvage services, mostly from the land, and lasting over eighteen months, were rendered by the admiral in charge of the station, and by a Captain Dickinson and others nominated by him for the work; in addition, plant and apparatus of what was then a novel and ingenious kind were specially made, funds being found by the Admiralty for the purpose. In the end 750,000 dollars were recovered. Sir Christopher Robinson made various awards to the salvors for personal services. There was in addition a claim by the Admiralty itself of 13,833*l.* for the expenses to which they had been put, but there was no adjudication upon the legal justification of this claim, as the owners of the treasure and the admiral as salvor both assented to its being met out of the salved dollars; so that to that extent there was no dispute about the Admiralty's right. In addition it must be remembered that the nature of the service was very unusual. Sir Christopher Robinson said of it (3 Hag. Adm. at p. 61): "The claim on the part of the Admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented; but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public in regulating the employment of His Majesty's ships; and they act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is undoubtedly a difference between the assistance afforded in ordinary cases by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores to a service of this kind, for eighteen months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service." The observation of the learned judge will be noted that such a claim had not hitherto been allowed "in ordinary cases."

Again in *The Ewell Grove* (1835, 3 Hag. Adm. 209) a vessel stranded hard on a rocky shelf off Jamaica in a position of great danger, was rescued by H.M.S. *Rhadamanthus*, a steam vessel. Sir John Nicholl (see pp. 224–5) pointed out the similarity of circumstance in the use of a King's ship to the ordinary case of a private owner. But the salvors claiming were not the Admiralty but the captain and crew of the King's ship, and Sir John Nicholl only referred to a possibility of the Admiralty asking the salvors for part of their award.

The fact that in ordinary cases an exception had been made in favour of private owners but that this privilege had not been definitely extended to the Crown for the use of King's ships is the more significant, in that it would seem just as logical to extend the benefits of the law of salvage remuneration so as to give the Crown some reward for the risks run by its property, as it had been to extend it so as to give the owners of private salvor ships a reward for the risks run by their property. So much are the two on a parity that I cannot help thinking that the real reason why the right of the Crown was not frankly recognised must have been some view taken of public policy—possibly that it was a wrong principle to allow the Crown to claim, because the Crown was already under a moral duty to all its subjects to assist them in distress at sea, and therefore ought not to seek a reward when using public ships to discharge a public duty. But it is not for the court now to speculate as to what the reason was; it is enough to record the fact that in 1853, when the relevant statute was passed, the state of the law appears to have been that the question of remuneration to the Admiralty for the use of King's ships and other matters mentioned in the statute had not been the subject of direct judicial decision, although it had been indirectly considered from time to time.

In the argument before us it was contended that in some of the cases in the first half of the nineteenth century the court intended to express an opinion which, although *obiter*, was entitled to respect, to the effect that a claim by the ship itself, i.e. by the Crown or Admiralty was cognizable, and that reward might in that capacity be given to the owners of the King's ship. I do not think this was ever intended by our Admiralty judges. A good illustration of the misconception is afforded by the passage in the judgment of Dr. Lushington in the year 1844 in the case of *The Iodine* (3 Not. of Cas. at p. 141), which was actually cited by Bankes, L.J. in *The Sarpen* (13 Asp. Mar. Law Cas. at p. 374; 114 L. T. Rep. at p. 1015; (1916) P. at pp. 319–20). The passage to which I refer is: ". . . that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked."

The second sentence was quoted to us (and apparently also to the court in *The Sarpen* (114 L. T. Rep. 1011; (1916) P. 306)) as intended to refer to claims on behalf of the Crown, or the Admiralty, in respect of the services rendered by a King's ship. I do not think this is the correct interpretation of the sentence; in my view it meant simply that in a suit for salvage remuneration on behalf of officers and seamen of one of His Majesty's ships, although so far as concerned their claims for their personal services the claimants were on the same advantageous footing as persons not in His Majesty's service, yet their remuneration must be limited to the value of their personal services without any reference to the risks caused to His Majesty's ships, and other property in the course of the salvage services, just because the claimants did not own them, with the consequential corollary that the total remuneration to be paid out of the salved property would always for that reason be less than if the salvors had been private owners: (see Kennedy on Civil Salvage (3rd edit.), at pp. 124–5).

In examining to-day the language used by the earlier Admiralty judges it is important to keep in mind the inveterate habit of personifying the ship, as being itself the plaintiff or defendant in Admiralty suits, including salvage cases. Time after time Admiralty judges are reported as speaking of the ship as making the claim, in cases where the

salvage had been effected by a King's or Queen's ship, but the only claimants before the court were the officers and crew. It never seems to have entered anyone's head in those days that the Crown or the Lords Commissioners of the Admiralty were being referred to, or that they were or could be plaintiffs suing in the capacity of owners of the ship which had incurred risk or suffered damage in effecting the successful salvage. Illustrations of this source of ambiguity are to be found in two or three cases cited to us by counsel, and particularly in *The Iodine* (1844, 3 Not. of Cas. 140), cited by Bankes, L.J. in *The Sarpen* (13 Asp. Mar. Law Cas. at p. 370; 114 L. T. Rep. at p. 1011; (1916) P. at p. 319), to which I have already referred: see, for instance, *The Louisa* (1813, 1 Dods. at p. 317), where Lord Stowell, then Sir William Scott, said in regard to the salvage of a recaptured ship which was in a sinking condition: "The ship must be taken to have been in a state of considerable danger from her own condition; and though it is certainly the duty of King's ships to afford assistance to all His Majesty's subjects whom they may meet with in distress, yet I do not know that it is incumbent upon them, at the hazard perhaps of their lives, and without any prospect of reward, to take charge of a ship in a sinking state. Any hesitation in affording assistance might be of dangerous consequence to the property of persons so circumstanced; and it is therefore proper, for the encouragement of prompt and signal exertions on the part of the King's officers and men, to hold out to them the prospect of reward. . . . The captain of a man-of-war is not bound to put himself or his men in danger to preserve a merchant ship from sinking; and I do not know that he is bound to take her in tow. He did so, in this instance, for as long a time as any assistance of that kind was required; and although the service which has been performed is not of the highest degree of merit it is not to be too lightly estimated."

It is to be noted that the case is reported under a headnote saying "Civil salvage is due to a King's ship for services rendered to a vessel in distress," but the only claim before the court was one by officers and crew. Similar observations apply to *The Mary Ann* (1823, 1 Hag. Adm. 158), where the commander and crew of H.M. sloop *Arab* were given salvage and Lord Stowell said: "In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop *Arab*; and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the state, and although there is an obligation upon King's ships to assist the merchant vessels of this country; yet, when services have been rendered, those who confer them are entitled to an adequate reward."

The examination of the old cases seems to show that it was common form in the Admiralty Court that it was only the officers and men who were entitled to claim, at any rate in respect of remuneration proper, for the services of the ship. Nor have I found any case, with the doubtful exception of *The Thetis*, in which loss or damage to government stores, or, indeed, any expenses incurred by the Crown were allowed as salvage. Nor have I found any case of an agreement for such payments being enforced by the Admiralty, either as salvage or at all. It is true that in the case of *The Lustre* (3 Hag. Adm. 154) there was reference to what is there called an "express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged"; but there again the claimants were the officers and men of the King's ship; and in addition there was no adjudication on the question of the agreement.

The position therefore when the Act of 1853 was passed may, I think, be summarised by saying that no practitioner in the court imagined that a legally enforceable claim could be put forward by the Crown for salvage remuneration due to it as owner in respect of a Queen's ship used in the salvage service. What then was the object of the Act? It may have been merely declaratory. Possibly it may be a more natural inference that, as there had been signs of attempts by the Admiralty to make claims—such as that in *The Lustre*—Parliament thought it good public policy to forbid such claims in clear terms. Possibly some question may have arisen with a foreign Government through the Admiralty trying to recover salvage from a foreign ship.

In the result, I feel forced to the conclusion that Parliament had deliberately taken the position in hand, and then decided to clear up doubts by declaring that no such claims were to be allowed in the future. One proposition at any rate is clear; it cannot be said that Parliament was by the new law conferring any particular benefit upon the owners of ships, freights and cargoes in maritime peril as a class. Taking everything into account there seems to me to be sufficient reason to resolve any doubt, which there may be (and I see none) in favour of the construction of the words "no claims shall be allowed" as meaning "all such claims are forbidden."

It is curiously interesting that we have the report of a case which came before Dr. Lushington within three months of the Act of 1853 coming into force (which was the 1st October, see sect. 3 of the Act) where he expressed his understanding of the new Act. *The Rosalie* (heard on the 20th December, 1853) (1 Spink Eccles. & Ad. 188) was a salvage case where the claimants were the officers and crew of a Queen's ship, and Dr. Lushington said this: "Before I advert to the particular facts and circumstances of this case, I will observe that I do certainly rejoice the ancient law and practice of this court has not been altered. Whatever may be the merits or demerits in this particular instance, I think that, continuing to allow Her Majesty's officers and those under their command to obtain a reward where they do render beneficial services, frequently at great risk and peril, and sometimes where the commander incurs great responsibility, is not merely an act of justice, but most advantageous to the mercantile marine of this country. . . . The parties promoting this suit are Lieutenant Day and those on board the *Locust*. Of course he could make no claim for the service of the steamer himself—she is the property of the Government; and though he would be responsible for any damage which improperly occurred, he would be answerable for nothing else. It is impossible for him to advance any demand at all like that of the owners of steam or other vessels who have risked their property in order to render assistance to others." It will be observed that in the first passage quoted Dr. Lushington says in terms that the ancient law and practice of the court has not been altered by the recent Act. In the second passage he points out that the service of the Queen's ship in itself, being the property of the Government, cannot enter into the consideration of the officer's claim for remuneration of himself, except in so far as being responsible for damage to the vessel through his own negligence, he may have incurred a personal risk in that respect

This second sentence serves to reinforce the view I have expressed as to the true meaning of the passage in *The Iodine* (*sup.*) quoted by Bankes, L.J. in *The Sarpen* (*sup.*). It also shows that Bankes, L.J. used the word "restricting" in that passage inaccurately; and, consequently, that Branson, J. was in error in relying upon his construction of it.

There is still one more reason for construing sect. 557 as a prohibition of claims within its ambit on general grounds of public policy, and not as a grant of optional defence to defendants. It seems to me that the Act of 1916 read in its natural sense assumed that sect. 557 prohibited claims by the Admiralty, and that it is because Parliament took this view of the law that it decided, perhaps in the interest of British merchant shipping during the War, to rescind the prohibitions to a partial extent, namely, for His Majesty's specially equipped salvage vessels and tugs. The judgment of Sir Samuel Evans, P. in *The Matti* (1918, P. at p. 319) seems to support that view.

For these various reasons I have arrived at the conclusion in answer to my question (3) that, even if there is any ambiguity in sect. 557 the crucial words in it ought to be construed as a prohibition. If so the Admiralty could not make a contract to defeat the Act, and whether my view upon question (1) is right or wrong I agree in the conclusion reached by Slesser, L.J. that the appeal should be allowed.

Appeal allowed. Leave to appeal.

Solicitors: for the appellants, *William A. Crump and Son*; for the respondents, *The Treasury Solicitor*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, December 21, 1936.

(Before PORTER, J.)

Marstrand Fishing Company Limited v. Beer. (*a*)

Marine insurance — Barratry — Constructive total loss—Vessel not irretrievably lost—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 56, 57, 58, 59, 60.

The plaintiffs' ship was insured against perils of the sea, theft and barratry. Instructions were given to the master to take her to a fishing area in the North Sea. In breach of those instructions the master took her to various foreign ports with intent to deprive the plaintiffs of possession and ownership. He disguised the ship and falsified the log. The plaintiffs gave notice of abandonment, which the underwriters refused to accept, but they agreed to place the plaintiffs in the same position as if a writ had been issued. The plaintiffs claimed under the policy for an actual, or alternatively a constructive, total loss.

Held, first, that an act of barratry had been committed, but, secondly, that at the date of the notional issue of the writ the ship was not irretrievably lost, and was not therefore an actual total loss within the meaning of sect. 57 *of the Marine Insurance Act*, 1906, *and, thirdly, that at that date the recovery of the ship was not on the balance of probabilities so unlikely as to make her a constructive total loss within the meaning of sect.* 60, *sub-sect.* (2) *of that Act, and therefore that the plaintiffs could not recover on the policy.*

ACTION in which the plaintiffs, as owners of the fishing vessel, *Girl Pat*, claimed from the defendant, a Lloyd's underwriter, for the total loss of the ship under a policy of marine insurance for 3600*l.*, which the defendant had subscribed for 37*l.*

The plaintiffs' case was that on the 2nd April, 1936, the *Girl Pat* left Grimsby to make a fishing voyage in the North Sea, but the master and crew abandoned the voyage and took possession of the ship. They alleged that the master and crew had piratically and feloniously stolen her, and that she had thereby become an actual, or alternatively a constructive, total loss.

The defendant denied that the plaintiffs had been irretrievably deprived of the ship, and that she had become either an actual or constructive total loss by the perils insured against. The facts are fully set out in the judgment.

Carpmael, K.C. and *Naisby*, for the plaintiffs.

Willink, K.C., and *Stevenson*, for the defendant.

Porter, J.—This is an action on an insurance policy insuring, among other things, against perils of the sea, against theft, and against barratry. It is an action on a Lloyd's policy in the ordinary form containing insurance against ordinary perils. The insurance is in respect of the vessel known as the *Girl Pat*. The plaintiffs in the action are the owners of that vessel, and the defendant is one of Lloyd's underwriters. The vessel is part of a fishing fleet owned by the plaintiffs. She is not one of their smaller vessels, and was insured for the sum of 3600*l.* She had been under certain repairs, and she sailed on the 31st March, 1936, from Grimsby on the voyage in respect of which the claim was made. Her master was one George Black Orsborne, and her crew, except the engineer, were chosen by him. It appears that George Black Orsborne was a man of a somewhat hot temper, and it was thought advisable to let him choose his own crew rather than provide him with a crew chosen by the owners. He had originally been given another ship, and the *Girl Pat* had been given to another master as from the 8th April, 1936. It followed that the *Girl Pat* must be back in Grimsby by that date. The instructions given to the master were to fish in the North Sea, and it was suggested, but not given as a definite instruction, that he should join one of the other ships of the plaintiffs, the *Student Prince*, which was fishing some fifty-six miles E. by N. of Spurn. It is said that the ship originally sailed on the 31st March, but, according to the evidence given, even before that date the master had been discussing with the crew, or expected crew, the question of not taking the ship to the fishing grounds, but of running off with her. In fact, some trouble occurred to her engines and she put back, but that trouble was got over, and she sailed again on the 1st April, 1936. Instead of sailing N., or N.E., as she was expected to do, she was taken south to Dover. During that period it seems that discussions again took place between the master and crew as to the possibilities

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

of running off with the ship and trading with her, and ultimately selling her At any rate, she reached Dover on the 4th April, 1936. The one man chosen by the owners was the engineer, and, apparently after a number of unsuccessful attempts to get rid of him, the master succeeded in leaving him behind and getting off with the ship without an engineer. He had, however, the same number of crew, because both on the setting out on the 31st March and on the 1st April, the master's brother, Jim Orsborne, had come aboard as a stowaway. I think that one may adduce that this was part of the plot then discussed of taking the vessel from her owners. The master had spoken of going from Dover to fish on the west coast of Scotland, and at Dover the ship had taken in fresh provisions and possibly some further fuel. She had provisions when she left Grimsby for twelve days, and fuel for twenty-one days, if she were fishing, but only for twelve days direct steaming. To go to the west coast of Scotland would take twelve to fourteen days direct, or twenty days if she were fishing. The engineer, who had made a report to the owners after he was left behind, reported the existence on board of the stowaway, Jim Orsborne; and Mr. Moore, the owners' representative, suspected that the stowaway was the master's brother.

On leaving Dover the ship had full bunkers and five weeks' provisions. It may be accepted that there was no honest reason why the master should go to Dover. The taking of five weeks' provisions on board suggested dishonesty, and though it was possible that the master might come back up the east coast and fish in the North Sea, it was unlikely. Thereafter nothing was heard of the vessel for over a month and a half. Mr. Moore said in evidence that he thought that the man had probably gone, as he described it, "on the booze." He knew there was no engineer on board, and he thought that there was a considerable possibility of collision, and that the ship might have been lost by perils of the sea. By the 20th April he was anxious and suggested that the underwriters should be communicated with, and by the 28th April notice of abandonment was given. That notice of abandonment was not accepted by the underwriters, but they agreed to place the owners in the same position as if a writ had been issued.

By way of trying to recover the ship in case she had either suffered some casualty, but had not been lost, or in case she had been taken away by her crew, a radio broadcast was issued on the 29th April, 1936. By the 30th April application was made for posting the ship as missing. Lloyd's did not accede to that request, but postponed the matter for fourteen days. While that matter was still deferred there arrived, on the 11th May, from Corcubion, a port in Spain, a disbursement account for 235*l.* 18*s.* 7*d.* in respect of the *Girl Pat*. That information was afterwards amplified and other information given. Perhaps the shortest method of describing it is that contained in the correspondence: "(1) The account for disbursement discloses that the master is using the name of Captain Black, whereas his name is George Black Orsborne. (2) The master gave the name of his owners as Sir Richard Irvin, of Aberdeen, whereas the vessel is owned by the Marstrand Fishing Company Limited, of Grimsby. (3) The master gave the port of registration as Aberdeen, whereas the port of registry is Grimsby. (4) The master obtained a cash advance at Corcubion of 8135 pesetas, which is over 200*l.* (5) It has been stated that the master stated at Corcubion that his vessel was engaged in following Sir Richard Irvin's yacht, which was going down the Mediterranean, and was to catch fish for those on board." That was the information received, and on that it was submitted by the representatives of the owners that it was clear that the master had barratrously taken the vessel and that she was a loss by barratry. Application for assistance in recovering the vessel was made to the police about that date, and about the 14th May telegrams were sent to a large number of Lloyd's agents down a certain distance on the west coast of Africa and also across the Atlantic. On the 18th May the owners amended their notice of abandonment by asking that loss by barratry should be substituted as the loss on which they relied. The document making that request is contained in a separate instrument, which contains both the original notice of abandonment and the amended notice. The original notice contains at the bottom the following remarks by the underwriters: "Abandonment declined but to avoid action we hereby agree to place the assured in the same position as if a writ had been issued this day," that is, the 28th April. The second notice, dated the 18th May, is as follows: "Further to the letter the writer addressed to you yesterday and in view of the further information received from shipping to-day, we shall be glad if you will amend the notice of abandonment to read 'that the owners abandon the *Girl Pat* to the underwriters on the ground of the barratry of the master.' Will you please also indicate that the owners claim the total amount of the loss insured?" That is annotated: "Note amendment of terms—abandonment declined on previous terms."

It is not absolutely clear from those letters whether the second letter was a fresh notice of abandonment, speaking from the date the 18th May, or merely an amendment of the original abandonment, speaking from the 28th April. I do not regard the question as to which is the vital date as being important, but, at any rate, one of those dates is the date at which the notional issue of the writ must be taken to have occurred. As I shall indicate later, except as indicating possibilities which might have occurred to someone at that time as being likely to happen in the future, I do not regard the future events as being material in considering whether the assured was entitled to claim for a constructive total loss, if constructive total loss be the true claim in respect of the vessel, but I go on to state those facts as part of the history of the case. On the 18th May a report was received of a vessel having been seen fishing off the Salvage Islands. Probably that vessel was not the *Girl Pat*. On the 20th May the Admiralty were approached, and some question, though not, to my mind, a very material question, arose as to what the Admiralty were prepared to do. It was said on behalf of the owners that they were not prepared to do anything. It was said on behalf of the underwriters that if the owners had taken further steps the Admiralty might have done a great deal. I do not myself see that they could have done very much, but, at any rate, it appears that they suggested a letter should be written, and Captain Knox-Little, who had been approached, took the view that at that time the *Girl Pat* was not likely to get away, but that her recovery would be obtained in a comparatively short time. However, by the 25th May, certain of the underwriters, thinking that the loss was a loss for which they were liable to pay, agreed to settle, and a settlement took place. Certain of the underwriters refused to settle, taking the view that there was no total loss under the policy, and on the 26th May, 1936, the writ was issued in the present action. It appears now from what has been learned since,

that after leaving Dover the *Girl Pat* put into the shelter of the Channel Islands and altered her rig, putting on a bowsprit, and that at that time there was some discussion about going to Madeira. It also appears that the engines broke down, and broke down, as perhaps was not altogether surprising, in the absence of an engineer, because the boy who was shipped as cook, one Stephen, had failed to turn on the lubricating oil.

The vessel, it also appears, was in Corcubion from the 12th to 24th April, 1936, and at that time she had blacked out the letters and numbers on her side, the engines were not in good order, and during a great portion of that time work on the engines was taking place. It also appears that the log was falsified, the master using the name of George Black, for instance, and giving false names for the crew. From Corcubion she sailed to Teneriffe, where she was three days, thence to the Salvage Islands, and thence to Port Etienne, on the west coast of Africa, where she remained from the 11th to 15th May. After leaving Port Etienne for the first time she was twice ashore and had to put back. On the 23rd May she reached Dakar, and she was reported by Lloyd's agent as having arrived there. Telegrams were sent to him indicating that she ought to be kept, and that probably she had been barratrously seized. Steps were taken to keep her, but the master, who had had his engines repaired, indicated that it was necessary to try the ship to see whether he should pay for the engine repairs, and Lloyd's agent, and I think the port authorities, seem to have been prepared to let him try her engines. Perhaps a man a little more alive to the possibilities might not have done so, but, however that may be, they did let him try her engines, and she immediately put to sea and ran away. From that date a number of rumours were heard, such as that she was in tow of a British ship, that she was making for Cape St. Verde, and that the master was going to South Africa. None of those rumours were in fact true, and the ship eventually arrived off Georgetown, in British Guiana, and was arrested on the 19th June, 1936. I might add that the Dakar authorities, though they failed to keep her, thought, like Captain Knox-Little, that the vessel was getting to the end of her tether as the distance she had to travel would be great, and, after all, she only had a certain amount of fuel and stores on board. In those circumstances it is claimed that the *Girl Pat* was either an actual or constructive total loss by barratry.

First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone, I do not think, was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think that it is certain, even then, that that result would follow. Normally, I think capture is a constructive total loss, and the confusion which has arisen with regard to whether it is an actual or a constructive total loss arose merely because in the earlier cases the distinction between those two classes of loss was not kept clear. In the same way, damage may amount to a constructive total loss, but will not amount to an actual total loss, though it may amount to an actual total loss if it has been followed by sale so as to make the position one in which the vessel was lost to her owners by the proper sale after sufficient damage to justify it. The class of case to which I am referring is *Dean and another* v. *Hornby* (23 L. J. Q. B. 129), and *Stringer* v. *English and Scottish Marine Insurance Company Limited* (3 Mar. Law Cas. 440; 22 L. T. Rep. 802; L. Rep. 4 Q. B. 676). However that may be, whether under the old law capture was or was not an actual or constructive total loss, the case is now governed by sects. 56 to 60 of the Marine Insurance Act, 1906. By sect. 57 there is an "actual total loss," if the assured is "irretrievably deprived" of the vessel. In my view, no one could say here that the vessel was irretrievably lost to her owners. There was no actual total loss.

Then comes the question: Was the ship a constructive total loss? The test there is the test set out in *Polurrian Steamship Company Limited* v. *Young* (13 Asp. Mar. Law Cas. 59; 112 L. T. Rep. 1053; (1915) 1 K. B. 922), which was actually, of course, the test set out in sect. 60, sub-sect. (2) (*i.*), in which the material test is stated as being: "Is the recovery of the vessel unlikely?" It has been determined in *The Polurrian* case (*sup.*) that "unlikely" means that the balance of probabilities is against the vessel's being recovered. The person to whom it must appear that the vessel is unlikely to be recovered is not the individual concerned but is the "reasonable man." But that leaves the question: By what information must the person concerned judge? In giving notice of abandonment he can only act on such information as he has, and, indeed, he may act on a reasonable guess and can recover, providing in fact the recovery of the vessel was unlikely: *George Cohen, Sons, and Co.* v. *Standard Marine Insurance Company Limited* (21 Ll. L. Rep. 30). In determining whether in fact she was a constructive total loss two matters must be determined: (1) At what date must the judgment be exercised? (2) Is the accuracy of that judgment to depend on the facts known to the person forming the judgment at the time he does so, or is it to depend on the true facts existing at that time?

As to the first question—at what date must the judgment be formed—I think that *The Polurrian* case (*sup.*) determines the question. It is the date of the issue of the writ, or of the notional issue of the writ—that is to say, the date at which the underwriters agree to treat the matter as if it had been an issue. That, in this particular case, is either the 28th April or the 18th May, and I have said, having regard to my view as to the second question, I do not think it matters which date we take. In fact, I do not know that it matters in either case which date is taken. The second question—on what must the person making the claim be taken to have acted—depends on sect. 60, sub-sects. (1) and (2), of the Act. If the decision depended on sect. 60, sub-sect. (2), then the question is: Was the recovery on the proper date unlikely or not? *Primâ facie*, that means: "Was the recovery unlikely on the true facts as then existing and not on the facts as known to the assured. But it may be said that sect. 60, sub-sect. (2), is a particular instance of which sect. 60, sub-sect. (1), is the general expression, and, if so, the meaning of the general expression must govern that of the particular which is an instance or example of it. Even if this be so, the

phrase in sect. 60, sub-sect. (1), that there is a constructive total loss when the subject-matter insured "is reasonably abandoned on account of its actual total loss appearing to be unavoidable," may mean because on the facts as known the vessel's loss appears unavoidable, or because on the true facts the loss appears unavoidable. I prefer the latter of those two constructions, (*a*) because the particular instance in sect. 60, sub-sect. (2), would seem to point to the true facts being the criterion, and (*b*) because that was, I think, the view accepted in *The Polurrian* case (*sup.*). If that be an accurate view, the word "appearing" is used because the future of the vessel is still unknown and her loss must still be described as "appearing" unavoidable since certainty can never be predicated of the future. It would be curious if that were not so, since the result of the other meaning would at least be an odd one. One example may suffice. If the decision were to depend on the apparent facts, an owner, whose credible information was that the ship had been driven ashore in such circumstances that her loss appeared to be unavoidable, could give notice of abandonment, issue his writ, and recover, though it was found the next day that the vessel was safe and sound in harbour. To accept that a constructive total loss had occurred in such a case would be to hold, I think, as Mr. Willink said, that the insurance had been effected, not against loss, but against bad news. The same view seems to be supported by Arnould on Marine Insurance (11th edit.), section 1095, p. 1421.

Would, then, a prudent owner have come to the conclusion on the true facts as existing on the 28th April or the 18th May, that the recovery of the *Girl Pat* was unlikely? At that time the master and crew had determined to deprive the owners of possession of her and, I think, of ownership. There was no competent engineer on board; the engines had broken down twice; the log had been falsified: there was no proper chart; and the vessel had reached and sailed from Corcubion after having had her rig altered by the addition of a bowsprit, and after the blacking out of her fishing numbers, and repainting. She was not lost by a peril of the seas, but a clear act of barratry had been committed, and any loss following that barratry would, I think, be a loss by barratry (see Arnould on Marine Insurance, section 858). In those circumstances she might have escaped and been sold, or gone ashore, or perhaps been seized by necessaries-men or come into collision with another ship. All these things were possible, and, indeed, not unlikely, but I cannot say that, in my view, on a balance of probabilities, she was more likely to be lost than recovered. To my mind, it is a case exactly on all fours with that of *The Polurrian* case (*sup.*), her recovery being uncertain, but not unlikely. If I had been asked to say: "Is she more likely to be lost or recovered," I should have felt obliged to reply: "I do not know." Nor is the case changed if the 18th May is taken as the vital date. By that time she had still eluded capture, though she had been to Teneriffe and Port Etienne. By that time she had also been twice ashore outside that port, but she was still afloat, still required fuel and provisions and was put into some port to get them. Her good fortune in eluding capture so far might not be repeated, and I do not think that the possibility of the master and crew reaching South America and selling her is enough to turn the scale. So far I have, rightly, I think, excluded all consideration of what occurred after the 18th May. But even if I take subsequent events into account up to the date of the recovery in Georgetown, I do not think that I should change my mind. She had made, it is true, one more escape, but my judgment accords with that of Captain Knox-Little and the Port Authorities of Dakar, that she was nearing the end of her tether. It is true that the majority of the underwriters paid as for a total loss, but even if I take account of their action I have to remember that I do not know what view of the law they took, or, indeed, what they took to be expedient to do—to pay, or to refuse, whatever the law might be. For my part, I am in complete darkness whether the *Girl Pat* was likely or unlikely to be recovered, and I must hold that she was never a constructive total loss and that her owners cannot recover. On that view, I must dismiss the action, with costs.

Solicitors for the plaintiffs, *Deacon* and *Co.*, for *Grange* and *Wintringham*, Grimsby.

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

December 17, 18, *and* 21, 1936, *and January* 19, 1937.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House).

The Mulbera. (*a*)

Damage to barge through sinking in Royal Albert Dock—Prima facie *negligence—Cause of accident left in doubt—Burden of proof.*

This was a claim by the owners of the wooden barge W. (29¾ *tons register and* 50 *tons dead-weight) against the owners of the steamship* M. (9100 *tons gross,* 466*ft. in length and* 60*ft. in beam) in respect of damage sustained by the* W., *which sank in the Royal Albert Dock on the night of the* 1*st to* 2*nd May,* 1936, *and was subsequently raised by the Port of London Authority.*

The facts were as follows: On the 29*th April, the* W. *arrived off the* M., *which was moored alongside the quay at No.* 28 *shed, to take delivery of some scrap metal from her. After some* 22 *tons had been discharged into the* W. *from the* M.*'s No.* 5 *hold she was pushed away to make room for another barge and was made fast to the* M. *aft. Later the* W. *was made fast by a servant of the plaintiffs alongside the quay and astern of the* M. *by means of her chain headfast, which was passed round a bollard on the quay, without, however, having any moorings aft. The* W. *remained in that position until the afternoon of the* 1*st May. On the morning of that day the plaintiffs' foreman was requested by the defendants' servants on the quay to move the* W. *from aft of the* M. *to forward of her so that cargo could be delivered into the* W., *which had come out of the* M.*'s No.* 2 *hatch, but the foreman having said he was unable to do so, the defendants, by their own men, moved the* W.

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

to the forward end of the M., *and made her fast alongside the quay in such a position that her port forward quarter (the* W. *was a swim-headed barge) was inside the stem and port bow of the* M. *and between the* M. *and the quay. Whilst in that position the* W. *took in* 16 *tons of metal, which brought her load up to* 38 *tons. After work was knocked off the* W. *was made fast by means of a single rope to a bollard on the quay, but she was not made fast aft. The* W. *was then about* 6*ft. inside the stem and port bow of the* M., *she had a freeboard of about* 2*ft.* 6*in., and between her and the* M. *there was about* 10*ft. of water. At* 7 *a.m. on the* 2*nd May it was discovered that the* W. *had sunk. She was raised the same day, and it was found that she had been lying in* 30*ft. of water about parallel to the quay, with* 8-10*ft. of her forward part under the stem of the* M., *which was drawing* 19*ft. There were three further facts of importance established by the evidence, namely, that the* M. *was at all times properly moored with her port side hard up against the quay; that there was a mud bank at the foot of the quay down which the* W. *would probably slip after she sank; and that although the* W. *was fifty years old, she had been kept in good repair and had, so lately as April,* 1936, *carried* 35 *tons, and in February,* 1936, *as much as* 40 *tons, without any damage. The plaintiffs contended that the defendants were liable because, without the knowledge of the plaintiffs, the defendants had moved the* W. *to a position which was unsafe for her in that she was liable to be squeezed between the quay and the* M. *or other craft; that she was in fact so squeezed, and so badly damaged that she sank. The defendants, whilst admitting they moved the* W., *denied negligence and said she was moved to a safe position and there properly and securely moored; that this was done with the knowledge of a servant of the plaintiffs; that the* W. *was not squeezed and sank because she was unseaworthy.*

Held, that, as the M. *was properly moored, the position in which the defendants moored the* W. *was not an improper one, that the damage sustained by the* W. *did not prove that she had been squeezed, and that accordingly the plaintiffs had failed to establish any negligence against the defendants; that on the evidence it was impossible to say what caused the ingress of the water into the barge and her consequent sinking, but that the cause was probably a combination of two causes suggested by the defendants, namely, old age and contact with the quay wall through being pushed against it by craft, other than the* M., *which were in the vicinity; that in the circumstances the defendants had no greater duty than to exercise due care and skill in their handling of the barge, and that, having established the exercise of that due care and skill, and suggested a reasonable and probable explanation of the accident without negligence on their part, the defendants had discharged the onus which lay upon them of dislodging the* primâ facie *presumption of negligence arising from the fact of the accident, and were not liable to the plaintiffs for the loss. Action dismissed with costs.*

DAMAGE BY SINKING.

The plaintiffs were Messrs. Darling Bros. Limited, of London, owners of the wooden swim-headed barge *William* (29¾ tons register, 64ft. in length and 17ft. in beam, with a depth of side amidships of about 5ft. 6in.). The defendants were the British India Steam Navigation Company Limited, owners of the steamship *Mulbera* (9100 tons gross, 466ft. in length, 60ft. in beam and drawing, at the material time, 19ft. forward). The *Mulbera* was lying moored with her port side close up to the quay opposite No. 28 shed, Royal Albert Dock, on the 29th April, 1936, when the *William* arrived off her to take delivery of some scrap metal from her. Before she was loaded to capacity (her deadweight was 50 tons and she had only taken in 38 tons of the cargo which was to be discharged into her) the *William* sank. The exact time of her sinking was not known either to the plaintiffs or the defendants, but was established to have been between 5.30 p.m. on the 1st May and 7 a.m. on the 2nd May, 1936. She was subsequently raised on the 2nd May by the Port of London Authority. The circumstances of the accident, as far as they were known to the parties, and the facts which emerged from the evidence, are sufficiently set out in the headnote and appear fully in the judgment. It was admitted on behalf of the plaintiffs at the hearing that the fact (which was agreed) that the defendants had moved the *William* from astern to forward of the *Mulbera* was not in itself an act which infringed the plaintiffs' rights, but it was argued that the sinking of the barge raised a *primâ facie* case of negligence against the defendants, and that they could only escape liability either (*a*) by showing what was the cause of the loss, and that the result of that cause was one which could not have been avoided by them, or (*b*) by showing all the possible causes and, with regard to every one of those causes, that the result could not have been avoided by them by the exercise of reasonable care on their part. *The Merchant Prince* (7 Asp. Mar. Law Cas. 208; 67 L. T. Rep. 251; (1892) P. 179 (C. A.), per Fry, L.J. at p. 189) and *The Princess* (18 Asp. Mar. Law Cas. 56; 142 L. T. Rep. 94; (1929) P. 287, per Hill, J. at p. 289) were relied upon by the plaintiffs, but in his judgment the learned judge, whilst prepared to apply the presumption of *primâ facie* negligence, which was applied by Hill, J. in *The Princess* (*sup.*), declared that the cases which had been most helpful to him in arriving at a decision, and which he proposed to follow, were *Ballard* v. *North British Railway Company* (1923, S. C. (H. L.) 43, per Lord Dunedin, at p. 54) and *The Kite* (149 L. T. Rep. 498; (1933) P. 154, per Langton, J. at p. 170).

H. G. Willmer for the plaintiffs.

Owen L. Bateson for the defendants.

Cur. adv. vult.

Bucknill, J.—In this case the plaintiffs are the owners of the barge *William*. The defendants are the British India Steam Navigation Company Limited.

The cardinal fact of the case is that the *William*, laden with a cargo of about 38 tons of metal in bags, sank in the Royal Albert Dock off No. 28 shed, on the night of the 1st, or early morning of the 2nd, May, 1936. There is no direct evidence as to when or why she sank, but the evidence indicates

that she sank between 9 p.m. of the 1st May and 7 a.m. of the 2nd. The plaintiffs say that the sinking of the *William* was caused by the negligence of the defendants or their agents. The defendants say that the sinking was not due to any negligence on their part. They also allege that the barge sank because she was unseaworthy.

The material facts as I find them are as follows :

The *William* is a wooden swim-headed barge of 29¾ tons register, and 50 tons deadweight capacity, about 64ft. long and 17ft. beam, with a depth of side amidships about 5ft. 6in. On the 29th April the *William* arrived off the steamship *Mulbera*, belonging to the defendants, to take delivery of some scrap metal from her. The *Mulbera*, which is 466ft. in length, was lying moored alongside the quay near No. 28 shed, in the Royal Albert Dock, and was properly and securely moored with her port side hard up against the quay. The plaintiffs' foreman, William Shore, brought the *William* to the ship, and at that time expected to take about 30 tons of metal. There were two parcels of scrap metal in the *Mulbera*, one parcel of 35 tons and a smaller parcel of 7 tons. Of the parcel of 35 tons, 25 tons were loaded in No. 5 hold, and the remaining 10 tons were loaded in No. 2 hold. The small parcel of 7 tons was loaded in No. 6 hold. When the *William* arrived, and, indeed, up to the time when she sank, no bills of lading for either of these parcels had been lodged at the defendants' office. On the 29th, 22 tons were loaded into the *William* from No. 5 hold.

The *William* was then pushed away to make room for another barge, and was made fast to the ship aft. William Shore, at some time on the 29th, was told by a representative of the defendants to put the *William* alongside the quay to finish loading there. Accordingly, on the 29th, the *William* was made fast alongside the quay astern of the ship by means of her chain headfast to a bollard on the quay, and stayed in that position until the afternoon of Friday, the 1st May.

There was some conflict of evidence as to conversations between the defendants' agents and William Shore, on the 1st May. Shore said that on the morning of the 1st May he asked McClure, the chief tally clerk in the employ of the defendants' ship managers, whether McClure had any documents for the *William's* cargo, and McClure shrugged his shoulders and gave him no instructions whether cargo was to be loaded that day or not. McClure denied that he had any communication with Shore on the 1st May at all.

On the other hand, one Sharman, the defendants' quay foreman at No. 28 shed, gave evidence that on the afternoon of the 1st May he asked William Shore to remove his barge from aft of the *Mulbera* to forward of her, so that cargo could be delivered into her which had come out of No. 2 hatch, and that Shore said he could not do it himself but that there was a man about somewhere who would shift her. Shore denied any such conversation. His son, Charles Shore, said in his evidence that in the morning on the 1st May Sharman told him that he could not deliver goods to the *William* until the necessary bills of lading were rendered, and that there would be no more cargo for him that day. Sharman denied saying this. I find that neither Sharman nor McClure at any time on the 1st said to either of the Shores that there would be no cargo for the *William* on that day, and I find that William Shore was asked to move the barge on the 1st as stated by Sharman.

In the afternoon of the 1st May Gardner told a man called Lambe, in the employ of the defendants, to move the *William* to the forward end of the ship to take cargo which had already been put on to the quay, and the *William* was moved up in charge of two men in the employ of the defendants and was made fast alongside the quay heading to the eastward, and in such a position that her port forward quarter was inside the stem and port bow of the *Mulbera* and between the ship and the quay.

Loading into the *William* of bags of metal then started about 4 p.m., and after 180 bags of metal had been loaded into her, discharge ceased about 4.40 p.m. The weight of these bags amounted in all to about 16 tons, so that the *William* now had on board a total cargo weight of 38 tons. The bags were wheeled from the quay on to a plank which ran across the hatch of the *William* from gunwale to gunwale and were then stowed in the hold.

The loading of the *William* was done by the defendants' agents. After work was knocked off the barge was made fast by means of a single rope from her bows to a bollard on the quay. The man who made her fast described it as a short line made fast to a cleet on the quay and to some part of the barge which he was unable to specify. There was no reliable evidence that she was made fast aft after the loading ceased.

About 5.30 p.m. on the 1st Gardner went on board the *William* and found the barge lying alongside the quay in such a position that her port forward end was about 6ft. inside the stem and port bow of the *Mulbera*. The barge at that time appeared all right and had apparently about 2ft. 6in. freeboard. There was about 10ft. of water between the ship and the barge. A large empty barge was lying head to the quay about 15ft.-20ft. from the stern of the *William* with another barge made fast to her aft.

Nothing more is known about the *William* during the next fourteen hours, but about 9 p.m. a barge which was probably the *William* was seen by Milne, the second officer of the *Mulbera*, lying in a position similar to that given by Gardner, to which I have already referred. At about 7 a.m. on the 2nd May it was discovered that the *William* had sunk. The *William* was raised by the Port of London Authority on the same day. When about to be raised she was found nearly parallel to the quay in about 30ft. of water with 8ft. to 10ft. of her forward part under the stem of the *Mulbera*. The *Mulbera's* draft at that time was about 19ft. forward. There is a mud bank at the foot of the quay down which the barge would probably slip after she sank.

This appeared to be the substance of the material facts relating to the casualty itself, as I find them.

It was argued by Mr. Willmer on behalf of the plaintiffs that as the defendants had elected to move the *William* the burden was on them to satisfy the court that they had not been negligent in any way which could have caused or contributed to her loss. Mr. Willmer argued that the sinking of the barge raised a *primâ facie* case of negligence against the defendants, and that they could only escape liability by showing what was the cause of the loss, and by showing that the result of that cause was one which could not have been avoided by them, or by showing all the possible causes, and, with regard to every one of these causes, that the result could not have been avoided by them by the exercise of reasonable care on their part. He relied on the judgment of the Court of Appeal, and more especially on the judgment of Lord Justice Fry in the case of *The Merchant Prince* (7 Asp. Mar. Law Cas. 208 ; (1892) P. at p. 189).

Mr. Willmer also relied on the case of the *Princess* (18 Asp. Mar. Law Cas. 56 ; (1929) P. 287) as

showing that the sinking of the barge raised a *primâ facie* case of negligence against the defendants. He also referred to *The Kite* (1933, P. 154), and argued that even if the principle laid down in *The Merchant Prince* did not apply, the burden was on the defendants of proving that the sinking was not caused by their negligence and that the burden was only discharged if they provided a reasonable explanation of the loss without any negligence on their part.

Mr. Willmer said, and in my view rightly said, that he did not contend that the defendants in moving the barge alongside the quay on the 1st May were doing an act which in itself was an infringement of the plaintiffs' rights. I have now to consider whether the defendants were negligent in any way, and in particular whether they were negligent in making the *William* fast in the position in which they did, and in leaving her unattended and without giving notice to the plaintiffs of her position, and also I have to consider the question as to whether the fact of the sinking of the barge in itself raises a *primâ facie* case of negligence against the defendants, and, if so, whether they have discharged that burden.

The main attack made by the plaintiffs on the defendants' method of dealing with the barge was that she was placed in an unsafe position between the ship and the quay in that she was liable to be squeezed between the quay and the *Mulbera* or between the quay and other craft which were lying in the vicinity. It was alleged on behalf of the plaintiffs in support of this attack that the *William*, when raised, showed positive signs of having been squeezed, and in particular that her top sides were set in to the maximum of 3½in. amidships.

I have considered this question with the Elder Brethren. My view, which agrees with their advice, is that the setting in of the *William's* top sides and her other damage do not prove that she was squeezed. The Elder Brethren advise me that this damage would probably be caused when the barge with her cargo in her was raised by wires.

I accept the evidence of Gardner, who gave his evidence well and impressed me as a reliable and trustworthy witness, as to the position of the barge when he went on board her on the evening of the 1st May. I also accept the evidence of the second officer and of the quartermaster of the *Mulbera* as to the number and position of the ship's moorings, and that they remained tight throughout the night of the 1st May and that the position of the ship's gangway remained the same. The Elder Brethren advise me that on these facts the *Mulbera* was properly moored, and that it would be impossible for the *Mulbera* to move more than a few inches. They also advise me that it was not improper to moor and leave a barge of normal strength inside the bow cavity of the *Mulbera* and between her and the quay, in the position deposed to by Gardner.

I have also asked their advice as to whether it was negligent to moor the barge to the quay with one rope forward, and they advise me that this was not improper. Neither do the Elder Brethren consider it unusual or improper to leave the barge unattended during the night inside the cavity of the *Mulbera's* bows, if the ship was properly moored. On this advice, with which I agree and adopt, I also hold that the defendants were not to blame for omitting to tell the plaintiffs of the position in which they had left the barge on the night of the 1st May. In my judgment the plaintiffs have failed to establish any positive negligence by way of act or omission against the defendants.

The question was much debated as to the condition of the barge and whether she was in a fit state to take on board and bear the burden of 38 tons of metal without leaking to any material extent. It is clear that the *William* sank because water got into her hull after discharge had ceased for the night. There was no heavy rain during the night, and it is not suggested that water was pumped into her from the quay or from any other craft, and, therefore, presumably the water which caused her to sink entered through a hole or holes in her bottom or sides from the dock.

Was that hole or holes caused by physical contact with some external object or was it caused by some defect in the wooden structure of the barge or did both these causes operate? In my judgment, and I may say that although the decision is mine alone, it agrees with the view of the Elder Brethren, on the evidence placed before the court it is impossible to say what was the cause of the leakage. The *William* may have been forced against the quay by some other moving tug or barge, or she may have started to leak from decay or defect of some under-water part of her structure. The *William* is an old barge, fifty years old, bought for 20*l.* in 1925 by the plaintiff, who then spent 225*l.* on a general overhaul and sheathing of her sides. Since then she has had minor repairs executed on her, and in 1934 the last substantial repair was done amounting to 40*l.* She was carrying cargoes up to the time of her loss, including the following, namely: 40 tons scrap metal on the 4th February, 1936; 35 tons cases grape fruit on the 25th April, 1936. In my view, it is quite a probable explanation of the sinking of the *William* that she started to leak from decay or defect in her hull, which may have been contributed to by contact with the quay wall owing to the pushing of other craft against her.

What, then, is the legal position? Here is a barge which sinks for some reason which has not been ascertained. Are the defendants liable for the loss? It appears to me that they would not be liable unless the fact that they moved and moored the barge on the 1st May raises a *primâ facie* case of negligence against them which they can only discharge by proof that the barge sank from a cause which they could not have avoided by the exercise of reasonable care.

The defendants took charge of the barge and were bound to exercise due care in the handling and management of her, but they did not become insurers of her safety, and the question for my decision appears to be whether they avoid liability for her loss if they show they have exercised proper care in their handling of her, and the court has to guess, if it can, what was the reason which caused her to sink. No case has been brought to my notice which shows that the defendants in such circumstances as these have any greater duty than to exercise reasonable care and skill in the handling and management of the barge, and my view is that, having established that they did show such care and skill, they have discharged the burden and are not liable to the plaintiffs for the loss.

If I apply to this case the presumption which Hill, J., applied in *The Princess*, and if I assume that the sinking of the barge is *primâ facie* evidence of negligence on the part of the defendants, the burden is then cast upon them of proving that they were not negligent. By what means do they discharge that burden? In order to discharge it, must they prove the actual cause of the loss, and that they are not responsible for that cause, or do they discharge it by proving a reasonable and probable cause and that they are not responsible for that cause?

The decision of Langton, J. in *The Kite* (1933, P. 154) is helpful to me in answering these questions. That decision is based upon Lord Dunedin's speech in *Ballard* v. *North British Railway Company* (1923, S. C. (H. L.) 43, 54). Lord Dunedin in that case said:

"I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that if the defendants can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion."

Now, in the present case, I have come to the conclusion after hearing all the evidence, that it is a reasonable and probable suggestion that the leakage which caused the *William* to sink was due to her condition as an old wooden barge. That is no more than a suggestion of a probable cause of her loss which, on the evidence, I think is reasonable. It appears to me a much more reasonable suggestion than the suggestion that she was squeezed between the *Mulbera* and the quay by movement of the *Mulbera*.

There is another probable factor to consider. Some other craft may have pushed against the *William*, pressing the *William* against the quay or against the *Mulbera* and doing damage to her and causing her to leak to such an extent that she eventually sank. The Elder Brethren advise me that when ships are moving about in this dock the barges lying in the dock get a considerable amount of buffeting and pressure in the ordinary course of their work, and that a barge which uses this dock must be strong enough to withstand such treatment.

After hearing all the evidence I have grave doubts whether the *William* was fit for any such treatment. On the assumption to which I have referred that the sinking of the *William* raises a *prima facie* case of negligence against the defendants, I think that the judgment of Langton, J. is apt to this case where the learned judge said:

"What the defendants have to do is to give a reasonable explanation which if it be accepted is an explanation showing that the accident happened without their negligence. They need not even go as far as that, because if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident."

For these reasons I hold that the plaintiffs have failed to establish their claim against the defendants, and that it must be dismissed.

Solicitors for the plaintiffs, *Keene, Marsland, and Co.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

February 10, 11, *and* 12, 1937.

(Before Lord WRIGHT, M.R., ROMER and SCOTT, L.JJ.)

Boag v. Standard Marine Insurance Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Increase in value of cargo during voyage—Increased value policy with different underwriters—Cargo jettisoned to refloat ship—Total loss paid by underwriters—General average adjustment—Sum received by cargo owners as salvage on adjustment—Right of increased value underwriters to share in salvage—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 79.

Interpleader issue tried on an agreed statement of facts. B. J. and D. Limited were the owners of part of the cargo of a ship on a voyage from Mediterranean ports to the United Kingdom. The c.i.f. value of their goods was 635*l.* 18*s.* 1*d. at the date of shipment, but owing to an increase in the value of the commodity concerned, the value on reaching the United Kingdom would have been* 699*l.* 14*s.* 8*d. They had insured the goods up to the original value with the defendants, and at a later date they insured them with the plaintiff and other Lloyd's underwriters for a further* 215*l. in respect of the increased value. The ship ran aground during the voyage, and in order to refloat her, part of the cargo, including B. J. and D. Limited's goods, was jettisoned and became a total loss. B. J. and D. Limited claimed under their policy against the defendants as for a total loss, and the claim was admitted and paid, and the defendants took from them a letter of subrogation. B. J. and D. Limited then claimed against the plaintiff and his fellow underwriters as for a total loss on the increased value policy, and that claim was also paid in full and a letter of subrogation given. A general average adjustment was prepared, and under it B. J. and D. Limited became entitled to be paid* 532*l.* 4*s.* 8*d. in respect of the jettisoned goods. The defendants, as cargo underwriters, claimed under their subrogation rights to be entitled to the whole of that sum. The increased value underwriters claimed to be entitled to a part thereof, namely,* 127*l.* 2*s.* 11*d., being the proportion of the general average allowance applicable to the increased value policy. The defendants had no knowledge of the existence of an increased value policy until after they had paid for a total loss.*

Held, by Branson, J. (154 *L. T. Rep.* 625), *that the defendants, as cargo underwriters, were*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

entitled to the whole sum of 532*l.* 4*s.* 8*d. It was clear that, as between the insured and the defendants, the insured had no claim to any part of that sum, and the increased value underwriters could have no greater rights than their insured had had. Further, there was no evidence that the taking out of increased value policies was so general that the cargo underwriters must be taken as having contracted on the basis that their insured would do so. Judgment for the defendants.*

The plaintiff appealed.

Held, that the question was whether, where the goods owners were recouped in general average, each of the two sets of underwriters, the defendants and the plaintiff, had claims to be subrogated in respect of the contribution so recovered; in other words, whether the underwriters on the primary policy were entitled to be subrogated in respect of the whole, or must share with the underwriters of the later or supplementary policy on increased value. Sect. 79 *of the Marine Insurance Act,* 1906, *sub-s.* (1), *provided that the insurer who had paid for a loss was thereby subrogated to all the rights and remedies of the insured in and in respect of the subject-matter as from the time of the casualty causing the loss. On the clear terms of that section the result must be that it was an integral part of the primary policy that the defendants, now the respondents, had a contingent right of subrogation which vested in them at the moment when the policy was effected. Here the contingency had occurred and the contingent right had become a vested right. On the facts, there was no answer to that conclusion. The case would have been different if it had been one of double insurance under sect.* 32 *of the Act of* 1906. Thames and Mersey Marine Insurance Company Limited *v.* British and Chilian Steamship Company Limited (13 *Asp. Mar. Law Cas.* 221; 114 *L. T. Rep.* 34) *applied.* Steamship Balmoral Company Limited *v.* Marten (87 *L. T. Rep.* 247; (1902) *A. C.* 511) *distinguished.*

Decision of Branson, J. (19 *Asp. Mar. Law Cas.* 26; 154 *L. T. Rep.* 625) *affirmed.*

APPEAL from the judgment of Branson, J.

The facts are stated shortly in the headnote and are more fully set out in the judgment of the Master of the Rolls.

C. T. Miller for the appellant.

W. L. McNair for the respondents.

Lord Wright, M.R.—This is an appeal from a judgment of Branson, J., which raises a short but interesting point on marine insurance law, a point which, so far as I know, is not covered by any authority. The question is, where you have an insurance on a consignment or a cargo by the goods owner valued at a certain amount, and insured to the full extent of that value, and then you have a later additional or supplementary insurance on the same goods on what is called increased value, for a further amount, valued at that increased value figure, and the goods are lost by being jettisoned so that the goods owner is entitled to be recouped in general average, which of the two sets of underwriters have claims to be subrogated to the amount of the general average contribution so recovered by the goods owner; that is to say, is the underwriter on the primary policy entitled to be subrogated to the whole, or must he share with the underwriters on the later or supplementary policy on increased value? In stating that question I have not added one element which might be of considerable importance in a certain event. I have not stated that for the purposes of this inquiry the general average contribution is less than the amount covered by the primary policy. If it had been in excess of that amount then a further question would have arisen as to the surplus, but that complication does not arise here.

The action was brought by the plaintiff against the shipowners, claiming a proportion of the general average contribution as adjusted. The claim was for 215/900ths of that sum. It is clear that the plaintiff, in bringing this action, was so doing on behalf of the increased value underwriters, and that the real question involved a matter of competition between the two sets of underwriters. That being so, it was very conveniently ordered, no doubt by agreement, that the issue should be tried out as between these two parties, and the shipowners, who had no interest in the matter at all, dropped out. Therefore, the two litigating parties here are the first underwriters, the Standard Marine Insurance Company Limited on the one hand, and the increased value underwriters, who are Lloyd's underwriters, on the other hand. The consignment in question was a consignment of wheat offals shipped from an Italian port. The shippers had sold a consignment to the nominal plaintiffs, and had transferred to them the usual shipping documents, which included the Standard Marine policy for 685*l.*, which was the invoice amount. The policy was a value policy, and the total valuation was 685*l.* I shall refer to the terms of that policy in a moment. After the plaintiffs had taken over the documents it appeared to them that the value of the consignment had increased above the invoice amount, and thereupon they effected a further policy for 215*l.* on increased value so valued. I say that they effected a further policy, but in fact what they did was to make a declaration against a floating and peace value policy for a total amount of 5000*l.*, in which they were interested as assured. On the voyage the vessel, which had loaded at Naples with the consignment in question, got into trouble and went aground off Cape Huertas on the 27th September, 1934. She was finally refloated, but the consignment in question was jettisoned and became a total loss, and the general average contribution to the cargo owner in respect of that loss by jettison was adjusted at 532*l.* 4*s.* 8*d.* That is the sum about which this battle rages. The increased value underwriters claim that they are entitled to 127*l.* 2*s.* 11*d.* as a sum to which they are subrogated under their policies, leaving the balance to the Standard Marine Company. That sum of 127*l.* 2*s.* 11*d.* is the proportion of the general average allowance applicable to the increased value policy. The Standard Marine Company claim that they are entitled to the whole amount on the ground that it is theirs by subrogation. The two policies differ in their terms. I ought to say the three policies, because the amount covered by the Standard Marine Company, though coming in all to 685*l.*, is covered by the two policies which, however, are in identical terms, and they are both dated the 19th September, 1934. They are: "Subject to flour 'all risks' clauses as attached,"

and, as I have already said, they are both valued policies, each on a separate portion of the consignment, but they add up, taken together, to an insurance for 685*l.* on cargo which altogether is valued at 685*l.* The Lloyd's policy, the floating policy, is in a different form. It is an F.P.A. policy subject to the F.P.A. clauses issued by the London Corn Trade Association, and contains clauses for use in increased value policies. It purports to be a floating policy on "increased value on grain and/or meal and/or cake to be declared and valued hereafter at the difference between the purchase price and highest market value during voyage." In this case that valuation for the purposes of this policy on increased value, is fixed at 215*l.*, which was the amount declared and duly written off the floating policy. There are only two clauses in that policy to which I need call special notice. One is the clause at the end of the general F.P.A. clauses not specifically appropriated to the increased value policy, which is in these terms: "In the event of any additional insurance being placed by the assured for the time being on the cargo herein insured, the value stated in this policy shall, in the event of loss or claim, be deemed to be increased to the total amount insured at the time of loss or accident." That means, if you have what I may call an ordinary policy, and you effect an additional insurance on the same cargo or parcel, then the original policy value is to be increased to the total of the two values if the case is limited to the two values; that is to say, applying that to the present case, if the first policy had been a policy with these clauses for 685*l.* on the consignment valued at 685*l.*, then when the 215*l.* of increased value was covered the value in the former policy would be increased to 900*l.* That is a businesslike arrangement, providing for this particular state of things, and having the effect of eliminating any such questions as arose in this case, or at least of eliminating the raising of such questions. Then there are two further clauses added to apply to increased value policies, and the second of those clauses is in the same terms as the additional insurance clause which I have just read, and will have the effect of applying that clause to a case where, after one increased value policy has been effected, another is taken out. These are the two policies. There are only two other facts to which I need refer. One is that a subrogation letter in the usual form was signed by the goods owners in favour of the Standard Marine Insurance Company. That was dated the 3rd November, 1934. Later, on the 14th December, 1934, the goods owners signed a subrogation letter in favour of the Lloyd's underwriters. The former of these letters related to the sum of 685*l.* and recited that that sum had been paid as for a total loss under the Standard Marine Policy. The second of these letters referred to the policy for 215*l.* on the increased value, and recited that that amount had been paid. In those circumstances, it seems to me, agreeing with the learned judge, that the claim of the Lloyd's underwriters is ill-founded. I come to that conclusion on the clear words of sect. 79 of the Marine Insurance Act, 1906: "Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby"—these are the material words—"subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss." Those words merely give effect to a well-recognised law, subject to one point which is, however, not here material, applying to subrogation: "Subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss." The result is, that it is an integral condition of this policy that the Standard Marine Company has a contingent right of subrogation which attaches and which vests in them at the moment when the policy is effected. It is contingent in the sense that the state of affairs postulated may never arise, but the contingent right is there, and here the contingency has arisen, and the right vested as a contingency has become an effective right. In the facts of this case I can see no answer to that conclusion. We are not here troubled with the question which has been greatly debated, whether under sect. 79, and the earlier cases on which it was based, the right of subrogation in such a case—if it is a question of subrogation and not abandonment—would extend and give the underwriter a right or remedy exceeding in value the amount for which he is liable under his policy. So far as that is concerned, the law is now covered in this court by the decision of the Court of Appeal in the case of *Thames and Mersey Marine Insurance Company Limited* v. *British and Chilian Steamship Company Limited* (13 Asp. Mar. Law Cas. 221; 114 L. T. Rep. 34, at p. 35). In that case, Swinfen Eady, L.J. sums up the matter in this way. He quotes the section which I have read, and then he says: "What the underwriters are really saying here is that according to the true construction of the statute they are entitled to be subrogated to all the rights and remedies of the assured in and in respect of the subject-matter of the ship, and not to part of it only. In my opinion the Act embodies the law as laid down in *North of England Iron Steamship Insurance Association* v. *Armstrong* (3 Mar. Law Cas. 330; 21 L. T. Rep. 822; L. Rep. 5 Q. B. 244), and the judgment below was right on this point and the plaintiffs are entitled to recover from the shipowners"—the plaintiffs are the underwriters—"all the sums which the shipowners received in respect of the ship"—then come the material words—"up to the 45,000*l.*, the amount of the insurance." Applying that here, the primary underwriters are entitled to recover all the sums which the shipowners received in respect of cargo up to the 685*l.*, which is the amount of the insurance. As I say, that limitation may be accepted here without question, because the amount of the general average contribution recovered is 532*l.*, while the amount of the insurance is 685*l.* The position would have been different if this had been a case of double insurance under sect. 32 of the Act, but Mr. Miller has very fairly pointed out that it cannot be so regarded, and I need not trouble any further about that. In the case of double insurance, obviously, as the two sets of underwriters have to share the burden, they would be entitled to the proportionate benefit of any sums which went in reduction of the burden, and they would share both the amount of the indemnity which had to be paid, and against that they would be entitled to share the salvage in regard to which they were entitled to be subrogated in reduction of that indemnity. There is no such question here. The case here is that of a subsequent and subsidiary insurance, an increased value insurance, which is effected by way of supplement for the goods owner's convenience in order to make up what he regards as the full value over and above the first insurance. The first insurance is on the whole of the

subject-matter, and is on the subject-matter for its full value for purposes of that policy, and as between the goods owners and the underwriters of that policy. As that is so, they are entitled to the full rights of the subrogation. There is no circumstance here which would entitle any reopening of the valuation, or any supersession of the valuation between those parties such as might arise in the case of a constructive total loss, or as might come into question in such a case as *Steamship Balmoral Company Limited* v. *Marten* (9 Asp. Mar. Law Cas. 321, H. L.; 87 L. T. Rep. 247; (1902) A. C. 511), which did not deal with rights of subrogation, but with an entirely different question, namely, the liability of an underwriter to shipowners who were claiming for a partial loss in respect of general average and salvage charges. It was held in the *Balmoral* case that in such a case, in those circumstances, the valuation had to be brought into consideration, because if the general average and the salvage charges were adjusted on a higher valuation than that which appeared in the policy the underwriters were only liable in the proportion which the insured value bore to the value for the purposes of the adjustment. That is an entirely different question, and is dealt with, in fact, under a different section of the Act, namely, sect. 73. I cannot find any guidance in that case for present purposes. Mr. Miller has read a passage from Lord Brampton's judgment in the *Balmoral* case (87 L. T. Rep. at p. 250; (1902) A. C. at p. 519), but I need not discuss that passage in detail, because it seems to me not to afford any help in this case. It was dealing with an entirely different question, namely, the right of the shipowners to claim against the underwriters in such a case as I have stated. It was before the Act, and there are some aspects of what Lord Brampton said which I find it difficult to follow. However that may be, it affords no assistance, in my judgment, in the present case.

Mr. Miller's main argument appears to have been based upon the letters of subrogation. He claims that, because the goods owners have assigned to the Lloyd's underwriters a share of the salvage, that share has been properly vested in the Lloyd's underwriters, and on that ground they are entitled to succeed in their claim here, but it seems to me that if that were done the effect of it would be that the rights of the Standard Marine Company to subrogation in the sense which I have explained, would be prejudiced if they are entitled, as I think they are, to the whole of the rights and remedies of the assured. Any attempt by the assured to dispose of the value of those rights and remedies in any other direction, whether to increased value underwriters or to anyone else, would, to my mind, either be futile, or, if in fact the rights of the Standard Marine Company were affected, would entitle the Standard Marine Company to bring an action against the goods owners to recover from them to the extent that their valuable rights of subrogation had been prejudiced. I need not refer to authorities for that, because that has long been established. What I think is at the basis of the contention of the Lloyd's underwriters is, that there is an implied term in the original policy, the policy for 685*l.*, entitling the goods owners, if the value of the cargo does rise, to take out an increased value policy, and to take out such a policy as would rank *in pari passu* with the first and main policy, but I cannot see any foundation for that argument at all. It is perfectly clear that if the Standard Marine policy had contained a clause analogous to that which I have read from the F.P.A. fire clauses in the Lloyd's policy, there would have been an express vesting of such a right in the goods owner, and the matter could have been worked out in accordance with that intention on businesslike lines by increasing the total valuation under both policies to the valuation of the two policies taken together. But nothing of the sort has been done here, and in the absence of an express clause I cannot imply any such intention to the original policy. In this connection it is useful to refer to a short passage in vol. 2, ch. XVII., of Phillips on Insurance, 5th edit., at p. 386, where the learned author says: "The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right." Then the learned author adds this: "Upon this principle, the amount of salvage to which one underwriter may be entitled upon an abandonment"—I think that includes subrogation—"ought not to be diminished in consequence of any particular agreement between the assured and other underwriters on the same subject." I think that rule applies here. Under all those circumstances, it seems to me that there is no foundation at all for any argument that the position under the Standard Marine policies has been in any way affected by the Lloyd's policy, which is for these purposes simply *res inter alios acta*, and that policy does not affect the position between the Standard Marine Company and the goods owner for any purposes in the facts of this case, and it does not prejudice the rights of subrogation of the Standard Marine Company, nor does any dealing subsequently, such as the letters of subrogation, have any such effect.

I think the judgment of Branson, J. was right, and should be affirmed, and the appeal dismissed with costs.

Romer, L.J.—In my opinion, on the 28th September, 1934, when the increased value policy was effected, the Standard Marine Insurance Company had, by virtue of the decision of this court, in the *Thames and Mersey Marine Insurance Company Limited* v. *British and Chilian Steamship Company Limited* (13 Asp. Mar. Law Cas. 221; 114 L. T. Rep. 34), to which the learned Master of the Rolls has already referred, and by virtue of sect. 79 of the Marine Insurance Act, 1906, become contingently entitled to receive the sum of 532*l.* 4*s.* 8*d.*, which is the subject-matter of these proceedings. That right is not one which the assured could deprive the Standard Marine Insurance Company of. I agree that this appeal fails, and must be dismissed with costs.

Scott, L.J.—I agree. There is no section of the Marine Insurance Act, 1906, and no judicial decision which directly covers the question raised in this appeal, but in spite of an attractive and thoughtful argument from Mr. Cyril Miller, I think the law is beyond doubt, and is against him. The decision of the Court of Queen's Bench in the case of *North of England Iron Steamship Insurance Association* v. *Armstrong* (21 L. T. Rep. 822; L. Rep. 5 Q. B. 244) was definitely approved by the Court of Appeal in the case of *Thames and Mersey Marine Insurance Company* v. *British and Chilian Steamship Company Limited* (*ubi sup.*), and is, therefore, binding on us to-day. In the course of his judgment in the latter case, Swinfen Eady, L.J. said in terms in the passage which my Lord has quoted, that the court was affirming, in

effect, the decision in the *North of England Insurance Association* case. I think it is important to correct the report of the *Thames and Mersey* case as it is in the Law Reports (1916) 1 K. B. 30), because at p. 32 it is stated : " No argument was addressed to the court upon the point decided by Scrutton, J. and reported in the court below." Then it goes on : " The arguments in the Court of Appeal were limited to the question of fact how much was recovered in the collision proceedings by the assured in respect of the subject-matter insured, namely, the ship." That is incorrect, as appears from the report in 21 Commercial Cases, and one or two other reports, particularly as shown by the passage my Lord has read. The decision in the *North of England* case was that, as between the assured and their insurers on a valued policy on hull valued at 6000*l.*, the whole of a sum of about 5000*l.* recovered from the owners of a vessel which had been held in fault for the loss of the insured vessel, belonged to the insurers as salvage to which they were entitled by virtue of their right of subrogation. It was argued for the assured that because the real value of the vessel had been 9000*l.*, and because the damages recovered in the collision action had been assessed in the light of that value, they were entitled to share to the extent of one-third, or 3000/9000ths, in the amount recovered, but the court held that the valuation was binding as between the assured and the insurers, and that up to that amount any damages recovered belonged to the insurers as salvage, because the assured were estopped from saying that the value of the vessel in respect of which they had been paid damages was anything different from the value agreed in the policy. In the present case if the shipowners had paid the net amount of the general average statement of 532*l.* 4*s.* 8*d.* direct to the assured, and the Standard Marine Insurance Company had thereupon sued the assured for that sum as money had and received, the assured would have had no answer. The two cases above cited, as well as others, are, in my view, clear authority for that conclusion, and the reason would have been the essential nature of a valued policy binding both parties to the agreed valuation. By virtue of that contractual term, the Standard Marine Company's right to claim that amount as salvage, it being less than the total valuation of 685*l.* in the two policies, would have attached automatically and instantaneously on its receipt by the assured. In such a case it would be no defence to the assured to plead that they had in effect entered into a Lloyd's increased value policy for 215*l.* on the same consignment valued at 900*l.*, because the Standard Marine Company would have replied that that was *res inter alios acta* so far as they were concerned, and could not prejudice their contractual right which had already accrued in respect of the whole sum in the hands of the assured, so as to identify it as money had and received for the plaintiffs' use, or possibly even to constitute it a fund held in trust for them. *Bruce* v. *Jones* (1863, 7 L. T. Rep. 748 ; 1 H. & C. 769) supports that view. Had the assured in any way prejudiced their rights of recovery so as to deprive the Standard Marine Company of the benefits of subrogation, the assured would have incurred a personal liability to the company to the extent of the prejudice so caused. The *West of England Fire Insurance Company* v. *Isaacs* case (75 L. T. Rep. 564 : (1897) 1 Q. B. 226) and *Phœnix Assurance Company* v. *Spooner* (93 L. T. Rep. 306 ; (1905) 2 K. B. 753) are authorities for that proposition. If my view of the hypothetical position, assuming the fund to have got to the hands of the assured, which I assumed just now, is legally correct, as I think it is, it really establishes the view and conclusion of law which Mr. McNair has submitted to us to-day, namely, that if the assured wanted to keep open a liberty to take out an additional policy on the same subject-matter on a higher valuation, he ought to have obtained the consent of the Standard Marine Company to include in their policy the institute clause which was subsequently, in fact, attached to the Lloyd's policy on increased values, in the words which my Lord has already read out, and which I need not repeat. Had the assured reserved that right, his subsequent Lloyd's policy would have been within the contemplation of that clause, and, therefore, not *res inter alios acta*. I said just now : " Had he wanted to take out an additional policy on a higher valuation," because, of course, if it had been on the same valuation it would have been irrelevant to any question here, because it would have simply produced a case of double insurance. Without such a clause in the Standard Marine policy, I think the assured is estopped by the valuation clause from alleging that the subject-matter of the insurance ever had any increased value ; that is to say, a value over and above the value agreed to in the Standard Marine policy, and if the assured is so estopped I think that the subsequent insurer, standing, as he must, in his assured's shoes, is equally estopped. At first I was attracted by Mr. Miller's argument that there must be an equity between the two insurers to share in the salvage, resting on the same sort of principle as that of contribution between co-sureties and an equity independent of the terms of the statute, though analogous to the principle applicable in certain cases of double insurance. But I think Mr. McNair gave the true answer to that, namely, that Lloyd's underwriters could only derive title, so to speak, through their assured, and in regard to the extent of the Standard Marine Company's rights of subrogation, their assured had parted with his interest in any salvage he might recover, from which follows, in my view, the conclusion expressed by Romer, L.J. in his short judgment just now. The letters of subrogation are irrelevant to any question, if that be the right view of the law. Whether they constitute contracts for good consideration upon which an action could be brought, does not arise, and I express no opinion as to whether the Lloyd's underwriters had any rights against their assured in the circumstances.

I agree that the appeal should be dismissed with costs, and that we should affirm the judgment of the court below.

C. T. Miller.—I am instructed to ask your Lordship for leave to appeal on the ground that this is a novel point ?

The Master of the Rolls.—No.

Appeal dismissed.

Solicitors for the appellant, *Botterell* and *Roche*, agents for *Weightman, Pedder*, and *Co.*, Birmingham.

Solicitors for the respondents, *Ince, Roscoe, Wilson*, and *Glover*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

February 18, 19, *and* 22, 1937.

(Before LANGTON, J., assisted by Elder Brethren of Trinity House.)

The Trentino. (*a*)

Collision in Sea Reach, River Thames, between vessel going down-river and vessel at anchor—Anchor lights—Look-out—Failure to avoid collision with vessel whose anchor lights only visible at one cable, not negligence—Anchored vessel held alone to blame—Port of London River By-laws, 1914–1934, *by-law* 14.

This was a claim by the owners of the Greek steamship N. *against E. W.'s Line Limited, of Hull, owners of the steamship* T., *for damages in respect of a collision which occurred about abreast of Shellhaven Point, Sea Reach, River Thames, on a clear but dark night, at about* 2.30 *a.m. on the* 12*th December*, 1936. *The* N., *with no pilot on board, was at anchor; the* T., *in charge of a fully-licensed Trinity House pilot, was proceeding down-river on a voyage from London to Hull.*

The plaintiffs' case was that the N., *having failed to find a pilot off the Tongue Light Vessel, had proceeded up the river in the wake of another vessel, whose pilot had undertaken, by wireless, to lead the* N. *to a safe place of anchorage; that when the* N. *was about abreast of Holehaven Creek the pilot on board the other vessel had sent a wireless message to the* N. *telling her to drop anchor there and promising to return in a couple of hours to pilot the* N. *to London Docks; that the* N. *thereupon immediately dropped her starboard anchor, she being then about* 300*yds. off Holehaven Creek and stemming the ebb tide, put out her navigation lights and posted her anchor lights, which thereafter burned brightly. About ten minutes before the collision those on board the* N. *observed the red light of a vessel which proved to be the* T., *about a mile distant and bearing on the* N.*'s port bow. The* T. *came on, but instead of passing the* N. *portside to portside as she could and ought to have done, the* T., *with her stem and port bow, struck the* N.*'s port bow, doing damage. The defendants' case was that the* T. *was proceeding down the river at full speed and doing about twelve knots over the ground. After passing West Blyth buoy on her starboard side at a distance of about* 150*ft., the* T. *set a course of E.* ½ *S., which was maintained until just before the collision, and on that course she proceeded down Sea Reach well on the southern side of mid-channel. When about half a cable away, those on board the* T. *descried the loom of the* N. *about ahead, and very shortly afterwards a faint light was seen. Although the wheel of the* T. *was hard-a-starboarded and her engines were put full speed astern, the* T.*'s port bow struck the port bow of the* N., *whereby the* T. *sustained considerable damage. As the* T. *then scraped along the port side of the* N., *it was observed that some of the* N.*'s portholes appeared to be very dimly lit. The defendants denied liability and blamed the plaintiffs for the collision, alleging that the* N. *was improperly anchored in the fairway and was not exhibiting the anchor lights required by the Port of London River By-laws*, 1914–1934.

The learned judge having found as a fact that the N. *was not lying where she said she was, but was anchored well in mid-channel about abreast of Shellhaven Point,*

Held, that, even if the N.*'s lights were visible at a cable's distance, as the evidence called on behalf of the defendants appeared to establish, this was in flagrant breach of by-law* 14 *of the Port of London River By-laws*, 1914-1934, *which required that anchor lights should be clear and visible all round the horizon at a distance of at least one mile; that the failure of those on board the* T. *to descry such lights as the* N. *had before they did, did not amount to a bad look-out, and that in the circumstances there was no negligence on the defendants for not having avoided the collision. The plaintiffs were accordingly alone to blame.*

DAMAGE by collision.

The plaintiffs were the owners of the Greek steamship *Nagos* (1926 tons gross). The defendants were Ellerman Wilson's Line Limited, of Hull, owners of the steamship *Trentino* (3079 tons gross). A collision occurred between the two vessels in Sea Reach, River Thames, at about 2.30 a.m. on the 12th December, 1936, in clear but dark weather. The *Nagos* was at anchor in the river, and the *Trentino* was outward bound on a voyage from London to Hull. The circumstances of the collision as pleaded by the parties, are set out in the headnote, and the facts as they emerged from the evidence fully appear in the judgment. The defendants called evidence from three other vessels which had gone down river shortly before the *Trentino* to prove that the *Nagos* was lying in the fairway in her wrong water, and was exhibiting such inadequate lights that each of these vessels in turn narrowly avoided colliding with her.

The following cases were referred to in argument: *The Slieve Gallion* v. *The Cumberland Queen* (1921) 8 LL. L. Rep. p. 250, per Lord Sterndale, M.R. at p. 254), and *The Shakkeborg* (1911) P. 245, Note).

G. St. C. Pilcher, K.C. and *H. G. Willmer*, for the plaintiffs.

K. S. Carpmael, K.C., *E. W. Brightman*, and *J. A. Petrie*, for the defendants.

Langton, J.—In this case the vessels in collision were the plaintiffs' vessel—a Greek vessel—the *Nagos*, of 1926 tons gross and 267ft. in length, and the defendants' vessel, the *Trentino*, of 3079 tons gross and 310ft. in length. The collision occurred at about 2.22 a.m. on the 12th December, 1936. It is not now in dispute that so far as up and down channel was concerned, the collision took place in Sea Reach of the River Thames, about a mile below the West Blyth buoy. The wind at the time

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

was negligible and the weather fine, clear and dark—it was a dark December night—the tide was ebb with a force of about two knots. It is not in dispute that at the time when the collision took place the *Nagos* was lying to an anchor. It is not in dispute that she had some ship's lights exhibited as anchor lights. No attack has been made on the lights as such, that is to say, the lights that have been exhibited before me were ordinary ship's lights. The Elder Brethren tell me that they were the lights that they would expect to see for anchor lights, and no suggestion has been made that they were, in themselves, improper or defective lights. They were paraffin lights, and the case of the *Nagos* was that, having come to an anchor at a position to the northward of the dredged channel, she was lying very peacefully at anchor with her lights alight and burning brightly, when the *Trentino* coming down the river came either straight at her or, under a last moment port helm, came into her and did the damage complained of. The case for the defendants—the *Trentino*—was that proceeding at her full speed, making a speed over the ground of about twelve knots, she came past the West Blyth buoy at a distance of about 150ft.; thereafter got upon her course of east half south magnetic, and, keeping the Chapman Light on her port bow, proceeded on that course down river. When she was about a mile below the West Blyth buoy on that course she saw at a distance of about a ship's length a vessel ahead of her, seeing first only the loom of the vessel, and although she put her helm over in an attempt to avoid the vessel, she struck the *Nagos* at anchor. The parts in collision were slightly in dispute but I think it is right to say, from the survey report, that the stem and port bow of the *Trentino* struck the port bow of the *Nagos*. After the collision occurred the *Trentino* went down the port side of the *Nagos* and rounded under a port helm and came up again and hit the *Nagos*. Owing to the fact that those on board the Greek vessel were unable to speak any English—with the exception of one person of whose English I was given a demonstration, the pilot of the *Trentino*—the ship's custodians of the *Trentino* were even unable to ascertain the name of the *Nagos*. Having given their own name and satisfied themselves that the *Nagos* was in no immediate danger of sinking, they went back to Gravesend and sent a tug down to the assistance of the *Nagos*. Those who are acquainted with the river will not be surprised to hear that the tug was reinforced by two other tugs. So far as I can understand none of those tugs took any profit by their motion.

The points which emerge from this case are two. I think Mr. Pilcher, who has argued this case with great ingenuity and tenacity, was well founded in saying that there are really only two points in the defence. The first point was where, so far as the deep channel is concerned, did this collision happen, and (2) what lights, if any, were actually being exhibited as effective lights by the *Nagos*? I will say a word first of all as to the credibility of the witnesses. It is always very difficult to judge of the credibility of foreign witnesses who give their evidence through the disadvantage of an interpreter, and in saying what I do I wish it to be understood that I have felt the greatest reluctance to disbelieve these witnesses upon any question of their demeanour. I can only say with regard to the Greek witnesses—whether it was their fault or their misfortune—they did not succeed in impressing me at all favourably. The master was a quiet, tired-looking sort of man, but his evidence was not the most important from the ship. The lamp trimmer, whose evidence was the most important from the *Nagos*, was the usual obliging type of Levanter, and seemed ready to give evidence which he thought at that particular moment would assist his side. His first evidence was that he cleaned the lamps twice a week. On inquiry he was ready to make that number greater, and eventually he said that if he used the lamps every night he would clean them every night. That may or may not be correct, but it was not made clear to me on his evidence in chief that he regarded it as a necessary part of his duty to clean them after every occasion on which they had been used. That emerged, I think, in re-examination by me. Even with the handicap under which this gentleman laboured, I failed to gather that it had been his rule to clean the lamps with unfailing regularity on each occasion on which they had been used, but even if it had been his intention to convey that intelligence to me he signally failed to do so. The chief officer I mistrusted altogether, and his evidence seemed to be at wide variance with any probabilities as to the actual facts.

The case, however, for the plaintiffs was very greatly strengthened by two witnesses of quite obviously unimpeachable impartiality; they were customs' officers who had their duty upon the north side of the river—Mr. Grant was the one and Mr. Henderson was the other. I think these witnesses gave their evidence exceedingly well. They were quite clearly not advocates for the side on which they were called, and, indeed, they had not been approached in any way to give evidence until nearly a month after the collision. The fact that they were not so approached casts no kind of reflection upon the energy—the well-known energy, I might say—of the legal advisers of the plaintiffs. Indeed, they were not, and could not be apprised that the main part of the case against them was going to be that they were anchored on the wrong side of the river until they received the defence on the 6th February this year. It is, however, a fact to be borne in mind in weighing their evidence that their recollection had not been stimulated for that long time. Against that may be set the fact that they had not been in attendance on many ships since they went to the *Nagos*. They had gone to the *Nagos* in a rowing boat—a trifle slow method of progress in modern times—and it might have been impressed on their memory if they had had to go far, but they judged the distance which they had made to have been something like 400yds. Incidentally, they fixed the place of collision up and down channel, and it coincided as near as makes no difference with the position up and down the channel which had been fixed upon and pleaded in the preliminary act of the defendants. Mr. Brightman made a very powerful comment upon the value of the Greek evidence as to their position in the river by pointing out that they were some thirteen cables out of their estimate with regard to the place which they had originally selected, and which they had given in their evidence as being their position when the *Trentino* struck them. On those two points that I have referred to—the place north or south of the channel or in mid-channel, and as to what lights were being exhibited—the burden of proof seemed to me to be upon the plaintiffs, but I think Mr. Pilcher was well founded when he said that when he had proved that he was at anchor exhibiting anchor lights and not in any way obstructing the fairway the burden of proof was shifted upon the defendants. I do not think it is necessary to go into any question concerning that burden of proof because it is not in this case a question of importance. The burden of proof is

always upon the plaintiff, who, of course, may shift it, and this is one of the cases in which it was shifted during the trial.

I have approached this case, therefore, on the footing that the defendants had to establish to my satisfaction—no light matter—that a large steamship—as large as the *Nagos*—was lying in a completely improper position where she would be in the way of the traffic up and down, and that she was improperly lighted. I think that is a heavy burden for the defendants to carry.

The defendants' case—which was pretty plain—was presented by Pilot Vincett, the pilot in charge of the *Trentino*, and the ship's company of the *Trentino*, and was powerfully supported by three other pilots—the pilots in three other ships that were navigating Sea Reach on this night, and a Danish master, Captain Nielsen, who was on board one of those three ships. But again, as Mr. Pilcher pointed out, their evidence does not become important until one is absolutely satisfied that they were speaking of the same ship as that which the *Trentino* struck. There was no very clear evidence—in fact one might probably say there was no evidence at all—that the ship which caused difficulty to these three down-going vessels was actually the *Nagos*. All three vessels—the *Miranda*, the *Edam* and the *Marguerite*—succeeded in avoiding the *Nagos*, and it was not surprising that they did not go back to inquire her name. I must say that I was a little surprised that none of them seemed to have hailed her or done anything to try and warn her of her position, but I am not, of course, judging them, and if they did not think that it was their duty to interfere with what some other person was doing, well, I do not know that I ought to make any reflection upon that.

Now, coming back to the main facts in this case, the first fact is, where was the *Nagos* lying on the night of the 12th December? She had come to anchor at night. That seems to be the first important factor. Her master and personnel were not intimately acquainted with the River Thames. That was a second factor of some importance. They were unable to get the services of a pilot at the Tongue Lightship, where they had stopped to try to pick up a pilot. That is a third factor of some importance. They had taken up the anchorage they did at the warning or with the assistance of a pilot who had been proceeding on a ship ahead, and who had apparently given them warning by wireless as to when they should let go their anchor. They said that they had let go their anchor in a position well to the northward of mid-channel (I think the master placed it at about 300yds. from the north shore); that it was about Holehaven Creek, which, as I have pointed out, is some thirteen miles from the Oven's Buoy up and down the channel in which the collision occurred; that they had a dredger about three ship's lengths astern of them, and a tanker about three ship's lengths ahead of them. Upon examination these observations appeared to have been scarcely accurate. I am satisfied that there was no dredger within three ship's lengths of them, and that the dredger that in fact was working was nearly a mile further down the river than the place in which the *Nagos* eventually anchored. I am not forgetting that she let go her anchor on the flood tide and that she subsequently swung to the ebb, but there never can have been any moment when she lay at anchor with the dredger within three ship's lengths of her astern. A reflection has been made to the effect that no evidence was called either from the dredger or the tanker, but I am not surprised about that as regards the dredger and I am equally not surprised that nobody from the tanker happened to notice this comparatively small vessel coming to anchor below her. I am not impressed by the fact that I have no evidence from either the dredger or the tanker.

Now comes the evidence from the other side. The *Trentino* had a most experienced pilot, who gave his evidence very well indeed before me. He said that he came down the river in his ordinary way upon a quite ordinary night, and the Elder Brethren advise me that the way in which the pilot came down was not only the right way but the ordinary way in which to come down the river. He had the assistance of a man on the look-out—quite a smart young man, though a little rough in the way he gave his evidence—and the second officer who checked the course immediately on rounding the West Blyth buoy. I want to say emphatically that I accept his evidence and that of the helmsman, that this officer did check the course on rounding the West Blyth buoy. The position, then, was that rounding the buoy at full speed on a perfectly clear night he had ahead of him on his port bow the Chapman Light, and he had on his starboard hand the Middle Blyth buoy; he had a perfectly clear line between those two lights so as to be able to proceed upon an ordinary course. His actual point of departure, 150ft. off the West Blyth buoy, though quite a natural position, is a mere question of estimate. I have laid off the course making that estimate into some 300ft. rather than 150ft. to give a certain possible margin of error. If the course then is laid off in that way, it is apparent that the pilot could take this vessel in her then trim quite simply, and easily, and naturally, on the course upon which he says he took her. If he so took her upon that course, and the course is checked by the second officer going on the monkey island and looking at the standard compass—if that were done it would be wholly and absolutely impossible for the down-coming *Trentino* ever to get even to the middle, much less to the northward, of the dredged channel. She would proceed down, keeping to the southward of the dredged channel until she came to a point just above the Blyth Middle, and as the point of collision is well above that point it is quite unnecessary that I should pursue her further course. I have to ask myself as between these Greek witnesses who were very vague as to their position, and the pilot who was quite precise as to his position—as between these Greek witnesses whose evidence caused me the gravest suspicion and the pilot whose evidence caused me no suspicion at all—I have to ask myself which of them I believe, and I must say I believe the *Trentino's* pilot and her witnesses. I think this vessel did proceed upon a course of east half south magnetic, and that the position of the *Nagos* at the time the collision happened was either actually to the south of the dredged channel or actually somewhere near the southerly edge of the dredged channel. I can see no possible reason for believing it happened anywhere else. When one has arrived at that position in this case, the evidence of the other Trinity House pilots, and the Danish master Captain Nielsen, becomes of sovereign importance. In order to make the case for the *Nagos* of a collision to the northward of the dredged channel remarkable coincidences must agree. To begin with, this experienced pilot must have wholly neglected his business in order to get a position which would take him wholly out of his way and where he had no business to be. The look-out must have taken a spell off duty or to have wholly neglected his

business, because if his position of the *Nagos* is true the vessel would be going into certain danger in the cluster of lights on the north side of the channel. The officer who tells me that he went to check the course on the monkey island, must be telling something completely untrue, because he can never have checked a course that would take him into the position that is alleged. But an even stranger incident must have occurred because if the three other pilots I have mentioned, and Captain Nielsen, are not telling me a wholly invented tale, they had great difficulty with a vessel lying to the southward of mid-channel in precisely the same place up and down channel as the *Nagos* now admits that she was lying in on the northward of the channel. Therefore, this down-coming *Trentino* must have struck a vessel with good ship's lights showing, and in addition certain electric deck lights, while at the same time a comparatively unlighted vessel was lurking on the other side of the channel and giving difficulty to all down-coming traffic. I am afraid these coincidences are altogether too wide for me. I think, therefore, that the *Nagos* was lying to the southward of the dredged channel or just on the edge of it, and according to the very credible and excellent testimony of three Trinity House pilots and a Danish master of great experience, was causing the greatest possible difficulty to all down-coming traffic. These three vessels, one at the turn of the tide—the *Miranda*—and the others—the *Edam* and the *Marguerite*—sighted the *Nagos* in their path at a very short distance indeed. The extreme distance at which any of them claim to have seen her was about a cable-and-a-half, or a little over a cable, and that, as Mr. Brightman pointed out, was that of a vessel—the whole ship—lying across the tide. None of them, I think, saw any light of her until after they had seen the loom. Mr. Pilcher fairly claimed that he could at least prove that he had his forward anchor light up because everybody saw it. I agree everybody saw it, and everybody seems to have seen it after they had seen the loom of this vessel—the dark loom on a dark night. One can hardly condemn a light more completely or more sufficiently than to say that it was not visible until the loom of the vessel had already been picked up. The position, therefore, arises here that not only is this vessel lying in the wrong place in such a way as to obstruct the path of down-going traffic but she is also lighted in such a fashion that she is offending most flagrantly against the rules, and instead of exhibiting two anchor lights that can be seen at a distance of at least a mile is exhibiting lights which cannot be seen at a distance of more than a cable. I have been pressed by Mr. Pilcher to say that even if this be the result of my finding, nevertheless the downcoming *Trentino* ought to be held to blame. The *Miranda*, the *Edam*, and the *Marguerite* succeeded in avoiding her, and he claims, therefore, that if the *Trentino* had been equipped with a good look-out the *Trentino* also would have succeeded in avoiding her. The difficulties in the way of that argument seem to me to be many, and I will name only one or two. To begin with, it is not at all sure or certain that the state of visibility at one hour of the night is a constant factor for the remainder of the night. It does not follow that because it was possible to see the *Nagos* at a distance of one cable at one o'clock in the morning, that therefore you could have seen her at that distance at two o'clock in the morning. It does not follow that so far as any lights were concerned that they were in the same state at different times of the night. My own impression is that they were in a pretty bad state at all times of the night, but no one could presume to state with exactitude what was their state at that time of the night. For my own part I feel, in this case (and I am only dealing with this case), with a vessel proceeding at twelve knots an hour—1200ft. a minute—which would, therefore, even assuming the loom could be seen by a vigilant look-out at a cable, only have something like half a minute to deal with the situation—I do not think that I should be justified in saying that it was negligence not to see the loom at that distance. I think that with half a minute or less it would be putting too heavy a burden on any seaman to say that he was a negligent person because he had not succeeded in avoiding a vessel ahead of him under those circumstances.

I do not know what, in practice, may be necessary at night to pick up the loom of a ship. Of course, nights vary very greatly in the state of visibility. On a moonlight night it may be that you can see the loom of a ship at a very great distance. On a dark night it may be that I should find it difficult to blame anybody for not seeing the loom of a vessel at any particular distance. Suffice it to say that the rules are to the effect that a ship is entitled to the assistance from an anchored vessel of two lights which shall show not less than a mile. I am satisfied that these lights were not showing even at a cable, and I utterly decline to find the *Trentino* to blame for not seeing either the lights or the loom at such a distance as I have found to be the distance available.

For these reasons the claim of the *Nagos* will fail and the counterclaim of the *Trentino* will succeed.

Carpmael.—I ask for judgment for the *Trentino* with costs.

Langton, J.—Yes.

Carpmael.—If your Lordship pleases.

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

Solicitors for the defendants, *Botterell* and *Roche*, agents for *Hearfield* and *Lambert*, of Hull.

December 17 *and* 18, 1936; *February* 22 *and* 23; *and March* 22, 1937.

(Before LANGTON, J.)

The Stranna. (*a*)

Bills of lading—Short delivery of cargo of timber—Part of deck cargo lost at port of loading owing to the vessel listing—Cause of list not ascertained—Whether shipowners liable—Cargo carried "at charterer's risk"—Following exception clause in bills of lading: . . . "Peril of the sea . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever . . . always mutually excepted, even when occasioned by negligence, default or error in judgment of the . . . master, mariners or other servants of the shipowners"—Whether accident due to "peril of the sea" or "peril on the sea."

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

This was a claim which arose out of the loss of a certain portion of a timber cargo which had been loaded on to the deck of the Norwegian steamship S. *in July*, 1935, *whilst that vessel was lying at Herring Cove, N.B. About* 774 *standards of timber, representing* 117,198 *pieces, were to have been shipped there for carriage to Belfast, and of these* 39,585 *pieces were to have been carried on deck. When only twelve standards still remained to be loaded, in the early afternoon of the* 23*rd July*, 1935, *the vessel, while still loading, suddenly, and for a reason which was never definitely ascertained, took a heavy list to port, and then to starboard, causing the stanchions securing the deck cargo to break and a considerable quantity of timber to roll overboard. Owing to the thick fog prevailing and the flood tide running at the time, it was impossible to retrieve the timber. When the vessel arrived at Belfast the defendants failed to deliver* 4843 *pieces of the timber. The owners of the cargo claimed damages for breach of contract. The defendants, whilst admitting that a quantity of timber was shipped in the* S. *for carriage to Belfast under thirteen bills of lading, all of the same tenor and form, dated Alma, N.B., the* 23*rd July*, 1935, *and all claused, "quality, description and measurement unknown," denied the short delivery, but said that* (a) *if they did fail to deliver any of the timber they were protected by the exceptions clause in the bills of lading; and* (b) *that, as the bills of lading provided that the deck cargo was "at charterer's risk," they were not liable in any event. On behalf of the plaintiffs it was contended at the hearing* (a) *that the goods were lost not as the result of a "peril of the sea," but of a "peril on the sea"; and* (b) *that the words "at charterer's risk" did not cover the ship-owner against negligence.*

Held, (1) *That the loss was due to a cause excepted by the bills of lading, namely, a "peril of the sea occurring in a port of loading"; because, however, the casualty was caused, it was, in the words of Lord Herschell in* Thames and Mersey Marine Insurance Company *v.* Hamilton, Fraser, and Co. (12 *App. Cas.* 484, *at p.* 498; 57 *L. T. Rep.* 695), *"damage . . . caused by the sea," "damage of a character to which a marine adventure is subject, damage by a peril to which marine adventures are exclusively subject, and which possessed in relation to them a special or peculiar character," and that accordingly the defendants were not liable; but* (2) *that, assuming that the loss was not due to a peril of the sea, the defendants having failed to provide an explanation of the loss which was in any sense comparable in probability with the probability of their own negligence, they would not be protected by the words "at charterer's risk."*

SHORT DELIVERY OF CARGO.

The plaintiffs were the owners of a cargo of timber lately laden upon the Norwegian steamship *Stranna*, of which the defendants were the owners. The timber had been loaded on to the *Stranna* in July, 1935, whilst she was lying at anchor in Herring Cove, New Brunswick, from vessels known as motor scows, which had brought the timber down the River Alma out to the cove.

When the *Stranna* was almost loaded and only twelve standards of timber remained to be put on board her, she suddenly listed first to port and then to starboard, with the result that some of her deck cargo rolled overboard and drifted away, and owing to the prevailing fog and the flood tide which was running at the time, it proved impossible to retrieve it.

The plaintiffs claimed damages for breach of a contract contained in thirteen bills of lading, all of the same tenor and dated Alma, the 23rd July, 1935, alleging that the defendants had thereunder acknowledged the shipment in good order and condition on board the *Stranna* of 117,198 pieces of timber and undertaken to deliver the same in like good order and condition at Belfast, but that they failed to deliver 4843 pieces, and that the plaintiffs had thereby suffered damage.

The defendants denied the alleged short delivery and further said that if (which they denied) 4843 pieces were short delivered, they were protected from liability under the terms of the bills of lading, which provided *inter alia* as follows: "perils of the sea . . . and all and every other dangers and accidents of the seas, rivers, and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever . . . always mutually excepted, even when occasioned by negligence, default, or error in judgment of the master, mariners, or other servants of the shipowners." They also relied on the further provision in the bills of lading that the deck cargo was "at charterer's risk." At the hearing, counsel for the defendants admitted that these latter words did not excuse them from negligence, but submitted that unless such negligence were proved and determined, the words "at charterer's risk" availed to put upon the goods owner the risk of loss through unascertained causes.

Sir *Robert Aske*, K.C. and *J. V. Naisby*, for the plaintiffs.

H. U. Willink, K.C. and *Cyril Miller*, for the defendants.

Langton, J.—I have taken time to put this judgment into writing because Sir Robert Aske has told me that the case raises a new and important point of law. As to the novelty of the point I am in agreement with Sir Robert—as to its importance I will not venture an opinion. The case arises out of the loss of a certain portion of a timber cargo which had been placed on the deck of the Norwegian steamship *Stranna*. The governing documents in the contract of carriage are agreed to be bills of lading in a fairly familiar form, which provide (*inter alia*): (*a*) That the deck cargo is to be carried "at charterer's risk," and (*b*) the following exceptions: ". . . Perils of the sea . . . and all and every other dangers and accidents of the seas, rivers, and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever . . . always mutually excepted, even when occasioned by negligence, default, or error in judgment of the . . . master, mariners, or other servants of the shipowners."

The uncontroverted facts are as follows. On the 23rd July, 1935, the steamship *Stranna* was lying in an open roadstead called Herring Cove, New Brunswick. She had been lying at anchor at this spot since the 12th July, taking on board a cargo of timber composed of 774 standards, or 117,198 pieces, of which 39,585 pieces were to be

carried on deck. At about noon on the 23rd July about twelve standards remained to be loaded. The weather was a thick fog, there was no appreciable wind, and the water was calm.

Herring Cove is situated just north of Matthews Head in Chignecto Bay on the coast of New Brunswick, and the cargo of the *Stranna* was being brought out to her in vessels known as motor scows, which came out of the River Alma into the cove. In the early afternoon the vessel, while still loading, listed to port and carried away the wooded uprights or stanchions on the port side, thereby causing a considerable quantity of timber to be lost overboard. The vessel then rolled to starboard and uprights on that side were likewise broken, causing or allowing more of the cargo to fall overboard. A flood tide was running at the time. The timber drifted away and was soon lost sight of in the prevailing fog and was not recovered. In all, the lost timber amounted to 4843 pieces.

At the outset of the case the plaintiffs claimed that since the shipowners as bailees of the goods admitted that they had received the goods and had not delivered some of them, there was a *primâ facie* case of negligence against the defendants, and that the onus lay upon the shipowners to displace this *primâ facie* case.

The defendants agreed that the provision that deck cargo was " at charterer's risk " did not excuse them from negligence, and accepted the onus to the extent of admitting that the pleaded facts put a duty upon them to furnish an explanation of how the loss occurred. Their explanation was given through the medium of Captain Abrahamsen, the master of the vessel, together with the vessel's log and a written statement from the mate, Thomas Ganulfsen, which was admitted in evidence subject to the comment that the witness had not been cross-examined.

Before this explanation was given, the particulars embodied in the defence were amended by leave to include an allegation that, in addition to a strong flood tide, there was running at the time of the casualty a strong under-current. Upon this alleged under-current, running as it was said counter to the true flood tide, a curious structure of theory was erected. The master averred with an air of passionate conviction that the mishap had been caused by reason of his vessel having been caught and held broadside to the tide by the strong under-current. I was invited to imagine that these countervailing forces had undermined the stability of an otherwise steady ship and caused her to behave in an unexpected, unpredictable and wholly unprecedented manner. I am bound to admit that my imagination flagged sadly in the effort to visualise this theory. Throughout a long experience of cases involving the difficult question of stability I have never yet heard of current as a factor. But if one allows for purposes of argument that it might enter, it is still impossibly difficult to me to conceive how or why two currents impinging with almost equal force (for the ship lay, *ex concessis*, across them both) on opposite sides, should affect her stability otherwise than favourably. In the extremely limited scientific knowledge at my command, equal forces applied on opposite sides form a poor method of deranging the stability of any object whether afloat or ashore.

I was greatly relieved, therefore, when I found that this theory received no blessing nor, indeed, any adherence from Mr. Camps, the very well-known marine surveyor, who was called on behalf of the defendants. Equipped as he is with scientific knowledge and wide marine experience, Mr. Camps even doubted whether it was possible for a vessel to lie in cross-currents with her anchor at right angles as described by the mate ; and he professed himself quite unable to provide any scientific reason for the ship's behaviour in the absence of the necessary data which would enable him to calculate initial and final stability. I came to the conclusion that the master, who was an impulsive witness, was giving me a history of the occurrence which he had persuaded both himself and the mate to be true, but which was actually a version of the occurrence coloured by a somewhat fantastic theory conceived after the event. Mr. Flannery, on behalf of the plaintiffs, was no more successful than Mr. Camps in supplying any actual scientific reason for the listing of the *Stranna*, though he held fast, as I understood him, to the theory of a loss of stability caused either by overloading on deck or faulty management in respect of tanks. He, too, admitted frankly that he had no data upon which to base scientific reasons, and could only make rough arithmetical calculations upon assumed figures.

Before leaving this question of tide and current I ought to say that I see no reason to doubt the accuracy of the Admiralty chart as regards the force of the tide, nor did the evidence, such as it was, concerning the under-current convince me that such current was of any appreciable force.

In the end, I was left with a clear explanation, so far as it went, of how the cargo had come to be lost, but with no material upon which to base a finding as to the cause of the vessel's strange behaviour in listing as she did before taking on board the full complement which she had carried previously in safety and was expected to carry again. That casualties of this character occur in the timber trade is not only common knowledge, but is witnessed by several reported cases. Two of the best known of these are *Wade* v. *Cockerline* (10 Com. Cas. 47 ; (C. A.) 115) and *C. Wilh. Svenssons Travaruaktiebolag* v. *Cliffe Steamship Company* (18 Asp. Mar. Law Cas. 284 ; 147 L. T. Rep. 12 ; (1932) 1 K. B. 490), in each of which, though the contract of carriage differed in terms from that in the present case, the facts were not dissimilar.

Sir Robert Aske, for the plaintiffs, criticised the evidence for the defendants in severe terms. Much of this severity was well justified. The master, Captain Abrahamsen, was a poor witness, and he fared badly in cross-examination. The ship's documents were in some respects in conflict with the oral testimony, and the mate's written statement also contained matter in apparent contradiction to the log. Some of these difficulties can, I think, be overcome if one reads both the log and the mate's statement as not being drawn up in strict order of chronology, and I did not feel that anyone on behalf of the ship was attempting to present a consciously false case. Stated at its highest, however, the ship's explanation did not reach any further point than proving that the goods were lost through falling into the sea while the vessel was loading, by reason of the ship heeling in an unexpected manner first to port and then to starboard. To this meagre and unsatisfactory material it becomes necessary to apply the contract in order to ascertain whether the defendants are liable.

Mr. Willink, for the shipowners, takes two points. If either of them be sound, the defendants have a complete defence to the action. I will summarise them as follows : First, he says, this is a peril or accident of the sea, and, if this be so, it is immaterial whether such a peril or accident was caused by

negligence, because negligence is excepted in so far as it causes such perils or accidents. Secondly, the deck cargo was at "charterer's risk," and although it is conceded that this exception does not include risk caused by negligence, no negligence has been established here, and the cargo-owner takes the chance under this clause of loss by unascertained causes.

The first of these points raises the question of law which Sir Robert Aske claims to be new. On behalf of the plaintiffs he replies that the loss in this case is not a peril of the sea. All that is known is that the vessel heeled and that the lost cargo fell overboard into the sea. The mere falling of cargo into the water is not a peril of the sea, nor is stability a property peculiar to the sea or governed only by the sea. In a word, the plaintiffs' point is that this is a peril on the sea—not a peril of the sea.

The argument proceeded thus: What you do of your own volition to a ship is not a peril or accident of the sea. If the heeling of the ship be produced by putting cargo into or upon her, it is the cargo and not the water which is heeling the vessel. What you do by design is not fortuitous and, therefore, neither a peril nor an accident. The occurrence here under consideration accordingly lacks both the elements necessary to bring it within the exception relied on; it has no special marine character which would allow it to be classified as being "of the sea," and it has no quality of the fortuitous which would enable it to be ranked as a peril or accident.

It is, I think, useful to trace a little of the recent legal history of this class of occurrence in order to appreciate the angle of approach by which this point has come to be reached. In *Wade* v. *Cockerline* (*sup.*), where the facts resembled these with which I have to deal, the exceptions clause contained the words "accidents to hull." The phrase "deck load . . . at charterer's risk" was also included in the bill of lading, but the decision went in favour of the shipowner on a finding that the breakage of the stanchions constituted an accident to hull, and the second point, though considered, was not decided. In *Svenssons's* case (*sup.*), Lord Wright, the present Master of the Rolls, sitting then as a judge of first instance, dealt with facts almost identical with those in the present case. In that case the last load of cargo was actually on board but not actually stowed. In a most careful and illuminating judgment, which has not, I believe, ever been questioned, Lord Wright held, first of all, that there was no breach of the warranty of seaworthiness. Since in the present case, the facts fall a little short of this in *Svenssons*'s case, it would clearly have been idle for the plaintiffs to attack upon the line of unseaworthiness. Secondly, Lord Wright, following *Wade* v. *Cockerline*, held that the loss fell within "accidents to hull even when occasioned by negligence," &c., and that the shipowner was thereby protected. These words do not occur in the present bills of lading, so that the shipowner here could obtain no assistance from the decisions in either *Wade* v. *Cockerline*, or *Svenssons's* case, in so far as they dealt with that point, which (as I have noted above) was the only *ratio decidendi* in *Wade's* case. Finally, Lord Wright, in *Svenssons's* case decided that the words "at charterer's risk" standing alone in a separate clause did not excuse the shipowner from negligence.

The shipowner, therefore, was driven in the present case either to rely upon "charterer's risk" (which phrase also stands alone in a separate clause in these bills of lading) and to take the chance of negligence being proved against him, or to find a new line of defence. Hence comes, for the first time, the defence of perils or accidents of the sea.

I have been at pains to recite this history because to anyone who is not very familiar with this class of work it might seem more than strange that this point which has been open to the consideration of many very ingenious and erudite people for many years has not come into prominence before. The *locus classicus* upon this subject of what is and what is not a "peril of the sea," is, of course, to be found in what Mr. Willink referred to as a famous trilogy of decisions, namely, *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (6 Asp. Mar. Law Cas. 200, H. L.; 57 L. T. Rep. 695; 12 App. Cas. 484), *The Xantho* (6 Asp. Mar. Law Cas. 9, 207, H. L.; 57 L. T. Rep. 701; 12 App. Cas. 503), and *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (6 Asp. Mar. Law Cas. 212, H. L.; 57 L. T. Rep. 726; 12 App. Cas. 518). These well-known cases set at rest many controversies then current in the legal world concerning the insurance and carriage of goods by sea. For present purposes the first of the three seems to me to be the most fertile both in principle and in canons of construction.

In this first case it is well to note at once the warning of Lord Macnaghten: "Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression 'perils of the seas' in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad commonsense view, and not by the light of strained analogies and fanciful resemblances." Where Lord Macnaghten has forborne to tread lesser men may be excused from the adventure. I shall attempt no definitions. In what seemed to me to be the least happy part of an otherwise powerful argument, Sir Robert Aske propounded the analogy of a lorry being loaded as the *Stranna* was loaded with either timber or bricks until a list was produced and the load slipped off the top on to the road. Again, as in the matter of Captain Abrahamsen's cross-currents, I was conscious of an inability to follow what was no doubt a bold imaginative flight. Instead of a tall shape heeling first slowly and then quickly like a ship in a wind, my sluggish perceptions would only allow me to see this lorry standing with dull patience upon a hard but level road until the final overplus timber or brick having been laboriously superimposed it collapsed suddenly in an ignoble ruin. Nor could I at all visualise in this analogy how the load would come to be lost by reason of this somewhat drab disaster. As against a cargo swept relentlessly by a tide down the waters of a fogbound bay, I could only see, in the analogy provided, a picture of an unhappy carter surrounded by an embarrassingly extensive collection of the objects of his misplaced energy. I cannot think that this is a happy analogy, and it would almost seem from this example that an analogy can be strained without being over fanciful.

But an argument from a poor analogy is only bad if it rests upon the analogy alone. Sir Robert Aske's argument rests on far more solid foundations. I was invited by Mr. Willink to test these foundations by a passage in Lord Herschell's speech in the *Thames and Mersey* case. It will be observed that Lord Ellenborough limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which

has been caused by the sea but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character." This passage appears to me to shed great light upon the problem. The actual words in these bills of lading are " perils of the sea . . . and all and every other dangers and accidents of the seas . . . wheresoever, including ports of loading."

There are not many judicial pronouncements upon the term " dangers and accidents of the seas," but we have again the high authority of Lord Herschell in *The Xantho*: " The question, What comes within the term ' perils of the sea ' (and certainly the words ' dangers and accidents of the sea,' cannot have a narrower interpretation). . . ." Armed with this authoritative dictum we can at least proceed with the certainty that the introduction of the term " dangers and accidents " does nothing to cut down the ambit of " perils of the sea," and I would draw special attention to the words " including ports of loading " in this case.

With these matters in mind one may pass now to a review of the principal authorities, remembering always that the occurrence must be fortuitous and must have a marine character in order to fall within the meaning of this exception. The cases of *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (the donkey engine case) (*sup.*), *E. D. Sassoon and Co.* v. *Western Assurance Company* (12 Asp. Mar. Law Cas. 206; 106 L. T. Rep. 929; (1912) A. C. 561), and perhaps, strongest of all, the case of *Grant, Smith, and Co.* and *McDonell Limited* v. *Seattle Construction and Dry Dock Company* (122 L. T. Rep. 203; (1920) A. C. 162), lie on one side of the line, and provide instances of occurrences causing loss on the sea which are not " perils of the sea."

In the donkey engine case the air chamber of the donkey pump gave way under an excessive pressure of water owing to the outlet being closed. The House of Lords held that this accident was devoid of any special marine character.

In *Sassoon's* case a worn-out hulk sank by the incursion of water owing to its rotten condition, and the Privy Council held that there was nothing fortuitous. What must happen is not an accident.

In *Grant's* case the question was more difficult. A dry dock capsized, sank and was lost while being used for a legitimate purpose to submerge caissons as a feature of harbour construction. There could be little doubt of the marine character of the operation, and at first sight it would appear that there was some element of the fortuitous in the occurrence. But the Privy Council held that the dock was " destroyed because of its own inherent unfitness for the use to which it was put," and followed the board's own decision in *Sassoon's* case. Lord Buckmaster, in giving the judgment of the board, compared the dock to a vessel unfit to carry her cargo. He said: " It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water." Again, therefore, the element of the fortuitous was negatived.

On the other side of the line are *The Xantho* (*sup.*), *Hamilton, Fraser, and Co.* v. *Pandorf and Co.* (*sup.*), *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Company* (9 Asp. Mar. Law Cas. 263; 85 L. T. Rep. 783; (1902) 1 K. B. 290), and *Mountain* v. *Whittle* (15 Asp. Mar. Law Cas. 255, H. L.; 125 L. T. Rep. 193; (1921) 1 A. C. 615). In *The Xantho* the House of Lords held that foundering by collision is within " dangers and accidents of the sea." Lord Herschell disposes of the contention that the words are limited to casualties produced by tempestuous conditions. He says: " It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category."

And Lord Bramwell adds to the catalogue of fair weather casualties: " The argument is that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the sea within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea."

In *Hamilton, Fraser, and Co.* v. *Pandorf and Co.*, where rats gnawed a hole in a pipe on board the ship whereby sea water escaped and damaged the cargo, the House of Lords held that the damage was within the exception " dangers and accidents of the seas." Lord Halsbury says: " I think the idea that something fortuitous and unexpected is involved in both words, ' peril ' or ' 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 . . . and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a swordfish from without—the sea water did get in." And Lord Herschell: " It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated."

In *Blackburn's* case an engineer having opened the seacock with the intention of filling the ballast tank, inadvertently opened the wrong valve and thereby introduced water to the deep tank where bags of sugar were stowed, thus damaging the sugar. After a lengthy review of the authorities Walton, J., a great master of mercantile law, held, following *The Xantho* and *Hamilton, Fraser, and Co.* v. *Pandorf and Co.*, that the occurrence was accidental and the danger maritime, since it was a danger that sea water should come in, and therefore that it was a " peril of the sea."

In *Mountain* v. *Whittle* a houseboat towed by a large and powerful tug sank as the result of the towage because water entered through some of her side seams which proved to be defective. The House of Lords held that the houseboat was lost by a peril of the sea, but it is important to observe that in the opinions delivered much stress was laid upon the fact that the tug was of disproportionate size and power, and that the breast wave caused by the towage was accordingly in excess of what might reasonably have been expected. It is also important to remember that the policy upon which

the houseboat was insured was a time policy so that the unseaworthiness of the vessel which was found as a fact offered no defence to the claim. Save for the unusual and unexpected size of the wash or breast wave it would have been extremely difficult to distinguish this case from *Sassoon's* case.

It results plainly from the total of these authorities that exceptional violence of winds and waves is not essential to a "peril of the sea," and *Hamilton, Fraser,* and *Co.* v. *Pandorf and Co.* and *Blackburn's* case show that not only need the violence not be exceptional but there need be no violence at all. The quiet, undisturbed flow of perfectly calm water into a ship may be a peril of the sea if it enters fortuitously, and not, as in *Sassoon's* case, because it was the inevitable consequence of exposing the vessel to the action of water.

Sir Robert Aske rightly claimed *Grant's* case as the spearpoint of his argument. The action of sea water in calm conditions upon a body designed to work in such water does not produce a peril of the sea. I agree, but only when the element of the fortuitous is excluded, as it was in that case by the finding of the board.

Let us turn again at long last to the *Stranna.* There is here no violence of wind or wave, the agency causing the vessel to heel was human rather than elemental, namely, the addition of deck cargo; but are these matters the ultimate test of a peril of the sea? I return to Lord Herschell in the *Thames and Mersey Marine Insurance Company* case, in Mr. Willink's preferred passage. Was this "damage of a character to which a marine adventure is subject"? For my part it seems to me that it was. "Such an adventure," says Lord Herschell, "has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character." I cannot shut out from my recollection that I spent a pleasant morning during the hearing of this case in renewing and reviving my notions of the factors governing the stability of a ship, under able tutelage from both sides. May I not ask why? Is not the stability of a ship a special branch of marine engineering? Is it not a feature, sometimes (fortunately at rare intervals) a sinister feature, of every marine adventure? To my thinking the answers of these questions are very clear, and I would go further and fit the whole of Lord Herschell's tests to this case. It is true that I do not know exactly how this casualty was caused, but I do know that unseaworthiness is not suggested. Either the cargo was badly stowed, or parts of it were wet which caused an uneven and uncalculated distribution of weights, or the tanks which form so important a part in the stability of the vessel were mismanaged, or some other factor which has occurred to nobody's mind so affected her stability as to cause her to heel in an unexpected manner. It seems to me that it matters nothing how this particular heeling was produced; the ultimate facts are the same. A vessel in water took a wholly unexpected (*i.e.,* fortuitous) list or series of lists and cargo was thereby lost. In my eyes, following Lord Herschell, this is "damage which has been caused by the sea"; it is "damage of a character to which a marine adventure is subject"; it is damage by a peril to which marine adventures are "exclusively subject" and which possesses in relation to them a "special or peculiar character." Although it is right in one sense to say that the heeling was produced by a human agency in that it resulted from cargo being put on board, it is to be observed that this heeling was not only undesigned: it was the exact reverse of the effect desired and designed.

Finally, there is, I think, significance to be attached in this case to the words "ports of loading," which occur in the bill of lading. Before now, in a hurricane, vessels have broken adrift and thereby suffered heavy damage in a port of loading; buoys have come adrift from their moorings and vessels lying at the buoys have been damaged. But apart from cases of extraordinary weather it seems difficult to me to imagine a case more exactly fitted than this one to a peril of the sea or accident of the sea occurring in a port of loading.

Since this case may go higher and I may prove to be wrong in my determination of this first point, I think it is due to the parties that I should also express my view as to the second point raised by Mr. Willink. I would gladly have refrained from doing so. It is true that I am relieved by Lord Wright's judgment in *Svenssons's* case from the initial difficulty as to the meaning of the words "at charterer's risk" standing alone. As Lord Wright gave this judgment as a judge of first instance I suppose it would be my duty to express any doubts I might feel concerning it. I have no such duty because I have no doubts.

But I have very considerable hesitation in expressing my view as to the question of negligence in this case. I observe with some relief that both Branson, J. and a Court of Appeal composed of Wright, M.R., Romer, L.J., and Macnaghten, J., in the case of *Brooks Wharf and Bull Wharf Limited* v. *Goodman Brothers* (56 Ll. L. Rep. 71), expressed a view concerning the onus of proof resting upon a bailee who had lost the goods entrusted to him, which seems to be in accordance with an earlier decision of my own in the case of *The Kite* (149 L. T. Rep. 498; (1933) P. 154). In the *Brooks Wharf* case a remarkably clever gang of fur thieves had succeeded in abstracting a consignment of Russian squirrel skins from a bonded warehouse. The trial judge, Branson, J., was satisfied that the warehouseman had taken all reasonable precautions to guard against theft, and Lord Wright, M.R., delivering the judgment of the Court of Appeal, confirmed that finding. Founding himself upon statements of Lord Loreburn and Lord Halsbury in an unreported case in the House of Lords—*Morison, Pollexfen, and Blair* v. *Walton*—and upon a particularly helpful passage from Lord Dunedin in a dissenting judgment in *Ballard* v. *North British Railway Company* ((1923) Sess. Cas. (H. L.) 43, at p. 54), Lord Wright held that in the circumstances the warehousemen had discharged the burden of proof which lay upon them to give an explanation of how the loss could have occurred without negligence.

My decision in the case of *The Kite* was founded upon the same opinion of Lord Dunedin, and although I am confident that my view was covered by his words, I appreciate that the Court of Appeal were on more certain ground in their case than I was in *The Kite.* Lord Wright states in his judgment that the court was satisfied that the warehousemen "had taken all reasonable precautions." It follows that they were not negligent. In *The Kite* I could only find that upon the explanation furnished by the bailees the accident was equally as consistent with no negligence as with negligence—there was no preponderating probability one way or the other—and I held that this satisfied the onus upon them. This appeared to me to be the meaning which Lord Dunedin attached to "explanation" as distinguished from proof. The bailees had not to disprove negligence; they had to give an explanation.

Applying this line of thought to the present case, I am at once confronted by the difficulty that the

explanation given by the ship-owner is exceedingly meagre. His theory of cross-currents is quite untenable, and his evidence at the best leaves the cause of the heeling completely unexplained. Mr. Willink urges that although the words deck cargo "at charterer's risk" do not excuse him for negligence proved and determined, they will avail to put upon the goods-owner the risk of loss through unascertained causes. As to this I feel that the statement is too wide. I can quite easily read the words "at charterer's risk" to mean that the goods-owner takes the chance of some imperfectly ascertained causes of loss; but to say that it confers upon the ship-owner a right to claim exemption from liability in every case in which the cause of the loss is unknown, seems to me to be altogether too benevolent a construction in favour of the party who has inserted the exception. Pushed to its logical conclusion this argument would appear to go to the length of saying that these words excuse a bailee from giving any explanation of the loss of goods entrusted to him. Indeed, he might well deem it wiser not to attempt an explanation since without one he must succeed.

As usual, in cases of onus of proof, *The Glendarroch* (70 L. T. Rep. 344; (1894) P. 226) was much canvassed before me. I cannot think that this decision is very helpful in the present case. It must be remembered that in *The Glendarroch* the hearing in the court of first instance was purposely confined and restricted, and the Court of Appeal were only called upon to deal with the position of the parties before any inquiry into the question of negligence had begun. It was a case of damage and not a case of loss, and the decision only established that where a bill of lading contained an exception of perils of the sea but no further limitation of negligence, there was no burden upon the ship-owner to disprove negligence. I do not see how this perfectly unassailable decision throws much light on either the construction of the phrase "at charterer's risk" or upon the burden of proof thereunder.

The defendants in the present case have essayed an explanation of the heeling of the *Stranna* which I cannot accept, and they have put forward as a conceivable alternative to this theory and to negligence on their part that the wood was so weighted by wet as to render it out of the power of a reasonable and prudent seaman to load it without damage and loss. In support of their care in loading they gave me evidence of testing the effect of what they were proposing to do by handing certain weights of cargo in slings over the ship's side. This evidence was anything but clear in the result, and I do not feel at all satisfied that the tests spoken to were carried out at the times deposed to or with the weights stated. I am ready to believe that some experiments were made at some period of the loading, but if the facts spoken to in evidence are to be taken as true, the heeling of the *Stranna* almost immediately afterwards would not only be a mystery; it would be a miracle.

In the result, I do not think that the defendants have succeeded in providing an explanation which is in any sense comparable in probability with the probability of their own negligence. The loading of timber cargoes on deck is admittedly a difficult process. The preservation of a ship's stability during this process may be a matter of nice calculation. But one cannot pretend ignorance of the fact that both the process and calculation are being successfully accomplished practically every day, and that the comparatively rare cases of failure are usually due to carelessness or to a fairly elementary blunder. If the facts were otherwise, the carriage of timber cargo upon deck would have earned an unpopularity, at least among underwriters, which it does not appear to enjoy, and it is unlikely that the construction of the now familiar phrase "at charterer's risk" would have been delayed as late as the year 1937.

Upon the second line of defence put forward by Mr. Willink I have accordingly reached the conclusion, though not without some doubt and hesitation, that in the absence of a reasonably probable alternative explanation the heeling of the *Stranna* was caused by negligence for which the shipowners are not protected by the words "at charterer's risk."

As, however, they are protected by their first defence the plaintiffs' claim fails.

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

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

May 28 *and* 31, *and June* 1, 2, 8, *and* 11, 1937.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Eurymedon. (*a*)

Collision in Long Reach, River Thames, between vessel going up-river and vessel at anchor—Improper anchoring in fairway—Sufficiency of anchor lights—Failure of up-going vessel to identify anchor lights partly due to unusual position of anchored vessel—Duty of up-going vessel to reduce speed on seeing ship's lights ahead, although unidentified—Higher degree of care required when approaching locality where visibility known to be made more difficult by glare of shore lights—Both vessels held equally to blame.

This was a claim by the owners of the steamship C. *against the owners of the twin-screw motor vessel* E. *for damages in respect of a collision between the* C. *and the* E. *which occurred about opposite the eastern end of Cory's Jetty, Long Reach, River Thames, at about* 6 *a.m. on the* 6*th January*, 1937. *The* E. *was bound up-river on a voyage from Amsterdam to London, and the* C. *was riding to her starboard anchor and lying about athwart the river with her stern about* 350*ft. from the edge of the jetty. The* E., *with her port side about* 56*ft. forward of her stern struck the port counter of the* C. *and immediately afterwards hit with her stem the starboard side of another vessel—belonging to the same owners as the* C.*—which was at the time lying moored alongside Cory's Jetty.*

According to the plaintiffs' case, shortly before 6.10 *a.m. on the* 6*th January*, 1937, *the weather at such time being overcast and rainy, the wind S.S.W., a strong breeze and squally and the tide flood of about one knot's force, the* C. (2,337 *tons gross,* 300*ft. in length and* 45*ft. in beam*) *was in Long Reach, River Thames, lying to her starboard anchor with* 45 *fathoms of cable a little below the Smallpox Hospital and to the*

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

southward of mid-channel, and, being wind-rode, was angled about three to four points to starboard of a down-river heading. The C. *was exhibiting the regulation lights for a steamship at anchor, which were burning brightly, and a good look-out was being kept on board her. In these circumstances, the masthead lights and the red light of the* E. *coming up river in about mid-channel were observed, distant about one mile and bearing a little on the* C.'s *port bow. Thereafter the* E. *was so negligently navigated that, instead of passing all clear to the northward of the* C., *as she could and ought to have done, she came on, and, swinging rapidly to starboard at the last, with her port quarter struck the port quarter of the* C., *doing damage. The* E. *was heard to sound three short blasts at about the time of the collision, but these blasts were not heard by those on board the* C. *The plaintiffs charged the defendants or their servants on board the* E. *with failing to keep the* E. *clear of the* C.; *failing to pass to the northward of the* C., *as they could and ought to have done; causing and allowing the stern of the* E. *to fall or swing to port; failing to keep to their own starboard side of mid-channel sufficiently or at all; failing to starboard the wheel of the* E. *in due time or sufficiently; improperly putting and keeping their wheel to starboard; failing to put their wheel to port in due time or sufficiently or at all; failing to keep the* E. *under any or proper control; proceeding at an excessive speed; failing to ease, stop or reverse the* E.'s *engines in due time or at all; improperly and at an improper time reversing the* E.'s *engines; attempting to pass too close to the* C., *and failing to comply with rules* 33, 39, 41 *and* 42 *of the Port of London River By-laws*, 1914–1934. *The defendants' case was that, shortly before* 6.21½ *a.m. on the day in question, the* E. (6224 *tons gross,* 431.8*ft. in length and* 54.7*ft. in beam*) *was in Long Reach, River Thames, proceeding up-river on a voyage from Amsterdam to London, partly laden. The weather was fine and clear, but dark, the wind was S.W. of gale force, and the tide flood of about one knot's force. The* E. *was keeping to the northward of mid-channel, and, with her engines working half-speed ahead, was making about seven to eight knots. She was exhibiting the regulation masthead light, additional optional masthead light, side lights and fixed stern light, all of which were burning brightly, and a good look-out was being kept on board her. In these circumstances, a dim white light which proved to be the forward anchor light of the* C. *was observed by those on board the* E. *distant about a cable or a little more and bearing one to one-and-a-half points on the* E.'s *port bow, and immediately afterwards the outline of the* C. *was made out lying athwart the river right across the head of the* E., *and a very dim white light aft on the* C. *was also made out. Thereupon the wheel of the* E. *was immediately put hard a-starboard, one short blast was sounded on her whistle, her engines were stopped and put full speed astern, and three short blasts were sounded on her whistle. The head of the* E. *swung clear of the stern of the* C., *and the wheel of the* E. *was then hard-a-ported in an endeavour to swing her stern clear of the* C. *and also to prevent the* E.'s *head from fouling another vessel which was lying at Cory's Jetty, but, in spite of these manœuvres, it proved impossible to prevent the port side of the* E. *in way of the break of the poop from fouling the stern of the* C., *and at the same time the* E.'s *starboard bow came into contact with the starboard side of the other vessel which was lying at the jetty, whereby the* E. *sustained damage. The defendants charged those on board the* C., inter alia, *with failing to keep a good look-out; with failing to exhibit anchor lights of sufficient brightness in accordance with the by-laws; with being improperly at anchor in the fairway; failing to anchor the* C. *on the south side of the river, as in the circumstances they could and ought to have done; with improperly causing or allowing the* C. *to lie athwart the river and in a position where her lights were liable to be confused with surrounding shore lights, and to constitute an obstruction to vessels lawfully navigating in the river; and with failing to comply with rules* 24, 41 *and* 42 *of the Port of London River By-laws*, 1914–1934.

Held, (1)—*the learned judge having found as a fact that at the time of the collision the* C.'s *stern was about* 350*ft. from Cory's Jetty on the north shore; that the* C. *was occupying about* 300*ft. of the deep-water channel which at this place is* 1000*ft. wide, and that this was an unusual position for a vessel to lie in—that those in charge of the* C. *were lacking in good seamanship in allowing their vessel to lie athwart the river in this place and at this time, as not only did the* C. *lying in this position constitute a dangerous obstruction to vessels going up and down the river, but she was lying at a place where the brilliant lights on the north shore in the vicinity of the collision and the light and shadow caused by these lights on the water would probably make it more difficult to pick up the* C.'s *lights;* (2) *that the* E. *was negligent in that upon approaching a locality where visibility was known to be made more difficult by the glare of shore lights and approaching unidentified white lights ahead, she did not reduce her speed immediately (which the learned judge found to be at least ten knots over the ground) at the first appearance of the white lights ahead;* (3) *that in the circumstances of this case the negligence of the* C. *in taking up the position she did contributed to the failure of those in charge of the* E. *to take appropriate action to avoid a collision until they were too close to clear the* C. *and the other vessel lying alongside the jetty;* (4) *that both vessels were to blame in equal degrees.*

DAMAGE BY COLLISION.

The plaintiffs were Cory Colliers, Limited, of London, owners of the steel screw steamship *Corstar* of 2337 tons gross and 1336 tons net register, 300ft. in length, 45ft. in beam, and fitted with triple expansion engines of 266 h.p. nom.

The defendants were the Ocean Steam Ship Company Limited, of Liverpool, owners of the twin screw motor vessel *Eurymedon*. The collision occurred in Long Reach, River Thames, about opposite the eastern end of Cory's Jetty, on the north side of the river, at about 6 a.m. on the 6th January, 1937. The weather was overcast, and it was raining. The wind was south-westerly of almost gale force, and the tide was flood of force about one knot. The *Corstar* was riding to her starboard anchor with 45 fathoms of cable, and was lying almost athwart the river. The *Eurymedon* was proceeding up-river on her proper side of mid-channel in the course of a voyage from Amsterdam to London, and was partly laden. The circumstances of the collision as pleaded by the parties are set out in the headnote, and the facts as they emerged from the evidence fully appear in the judgment.

In the course of his judgment the learned judge referred to the following cases, namely: *Cayzer* v. *Carron Company* (5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873); *The Margaret* (4 Asp. Mar. Law Cas. 375; 6 Prob. Div. 76); *The Monte Rosa* (7 Asp. Mar. Law Cas. 326; (1893) P. 23); and *The Volute* (15 Asp. Mar. Law Cas. 530; (1922) 1 A. C. 129).

K. S. Carpmael, K.C. and *Owen L. Bateson*, for the plaintiffs.

H. G. Willmer and *Vere Hunt*, for the defendants.

Bucknill, J.—This case arises out of a collision between the plaintiffs' steamship *Corstar* and the defendants' motor vessel *Eurymedon* in Long Reach, River Thames, shortly after 6 a.m. on the 6th January, 1937. The weather, as I find, at the time of the collision was overcast with rain, and the wind was south-westerly and of about force 6. The tide was the last quarter of the flood of about a knot in force.

The *Corstar* is a screw steamship, 300ft. long and 45ft. in beam. The *Eurymedon* is a twin screw motor vessel, 431ft. long and 54ft. in beam. The *Corstar's* case is that at the time of the collision she was at anchor to the southward of mid-channel, angled three to four points off a down-river heading, and was exhibiting two riding lights in accordance with rule 14 of the Thames By-laws. The by-law requires a vessel of 150ft. in length or upwards to exhibit in the forward part of the vessel at a height of not less than 20ft. and not exceeding 40ft. above the hull a white light in a lantern so constructed as to show a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile, and to exhibit at or near the stern at such a height that it shall not be less than 15ft. lower than the forward light another such light. The interpretation clause of the by-laws states that the word "visible" when applied to lights means on a dark night with a clear atmosphere.

On the other hand, the defendants' case is that the collision occurred well to the northward of mid-channel, and that the *Corstar* was improperly at anchor in the fairway and lying athwart the river, and was not exhibiting riding lights of sufficient brightness to comply with the by-law.

Each vessel sustained damage in the collision. Almost immediately after the collision the *Eurymedon*, which was proceeding up-river, collided with the steamship *Corchester*, which was lying alongside Cory's Jetty on the north side of the Reach and heading down-river. The *Corchester* is a vessel of about the same dimensions as the *Corstar*, so that her starboard side was about 45ft. from the edge of the jetty.

I find as a fact that the collision between the *Eurymedon* and the *Corstar* occurred a few seconds before the collision between the *Eurymedon* and the *Corchester*. The *Corstar* was hit on her port counter by the *Eurymedon's* port side about 56ft. forward of the *Eurymedon's* stern. The *Corchester* was hit on her starboard side in the way of No. 4 hatch by the stem of the *Eurymedon*. I find that the angle of the blow between the *Eurymedon's* centre line and the *Corchester's* centre line was about four points leading aft on the *Corchester*, and that the angle of the blow between the *Eurymedon* and the *Corstar* was about three points leading aft on the *Corstar*. The collision between the *Eurymedon* and the *Corstar* was of a very slight nature and did not affect the heading of the *Eurymedon*.

I find that at the time of the collision the stern of the *Corstar* was about 350ft. from the edge of Cory's Jetty, and that the *Corstar* was lying nearly athwart the river, and about opposite the eastern end of the jetty. This places the *Corstar's* stern near the northern edge of the deepwater channel, and with about 300ft. of the channel occupied by her. The width of this channel at this place is about 1000ft.

The first and most important issue in the case is whether the *Corstar's* lights were burning properly. Evidence was called and was not challenged that the *Corstar* was exhibiting two riding lights, one at the fore-end on the forestay and one at the stern on the flagstaff, and it was admitted by the defendants that the lanterns and lamps themselves were of the usual and proper pattern for oil riding lights. There is no doubt that if the lamps were properly trimmed and burning proper oil, and if the glass of the lamps and lanterns was clean, the light from them would show at least one mile on a dark night with a clear atmosphere.

The Trinity House pilot in charge of the *Eurymedon* said in his evidence that the first he saw of the *Corstar* was a very dim light bearing about 1 to 1½ points on the port bow, and about 650ft. from his ship. Other witnesses were called from the *Eurymedon* and from other vessels which passed the *Corstar* at about the time of the collision, all of whom said that the *Corstar's* lights were dim, or faint, or poor.

On the other hand, the plaintiffs called on their behalf three witnesses from the *Corstar*, and two witnesses, one from their jetty and one from the *Corchester*, who said that the lights of the *Corstar* were burning brightly at the time of the collision. So far as the two last witnesses are concerned they are both in the employ of the owners of the *Corstar*, and the *Corstar* was lying at anchor close to them. Therefore they were not in a very good position to judge of the range of visibility of the lights. Svenson said that the after light, which was the one nearest to him, was not as bright as the forward light, but still it was a good light.

It seems to me that on this issue as to the condition of the lights of the *Corstar* the determining factor is the value I attach to the evidence of Jackson, the boatswain of the *Corstar*. Jackson said in his evidence that he trimmed these lights on the 5th, put them up at sunset, and took them down at about 8 a.m. on the 6th January. The *Corstar* had in fact come to anchor shortly after 10 p.m. on the night of the 4th and had remained at anchor until the collision, waiting to be called alongside Cory's Jetty. Jackson, who has been for fifteen years in the *Corstar*, said that before he put up the lanterns on the evening of the 5th, he trimmed the wicks and cleaned the glasses and filled the reservoirs. He said that after the collision

the lights were burning brightly and that they remained in position until 8 a.m., when he took them down in the presence of the first officer, Mr. Brodie, and that the lamps were burning quite brightly then. He said that when he took them down the glasses were quite clean and that there was no sign that the lamps had been smoking. Jackson said that he had been "shipmates," as he described it, with these lamps for six years and that they were very good lamps. He described in the witness-box what he did to get the lamps ready and lit. After seeing him in the witness-box and hearing his evidence, the conclusion to which I came was that he was an honest witness and an experienced lamp trimmer. I am unable to believe that he would concoct his evidence as to the state of the lamps when they were taken down on the morning of the 6th at 8 a.m., if, in fact, the lamps had been in a smoky and inefficient condition. On the other hand, I think he had a natural bias towards the efficiency of his lamps, and he is of course responsible for the state of the lamps to his employers, the plaintiffs.

In support of my view as to the reliability of Jackson's evidence, there is not only the evidence of the master and the chief officer of the *Corstar*; there is also the significant fact that the pilot of the *Eurymedon*, when he made his report in writing on the day of the collision to the marine superintendent of her owners, made no complaint about the state of the *Corstar's* lights. He wrote: "At the time of collision it was blowing a half-gale westerly. The cause of the collision [with the *Corchester*] was avoiding a collision with the steamship *Corstar* anchored well to the north of mid-channel and swung with her stern to the northward and about 300ft. clear and just to the eastward of coal jetty. Engines were both going astern at time of collision and the wind caught the steamship *Eurymedon* on her port bow, and before we could recover on hard-a-port helm we collided with our starboard bow, &c." It is very unlikely that if the pilot of the *Eurymedon* when he wrote that report had observed that the lights of the *Corstar* were in themselves defective, he would not have said so.

It is to be remembered that the *Eurymedon* remained alongside the *Corchester* for nearly a quarter of an hour after the collision and that those on board the *Eurymedon* had ample opportunity to notice whether the lights of the *Corstar* had anything to do with their failure to see her in due time. But no complaint was made by them at that time.

Shortly after the collision the tug in attendance on the *Eurymedon* came alongside the *Corstar*, and her master has given evidence and his evidence was this. He said: "The *Corstar* hailed me. I told the people on her quarter-deck that they ought to be ashamed of themselves to allow their ship to be brought up in that position, a danger to navigation. I said: 'Why don't you heave up and go over to the southward and clear the fairway, as you are blocking it up.' There was no reply." The master of the tug now says that the lights were very dull and very smoky—that the stern light was a very smoky light. But if he had noticed that at the time I feel sure he would have said so to those on board the *Corstar*.

On the 26th January the London agents for the Liverpool solicitors acting for the defendants wrote to the plaintiffs' solicitors: "We have to-day heard from our professional clients that their clients intend to resist this claim and to counterclaim against your clients on the ground that the *Corstar* was anchored in an improper position." So that on the 26th January the inquiries made by the Liverpool solicitors of the ship's witnesses so far as they had been carried at that time had not elicited from them any definite charge against the efficiency of the riding lights of the *Corstar*. It is true that on the 12th February another letter was written by the defendants' London agents: "Dear Sirs,—With reference to our letter to you of the 26th ultimo, our professional clients instruct us that they have now practically completed their inquiries into this matter, and from the evidence which they now have it appears that the *Corstar* was not only anchored in an improper position, but also had defective anchor lights."

Mr. Willmer argued that there was a recognised practice among seamen to take oil anchor lights down at midnight and trim them. The Elder Brethren do not know of any such practice. The advice they have given me as to the range of visibility of these lights is that without making a test of these lamps under the conditions of this particular night at this particular place, it is impossible to say what the range of visibility of these lights would be, but they say that it is probable that the lamps after burning fourteen hours in a strong wind and rain would not be burning as brightly as when they were put up. The probability of reduction in visibility depends on the tendency of the lamp to smoke and on the tendency of the wick to become clogged and need retrimming. They also tell me that so far as Trinity House is concerned their lamps are trimmed after twelve hours. After considering all the evidence on both sides the conclusion to which I have come on this important issue is that the *Corstar* was exhibiting anchor lights which complied with the by-law and that she is not to blame in this respect.

Mr. Carpmael argued that this was the only point in the case, which, if decided in his favour, must result in the *Eurymedon* being found alone to blame. I do not agree with that contention.

The second issue in the case is as to the position of the *Corstar* at the time of the collision. The pilot of the *Corstar* was called as a witness, and he said specifically and clearly that he anchored the ship to her starboard anchor and 45 fathoms of cable as close as he dare to the south shore and the barge roads, having regard to the necessity for allowing room to swing either way on change of tide. He gave the distance as 300ft. outside the line of barge roads on the south shore and in a position which puts the *Corstar* about opposite Cory's Jetty on the north side of the river. The width of the river at this point between the water alongside the jetty and the buoys on the south shore is about 1450ft. In this position the stern of the *Corstar*, if swung athwart the river at the full scope of her cable of 45 fathoms on the windlass, would be about 850ft. from the buoys on the south shore and therefore about 600ft. from the edge of Cory's Jetty. The master of the *Corstar* put his vessel nearer into the buoys and about 100ft. to 200ft. outside them. Saville, the foreman ship-worker at Cory's Jetty, put the *Corstar* at quite two lengths, *i.e.*, 600ft. outside the jetty, and Svenson, the carpenter of the *Corchester*, put her at the same distance. I have already found as a fact that at the time of the collision the stern of the *Corstar* was about 350ft. from the edge of the jetty. In my judgment, however, the pilot of the *Corstar* and her master had no accurate recollection of the position in which she was anchored. No record of any bearings was taken. I think they have tried to minimise the distance

out from the south shore at which the anchor was dropped. I am advised there is no reason to suppose that the *Corstar* dragged her anchor having regard to the strength of the wind, the nature of the bottom and her scope of cable, and there is no evidence that she did so except by inference from her change of position as alleged by the plaintiffs to the position at collision which I have found.

I find as a fact that the *Corstar* was lying in a very unusual position. Trinity House pilots from four other vessels which passed the *Corstar* while she was at anchor after the collision all alleged that the *Corstar* was anchored in an improper and dangerous position. "A wicked position from the point of view of traffic up and down the river," Mr. Windass, the pilot of the *Glenbeg*, said. "A cruel position," was the expression used by another pilot. "A very terrible place," was the expression of a third. The substance of the complaint made by these witnesses is that the practice in Long Reach is to anchor vessels to the southward of mid-channel, and that vessels, or at all events large vessels, proceeding up and down river, pass to the northward of the vessels at anchor. The pilot who anchored the *Corstar* himself said that the proper place to anchor in Long Reach is well on the south side of mid-channel, but that sufficient room must be allowed to swing either way. As I have already found, the *Corstar* was lying with her whole length to the north of mid-river and athwart the fairway in such a position that she was obstructing a large part of the fairway used by traffic up and down the river. The impression which I formed after hearing the evidence was that the pilots of the *Glenbeg*, *Coptic*, *Mahana* and *White Crest*, all experienced pilots of ships of a substantial size, felt genuinely aggrieved, as pilots in charge of the safety of these ships, at the position in which the *Corstar* had got, and that they honestly thought she was a danger to navigation in that place and ought not to have been there.

I accept their evidence on this point as quite honest evidence. I do not for one moment think that these pilots have combined to say anything which they do not honestly believe to be true. I think that these pilots were mistaken in saying that the lights of the *Corstar* were dim, if, by saying that, they meant to allege any positive defect in the lantern or lamp itself. In my view, the inference that the lamps were dim has been drawn, and naturally drawn, from the fact that the witnesses did not particularly notice the anchor lights of the *Corstar* until they were comparatively close to her. But in my judgment the reason why they did not identify these lights earlier was because they were not expecting to see a vessel anchored in this position, and were not looking out for or expecting to see the anchor lights of a ship lying across the fairway there. In addition to this, in my opinion and in the opinion of the Elder Brethren, the brilliant lights on the north shore in the vicinity of the collision and the light and shadow caused by these lights on the water would probably make it more difficult to pick up the lights of the *Corstar*.

The first question which I now have to consider is whether the *Eurymedon* was negligently navigated. The conclusion to which I have come is that the failure on the part of those in charge of the *Eurymedon* to identify the anchor lights of the *Corstar* as such in time to avoid a collision with her was partly due to the *Corstar's* unusual and improper and, therefore, unexpected position in the river, and was partly due to the fact that those on board the *Eurymedon* as they approached the place of collision, were not sufficiently alert to the possibility of danger ahead and did not take proper action to reduce their speed in due time. I doubt whether I have heard from the *Eurymedon* a complete account of the observations made on board her with reference to the *Corstar's* lights. The conclusion I have come to after hearing all the evidence is that those in charge of the *Eurymedon* became aware or should have become aware of white lights ahead which proved to be those of the *Corstar* at a distance greatly in excess of 650ft., and in ample time to avoid a collision with her, and that they did not take any action until the hull of the *Corstar* was sighted at about 650ft., because they did not realise until they saw the hull that the lights were the riding lights of a vessel at anchor athwart the fairway.

On seeing these lights, I am advised that those in charge of the *Eurymedon* should have realised the possibility of a ship or ships ahead, the precise position of which was obscure, and should have made a reduction of speed immediately. If they had done so they could in fact have cleared the *Corstar* by passing to the southward of her or by passing to the northward of her. They were coming up at a speed over the ground, as I find and am advised, of at least ten knots, and were approaching a locality where visibility is known to be made more difficult by the glare of the shore lights, and they were also approaching unidentified white lights ahead. Their speed was such as to require prompt reduction on the first appearance to them of the white lights of the *Corstar* ahead.

For these reasons I find that the *Eurymedon* was guilty of negligent navigation contributing to the collision. I find that she was not guilty of any breach of good seamanship in the measures taken by her to avoid collision, when once she did take action.

The second question is whether those in charge of the *Corstar* were negligent in allowing the ship to take up the position in the fairway which I have found. In my view, and in this also I am supported by the advice of the Elder Brethren, those in charge of the *Corstar* were lacking in good seamanship in allowing the *Corstar* to lie athwart the river in this place and at this time in the position as found by me. The fact that the master and the chief officer of the *Corstar* have denied that their ship ever got into this position indicates what their own opinion on this point is. If they had taken any care to ascertain their position at anchor, which I think they did not do, they would have known that the vessel under the prevailing conditions of wind and tide would be lying athwart the fairway on the last of the flood and at a time when vessels would be coming up and down river, and that they would be an obstruction to them as well as being in a very unusual position. There was no necessity whatever for the *Corstar* to be there, and after those in charge of her became alive to her position they moved away to a proper anchorage on the south side of the river. The *Corstar* had a very indifferent anchor watch, a man who apparently did not realise that the vessel was athwart the river. In my view, the conduct of those in charge of the *Corstar* in lying in this position was negligent. They were behaving in such a way as to make a collision probable with vessels proceeding up or down the river, and their conduct was not caused by any necessity, but merely by lack of good seamanship and failure to take ordinary precautions to avoid the risk of collision.

The third issue that arises is whether, assuming the position of the *Corstar* was improper and those

in charge of her were guilty of negligence in allowing her to get in that position, such negligence contributed to the collision, or whether the principle laid down in *Cayzer* v. *Carron Company* (5 Asp. Mar. Law Cas. 371 ; 52 L. T. Rep. 361 ; 9 App. Cas. 873) applies. In my view, that issue depends to some extent upon the question whether the negligence of the *Corstar* in taking that position contributed to the failure of those in charge of the *Eurymedon* to take appropriate action to avoid a collision until they were too close to clear her and the *Corchester*. If these incidents had occurred by day and those in charge of the *Eurymedon* had known that the *Corstar* was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the *Corstar's* negligence one of the contributory causes of the collision. The knowledge or lack of knowledge of the *Eurymedon* as to the improper position of the *Corstar* appears to me to be a cardinal fact on this issue as to the liability of the *Corstar*. The crucial factor of such knowledge appears to explain the difference between the decisions in *The Margaret* (4 Asp. Mar. Law Cas. 375 ; 44 L. T. Rep. 291 ; 6 Prob. Div. 76) and in *The Monte Rosa* (7 Asp. Mar. Law Cas. 326 ; 68 L. T. Rep. 299 ; (1893) P. 23), as Lord Birkenhead pointed out in his speech in *The Volute* (15 Asp. Mar. Law Cas. 530 ; 126 L. T. Rep. 425 ; (1922) 1 A. C. 129).

In this case, those in charge of the *Eurymedon* did not appreciate the fact that the *Corstar* was at anchor until it was too late to avoid her. I have already decided that the *Eurymedon* was to blame for not taking earlier action by reducing her speed, but the negligence of the *Corstar* in allowing herself to get into an improper position does seem to me to be so much mixed up with and part of the state of affairs brought about by the *Eurymedon*, to apply the words of Lord Birkenhead in *The Volute*, that, to borrow again from the same speech : "In the ordinary plain common sense of the business the *Corstar* has contributed to the accident by her negligence."

I therefore find both vessels to blame.

I do not see any sufficient reason for apportioning the blame otherwise than in equal degrees.

Solicitors for the plaintiffs, *Ince, Roscoe, Wilson*, and *Glover*.

Solicitors for the defendants, *Bentleys, Stokes*, and *Lowless*, agents for *Alsop, Stevens*, and *Collins Robinson*, of Liverpool.

House of Lords.

June 14, 15, 17, *and July* 19, 1937.

(Before Lords ATKIN, THANKERTON, MACMILLAN, WRIGHT, and MAUGHAM.)

A/s Rendal v. Arcos Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Claim for damages for delay caused to ship by ice—Notice of claim—Separate claim for damage caused to ship—Whether sufficient evidence that notice to an agent is notice to the principal—Meaning of "notice of any claim."

A charter-party expressed to be between the appellants, as owners of the Norwegian steamship R., *and the respondents, Arcos Limited of London, as charterers, provided by clause* 24 : *"Notice of any claim under this charter or under any bill of lading given hereunder must be given within twelve months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived." The charter-party also contained an ice clause.*

Upon arrival at the port of discharge the owners' agents gave notice to the Russian Trade Delegation in Norway, who were acting as agents for the respondents' principals in Moscow, of a claim for damages in respect of delay in the ice, and they made a further claim for the cost of repairing the damage sustained by the steamer.

Held, (1) *that "notice of any claim" in clause* 24 *of the charter-party did not mean a precisely formulated claim with full details, but it must be such a notice as would enable the party to whom it was given to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose ;* (2) *that there being a general claim for damages for breach of the ice clause, and a further claim for damage to the ship herself, clause* 24 *required a separate notice of the further claim ;* (3) *that in the circumstances notice of claim was given to the agents of the charterers and that those agents had authority to receive it on behalf of their principals.*

Decision of the Court of Appeal reversed.

APPEAL from the decision of the Court of Appeal.

The plaintiffs, as Norwegian steamship owners, claimed compensation for damage sustained by their steamship *Rendal* during a voyage from Leningrad to Sarpsborg (Norway) with a cargo of pulpwood, and for breach of a charter-party expressed to be made in December, 1930, between A/s *Rendal* and the defendants, Arcos Limited, of Bush House, Aldwych, W.C. 2, as charterers.

The charter-party was in the common form described as the Chamber of Shipping Baltic Wood Charter, 1926.

Goddard, J. having given judgment for 2495*l.* for the plaintiffs, the Court of Appeal reversed that decision.

The facts are fully set out in the opinion of Lord Wright.

The plaintiffs appealed.

C. T. Le Quesne, K.C., *Cyril Miller*, and *Richard Hurst*, for the appellants.

D. N. Pritt, K.C. and *Harry Atkins*, for the respondents.

The House took time for consideration.

Lord Atkin.—I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends, Lord Wright and Lord Maugham. The facts and the law are so fully considered in those opinions, and I am in such complete agreement with them, that although we

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

are differing from the Court of Appeal, I am satisfied with saying nothing more than that I agree with the opinions about to be delivered.

Lord Macmillan.—I also have had the advantage of perusing in print the opinions about to be read by my noble and learned friends and I agree with them entirely.

Lord Atkin.—I am asked by my noble and learned friend Lord Thankerton to say that he also agrees.

Lord Wright.—This appeal raises questions of some general importance on the construction of a common clause in charter-parties, and also on what is sufficient evidence to found the inference that notice to an agent is notice to the principal. The respondents also claimed in the alternative to uphold the judgment of the Court of Appeal as to some part of the damage.

The questions arise on a charter-party dated the 3rd December, 1930, expressed to be between the appellants as owners of the Norwegian steamship *Rendal*, and the respondents Arcos, Limited (for Exportles, Moscow), of London, as charterers. The charter-party, which was in the common form described as the Chamber of Shipping Baltic Wood Charter, 1926, was for the carriage of a cargo of pulpwood from Leningrad to Sarpsborg (Norway). It is not necessary to refer to more than a few of the clauses of the contract. By clause 2 the master or owners were to telegraph to the shippers of the cargo (described as Exportles, Moscow) giving at least seven days' notice of the probable date of arrival at loading port. For delay in loading or discharging demurrage was payable at 30*l.* a day. There was the usual cesser clause and the usual lien clause for freight, dead freight, demurrage, lighterage at port of discharge and average. Clause 35 was the clause known as the Ice Clause, under which the charterers were to supply the steamer with ice-breaker assistance if required to enable her to enter and (or) leave the port of loading free of all expenses to owners. Clause 24 must be set out in full. It runs: "Notice of any claim under this charter or under any bill of lading given hereunder must be given within twelve months of the date of the vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived."

The vessel loaded her cargo and arrived at Sarpsborg on the 27th February, 1931. Thereupon the owners' agents, the Nordisk Skibsrederforening (referred to hereafter as the Nordisk), gave notice to the U.S.S.R. or Russian Trade Delegation in Norway (referred to as the delegation) who were acting, at least in some respects, as agents at Oslo for Exportles, the principals of the respondents in regard to the charter, that they claimed 1532*l.* for thirty-nine days one-and-a-half hours loss of time at 30*l.* a day and extra coal consumption 200 tons and 100*l.* for extra call at Reval to replenish the bunkers, which had been depleted by the delay in the ice. At that time the true effect of the Ice Clause had not been decided by the courts but was in dispute. It was agreed between Nordisk and the delegation that the latter should deposit with a Norwegian bank in joint names 1532*l.*, the amount claimed, to abide the decision of the Norwegian court in a suit between the appellants and the delegation brought to decide the question. This action was finally decided by the Norwegian Supreme Court on the 9th February, 1933, in the appellants' favour. But the appellants also claimed as further elements of damage for the same breach of the Ice Clause the cost of repairing the damage alleged to have been sustained by the steamer through being delayed in the ice for want of proper ice-breaker assistance. There was delay in commencing the action for these claims until the construction of the Ice Clause had been decided, as it was, by the House of Lords, in *Ugleexport Charkow* v. *Owners of Steamship Anastasia* (151 L. T. Rep. 261). This decision was in favour of the shipowners, and so far as principle goes, covered the claims of the appellants in this case in respect of ship damage. The main defence raised in this action, apart from questions of amount, was that notice was not given of the claim in accordance with the requirements of clause 24. Goddard, J., who tried the case in the Commercial Court, held that this objection failed, but the Court of Appeal, reversing the learned judge, have held that it ought to prevail. It will accordingly be necessary to examine the matter in some detail. The counter-objections of the respondents as to part of the damage I shall consider later.

The issues principally debated on the appeal are two. There is first the dispute as to the true construction of clause 24. Then there is the question whether notice, if proper notice was given, was given to the proper parties. It might appear strange that in an ordinary shipping transaction of this nature there should be any difficulty on a simple question of fact such as this latter question. But the respondents have called no evidence and given no discovery as to documents or correspondence or interviews between the three parties concerned on their side, the Trade Delegation, the respondents, and Exportles. The matter is left to be decided on the communications between Nordisk, the Trade Delegation and the respondents. It is, therefore, necessary to examine this scanty material to see if it is sufficient to establish the appellants' case. The onus is on the appellants to show compliance with clause 24, but if they show a *primâ facie* case there is no rebutting evidence to displace it.

It is convenient first to state how I construe clause 24. That clause requires "notice of claim." That, in my opinion, does not mean a precisely formulated claim with full details, but it must be such a notice as will enable the party to whom it is given to take steps to meet the claim by preparing and obtaining appropriate evidence for that purpose. Thus, in the present case there was a general claim for damages for breach of the Ice Clause, with particulars so far as damages were claimed in respect of delay and consequent expenses. The further claim for damage to the ship herself was a claim in respect of the same cause of action, that is, breach of the Ice Clause, but it involved different issues of fact, estimates of damage, ship surveys, repair accounts and so forth. I think, therefore, that clause 24 requires a separate notice in respect of such a claim, if the purpose of clause 24 is to be fulfilled. It is to be observed that clause 24 is what is called a mutual clause, that is, it is for the benefit both of the shipowner and of the charterers or bill of lading holders. Before Goddard, J. it was argued on behalf of the appellants that it was analogous to an exception clause for the benefit of the shipowners only, but Goddard, J. rightly rejected that contention and it was not persisted in either before the Court of Appeal or before this House. The clause does not specify to whom notice is to be given. That must obviously depend on circumstances. The shipowner might have claims against the charterers or bill of lading holders or shippers, and the notice would have to be given accordingly. Or, conversely, charterers, bill of lading holders or shippers might have claims against the shipowner.

The person to whom notice is to be given must, I think, be the person against whom the claim is to be made, or, if he is an agent, his principal or the person ultimately liable and capable of acting upon the notice. In the present case the actual principal charterer is admittedly Exportles, which is disclosed in the charter-party as the person for whom the respondents were acting. It is true that the respondents may alternatively be made liable on the charter-party, as indeed is not contested. But Exportles are conceded to be the party ultimately concerned, and it is not contested that notice to them, if established, is sufficient, as was assumed in the Court of Appeal. It is, however, urged that what is relied on as being notice to Exportles is not notice of a claim, and, secondly, that while it was given to the delegation, there is no evidence or no sufficient evidence that the delegation either had authority to receive the notice or ever passed it on to Exportles.

On the first point I am of opinion, with all respect to the Lords Justices who have held the contrary, that there was a notice of claim within clause 24. This point is barely touched by Goddard, J. and does not seem to have been seriously taken before him on behalf of the respondents. As I have already stated, Nordisk had formulated an itemised claim for delay, loss of time and consequent expenses in regard to bunkers. Nordisk, in summarising the position which they say was agreed upon, then go on to write :—

> "As a matter of regularity we beg to observe that the owners also reserve their right to claim compensation for the damage to the ship caused by the fact that the ship was left by the ice-breaker in the ice. The owners have not yet had the ship dry-docked and therefore cannot say what damage has been done to the ship in this way and as you yourselves are of course only responsible under the charter-party within the frame of the deposit this question only concerns you in case the above-mentioned claim should for some reason or another be reduced."

The delegation, writing in reply to Nordisk on the 21st March, 1931, after stating that all claims for alleged demurrage arisen during navigation through the ice 1930–31 had to be settled through Derutra Hamburg, say : "We will, however, already to-day point out to you that . . . we are not obliged to cover any expenses for 'extra coal consumption' or, even less, ice damage. That kind of claims we must strictly repudiate on behalf of the charterers, as they are not justified by the charter-party." They also repudiate claims for delay except for a limited period. Nordisk, in replying on the 28th March, 1931, suggesting by way of compromise that they might get the owners to consent to accept payment of 1170*l.* 3*s.* 9*d.* if made by the 10th April, say : "We will attempt to persuade the owners to waive the claim in respect of extra coal consumption through the call at Reval and the repairs of the ice damage which in this case we understand is not very considerable." These well-meant efforts failed, and on the 20th June, 1931, Nordisk wrote again to the delegation saying the matter of the claim for 1532*l.* 12*s.* must go before the court at Oslo, adding : "The claim for compensation in respect of damage which the ship has suffered in the ice, we shall probably have to take up with Arcos in London as the amount deposited does not cover this damage." The proceedings in Oslo which were against the delegation on their agreement were limited to the amount deposited in the joint names.

The Court of Appeal have held that these communications are not a notice of claim for damage to the ship but merely a problematical or tentative intimation that at some future time they may consider whether such a claim may be made and perhaps decide to advance it. Notice of claim, it is said, means notice of an actual present claim, not the reservation of a mere possibility of claiming in the future. I do not so read the letters. They amount, I think, to a clear notice that the ship has been damaged in the ice and that the appellants have a claim for that damage. The claim is reserved for two reasons, (1) in March and April the ship had not been surveyed, so that the claim could not be quantified ; (2) the claim was in another sense being reserved out of the agreement which was being made for the joint deposit ; it was reserved "for regularity's sake," that is, to prevent any misunderstanding or any idea that the matters discussed in relation to the joint deposit completely covered all the damages consequent on the breach of the Ice Clause. While in March and April the claim for ship damage could not be quantified, it may be that it could have been quantified in June, 1931, but liability for these matters had been repudiated by the charterers and there was no need to formulate a precise claim until the writ was issued. That was done as soon as the construction of the Ice Clause was determined by this House in 1934. But the notice originally given was categorical both that the ship had been damaged and that the appellants had a right to claim for that damage under the Ice Clause. The delegation repudiated any such claim—and thereby waived further particularisation of the claim, but they had all the notice necessary for them to demand to take part in joint surveys or to survey the ship themselves and otherwise prepare to meet the claim. All that clause 24 requires is notice of the claim, and in my opinion, reading this correspondence in the ordinary way, I think that the notice was sufficient in form to meet the requirements of the clause.

The second question is whether the notice given to the delegation was a notice to Exportles, notice to them being in this case admitted to be sufficient. The Court of Appeal have held there was no evidence of notice to Exportles, that is, no evidence that the delegation were agents to receive the notice and no evidence on which it could be found that the notice was passed on to Exportles. I am again unable, with all respect, to agree with the Court of Appeal. If evidence is scanty, that is the affair of the respondents, who could have attempted by evidence or correspondence to have negatived the existence of the alleged agency. No doubt they were not bound to do so. The onus is on the appellants to prove their case. But if they have produced material which, fairly considered in the light of all the proved circumstances, justifies the inference of agency, and if the respondents do not seek to displace that inference by the evidence, which, if it existed, could only be produced by them, by which I mean evidence of the precise internal connection between the delegation, Exportles and the respondents, then, according to the general rule applicable in such circumstances, the appellants have established their case. I think that some complication and confusion have been introduced by the suggestion that the court can take or ought to take judicial notice of what is said to be an aspect of the Constitution of the Soviet Republic, namely, that all trade is a monopoly of the Soviet Government and that all Russian trading bodies are organs of the Soviet Government, so that any one such body may

be an agent of the other, and so that notice to one body may be notice to any other body concerned in the same transaction. The Court of Appeal has rejected the idea of any such judicial knowledge. I think rightly so. But Mr. Le Quesne did not base his case on any such idea, and Goddard, J. did not rest his judgment solely on this conception of the position of the Soviet Government in relation to trade, though he was prepared, in view of certain dicta in earlier cases in the Court of Appeal, to take the conception as one of the grounds of his judgment. If or in so far as he did, I think he was wrong. I do not think the court can derive from its inner consciousness or general experience any such conception, but must act, as in other matters of foreign law, on express evidence, of which none is produced in this case.

What then are the relevant facts as they appear in the documents? On the steamer's arrival at Sarpsborg on the 27th March, 1931, Nordisk cabled to Exportles that bills of lading had not been presented, and the steamer was lying at charterers' account. Exportles replied at a late hour on the 28th March that the bills of lading had been presented to the buyers through the Christiania Bank, adding, "Please apply Trade Representative" [which means the delegation] "Oslo." This clearly nominated the delegation as the agents of Exportles in regard to some matters relating to the discharge of the ship at Sarpsborg, which is near Oslo, and the completion of the charter-party. But earlier on the same day by telephone Nordisk and the delegation had arranged the joint deposit of 1532*l.*, obviously to prevent any delay in discharging the cargo or delay due to the exercise of an actual or assumed right of lien. But the delegation proceeded, as already explained, to act as charterers' agents, as if with full authority to deal with all matters arising at the port of discharge under the charter-party. They repudiated liability for certain claims. They put up a deposit of 1532*l.* They agreed that the deposit should be subject to the decision of the Oslo court. They took part in the action which was then in due course defended and decided. It is true that in many cases assumption of authority by one who purports to be an agent is no evidence that he possesses the authority he professes to have. By inadvertence or by intention he may be claiming to exercise an authority which he does not possess. But in a case like this it was essential that Exportles should be represented by agents at Oslo to attend to the settlement of the matters which had to be dealt with on the spot on the termination of the adventure and the separation of ship and cargo. It is incredible that Exportles did not have such agents at Oslo. In fact, Exportles expressly instructed Nordisk to apply to the delegation; that authority was said to be limited to the matter of the bills of lading, but I see no reason so to limit the language of the cable which is not in terms limited at all. I read it as meaning that the delegation were to be treated as representing Exportles *quoad* the *Rendal* at Oslo. Then I cannot conceive that the delegation would put up the sum of 1532*l.* on their own responsibility and out of their own moneys. I can only infer that they did so on the authority of Exportles.

I may add that the delegation also acted as agents at Oslo on behalf of charterers in respect of another vessel, the *Oddvar*, chartered by or on account of Exportles, which arrived at Sarpsborg on or about the 27th February, 1931. When the Nordisk made their proposal in regard to the *Rendal*, they simply stated that they did so on the same basis as set out in their letter to the delegation of the 27th February, 1931. This letter, addressed to the delegation by Nordisk, was unfortunately not before the Court of Appeal, but it was by consent of the parties put before this House. It is so significant of the actual position that I venture to quote in full the translation, which, omitting formal points, is as follows:

"*No.* 42631*S.*, *s.s.* '*Oddvar.*'

"As stated to you to-day over the telephone this steamer has now arrived Sarpsborg and cannot commence discharging of her cargo because the bills of lading have not been presented. We therefore to-day took the liberty, on behalf of the owners, to inform Exportles in Moscow telegraphically about this and that the vessel is lying for the charterers' account.

"As stated to you over the telephone the owners demand compensation for forty-five days' loss of time on account of the vessel having had to wait for ice-breaker. The charter-party's demurrage rate is 30*l.* per day and the claim thus amounts to 1350*l.* As far as we understood you over the telephone you will see that this amount is deposited in a first-class bank here in Oslo so it will not be necessary for the owners to take a lien on the cargo for the claim.

"The depositing should be so arranged that the owners could have opportunity of taking legal action against a person or a firm here in Norway for payment of the amount. It could, for example, be arranged that the amount was deposited in the owners' and your joint names and that you at the same time give a statement that action can be taken against you here *re* the owners' claim against Exportles according to this charter-party.

"If not it can be arranged that the amount be deposited in the owners' and Exportles' joint names and that we are informed that Exportles will agree to be represented in the case at a Norwegian court.

"Finally it could also be arranged so that the owners were given a right to demand the amount paid if the charterers within a certain period have not entered legal action here in Norway. This period could then be made so ample that one had time to examine the case beforehand.

"The last is probably the most practical arrangement."

Thus it is seen that the Trade Delegation were being asked to accept a position of full representation for Exportles in respect of two separate Norwegian vessels and accepted that position. Nordisk, the Norwegian Shipowners' Protection Club, must be taken to have known with whom they were dealing. As I have observed, these proposals were carried through in substance.

But the matter does not rest merely on inference, because there is the express statement or admission of the respondents identifying the delegation and Exportles in regard to the proceedings in respect of the joint deposit. When a letter was written on behalf of the appellants before writ, the respondents replied by letter of the 14th January, 1935, saying (*inter alia*): "The owners are well aware that Exportles are charterers, as the owners themselves have already taken proceedings in Oslo against Exportles." This refers to the proceedings at Oslo in regard to the joint deposit; these proceedings were in form against the delegation, but the respondents are saying that in truth they were against Exportles, which means, as I think, that in the transaction the delegation represented

Exportles. This statement made by the respondents is evidence against them and seems to me to confirm the inference otherwise arising that the authority which undoubtedly to some extent the delegation possessed as agents at Oslo on behalf of Exportles extended to all the business in relation to cargo at Oslo. Someone had to represent Exportles there. The delegation purported to do so. Their conduct has never been repudiated by Exportles or by the respondents. There must have been communications and settlements between the delegation and Exportles. The respondents do not produce them nor do Exportles. I think that the court is bound to draw the only inference which is consistent with the admitted facts. So far as concerns the limited matter of authority to receive notice of a claim under clause 24, I observe that in respect of all the other claims covered by the agreement for the joint deposit and by the Oslo action and judgment, notice to the delegation was obviously treated as good. It is clear from the record of the Norwegian court that no point that clause 24 was not complied with was raised by Exportles, who, as the respondents say or imply, were the real, though not nominal, parties in the proceedings. If they had authority to receive notice of those claims, I do not see why it should be held that they had no authority to receive notice of the claim for ice damage to ship.

If it is said that the true view is that the delegation were agents for some purposes for Exportles, and as such were capable of receiving a notice, but merely as a sort of postman, to pass on to Exportles, with the result that the notice had no effect till actually communicated to Exportles, and that there is no evidence that the delegation ever did communicate it to Exportles, I think that the court is entitled to draw the inference on the facts of this case that the notice was passed on and that the communication was made. The *primâ facie* inference in such a case is that a responsible agent does what duty to his principal may seem to require. I do not put this as a rule of law, but as a presumption of fact. The presumption can no doubt be rebutted by evidence of failure so to act on the part of the agent, but no such evidence is here produced. I think the principle is similar to that laid down by courts of equity in cases where a solicitor, not authorised to accept a notice, is presumed to have passed to his client a notice that he has received. The rule is stated in *Thompson* v. *Cartwright* (9 L. T. Rep. 138, at p. 139; 33 Beav. 178, at p. 185) by Sir John Romilly, M.R.: "I take the rule to be, generally, that the client must be treated as having had notice of all the facts which, in the same transaction, have come to the knowledge of the solicitor, and that the burthen of proof lies on him (the client) to show that there is a probability, amounting to a moral certainty, that the solicitor would not have communicated that fact to his client." The presumption is rebuttable and in *Thompson's* case was rebutted. The same general rule was again reiterated in *Sharpe* v. *Foy* (19 L. T. Rep. 541; L. Rep. 4 Ch. App. 35) and *Cave* v. *Cave*; *Chaplin* v. *Cave* (42 L. T. Rep. 730; 15 Ch. Div. 639). In both these cases the application of the rule was excluded by the special facts; in the latter case the solicitor was fraudulent, a circumstance which was held to rebut the presumption. In my opinion a similar principle should be held to apply in commercial transactions in this sense, that in the absence of sufficient evidence to the contrary, an agent acting for his principal in a transaction but not authorised to accept for his principal a notice in regard to matters appertaining to the same transaction should be presumed to have acted in the usual way of business by passing on the notice to his principal.

It follows from all these considerations that in my opinion the judgment of the Court of Appeal cannot be sustained on the ground on which it is based. But the respondents are entitled to support the judgment in their favour on any fit and proper grounds even though those grounds are other than those on which they succeeded in the Court of Appeal, and to do so either as to the whole of the claim or as to any part of it. They have accordingly put forward an alternative case that they are not to be held liable in any event for more than 1650*l.* and are entitled on this appeal to succeed in respect of the difference between that sum and 2495*l.* 19*s.*, the amount for which judgment was entered by Goddard, J. To examine this contention it is necessary to refer briefly to the findings of the special referee as to the damage sustained by the *Rendal* while in the ice and to the circumstances under which the damage was sustained.

The claim was based on the breach of contract by the respondents in that icebreaker assistance was not duly supplied as required by the Ice Clause, with the result that the *Rendal* was delayed in getting out into open water. She did not reach open water until the 20th February, 1934, whereas it has been found that with proper icebreaker assistance she could have reached open water by the 17th January, 1934. Goddard, J. found not only that the ship had suffered damage by reason of the failure on the part of the respondents to provide icebreaker assistance, but also that the respondents had failed to show that the same damage would have been sustained by the ship even if they had provided icebreaker assistance. He had found in the case of the *Oddvar*, which it was agreed was on all fours with the case of the *Rendal*, that ice conditions were getting steadily worse after the earlier part of January. In fact, in the period up to the 17th January, no icebreaker assistance was supplied to the *Rendal* between the 9th and 17th January; up to and on the 9th January it had been supplied for a few hours only. None was supplied from the 18th January to the 1st February, or from the 7th to the 16th February, and at other periods up to the 20th February only at intermittent times.

The special referee distinguished between pressure or screwing damage suffered while the ship was being held in the ice, and forward damage caused while she was moving ahead. As she was bound to move ahead anyhow, it was argued that she would have sustained the same damage in any event, because even if she was delayed by the absence of icebreakers, still she had to proceed forward in order to get out of the ice. The respondents accordingly contended that there was no evidence on which it could be found that the cost of repairing the forward damage and the consequential loss and expense constituted damage caused by the breach of contract.

The special referee was not satisfied, as I read his report, that had the vessel received proper icebreaker assistance any of this damage would have been sustained.

The learned judge accordingly entered judgment for the whole amount. As the Court of Appeal rejected the whole claim on the preliminary points, they did not find it necessary to consider this matter and your Lordships have not the benefit of their assistance. But I think the judge was right

in the course he took. In my opinion the respondents cannot escape liability for any part of the damage unless they can show affirmatively that the same damage must have occurred if there had been no breach of contract. There is nothing to show that any ice damage would have been suffered by the *Rendal* if she had been clear of the ice, as she ought to have been, by the 17th January. As from that time the breach of contract was in full force and effect, and the delay in the transit was in constant operation. Ice conditions were steadily getting worse, and the *Rendal* was exposed to these conditions. Even if she had to traverse anyhow the same course, she did so at different times, under different weather conditions, with thicker ice floes, and had to pass over a wider area of frozen water as the severe frost continued. In my opinion under these circumstances all the ice damage, without distinction (except for trifling damage sustained on her inward journey), is properly attributable to the breach of contract, since so far as appears, it was all caused while the breach was operating, as it necessarily operated from the time when the delay commenced. I apply here the judge's finding in the similar case of *The Oddvar*, that "the vessel would have had quite a good passage for a winter passage if she had been got out and helped in the earlier part of January."

The contract here is in many respects different from contracts of carriage by sea under which shipowners have been held liable for unjustified deviation or delay; such a case was *Davis* v. *Garrett* (6 Bing 716, at p. 724), where Tindal, C.J. lays down a general principle: "But we think . . . that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done." He adds that it might be different if it were shown that the same loss not only might have happened, but must have happened, if the breach had not been committed. Among modern statements of the same principle, I may refer to *James Morrison and Co. Limited* v. *Shaw Savill and Albion Company Limited* (13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508, at pp. 510 & 512; (1916) 2 K. B. 783, at p. 795 and p. 800); and *Hain Steamship Company Limited* v. *Tate and Lyle Limited* (19 Asp. Mar. Law Cas. 62; 155 L. T. Rep. 177, at p. 182), where it was said that "the casualty must be deemed to have been caused by the deviation, since it is impossible to say that the casualty would have occurred if there had been no deviation." The deviation had resulted in delay. On the same principle in the case of bailments on land, the bailee who has unjustifiably shifted the place of bailment, is held liable for the loss of the goods while in the unauthorised place, even though he would have had a defence if the goods had been lost by a similar peril while in the place where under the contract they should have been: (*Lilley* v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510, and *Gibaud* v. *Great Eastern Railway Company*, 125 L. T. Rep. 76; (1921) 2 K. B. 426). The principle is not limited to cases where the defendant is a bailee, nor has it merely the effect of depriving the defendant of the benefit of contractual exception, which it is held cannot be applied to a manner of performance not contemplated by the contract. The essence of the principle is that damage has been sustained under conditions involving danger other than and therefore different from the conditions which would have operated if the contract had been fulfilled; for the consequences of such conditions the defendant is held liable. The principle thus applies whenever the breach of contract has the consequence of exposing the subject-matter to conditions of risk different from those which would have operated if the contract had not been broken. The thing exposed to the risks in this case was a ship, which, it is true, was in the possession and control of the shipowner. The charter-party exposed the ship necessarily to certain sea perils, including perils of ice, but the respondents' breach of their obligation to furnish reasonably the means necessary for the ship to pass through the ice needlessly increased the hazards, so that in such a case when damage ensues after such a breach, the onus of proof is shifted. The defendant must show (if he can) that there must have been the same damage if the contract had not been broken. A somewhat analogous case is afforded by breach of a contract to tow a ship. This again is an instance of a maritime adventure, in which, as in all maritime adventures, from their nature there are involved sea perils liable to be aggravated by the breach. Such a case was *The Cap Palos* (15 Asp. Mar. Law Cas. 403, C. A.; 126 L. T. Rep. 82; (1921) P. 458). There the contract was to provide means of propulsion; here it is to remove obstacles to progression. To these and similar cases the principle applies. But as is shown by the land bailment cases, the mere fact that the risk is changed will be enough to shift the onus on to the defendant. It is, of course, not implied that every breach of a fundamental condition of any contract from which damage is said to follow necessarily throws this onus on the contract breaker.

In my opinion, the objections of the respondents fail. There is no ground for apportioning the damages which Goddard, J. has awarded. I think that the appeal should be allowed, the judgment of Goddard, J. restored, and that the appellants should have their costs of their appeal to this House and in the courts below.

Lord Maugham.—This case raises questions of difficulty and importance on which your Lordships have found yourselves unable to agree with the Court of Appeal, who reversed the decision of Goddard, J. I have had the advantage of reading the elaborate opinion of my noble and learned friend, Lord Wright, with which I entirely concur; and, but for the respect I bear to the Lords Justices, I should have been content to be silent. As it is, I shall endeavour to state briefly in my own language the reasons which have led me to think that the appeal should be allowed.

It is needless to restate the facts which, if I may say so, are most clearly set out in the opinion to which I have referred. There are two main points on which the respondents rely. First, they contend that the letter of the 19th March, 1931, is not a claim in respect of the matters which are the subject-matter of the present action. Secondly, relying on clause 24 of the charter-party, they say that the letter was not addressed to or received by any person having authority from the charterers to receive notice of such a claim, and as a corollary they assert that there is no evidence that notice of such a claim was in fact received by the charterers or by any person on their behalf.

On the first point the Court of Appeal has held that the letter was not a definite notice of claim. For my part I am in agreement with this view if

it means that the letter lacks definiteness. But clause 24 of the charter-party uses no adjective indicating precision as to details or amounts. It is, I think, a sufficient claim under the clause if the shipowner or the charterer, as the case may be, indicates that there will be a claim in respect of an indicated head of damage arising from a breach of a clause in the charter-party. With all respect to the learned Lords Justices I do not read the letter as saying "we may or may not make a claim." The letter uses the words "the damage to the ship *caused* by the fact that the ship was left by the icebreaker in the ice." The phrase indicates I think to a commercial man, as well as to a lawyer, that damage has in fact been actually occasioned owing to a breach of the charter-party by the charterers, and the default is clearly alleged in the letter to be a breach of the Ice Clause in the charter-party. The letter is dealing solely with the charter-party, and the liability of the charterers under it. It must be read in the light of the fact that the writer refers in the letter to the terms of the charter-party, and in all probability has it before him. He must be taken to be well aware of clause 24. What meaning then should be attached to the sentence, "as a matter of regularity . . . the owners . . . reserve their right to claim compensation for the damage to the ship caused by" an alleged breach of the Ice Clause by the charterers? The difficulty I have is to see what the sentence means if it is not a reservation of a claim based on a legal right under sect. 24, and a reservation of a claim seems *ex necessitate rei* to be a notice of that claim. The letter is a strictly business-like letter from the first word to the last, and one would not expect to find in it a piece of chatty information of little interest to the recipient and of no commercial effect. The circumstance that the agents of the charterers (agents for at least some purposes) treated the letter as a claim is not I think strictly relevant to the present question; but I confess to a certain satisfaction in finding that these business people taking the same view as that above expressed treated the letter as a claim under the charter-party, and thought it wise at once to repudiate the claim on behalf of the charterers as not being a claim justified under the charter-party.

The second point amounts to this, that the body describing itself in its letters as "the U.S.S.R.'s Trade Delegation in Norway (Chartering Department)" had no authority from the charterers to receive a notice under clause 24. The charterers were certainly "Exportles, Moscow," and the respondents, Arcos Limited, are liable only as their agents under a charter-party made in London for charterers residing abroad, a liability which was admitted by the respondents and as to which no question arises. The learned judges in the Court of Appeal assumed that a notice given to Exportles or to its authorised agent would be a sufficient notice under clause 24, and I see no reason for questioning this view; and they then went on to consider whether "the person to whom the notice was given was duly authorised by the party concerned to receive the notice." To quote from the judgment of Greene, L.J., he says: "When I say 'duly authorised' I mean of course authorised in accordance with the ordinary principles of the law of agency. The authority may be express, or it may be general, provided it is sufficiently wide to cover the receipt of notice, or it may be an authority which is to be imputed under the doctrine of holding out." With the greatest respect for the Lord Justice, it seems to me that, where one is dealing with a question whether a notice handed to a person who is in some respects an agent for a principal has reached the principal, there is yet another possibility.

In such a case it may well be that there is a presumption that the agent has in fact handed on the notice to the principal, or, in other words, that the handing of the document to the agent is evidence for the jury or the judge from which they or he may properly infer that the document has reached the principal. This presumption of fact or this evidence is rebuttable. The principal can give evidence that the document never reached him, and if believed, the notice—on the hypothesis that it was not given to a person authorised to receive it on behalf of the principal—would be treated as ineffective. But if, as in the present case, the principal prefers not to call evidence on the point, I think there is every reason for maintaining, in a case where the probabilities are all one way, that the document or the notice has reached the principal.

The first question to be considered is whether the available evidence is such that the court ought not to infer that it was within the general scope of the authority of the Trade Delegation in Norway to receive the notice under clause 24. I will not take up your Lordships' time by repeating the various considerations which have led the noble Lord to the conclusion that the inference suggested is justified by the facts. Exportles expressly instructed Nordisk to apply to the Delegation—in reference to a claim arising under the charter-party. The Delegation proceeded to act as charterers' agents at Oslo, and to contest in the Norwegian courts a claim for demurrage under the charter-party. I should like to add that the acts of an agent may properly be looked at when the question at issue is as to the scope of his authority, provided his agency is one of a well known and continuous character; and *a fortiori* is this the case if the principal does not intervene and repudiate the agent's authority in the course of a lengthy transaction, although circumstances are such that there must be constant communications between the agent and the principal. I must therefore agree with my noble and learned friend on this question of the authority of the Trade Delegation, and with the reasons he has given in support of his view.

I will venture to add some observations on a question of considerable general importance, namely, the alternative view that, assuming there was no authority to receive the notice, there is nevertheless evidence from which the court may infer that it was transmitted in the usual and regular course of business to Exportles. It may be worth noting that modern business is conducted on the faith of a strong probability that the general course of business and the usual practice in its conduct will be followed. The principle that there is a presumption of fact to the same effect is one which is constantly applied in our law of evidence. The commonest illustration is that connected with the posting of letters; but many illustrations could be given to show that the principle is not confined to official acts and is often applied in other cases. The cases of *Lucas* v. *Novosilieski* (1795, 1 Esp. 296) and *Hetherington* v. *Kemp* (1815, 4 Camp. 193) are early instances. Other cases are those relating to the due execution of deeds and wills. That there is a like presumption of fact that a mercantile agent will send or hand on a notice intended for his principal received in the ordinary course of business—unless there is some special reason, such as that the agent was intending some fraud in the matter and therefore would not be likely to send on the notice—is in

my opinion not open to doubt. The circumstance that there is a certain paucity of authority directly in point is due, I think, mainly to the fact that it is generally impossible for the principal in a modern case where there is adequate discovery of documents to deny the receipt of the notice. I may, however, add to the authorities referred to by my noble and learned friend Lord Wright the case of *Macgregor* v. *Keily* (1849, 3 Ex. 794). It is true that it relates to a case not of a mercantile agent but of a servant, but the distinction is not important for the present purpose. The action was on an attorney's bill for fees due and payable by a client, and it was necessary to prove delivery of the bill to the defendant before suit. At the trial it was proved by a witness that he went to the house where the defendant then lived, saw a man-servant at the door and delivered to him the plaintiff's bill. The trial judge, Pollock, C.B., overruled the objection that this was no proof of a delivery to the defendant. A verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a verdict for him if the court should be of opinion that the mode of delivery did not support the issue. Parke, B., who delivered the leading judgment, a judge of great eminence who was not at all averse from a purely technical point, stated that he was at first of a different opinion from that at which he had arrived. The material part of his judgment was in the following terms (3 Ex. at p. 797): "In this case the bill was left with a man-servant at the door of the defendant's residence—therefore, presumably, the family was in town—and the leaving the bill with the servant affords a presumption of its having reached the master. The fact of putting it in the servant's hands is sufficient to constitute the servant the agent of the plaintiff for the delivery of the bill. But then, upon this issue the defendant might call the servant to prove that he never did deliver the bill to his master, in which case the plaintiff would fail in showing that the servant was the agent of his master for the purpose of receiving the bill. I own I do not think that a domestic servant is an agent for that purpose; but the question is, whether the fact of delivery to the servant may not be used as evidence of a delivery to the master. So, by sending the bill by post, the plaintiff would in the same way run the risk of the servant being called to say that he never received it. For these reasons I think the verdict was right."

Even if we assume for the present purpose that the Trade Delegation in Norway was not the duly authorised agent of Exportles to receive a notice under clause 24 I think the circumstances detailed by my noble friend are amply sufficient to justify the finding that the sending of the letter of the 19th March, 1931, to the Trade Delegation in Norway was evidence from which the court might infer that Exportles received the notice. It is reasonably plain that if the Trade Delegation had no authority to accept such a notice and did not intend to forward it, they ought, according to the ordinary standards of commercial dealing, to have so informed the writers of the letter. The correspondence and the events show that they must have been in constant communication with Exportles and that they were purporting to have authority to repudiate (amongst others) the claim for ice damage. Their letter of the 21st March, 1931, could only be regarded as grossly misleading, if not actually dishonest, if we are to assume, one, that they were not authorised to accept the notice and, two, that they did not intend to forward it to Exportles. Nor would they be performing their obvious duty to the latter if they so acted; for no mercantile firm could properly take the responsibility of refusing to transmit such a notice to Exportles, since they could not know that the notice would not bind Exportles, and it is almost incredible that they would take the risk of greatly prejudicing Exportles if and when the question of ice damage to hull should come before a legal tribunal. I am therefore unable to make the strange conjectures which in my view are necessary in order that the conclusion may be arrived at that Exportles did not receive the notice.

I do not feel that I can usefully add anything to what has fallen from my noble and learned friend on the question of quantum of damage. I agree with the opinion that the appeal should be allowed, and that the judgment of Goddard, J. should be restored.

Appeal allowed.

Solicitors for the appellants, *Sinclair, Roche,* and *Temperley.*

Solicitors for the respondents, *Middleton, Lewis,* and *Clarke.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 12, 13, 14, 15, 16 *and* 21, 1937.

(Before BUCKNILL, J. assisted by Elder Brethren of Trinity House.)

The Umtali. (*a*)

Collision in St. Clement's Reach, River Thames, just below Stone Ness Point—Down-going vessel and up-coming vessel approaching each other at high speed on the south side of mid-channel—Porting by down-going vessel, starboarding by up-coming vessel—Failure to pass port-to-port—Failure of up-coming vessel, navigating against the ebb-tide, to "ease her speed or stop on approaching . . . bend . . ." Port of London River By-laws, 1914–1934, *by-laws* 4 (*a*) *and* 33.

This was a claim by the Donaldson South American Line Limited, of Glasgow, owners of the steamship C. (6863 *tons gross*) *against Messrs. Bullard, King, and Co. Limited, of London, owners of the steamship* U. (8158 *tons gross*) *for damages in respect of a collision between the* C. *and* U., *which occurred on the morning of the* 16*th May,* 1937, *in St. Clement's Reach, River Thames, off Greenhithe, about two cables below Stone Ness Point and to the north of mid-channel. The stem of the* U. *came into contact with the port side of the* C.

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

in the way of the C.*'s engine room and both vessels were so severely damaged that they had to be beached. The damage sustained by the* C. *and her cargo were in the neighbourhood of* 100,000*l. The facts found by the learned judge as far as the navigation of the vessels was concerned, were as follows: The* C. *was proceeding up-river to the south of mid-channel and against the tide, which was a quarter ebb and of about one knot's force. The* U. *was proceeding down-river from the north, in her own water. Each vessel was in charge of a duly licensed Trinity House pilot, and up to within half a mile of the collision which occurred to the north of mid-channel, and about two cables below the bend at Stone Ness Point, was doing about ten knots over the ground. At half a mile apart the* U. *sounded two short blasts, ported her wheel, and put her engines to half-speed ahead, the* C. *being then fine on the* U.*'s port bow. The* C. *replied with one short blast and repeated that signal ten seconds later, indicating that she was directing her course to starboard, but the* U. *continued to go to port. The* C. *subsequently put her wheel hard a-starboard and again sounded one short blast. When the vessels were* 1000*ft. apart the* U. *put her engines full speed astern, but at collision her speed was still five knots, whilst the* C., *although approaching a bend in the river, never reduced her speed at all from the time the* U. *was first rounding the point up to the actual impact.*

Held, on the above findings, (1) *that the* C. *was at fault* (a) *for a breach of by-law* 33 *of the Port of London River By-laws,* 1914–1934, *which provided that meeting vessels should, unless the special circumstances made departure from that by-law necessary, pass port-side to port-side, each vessel keeping to that side of mid-channel which lay on her starboard hand; and* (b) *for breaking the new by-law* 4 (a) *according to which "every steam vessel navigating against the tidal stream shall, if necessary, in order to avoid risk of collision ease her speed or stop on approaching or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear." On seeing the* U. *coming down, the* C. *should have got over to her own proper side and on approaching the bend it was her duty to ease her speed;* (2) *that the* U. *was at fault for sounding two short blasts and porting when there was no necessity to do so—a deliberate breach of by-law* 33*—and for shaping to pass the* C. *starboard to starboard after the* C. *had sounded one short blast and had begun to go to starboard. His Lordship accordingly found both vessels to blame in equal degrees.*

DAMAGE by collision.

The plaintiffs were the Donaldson South American Line Limited, of Glasgow, owners of the steamship *Corrientes* (6863 tons gross). The defendants were Messrs. Bullard, King, and Co. Limited, of London, owners of the steamship *Umtali* (8158 tons gross). The collision occurred shortly before 7 a.m. B.S.T. on the 16th May, 1937, in fine and clear weather, in St. Clement's Reach, River Thames, about two cables below Stone Ness Point. The facts as found by the learned judge appear in the headnote, and are fully set out in his Lordship's judgment.

R. F. Hayward, K.C. and *O. L. Bateson*, for the plaintiffs.

G. St. C. Pilcher, K.C., *H. G. Willmer*, and *P. Bucknill*, for the defendants.

Bucknill, J.—This case arises out of a collision between the steamship *Corrientes* and the steamship *Umtali*, a little below Stone Ness Point in the Thames last Whit Sunday about 6.55 a.m. B.S.T. The *Corrientes* was proceeding up river, the *Umtali* was proceeding down river. Each ship was in charge of an experienced Trinity House pilot. The weather was fine and clear with light northerly airs, and the tide was the first quarter ebb and about a knot in force. There were no other vessels in the vicinity under way, so that the vessels had a clear space for manœuvre. The collision caused very serious damage to each vessel, and particularly to the *Corrientes*. The stem of the *Umtali* pierced the port side of the *Corrientes* in the way of the stokehold, and in consequence the stokehold and engine room were almost immediately flooded. One member of the engine room staff on duty was drowned and the others just escaped with their lives. Very shortly after the collision the *Corrientes* was beached about 250ft. to the southward of Stone Ness Light. Nos. 4 and 5 holds were flooded, and she remained on the beach for some days and was eventually patched and taken away for repairs. The material damage done by the collision to the stem and bows of the *Umtali* was also heavy.

The *Corrientes* is a single screw steamship of 6863 tons gross and 419ft. long, fitted with steam turbine engines. Her draft was about 26ft. 4in. forward and 27ft. aft. The *Umtali* is a twin screw steamship of 8158 tons gross and 468ft. long, fitted with triple expansion engines and a turbine. Her draft was about 25ft. forward and 26ft. aft.

The evidence given by those in charge of the *Corrientes* was that the *Corrientes* was coming up St. Clement's Reach at full speed at eleven knots and in about midstream a little to the northward of it. They sighted the *Umtali* over the land in Long Reach on the starboard bow and about one-and-a-half miles away. The *Umtali* was coming down on the south side of the river in her proper water, and was approaching Stone Ness Point. The *Corrientes* proceeded on at full speed up St. Clement's Reach on a course of about S.W.¼W. magnetic, although the helmsman was in fact not steering by compass but by objects on the land, and kept in about mid-river.

When the *Corrientes* was about off Bell Wharf and the *Umtali* was a little above the point and about half a mile away and half a point on the starboard bow, and had the *Corrientes* on her port bow, the *Umtali* gave a whistle signal. The pilot said he was not definite what the whistle was, whether it was a single blast or a two-blast signal. By this time the *Umtali* had started to round Stone Ness Point under port wheel and was heading about E. by N. The pilot sounded one short blast in reply, and the wheel was put to starboard by his order. Up to this time the *Umtali* was rounding Stone Ness in a normal way, but about the time the *Corrientes* sounded her short blast the *Umtali* increased her swing to port, and the pilot of the *Corrientes* then gave another signal of one short

blast. The interval between the two signals of one short blast given by the *Corrientes* was about ten seconds. The *Umtali* replied to this second signal of one short blast from the *Corrientes* with one short blast and appeared for a moment to ease her swing, but then again started to swing to port. The vessels were then about 1500ft. to 2000ft. apart. The *Corrientes* was still going at her full speed of eleven knots, and the *Umtali* appeared to be coming down at about the same speed—so that they were closing on one another at the rate of about 2200ft. a minute.

Very shortly after the *Umtali* sounded one short blast the master of the *Corrientes* gave the order hard-a-starboard and the whistle of the *Corrientes* was again sounded one short blast. The helmsman of the *Corrientes* said that this order by the master was given a matter of seconds after the order of the pilot, and the ship had then gone off about a point. The Elder Brethren advise me that this alteration of one point might take place in about thirty seconds. When the wheel was put hard-a-starboard the *Corrientes* swung rapidly to starboard. The *Umtali* again blew one short blast, but continued to swing to port. The vessels were now 900ft. apart and the master of the *Corrientes* put the telegraph to stop for a moment but the pilot said, "No, keep her going," and he put the telegraph down to full ahead again. The pilot's reason for this was that the *Umtali* had sounded one short blast and the pilot expected her to conform to this signal and to come to starboard although she was in fact swinging to port. The next signal from the *Umtali* was three short blasts when she was about 450ft. away. The *Corrientes* again replied with one short blast, but very shortly afterwards the vessels collided at an angle of six points leading aft on the *Corrientes*. Immediately before the collision the master of the *Corrientes* gave the order hard-a-port, and then at the collision the wheel was put amidships. The steam then failed owing to the flooding of the stokehold, and the ship ceased to steer.

The helmsman of the *Corrientes*, whose evidence on this point seemed to me to be reliable, said that under the orders of starboard and hard-a-starboard the vessel paid off about four to five points altogether. If the *Corrientes* was heading S.W.½W. before she started to starboard this would bring her head to about W. by N. at collision. I find that this was approximately her heading at the collision. The angle of the blow being six points leading aft on the *Corrientes*, the leading of the *Umtali* at collision was about N.E. by N., and I find that these were the headings of the two ships at collision, *Corrientes* W. by N. and *Umtali* N.E. by N.

According to the pilot of the *Corrientes* the collision was about 800ft. to the eastward of Stone Ness Point and about 800ft. to the northward of mid-navigable channel. That is the case of the *Corrientes*.

It must now be compared with the evidence given by those in charge of the *Umtali* to see how far there is any agreement between the two sides.

According to the evidence of those in charge of the *Umtali*, the *Umtali* was proceeding down Long Reach and approaching Stone Ness on the south side of mid-channel at a speed of about seven knots or perhaps a little more. They saw the *Corrientes* on the port bow over the land about one-and-a-half miles away, and as they came on the pilot formed the impression that the *Corrientes* was navigating well over in the South Channel, and he accordingly put his engines at half-speed and sounded two short blasts. According to the engine room movement book of the *Umtali* the order half-speed was at 5.47. This book does not in terms record the collision, but the full-astern order shortly before the collision was at 5.49.

When the *Umtali* sounded two short blasts she was just starting to port round the bend. The *Umtali* at that time was about 700–800ft. above the *Worcester*, and shaping to pass about 700–800ft. out from the south shore. When the *Umtali* sounded two short blasts the pilot said that the *Corrientes* was about half a mile away, or perhaps a little more, and about quarter point on her starboard bow and showing her starboard side to him. The *Corrientes* at that time was coming up a little more than 100ft. outside the lower Swanscombe Buoy and was heading straight up the reach with her masts slightly open to the *Umtali*.

The parties therefore agree that the *Umtali* was the first vessel to sound a signal. Mr. Hayward, on behalf of the *Corrientes*, said he must concede having regard to all the evidence that this signal was two short blasts. The parties further agree that when this signal was given the vessels were about half a mile apart, and that the vessels were approaching one another with the *Umtali* on the starboard side of the *Corrientes* and with the *Umtali* about to alter course to port to round the Point.

The vessels were also, in fact, approaching one another on the *Umtali's* admitted speed at 1800ft. a minute, so that half a mile would be covered by them if the joint speed is retained in about one-and-three-quarter minutes. Where the parties disagree is as to the position of the *Corrientes* at this time. The *Umtali's* pilot puts the *Corrientes* fine on his starboard bow and right outside of, and to the southward of, the deep-water channel, and about 100ft. from the southern edge.

Taking the width of the navigable channel in the vicinity of Bell Wharf for the type of vessel of the *Corrientes* at the then state of tide at approximately five cables, the *Corrientes*, if in mid-channel, as her pilot says, would be about 1500ft. outside the southern edge of the navigable channel. Her position at this time is therefore one of the important issues in the case. The pilot of the *Umtali's* justification for sounding two short blasts, which was an invitation to the *Corrientes* to depart from by-law 33, was two-fold. One justification was that if he had starboarded his wheel he would have gone inside the Swanscombe Buoy if the *Corrientes* had kept her position, although he admitted it would not be impossible to pass her port to port if the *Corrientes* had eased her speed and sounded one short blast in good time and the *Umtali* had eased her speed. His other justification raises the most acute controversy in the case. It is this. The pilot of the *Umtali* says that the *Corrientes* answered his two short blasts not with one short blast but two short blasts, which were a clear and definite portwheel signal and thereby accepted his invitation to break the by-law and to pass starboard to starboard. That is another important issue in the case.

Continuing with the case made by those in charge of the *Umtali*, her pilot said that after the *Corrientes* sounded two short blasts in reply to his signal the wheel of the *Umtali* was put to port, and when her head had gone off about half a point to port the wheel was then steadied so that the vessels should pass all clear starboard to starboard. The vessels then approached starboard to starboard, but when

the *Corrientes* was about 900ft. away the *Corrientes* sounded one short blast, although at that time she was coming straight up the reach on the *Umtali's* starboard side with her starboard side well open to him and the *Corrientes* then altered her course to starboard and crossed the bows of the *Umtali* from starboard to port. The *Umtali's* engines were immediately stopped and put full-speed astern, and three short blasts were sounded and the wheel was steadied, but the collision occurred. The vessels at collision were to the southward of mid-channel, and between Stone Ness Point and the Empire Paper Mills Jetty, and about 800ft. outside this jetty. The pilot said that the engines of the *Umtali* were reversing one-and-a-half to two minutes before the collision, and at collision the *Umtali* had a speed of about three knots, and was heading about E.N.E., and the *Corrientes* was heading about N.W. by W. In other words, the *Umtali* was heading practically down the reach, and the *Corrientes* was well angled to the north shore. That is the case made on behalf of the *Umtali*.

There is, therefore, a wide discrepancy as to the position of the *Corrientes* coming up the river and as to the whistle signals given and heard by each vessel, and as to the place of collision and as to the heading of the vessels at collision, and as to the speed of the *Umtali* at the time of collision.

After considering all the evidence and the probabilities of the case, and after discussing the matter fully with the Elder Brethren, these are my findings of fact on these issues.

When the *Umtali* sounded her first signal the *Corrientes* was coming up St. Clement's Reach a little to the southward of mid-river and a little below the lower Swanscombe Buoy, and was steering a course of S.W. by W.

The *Umtali* was coming down on her proper side at a speed of about nine knots through the water and was gathering way with engines at full-speed ahead. The two ships were, therefore, each doing about the same speed over the ground, namely, ten knots. When the vessels were about half a mile apart, the *Umtali* sounded two short blasts and ported her wheel, and her engines were put half-speed ahead. At this time the *Corrientes* was fine on the port bow of the *Umtali*, and the *Umtali* was fine on the starboard bow of the *Corrientes*, and the vessels were on headings which, if continued, would cut one another at an angle of about two points.

The *Corrientes* answered the *Umtali's* signal of two short blasts with one short blast, and about ten seconds after her first signal the *Corrientes* again sounded one short blast. This second signal was given before the *Corrientes* had made much noticeable turn to starboard under the starboard wheel order. The pilot of the *Umtali* then ordered the wheel amidships. He did not sound a short blast as alleged by those on the *Corrientes*. Very shortly afterwards, seeing that the *Corrientes* was turning to starboard or continuing to so turn, the *Umtali* again altered course to port. This manœuvre was denied by those in charge of the *Umtali*, but I am satisfied that some action was taken on board her which had this effect, probably by use of the engines as well as helm. Almost immediately afterwards the wheel of the *Corrientes* was put hard-a-starboard, and one short blast was again sounded on her whistle. By this time the ships were approximately 1000ft. apart, and there was imminent risk of collision and both engines of the *Umtali* were stopped and very shortly afterwards put full-speed astern, and the whistle was sounded three short blasts. It is impossible to say how much speed was taken off the *Umtali* by reversed engines before collision. I think her speed was substantial at collision, but had been somewhat reduced, probably to about five knots, having regard to the nature of the damage. The speed of the *Corrientes* was still about eleven knots.

Each vessel altered in all about four points under port and starboard wheels respectively from the time when the *Umtali* sounded her signal of two short blasts and ported. The collision occurred to the northward of mid-river and about two cables below the Stone Ness Light, but not so far over as the *Corrientes* pilot asserted.

On these findings of fact it appears clear to me, and the Elder Brethren so advise me, that both vessels are to blame for the collision. The *Corrientes* is to blame for breach of by-law 33 and the new by-law 4A. These by-laws are in the following terms :

> "33. Every steam vessel proceeding up or down the river shall when it is safe and practicable keep to that side of mid-channel which lies on the starboard side of such vessel and when two steam vessels proceeding in opposite directions the one up and the other down the river are approaching each other so as to involve risk of collision they shall pass port side to port side unless the special circumstances of the case make departure from this by-law necessary."
>
> "4. (*a*) Every steam vessel navigating against the tidal stream shall, if necessary, in order to avoid risk of collision, ease her speed or stop on approaching or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear of her."

On my findings the *Corrientes* was not coming up on her starboard side of mid-channel although it was quite safe and practicable for her to do so. When the *Corrientes* saw the *Umtali* coming down she should at once have taken steps to get over to her proper side. Being on her wrong side, there was a risk of collision with the *Umtali* which was coming down on her proper side, at any rate, so long as the *Corrientes* stayed where she was, and approached the point at her full speed, and it was, therefore, the duty of the *Corrientes* to ease her speed on approaching Stone Ness until she had got into her proper water and the vessels were in a position to pass port to port with a safe margin in accordance with by-law 33. Quite apart from by-law 4A, the Elder Brethren advise me that in the circumstances of this case as found by me the *Corrientes* should have eased her speed as I have said.

The *Corrientes* continued on at her full speed right up to the moment of collision although there was risk of collision from the time when the *Umtali* first started to round the bend and much more serious risk of collision when the *Umtali* sounded two short blasts and showed her desire to pass starboard to starboard by porting her wheel. The *Corrientes*, as soon as she saw this action by the *Umtali*, should at once have taken prompt steps to get into her proper water by decisive starboarding and sounding one short blast, and she should at once have stopped her engines. I am unable to find any reason why those in charge of the *Corrientes* did not hear this signal of two short blasts as they say. Instead of decisive starboarding and stopping her engines the *Corrientes* starboarded and sounded one short blast, and after a short interval sounded another short blast, and after a further interval put her wheel hard-a-starboard and sounded a third signal of one short

blast, and continued on at full speed of eleven knots up to the moment of impact. The *Corrientes* is, therefore, seriously to blame.

On the other hand, the *Umtali* started the immediate sequence of events which led up to this disastrous collision by sounding two short blasts and porting her wheel at a time when there was no necessity for her to do so. Her action was a deliberate breach of by-law 33. The *Umtali* continued on with her intention to pass starboard to starboard after the *Corrientes* had sounded a signal of one short blast and started to starboard. The *Umtali* took further action with helm and engines to alter course to port when the *Corrientes* was altering course to starboard. Those in charge of the *Umtali* ought to have seen that the *Corrientes* was altering course to starboard as soon as she began to do so and should have heard her starboard wheel signal and should have eased their speed at once and have starboarded their wheel to comply with the by-law. The further manœuvre by the *Umtali* to alter course to port was not admitted by those in charge of her, but I am satisfied that it took place. The *Umtali* did not reverse her engines until the vessels were about 1,000ft. apart and for nothing like one-and-a-half to two minutes before the collision as alleged by her pilot. The *Umtali* is therefore also seriously to blame.

The only question that remains is as to apportionment of blame. The statute requires that if it is impossible to apportion different degrees of blame the apportionment shall be equal.

In this case two vessels are both seriously to blame for a collision which was due to their breach of the appropriate Thames by-laws under conditions which afforded no excuse for the breach except their own convenience of navigation.

In my view it is impossible to come to any satisfactory conclusion as to what signals those in charge of either ship thought they heard from the other ship. I must leave that aspect of the case, and it is an unpleasant aspect, with my findings as to the whistle signals in fact sounded by each vessel, which I have already given.

Quite apart from the disputed whistle signals, those in charge of each vessel saw or ought to have seen the alteration of course by the other vessel, when each started to take action for the other. They would then have seen that the other ship was altering in a way which, coupled with their own manœuvres, must inevitably result in a collision. If they had taken proper action then a collision would have been avoided. There is to my mind no satisfactory reason for saying that one ship is more to blame than the other, and I therefore hold that they are equally to blame. The responsibility as to the findings of fact and conclusion as to apportionment are for me alone, but I think it right to say that the Elder Brethren's views on the whole matter coincide with mine.

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

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

Wednesday, July 21, 1937.

(Before BUCKNILL, J.)

The Ronald West. (*a*)

Port authority—Raising sunken barge in River Orwell under contract with barge owners—Negligence—Liability for damage—No protection afforded by sect. 1 *of Public Authorities Protection Act,* 1893, *where act done in pursuance of private obligation—Harbours, Docks and Piers Act,* 1847, *s.* 56.

This was a claim brought by the Ipswich Dock Commission, the harbour authority for the port of Ipswich, against the owners of the sailing barge R. W. *under sect.* 56 *of the Harbours, Docks and Piers Clauses Act,* 1847, *for the balance of the cost of raising the* R. W. *after she had been sunk in the River Orwell as the result of a collision with the steamship* C. *on the 5th November,* 1935. *A contract was then entered into between the plaintiffs and the defendants whereby the plaintiffs undertook to raise the* R. W. *at the defendants' expense. After the wreck had been raised on or about the 29th November,* 1935, *she was run into a few days later by the steamship* O. *and again sunk. At the time of the second collision and sinking the wreck, which had been placed by the plaintiffs, after the first raising, in a position over which at certain times of the tide vessels were in the habit of navigating, had been left in that position for several days unmarked by a lighted buoy or otherwise. After the* R. W. *sank for the second time she was again raised by the plaintiffs. The defendants had paid to the plaintiffs* 250*l. on account of their charges (which amounted in all to some* 544*l.) and denied liability for the balance. They further contended that as the result of the second collision and sinking the* R. W. *had sustained damage for which they counterclaimed against the plaintiffs, adding the owners of the* O. *as defendants to their counterclaim. The plaintiffs alleged that the raising of the* R. W. *was done in the exercise of their statutory duty under sect.* 56 *of the Harbours, Docks and Piers Act,* 1847, *and further said in their reply and defence to the counterclaim that they were a public authority, that they were at all material times acting in the exercise of their statutory and (or) other public duties, and that if the owners of the* R. W. *had suffered the alleged or any damage (which was denied) they (the plaintiffs) were protected from liability under sect.* 1 *of the Public Authorities Protection Act,* 1893, *as no action or proceeding had been commenced against them in respect thereof within the statutory period of six months next after the act, neglect or default complained of.*

Held, that the collision between the O. *and the wreck was solely due to the negligence of the plaintiffs in leaving the wreck in the position in which they did unmarked, and that the*

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

plaintiffs were accordingly unable to recover from the owners of the wreck the cost of the second raising; that the defendants' counterclaim against the owners of the O. must be dismissed; that the negligence of the plaintiffs in failing to mark the wreck was negligence in the performance of a contract between them and the owners of the R. W., *and was not negligence in the performance of a statutory duty or authority and that the plaintiffs were not protected by the Public Authorities Protection Act. Judgment was entered for the defendants on their counterclaim against the plaintiffs with costs, the expenses of the first raising and the damages to be assessed by the registrar.*

THE plaintiffs were the Ipswich Dock Commission, the port and harbour authority for the port of Ipswich; the defendants were Messrs. Samuel West Limited, owners of the sailing barge *Ronald West*; the defendants by counterclaim were Messrs. R. and W. Paul Limited, of Ipswich, owners of the steamship *Oxbird*.

On the question of the protection afforded to a public authority under the Public Authorities Protection Act, 1893, his Lordship referred to the judgment of Lord Haldane in *Bradford Corporation* v. *Myers* (114 L. T. Rep. 83; (1916) 1 A. C. 242).

J. V. Naisby for the plaintiffs.

R. F. Hayward, K.C. and *H. L. Holman* for the defendants.

K. S. Carpmael, K.C. and *O. L. Bateson* for the defendants by counterclaim.

Bucknill, J.—In this case the plaintiffs are the Ipswich Dock Commission and the defendants are Samuel West Limited. The action was originally started by the plaintiffs, who are the port and harbour authority for the port of Ipswich. I have not seen a copy of their statute, but I will assume, for the purposes of my judgment, that the Act does incorporate the Harbours, Docks and Piers Clauses Act of 1847, s. 56 of which lays it down that "The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same."

The defendants are the owners of a vessel called the *Ronald West*. On the 5th November, 1935, the *Ronald West*, while lying at anchor in the River Orwell, and within the jurisdiction of the plaintiffs as the port and harbour authority, was sunk. From the 5th November the plaintiffs lighted the ship. On the 9th November, Samuel West Limited wrote to the plaintiffs: "Dear Sirs,—With reference to our barge now lying sunk within your jurisdiction, we regret to say we have been wholly unable to obtain a reasonable contract to raise her, although we should like to have done this. Presumably you will be taking steps to raise her with a view to clearing an obstruction. We shall be pleased to assist in any way we can with such arrangements as you make and, on removal of the barge to a safe place, we will certainly arrange to see any reasonable account of yours properly dealt with, and, provided the barge is not too badly damaged, we shall be prepared to take her over from a safe place."

On the 12th November the plaintiffs replied as follows: "S.b. *Ronald West*. I duly received your letter of the 9th inst. and in reply have to inform you that at the present time we have no craft available for raising the above barge. We hope, however, to be in a position to start operations in about a fortnight and to lift the vessel during the week ending the 30th inst. during the spring tides. Every care will be taken in the lifting, but as we shall have to place craft over the wreck we cannot be responsible for any further damage which may accrue during the process of raising. I thank you for your assurance that our reasonable expenses will be met."

Following on these letters the plaintiffs on the 20th November started to raise the wreck, and they got her towards the bank. On the 29th November they took away the lighted mooring buoy—a wreck buoy with a green light which they had hired from Trinity House—under the unfortunate idea that they could save Samuel West Limited 7*s*. a day, the cost of the hire. On the 7th December they moved the wreck a little further in towards the bank and left it unlighted, and, on the following morning a steamship coming up, without any negligence on her part, ran into the wreck and damaged it.

I need not refer to the various claims and counterclaims which have been made in this case except to the particular counterclaim made by the owners of the *Ronald West*. On the 27th February, 1937, they claimed against the plaintiffs damages by reason of the negligence of the plaintiffs whereby this collision occurred and their craft was damaged. To that claim of the owners of the *Ronald West* the defence is put in (*inter alia*) that the plaintiffs are protected by sect. 1 of the Public Authorities Protection Act, 1893, the claim being made more than six months after the neglect complained of, and that, therefore, the claim fails.

I have to decide that question. The case which seems to me to throw light upon the point is *Bradford Corporation* v. *Myers* (114 L. T. Rep. 83; (1916) 1 A. C. 242), and I start with Lord Haldane's judgment where he said, in reference to the Public Authorities Protection Act: "My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority." A little farther on he referred to a judgment of Farwell, J. in *Sharpington* v. *Fulham Guardians* (1904, 2 Ch. 449). Lord Haldane then said: "For it seems to me that the language of sect. 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all. If this be so it is fatal to the contention of the appellants in the present case."

In my view, the two letters which I have read constitute a contract made between the plaintiffs and Samuel West Limited. I think it is clear that, quite apart from such powers as they have under the Act to which I have referred, the plaintiffs could have sued Samuel West Limited for the cost of raising the barge. I do not think that they were bound to raise her; they might have blown her up; they might have stood by and allowed somebody else to raise her, as was contemplated at first by Samuel West Limited. I think that they did raise her under this contract. That being so,

it seems to me that the case comes under the words of Lord Haldane in *Bradford Corporation* v. *Myers* (*sup.*), to which I have referred. I think that this is an Act which does restrict the rights of an individual when suing somebody else who has done him a wrong, and one must read the words of the Act strictly. If I find, as I do in this case, that the negligent act done by the plaintiffs was not done in direct pursuance of the provisions of the statute, or in the direct execution of their duty or authority, but was, in fact, done under a contract made between them and Samuel West Limited, I think that the provisions of the Act do not apply. Therefore I hold on that point that the defence to the counterclaim of Samuel West Limited fails.

There will be judgment for the defendants on their counterclaim, with costs, and a reference to the registrar to assess the damages. The question of the claim, and whether the tender of 250*l.* is sufficient, will be adjourned until the figures have been assessed by the registrar.

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

Solicitors for the defendants, *Holman*, *Fenwick*, and *Willan.*

Solicitors for the defendants by counterclaim, *W.* and *W. Stocken.*

House of Lords.

June 28, 29; *July* 1, 2, *and* 28, 1937.

(Before Lords ATKIN, THANKERTON, MACMILLAN, WRIGHT, and MAUGHAM.)

The Kafiristan. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Salvage—Lloyd's Standard Form of Salvage Agreement—Damage by collision—Whether owners of a salving vessel who are also the owners of a vessel partly responsible for a collision necessitating the salvage services are entitled to salvage remuneration.

After a collision between the E. of B. *and the* K. *in which the* K. *was badly damaged, salvage services were rendered to the* K. *by the* B. *which belonged to the owners of the* E. of B. *Liability for the collision was settled on the basis of both vessels being held to blame, the* E. of B. *to the extent of 75 per cent. and the* K. *25 per cent. The salvage service was rendered under Lloyd's Standard Form of Salvage Agreement based on "No cure, no pay."*

On a claim for salvage remuneration,

Held, that there was no authority for the proposition that a vessel wholly unconnected with the act of mischief was disentitled to salvage award simply because she belonged to the same owners as the vessel that had done the mischief, so that even if there had not been a Lloyd's Salvage Agreement executed between the parties, the salvage would have been claimable, but that agreement put the matter beyond doubt.

Per Lord Wright: "The duty cast by the Merchant Shipping Acts on one of the two colliding vessels to stand by and render assistance does not in itself prevent even that vessel, if she renders assistance, from claiming salvage."

The Glengaber (1 *Asp. Mar. Law Cas.* 401; 27 *L. T. Rep.* 386; *L. Rep.* 3 *A. & E.* 534) *approved.*

Decision of the Court of Appeal (19 *Asp. Mar. Law Cas.* 82; 156 *L. T. Rep.* 171; (1937) *P.* 63) *reversed.*

APPEAL from the decision of the Court of Appeal (Greer, Slesser, and Scott, L.JJ.), reported 19 Asp. Mar. Law Cas. 82; 156 L. T. Rep. 171; (1937) P. 63, on appeal from an award in the form of a special case stated for its opinion on a point of law by Sir Norman Raeburn, K.C., the appeal arbitrator nominated by the Committee of Lloyd's under the terms of a salvage agreement in Lloyd's Standard Form. The question of law raised for the decision of the court was whether the owners of a salving vessel, who were also the owners of another vessel which it was agreed was partly to blame for a collision with a third vessel, were entitled to salvage remuneration in respect of services rendered by the salving vessel to that third vessel.

In the present case the *Empress of Britain* had collided with the *Kafiristan* in the Gulf of St. Lawrence. The *Empress of Britain* stood by until the *Beaverford*, which was in the same ownership as the *Empress of Britain*, arrived on the scene. At the request of the master of the *Kafiristan*, the *Beaverford* took the *Kafiristan* in tow, and towed her for a distance of 100 miles in the direction of Sydney Harbour, after which the *Kafiristan* was handed over by the *Beaverford* to a tug which towed the *Kafiristan* to safety. It was not disputed that the services rendered by the *Beaverford* contributed to the ultimate safety of the *Kafiristan*. The owners of the *Kafiristan* subsequently entered into a salvage agreement in the terms of Lloyd's Standard Form with the owners of the *Beaverford*, under which it was agreed, *inter alia*, that the *Empress of Britain* was 75 per cent. and the *Kafiristan* 25 per cent. to blame for the collision, that the services were to be regarded as salvage, and that any matter between the parties was to be settled by arbitration. The owners of the *Kafiristan* were duly represented both at the original arbitration and before the appeal arbitrator.

Upholding the view taken by the original arbitrator, the appeal arbitrator was of opinion that the owners of the *Beaverford*, being also the owners of the *Empress of Britain*, were not entitled to any salvage reward.

Bucknill, J. held that the fact that the *Empress of Britain* was partly to blame for the collision disentitled her owners, as owners of the *Beaverford*, to a salvage reward for the services which the *Beaverford* had rendered, as to grant such an award would be to run counter to a well-established principle of law that no man can benefit by his own wrong.

On appeal, the Court of Appeal held that, upon the authority of the decided cases, the learned judge had come to the only decision that he could

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

come to and that accordingly the appeal must be dismissed.

The owners of the *Beaverford* appealed.

H. N. Willink, K.C., *R. F. Hayward*, K.C., and *V. J. U. Hunt* for the appellants.

F. A. Sellers, K.C., and *J. V. Naisby* for the respondents.

The House took time for consideration.

Lord Atkin.—I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Wright, and, as I entirely agree with it, I find it unnecessary to state in a different form the same reasons for reversing the decision in the court below. I will only add my personal opinion that the reasoning adopted in this case will require that careful consideration be given to the question of claims for salvage for services rendered by a vessel which is itself to blame. I wish, however, to make a few remarks on the effect of Lloyd's Salvage Agreement on the claim in this action. It cannot be ignored; for the agreement alone gave any authority to the arbitrator and the umpire to make any award, and to the courts to determine the points of law raised by the umpire's award. When the agreement is examined the terms appear to make it impossible for the defendants to contend that they are not liable to pay for salvage services, whatever may be the legal position if no agreement is made. The first stipulation is by the owner of the salving ship to use his best endeavours to salve the injured ship and her cargo, and for this purpose he is by clause 2 given a licence to use the vessel's gear. The services which he renders under this obligation are to be "rendered and accepted as salvage services upon the principle of no cure, no pay." This obviously is intended to prevent any suggestion that they are not salvage services, *e.g.*, that they are simply towage, and, I think, equally precludes the idea that they are not salvage services at all, or if salvage services, are not to receive any remuneration as such because the contractor's servants have been to blame for the collision. I asked counsel whether, in such circumstances as the present, the effect of his contention was that the salving owners were under an obligation to use best endeavours to salve, for breach of which they were liable in damages, but that the other party to the agreement *ab initio* were at no time under any obligation to pay for the contractual services if successful. I think that he admitted reluctantly that this was so, and it leads to such a fantastic result as to seem to me impossible. As far as the agreement is concerned, at this stage after the accident the question of fault seems to be irrelevant. Is it possible to imagine the master of the injured vessel saying to the master of the proposed salvor: "I want you to agree to do your best to salve me. You may have to risk your own ship and cargo and to deviate from your voyage and delay your adventure; but it is understood that if either you or any vessel of your owners is in any degree responsible for any damage you will get nothing." The obvious result would be no agreement, no attempt at salvage, other than the ordinary assistance given from humane motives or sense of statutory duties under the Merchant Shipping Act. I think the suggested defence has no place in a claim under such an agreement as this. I am also satisfied that to confirm such a rule as has found favour below would be seriously to impair the encouragement to vessels at sea to render salvage services, which has always been the foundation of the whole doctrine of salvage. I wish to add in conclusion that I find nothing in the agreement in its present form which in any way makes the master or crew parties to the submission or gives any jurisdiction to the arbitrator to include any sum for them in his award. It may be a convenient practice that their claim should be considered by the arbitrator; but unless there is a separate submission any such award is not binding upon anyone; and it may be worth while considering whether the form of agreement should not be altered in this respect.

I am also authorised to say that my noble and learned friend, Lord Thankerton, has read the opinion of my noble and learned friend, Lord Wright, which is about to be delivered and that he agrees with it.

Lord Macmillan.—I also concur in the opinion about to be delivered by my noble and learned friend, Lord Wright, which I have had the advantage of perusing.

Lord Wright.—This appeal raises an important question of the maritime law relating to salvage. It arises out of a collision which took place on the 16th June, 1935, in the Gulf of St. Lawrence between the Canadian Pacific liner *Empress of Britain*, owned by the appellants, and the steamship *Kafiristan*, owned by the Hindustan Steamshipping Company Limited. The *Kafiristan* was so badly damaged as to require salvage assistance. The *Empress of Britain* stood by for about six hours, when the *Beaverford*, a vessel also owned by the appellants, came up. Other vessels were approaching, including one belonging to the respondent owners of the *Kafiristan*. But at the request of the master of the *Kafiristan* the master of the *Beaverford* took the *Kafiristan* in tow for Sydney, Nova Scotia, and towed her stern first for about one hundred miles, when a salvage vessel, the *Foundation Franklin*, arrived and duly completed the towage to Sydney. It is not disputed that the *Beaverford* performed services of such a nature as materially to contribute to the safety of the *Kafiristan*, and, subject to the question of law to be discussed later, to entitle her to a salvage award.

On the 13th July, 1935, Lloyd's Standard Form of Salvage Agreement was signed in this country by the appellants and respondents.

Under this agreement an arbitration was held before Mr. Carpmael, K.C., who was appointed by the Committee of Lloyd's in accordance with the agreement recited in his award dated the 4th February, 1936, which also recited that the appellants salved the *Kafiristan* and her cargo in accordance with the said agreement. When the arbitrator made his award it had not been ascertained whether either or both vessels were to blame for the collision. The arbitrator was of opinion that if the *Empress of Britain* was wholly or partly to blame for the collision, the appellants were not entitled to salvage as owners of the *Beaverford*, but, if they were free from blame, they were entitled to 1850*l.*, together with 550*l.* for expenses. Whether the *Empress of Britain* was to blame or not, he awarded to the master and crew of the *Beaverford* 600*l.* By another award he held that the owners of the *Foundation Franklin* were entitled to 3500*l.*

There were appeals from both awards to Sir W. Norman Raeburn, K.C., who made an award on

the 1st July, 1936. By that time it had been agreed that the *Empress of Britain* and the *Kafiristan* were both to blame, the *Empress of Britain* to the extent of 75 per cent., the *Kafiristan* to the extent of 25 per cent. The award recited (*inter alia*) that as a result of the collision the *Kafiristan* was so damaged as to require salvage assistance and that such assistance was rendered by the *Beaverford* under the agreement dated the 13th July, 1935, and that Sir W. Norman Raeburn had been appointed by the Committee of Lloyd's under clause 8 of the agreement as arbitrator in the appeals. The award, which was in the form of a special case for the opinion of the court, proceeded to find that the salvage services rendered by the *Beaverford* were rendered under the agreement and that the parties had settled between them that both vessels were to blame in the proportions which I have set out above. It then stated the question for the opinion of the court to be whether the fact that the *Empress of Britain* was partly to blame for the collision disentitled her owners as owners of the *Beaverford* to a salvage award for the services rendered to the *Kafiristan*. He awarded, subject to the opinion of the court, that they were not entitled to any salvage award, but awarded that the master and crew of the *Beaverford* were entitled to an award against the owners of the *Kafiristan* and her cargo of 600*l*. In the alternative, if the court should be of opinion that the owners of the *Beaverford* were entitled to a salvage award, then, in addition to the 600*l*. awarded to the master and crew, he awarded to the appellants 1850*l*. with 550*l*. for expenses.

The award in favour of the master and crew has not been disputed and is not in issue in these proceedings.

The special case in due course was heard before Bucknill, J., sitting in the Admiralty Division, who upheld the award. He based his conclusion mainly on the principle, which he held to apply, that no man could profit by his own wrong, and held that the wrong, or negligence of which the appellants had been guilty by their servants on the *Empress of Britain*, prevented them from claiming any advantage from the salvage services which others of their servants had rendered from the *Beaverford*. In effect he held that the law laid down by Sir Robert Phillimore in *The Glengaber* (1 Asp. Mar. Law Cas. 401 ; (1872) 27 L. T. Rep. 386 ; L. Rep. 3 A. & E. 534) was bad law. He dismissed the contention that the respondents by entering into the Lloyd's Salvage Agreement had waived their right to dispute salvage.

His judgment was affirmed on appeal by the Court of Appeal, who gave leave to appeal to this House, Greer, L.J. saying that he would welcome the assistance of the House of Lords. Greer, L.J. dismissed the appeal solely, or at least principally, on the ground that he was bound by authority. He said that it did seem to him that a ship entirely at fault for a collision might properly be encouraged to render salvage services which would more than wipe out the fault which it had already committed. "So far from taking advantage of its own wrong, it is trying to set right that which it has done, which was wrong." *A fortiori* should this be so when the salving vessel is only to blame in a lesser degree. He thought the matter was concluded for him by authority binding on the Court of Appeal which compelled him to decide that the appellants, being owners both of the *Beaverford* and the *Empress of Britain*, could not claim for salvage services rendered by the former vessel any more than they could have claimed for salvage services rendered by the latter. Slesser, L.J. accepted the principle that the wrongdoer was disentitled to claim salvage and held that its application was not affected by the fact that he was claiming salvage rendered through the instrumentality of another of his ships, which was not concerned in the actual collision. He thought *The Glengaber* (*sup.*) was not an authority to be followed. Scott, L.J. was of the same opinion, though he thought that the decision was a hardship on the appellants and that it might be in the general interest that the rule should be altered. From these judgments this appeal came before your Lordships.

It is to be observed that the only reference in these judgments to the Lloyd's Salvage Agreement under which the salvage services were rendered and the arbitration was held, is by Bucknill, J. in the passage I have referred to, in which he dismissed a contention based upon it. Your Lordships were told that by some consent between the parties no point based on the agreement was to be taken, and your Lordships were asked to consider the question as if the Lloyd's Salvage Agreement had never been signed. Your Lordships refused to deal with the appeal on this false and artificial basis. It is the duty of this House to decide actual questions on the facts of the case which is brought before them. They ought not, whether the parties consent or not, to deal with what is in truth a hypothetical question, that is, a question arising not on the true facts, but on an artificial and arbitrary selection of the facts. In the present case the Lloyd's Salvage Agreement is an essential fact. As I have already said, the services were rendered under it and the arbitration was held in accordance with its terms, as indeed the award recites. I shall in the first place proceed to set out its terms.

The contract was in fact executed in this country, about a month after the collision, by the appellants on the one hand and the respondents on the other. There was, therefore, no possibility of treating it as an improvident bargain extorted by the pressure of urgent necessity. There is indeed no suggestion that it is not a valid and binding contract. By clause 1 the contractor (who would have been the master of the *Beaverford* if the contract had been executed on the spot) agreed to use his best endeavour to salve the *Kafiristan* and her cargo and take her into —— or other place to be thereafter agreed with the master, providing at his own risk all proper steam and other assistance and labour. The services were to be rendered and accepted as salvage services on the principle of "no cure, no pay." No fixed sum of remuneration for the services was mentioned, but the amount was to be fixed by arbitration in London. It was provided that the contractor was to be entitled to make reasonable use of the vessel's gear, anchor, and cables and other appurtenances during and for the purpose of the operation free of cost, but was not unnecessarily to abandon or sacrifice the same or any other of the property. Detailed provisions were set out relating to liens, to security, and to the conduct of arbitrations and appeals. The arbitration and appeal in the present case were duly conducted under these provisions. By clause 13 it was further provided that the master entered into the agreement as agent for the vessel and the cargo and the respective owners thereof and bound each (but not the one for the other or himself personally) to the due performance thereof. The parties to the arbitration and subsequent proceedings, including this appeal, were accordingly the owners of the *Beaverford* and the owners of the *Kafiristan* and her cargo. It was agreed that if the agreement was executed after the salvage

services had been rendered, its provisions were to apply *mutatis mutandis*.

The view which has so far prevailed and which has been urged before your Lordships on behalf of the respondents is that according to the law of maritime salvage the appellants cannot claim any remuneration because by their servants on the *Empress of Britain* they were responsible (at any rate in part) for the collision, and that to allow them salvage remuneration for the services rendered by them by means of the *Beaverford* would be to allow them to profit by their own wrong. It is said that the Lloyd's Salvage Agreement merely provides machinery, and expressly deals with the services as salvage services, and must accordingly be governed by the principle which, as just stated, is said to apply to questions of salvage services. The case, it was contended, is indistinguishable so far as the claim of the shipowners is concerned from a case where a ship, in whole or in part responsible for a collision, performs salvage services, but is held to be not entitled to any award for salvage remuneration. The principle in this latter case was said to have been established by authorities such as *The Minnehaha; Ward* v. *MacCorkill* (1 Mar. Law Cas. 111; 4 L. T. Rep. 810; 15 Moo. P. C. 133) and *Cargo ex Capella* (2 Mar. Law Cas. 552; 16 L. T. Rep. 800; L. Rep. 1 A. and E. 356) and other authorities ever since acted upon. Where the salving vessel, though belonging to the same owners as the vessel in whole or in part responsible for the collision, was innocent and came up after the accident, the position, so it was contended, was the same except that the crew of the innocent vessel were not debarred, as were the crew of the vessel which had participated in the collision, from being awarded salvage. Hence, in the present case the award made in the arbitration in favour of the master and crew of the *Beaverford* was not disputed, but it was submitted that the appellants were not entitled to any salvage award.

The appellants claimed that these contentions were wrong, and that both on authority and on principle, as well as under the terms of the Lloyd's Salvage Agreement, the alternative award of Sir W. Norman Raeburn in their favour "if the court should be of opinion that the owners of the *Beaverford* are entitled to a salvage award" should be upheld. In my opinion the claims of the appellants are well founded. I shall consider the question first as one of principle and then refer to the authorities, disregarding for the present the agreement.

There is here no dispute that the services rendered by the *Beaverford* were meritorious and contributed to the eventual safety of the *Kafiristan* and her cargo. They were voluntary. There was no such complication as might arise in the case of a colliding vessel. As to that I think it is clear law that the duty cast by the Merchant Shipping Acts on one of the two colliding vessels to stand by and render assistance does not in itself prevent even that vessel if she renders assistance from claiming salvage. I adopt the words of Lord Phillimore in *Owners of Steamship Melanie* v. *Owners of Steamship San Onofre* (15 Asp. Mar. Law Cas. 479; 132 L. T. Rep. 567, at p. 572; (1925) A. C. 246, at p. 262). It is also clear that the policy as to maritime law favours the grant of awards for meritorious salvage, in order to encourage the rendering of salvage services. This policy should particularly apply to the facts of this case in which, when the *Beaverford* came up, other vessels were supposed to be coming up. If the view put forward by the respondents be correct, the master of the *Beaverford* might well have been tempted to say to himself that his vessel would be debarred from any reward, if the *Empress of Britain* was to blame, even in a comparatively small degree, and to leave the work to other salvors not subject to any such disability. This course at the least must involve delay while the other salvors came up, which might have serious consequences. But the maritime law of salvage is based on principles of equity. There does not seem to be any reason in equity why the salved vessel (if I may adopt that sort of personification of the ship which, as Lord Sumner said in *The Susquehanna* (17 Asp. Mar. Law Cas. 81; 135 L. T. Rep. 456 at p. 459; (1926) A. C. 655 at p. 664) is inveterate in Admiralty cases) should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as the other colliding vessel. That fact seems to be irrelevant so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame, in whole or in part, is taken into account. That consideration ought not, it would seem, to affect the evaluation of the salving vessel's services. It receives due effect at a later stage in the transaction. If the other colliding vessel is solely to blame, the owner of the salved vessel, which is blameless, will bring into his account of damages the whole sum awarded to the salving vessel for salvage. It may be that in such a case a salvage award in favour of the shipowners is superfluous and need not be made on the principle of circuity of action, but the responsibility for the collision is mostly ascertained after the salvage award is made, and in any case there may be questions of limitation of liability. Where, however, both colliding vessels are to blame, the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other so as to ascertain the final balance of account. It is true that the owners of the other colliding vessel are in law responsible for the damages caused by the negligence of their servants including the amount of any salvage awarded to the salving vessel which they also own, but the equities are best worked out by making the salvage award without regard to the fact of common ownership, leaving the incidence of what is awarded to depend on the relative proportions of blame.

Thus in the present case the amount of the award will be borne ultimately by the *Kafiristan* and her cargo to the extent of 25 per cent. and by the appellants to the extent of 75 per cent. This seems obviously a more equitable procedure than to refuse any award at all to the appellants for the services rendered by the *Beaverford*. I do not feel that so inequitable a result can be justified by the rubric "that no man can profit by his own wrong," which indeed in my opinion is wholly inapplicable. The claim to salvage is not based on the fact that the *Empress of Britain* was guilty of negligent navigation. It is based on a separate fact, that the *Beaverford* rendered salvage services. It is for these meritorious services and not for the negligence of the crew of the *Empress of Britain* that the appellants claim the right to have salvage awarded. They are not seeking to profit by their own wrong, for which in the final account they will make the appropriate compensation by, among other things, bearing their proper share of the salvage award.

It is, however, said that if the principle that no man can profit by his own wrong excludes a claim for salvage where the salving vessel is the colliding vessel, as was held in the *Cargo ex Capella* and other cases, the same principle should apply where the

salving and the negligently colliding vessel belong to the same owner, because the wrong is committed by the person who salves, acting in either case by his servants. I shall assume that the principle there is established. I am doubtful of the logic or equity of it, but do not consider it necessary to express any final opinion about it here, because I do not think it applies logically to, or is proper to be extended to, the case where the salving vessel is innocent of and wholly unconcerned in the collision. It is, I think, in accordance with the ideas of maritime law to treat in a case like this for purposes of salvage the vessels concerned as separate entities and to disregard at that stage the aspect of common ownership and the consequences of the rule of vicarious liability. Thus the owner of the salving ship is dissociated from himself as owner of the wrongdoing ship. If the rule laid down in *Cargo ex Capella* (*sup.*) is at all sound, it is at any rate excluded where the ship which is the instrument of the salvage is a different ship from that which is the instrument of the negligent collision. It is, however, said that such a view would be contrary to the practice observed in these matters and acted upon in the present case by the experienced arbitrators who decided the matter in accordance with the practice. I find it impossible to give weight to these contentions for various reasons. In the first place, I have no evidence that cases in which the salving vessel and the negligent colliding vessel belong to the same owners are at all frequent or capable of founding a practice. No doubt cases where the salving vessel is one of the colliding vessels are more common, and the rule which seems to be recognised there is extended to the present case. But in any event the practice of those experienced in maritime law, if it really exists, cannot change the law, any more than the practice of average adjusters: (*Svensden* v. *Wallace*, 5 Asp. Mar. Law Cas. 232, C. A.; 50 L. T. Rep. 799, at p. 804; 13 Q. B. Div. 69, at p. 85). The court must decide the question according to the requirements of justice and sound reasoning, and on the basis of such authority as there is to be found in decided cases and books of authority. The earlier decisions of this House give no guidance on the matter, which indeed does not seem to have come even before the Court of Appeal until this dispute. But there is direct authority in the Admiralty Court in support of the appellants' contention. In *The Glengaber* (*sup.*) the *Warrior* tug rendered salvage services to the *Glengaber*, which had been put in peril by the negligence of another tug, the *Black Prince*. There were common owners of the two tugs. Sir Robert Phillimore rejected the objection that salvage could not be awarded to the *Warrior* because some of her owners were also owners of the *Black Prince*. He said: "This objection, if allowed to prevail, could not affect the claim of the crew nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage award simply because she belongs to the same owners as the vessel that has done the mischief." That was in 1872, and there is still no authority for the proposition which Sir R. Phillimore rejected. On the contrary, the accuracy of the principle which he enunciated has, so far as I know, never been contested. Thus in *The Duc d'Aumale* (9 Asp. Mar. Law Cas. 502; 89 L. T. Rep. 486, at p. 488; (1904) P. 60, at p. 73) Gorell Barnes, J. referred to *The Glengaber* as being a case where, by improper navigation of a steam tug, a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug rendered assistance to the drifting vessel, and it was held that the owners of that steam tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Later the judge observed "In the case of *The Glengaber* the steam tug which came up and rendered assistance had nothing to do with the accident which originally brought about the difficulty." These observations were *obiter dicta*. In *The Duc d'Aumale*, the claim was by owners of the tug which had been jointly responsible with the tow for causing the danger and by the master and crew of the tug. The claim of the tug owners was rejected on the principle stated in the *Cargo ex Capella*, and that of the master and crew on the ground that their negligence had caused the peril, the crew being identified with the negligent master on grounds of public policy which I need not here discuss but which seem to me as at present advised to be of dubious soundness. There was in that case no question of an independent salving vessel of the same ownership as the negligent vessel. The importance of the case is that Gorell Barnes, J., a most experienced Admiralty judge, treats *The Glengaber* as good law and as involving a different principle and to be distinguished from the *Cargo ex Capella*. Gorell Barnes, J. also refers to *The Glenfruin* (10 Prob. Div. 103), and suggests that the view taken in that case by Butt, J. differs from that of Sir R. Phillimore. In that case salvage services were rendered to the *Glenfruin* and her cargo by another vessel, the *Glenavon*, which was in part owned by the same persons as those who were owners of the *Glenfruin*. The danger which rendered the salvage necessary arose from the unseaworthiness of the *Glenfruin*, for which her owners were liable to the cargo owners under the contract of carriage. Butt, J. awarded salvage to the master and crew of the *Glenavon*, and also (*pro tanto*) to the part owner of the *Glenavon* who had no share in the ownership of the *Glenfruin*. But the ground on which the judge refused salvage to the part owners of the *Glenavon* who were also part owners of the *Glenfruin* was that such part owners, being liable under the bills of lading to the cargo owners for the damages "would be liable to reimburse the defendants any amount of salvage which I might award. To avoid what is called 'circuity of action,' I must decline to make any award to these plaintiffs." This view implies that, apart from circuity of action, the claim of the *Glenavon* would have succeeded in full. The principle that salvage is not recoverable where the salving vessel is to blame for the collision, is not based on avoiding circuity of action. Thus in *Cargo ex Capella* (*sup.*) both vessels were to blame and the damages would, in accordance with the rule before the Maritime Convention Act, 1911, be apportioned in equal parts. *The Glenfruin* is not in my opinion inconsistent with *The Glengaber*, nor are the analogous cases of towage contracts, where the common owner of the wrongdoing tug and of the salving tug would generally be liable to repay in damages the full amount of any salvage award if made in his favour and paid to him for the services of the innocent salvor. Thus in *The Maréchal Suchet* (11 Asp. Mar. Law. Cas. 553; 103 L. T. Rep. 848; (1911) P. 1), tug owners were claiming awards for salvage services rendered by one of their tugs. The danger was caused by the unfitness and the negligence of that tug while towing the *Maréchal Suchet* under a towage contract. The claim was rejected because the unfitness and negligence of

that tug constituted a breach of the towage contract. The plaintiffs' counsel admitted that if that were so, they could not claim salvage for the services of three other tugs belonging to the plaintiffs which had come up. I do not know the reason for that admission; it may have been because the case was covered in principle by *The Glenfruin* (*sup.*). But in that case the masters and crews of the three innocent tugs were awarded salvage. So far as they were concerned there was no question of circuity of action. If they were to be treated as entitled to salvage because identified with the three innocent tugs on which they respectively served, it would seem to recognise that if it were not for the question of breach of the towage contract, salvage could properly have been awarded in respect of these tugs, but for the fact that it would obviously have been futile to make any such award. It is only when the salving vessel is to blame for the collision that it seems that not only the members of the crew actually in fault, but the whole crew, however meritorious their services, are debarred. I feel doubt about the equity or policy of so sweeping a rule, but it is not necessary to consider it here. The special case of theft by salvors in the course of salvage operations has often been discussed, as for instance in *The Clan Sutherland* (1918) P. 332), where salvors, who had either stolen or by their remissness had failed to prevent their fellows from stealing, were held debarred from recovering salvage, except two lieutenants who, though by want of proper supervision they had failed to prevent the thefts, were held not debarred altogether, and were given a reduced award in consideration of their very meritorious services.

Your Lordships were asked to say that the principles laid down by Sir R. Phillimore in *The Glengaber* (*sup.*) were bad law. On the contrary they are in my judgment sound in reason and supported by authority. I may add that they are treated as good law in recognised works on maritime law, as for example in Kennedy on Civil Salvage, 3rd Edit., p. 92; Marsden in Collisions at Sea, 10th Edit., p. 249; Roscoe's Admiralty Practice, 5th Edit., p. 141. I quote from the current editions, which do not in this matter differ from what the deceased authors wrote.

In my opinion, even if there had not been a Lloyd's Salvage Agreement executed between the parties, the salvage would have been claimable. But that agreement seems to me to put the matter beyond doubt. I have already observed that its validity is not and could not be contested. It specifically provides for remuneration as salvors in the event of success; there is no reservation for the possibility that the *Empress of Britain* was in whole or in part to blame; I see no ground for implying any such reservation. In my judgment, in view simply of the agreement, the condition propounded by Sir W. Norman Raeburn in par. 9 of his award that "the owners of the *Beaverford* are entitled to a salvage award" must be taken to be established, so that his alternative award set out in that paragraph should be upheld.

The appeal should in my opinion be allowed, the order of Bucknill, J. and of the Court of Appeal should be set aside, the award in the alternative should be upheld, and the appellants should have their costs of this appeal and their costs in the courts below.

Lord Maugham.—I am in complete agreement with the opinions of my noble and learned friend Lord Wright. It may not be superfluous to add a few words in relation to the "Conventions for the unification of certain rules of law respecting collisions and assistance and salvage at sea," signed at Brussels on the 23rd September, 1910. These conventions were signed on behalf of Great Britain and nearly all the maritime countries of the world. Art. 8 of the Convention relative to salvage contained this paragraph: "The court may deprive the salvors of all remuneration, or may award a reduced remuneration, if it appears that the salvors have by their fault rendered the salvage or assistance necessary or have been guilty of theft, fraudulent concealment or other acts of fraud." I think it useful to state that the proceedings prior to the signature of the Conventions contain nothing to suggest that, according to maritime law as understood by countries other than our own, the fault of a ship leading or contributing to a collision *ipso facto* deprived the owners of the ship of a right to remuneration for salvage services.

Steps were taken to pass legislation here carrying into effect, so far as necessary, the Convention agreements. The Maritime Conventions Act, 1911, contained a preamble referring to the fact that at the Brussels Conference of the previous year two Conventions dealing respectively with collisions between vessels and with salvage were signed on behalf of His Majesty, and also stating that "it is desirable that such amendments should be made in the law relating to merchant shipping as will enable effect to be given to the conventions"; but by some mischance the Act, though it contained five important sections containing provisions as to collisions at sea and two containing provisions as to salvage, omitted to contain anything dealing with the portion of art. 8 of the Convention relating to salvage above quoted. Most of the other countries whose plenipotentiaries signed the Conventions have passed the necessary legislation to give effect to the Conventions, including that portion of art. 8; and it seems so desirable, as the Conventions themselves show, that rules on these topics should be uniform, that it may well be expedient to take an early opportunity of remedying this omission. If that had been done in the Act of 1911, this litigation or the greater part of it would have been unnecessary; for the circumstances of the case are far from suggesting any shadow of a ground or any equitable principle for depriving the owners of the *Beaverford* of the award for salvage conditionally awarded to them by the learned arbitrator.

I agree with the proposed motion.

Lord Atkin.—I would like to say that I hope the important suggestion made by my noble and learned friend Lord Maugham will be considered by the competent authorities.

Appeal allowed.

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

Solicitors for the respondents, *Middleton, Lewis, and Clarke*, agents for *Middleton and Co.*, Sunderland.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Tuesday, November 30, 1937.

(Before Goddard, J.)

D/S A/S Gulnes v. Imperial Chemical Industries Limited. (a)

Charter-party—Demurrage and dead freight—Provision for detention of ship caused by Spanish civil war—Ship destroyed by bombs—Frustration of contract.

A charter-party contained a clause as follows: "If the steamer is detained at San Juan by any cause arising out of the civil war in Spain, the charterers agree to pay demurrage and (or) dead freight." On arrival at San Juan, and before she had given notice of her readiness to load, the steamer was bombed from an aeroplane and so seriously damaged that she had to be broken up.

Held, that the clause only applied to cases where a ship was temporarily detained and was still in a condition to carry cargo after being released. It was inapplicable to a case where the ship was destroyed and ceased to be a cargo-carrying vessel.

Action on a charter-party. The defendants had chartered the plaintiffs' ship to proceed to San Juan in Spain, and there to load a cargo of metal. The following marginal clause was inserted in the charter-party: "If the steamer is detained at San Juan by any cause arising out of the civil war in Spain . . . the charterers agree to pay demurrage and (or) dead freight." The ship proceeded to San Juan, and, immediately on her arrival and before she had given notice of her readiness to load, she was bombed by an aeroplane and totally wrecked beyond hope of repair. The owners claimed damages under the above-mentioned clause.

Sir *Robert Aske*, K.C. and *Naisby* for the plaintiffs.

Willink, K.C. and *McNair* for the defendants.

Goddard, J.—This case raises a short question of construction under a marginal clause of a charter-party. It arises in this way. In September, 1936, Imperial Chemical Industries Limited, the defendants, had chartered the plaintiffs' steamship *Gulnes* to proceed to the port of San Juan on the Guadalquivir, quite close to Seville, and there to load a cargo of ore. On account of the civil war which was then proceeding in Spain, and as the port of San Juan is very close to Seville (which was then, and is now, in the hands of the insurgents), and as Seville at that time was still subject to an attack by Government forces, the shipowners inserted in the charter-party a marginal clause in these terms:

> "If steamer is detained at San Juan by any cause arising from the civil war in Spain, riots, strikes, &c., charterers agree to pay demurrage and (or) dead freight."

What happened was this. The ship arrived at the mouth of the Guadalquivir on the 6th December, obtained custom papers, sailed up the river, and arrived at San Juan on Sunday, the 7th December, where she made fast to the quay. What then happened was as lamentable as it was shocking. A Government aeroplane—or an aeroplane which was assumed to be a Government aeroplane, because it was evidently attacking Seville for some reason or another—dropped a bomb or bombs on San Juan—I suppose regardless of the shipping which was in the port—and one of these bombs struck this unfortunate Norwegian steamer, killed the first officer, killed other members of the crew, and, obviously, from the captain's evidence, inflicted shocking injuries on others, and put the ship entirely out of commission. It was not a question of merely damaging the ship, so that she could be repaired, and there is no question about the extent of the damage. When the master gave his evidence he was asked: "At any rate, it is clear, is it not, that she was so badly damaged that she was not worth repairing, and was only fit to be broken up?" He answered: "Yes." That is, in fact, what happened to her. She lay in the river until the 31st December or the 1st January, when she was towed to Gibraltar. It was then found that she was not worth repairing, and she was broken up. In any circumstances, during the whole of the time that she was in the river at San Juan, she was not fit to load a cargo. There is no question about that.

Sir Robert Aske has argued that the marginal clause here is inserted to ensure that, if the steamer went to this dangerous port, she could at least get her freight, and get the profit that she would have made had she carried out the voyage. He contended that the intention of the clause is that, once she gets to San Juan, she is to be paid demurrage and dead freight, although he concedes that perhaps, in certain circumstances—as, for instance, if she was sunk—she might not get demurrage, but she would, at any rate, be entitled to dead freight. I may say—and I say it because Mr. Willink laid some stress upon it—that, in the view I take of the case, it does not make any difference. She was struck by the bomb before any obligation to load had attached to the charterers. She had not had time to give notice; she had only tied up a few minutes before. The captain apparently left the wheel-house just before the bomb struck the ship, thereby saving his life. He had gone to get his dinner, and nothing at all had been done in the way of giving notice. Whatever may be the object of inserting this clause, I can only give effect to the language which the parties have used, and, in my judgment, the language of this clause is wholly inapt to cover such a case as we have here. Here we have a ship destroyed as a cargo-carrying ship, and it seems to me that this clause is applicable only where the ship remained a cargo-carrying ship, that is to say, a ship capable of carrying cargo, or capable, if she was damaged by some matter arising out of the civil war, of being repaired in a reasonably short time. I do not think that it applies to a case where the ship is destroyed. If the ship is destroyed, and I am using the word "destroyed" in the sense of destroyed as a cargo-carrying ship, if she is sunk or so badly damaged that she cannot be loaded, and is, in fact, lost, it seems to me that it would be a misuse of language to talk about the ship being detained, in those circumstances. As I put it to Sir Robert Aske at a very early stage of the case, if the bomb had passed through the ship, knocked a hole in her bottom of such a size that she at once sunk, or if the water was not very deep there, settled on the mud and remained there as a wreck, it would be a very odd way of expressing the situation to say that the ship was detained. Of course, if she had been refloated, or if the leak was not a serious one, and the necessary repairs could be done in a very short time, or if the ship could not be regarded as lost, different consideration might apply.

(a) Reported by V. R. Aronson, Esq., Barrister-at-Law.

I think that we have here a case which brings it within the ambit of the line of cases of which *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) is a leading example. Here you have a frustration by the destruction of the subject-matter, which the parties must have contemplated would have remained in existence. I do not think that this clause makes provision for the destruction or damaging of the ship to such an extent that it no longer remains a cargo-carrying ship. It would be perfectly easy, by the use of appropriate words, to make that provision and to say that the owners should pay the freight whether the ship was destroyed by the event of civil war or was seized or requisitioned or what not. I do not think that the parties have done so. I think that the clause contemplates "detention" in the ordinary sense of the word, that she is delayed for a period of time. But if she is delayed either because the civil war prevented the charterers from loading or some other act of either the Government or the insurgents prevented the ship from sailing, then I think that the clause would have effect. I think that there is a great deal to be said for Mr. Willink's contention that this is really corollary to clause 10 of the charter-party. I will not decide whether the failure to load owing to the action of the contending parties in Spain would have been "any cause whatever beyond the control of the shippers or receivers," or whether that clause has to be read *ejusdem generis* with "by reason of floods, frost, bad weather." But whether that is so or not, I think that very likely the framers of this clause may have had clause 10 in mind, and wanted to say: "If you go to this port, you are not to say that this action of the warring parties in Spain is a cause beyond your control, and throw all that loss upon us. You will have to bear that loss, and you will not go to Spain unless you do." The clause would have worked in favour of the owners if the ship had remained, and, after loading, the forces of one side or the other had prevented her from sailing. However that may be, whether this is to be regarded as an extension of or a corollary of clause 10 of the charter-party, I am clearly of opinion that the words are not apt to apply to the state of circumstances that exists here. I think, as I have already said, that the case is governed by the line of authority, of which *Taylor* v. *Caldwell* (*sup.*) is a leading example, which has been applied to shipping in cases of detention. Consequently, I give my judgment to the defendants. I have to add only that, in the event of a higher court taking a different view, the demurrage has been agreed at 282*l.* 15*s.* and the dead freight at 500*l.*

Judgment for the defendants.

Solicitors: for the plaintiffs, *Sinclair, Roche,* and *Temperley;* for the defendants, *William Morris.*

House of Lords.

November 16, 18, 19, 22; *December* 22, 1937.

(Before Lords ATKIN, RUSSELL, WRIGHT, MAUGHAM, and ROCHE.)

Admiralty Commissioners v. Owners of M/V Valverda. (*a*)

Shipping—Salvage—Services rendered by ships of Royal Navy—Salvage agreement between Admiralty and owners of salved vessel—Admiralty not entitled to salvage—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557, *sub-s.* (1)—*Merchant Shipping (Salvage) Act,* 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

By the Merchant Shipping Act, 1894, *s.* 557, *sub-s.* (1): "*Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service. . . .*"

Certain ships of the Royal Navy went to the assistance of an oil-tanker in which fire had broken out. The owners of the oil-tanker voluntarily entered into a salvage agreement with the Admiralty in the Admiralty Standard Form, which contained a clause providing for certain payment in the event of the services not being successful. The oil-tanker was in fact towed safely to port. The Admiralty claimed that they were entitled to salvage by virtue of the salvage agreement notwithstanding the prohibition contained in sect. 557 *of the Merchant Shipping Act,* 1894.

Held, (1) *that the provisions of sect.* 557 *of the Merchant Shipping Act,* 1894, *were imperative and prohibitory and that the salvage agreement did not amount to a contracting out or waiver of such provisions;* (2) *that the salvage agreement was an agreement for maritime salvage within the Act, and not merely an agreement for work and labour, notwithstanding the provision for payment in the event of the services not being successful; and* (3) *that the provisions of sect.* 557 *were intended to be exhaustive and applied not only to the particular matters specified therein, but to all claims for salvage by a King's ship, including any claim for the use or services of any such ship.*

Decision of the Court of Appeal (156 *L. T. Rep.* 98; (1937) 1 *K. B.* 745) *affirmed.*

APPEAL from a decision of the Court of Appeal (156 L. T. Rep. 98).

The appellants, the Admiralty Commissioners, claimed against the respondents, the owners of the motor vessel *Valverda*, salvage payment in respect of the services of a number of vessels belonging to His Majesty rendered to the motor vessel *Valverda*, which caught fire out at sea on the 21st January, 1935. The appellants relied on a salvage agreement in the Admiralty Standard Form which the respondents had entered into with them. On an arbitration the arbitrator (Sir Norman Raeburn, K.C.) made an award in the appellants' favour for 11,000*l.*, subject to the opinion of the court on a special case stated by him. The special case came before Branson, J. who upheld the arbitrator's award. The respondents appealed to the Court of Appeal, which, by a majority (Slesser and Scott, L.JJ., Greer, L.J. dissenting), reversed his decision. The Admiralty Commissioners appealed to the House of Lords.

(*a*) Reported by H. A. PALMER, Esq., Barrister-at-Law.

The facts and material statutory provisions are fully set out in the opinion of Lord Wright.

Sir *Donald Somervell*, K.C. (A.-G.), *G. St. C. Pilcher* K.C., and *Owen L. Bateson* for the appellants.

Kenneth Carpmael, K.C. and *H. G. Willmer* for the respondents.

The House took time for consideration.

December 22.—The following judgments were delivered :

Lord Atkin.—My Lords, in this case I have had the opportunity of reading the opinion which my noble and learned friend Lord Wright is about to deliver. I entirely agree with it, and I have nothing to add.

Lord Russell.—My Lords, I have had the same advantage, and I also concur.

Lord Wright.—My Lords, the appellants, whom I shall refer to as the Admiralty, obtained from Sir Norman Raeburn, K.C. an award in their favour of 11,000*l.* for salvage services rendered to the respondents' motor vessel *Valverda*, her cargo and freight, by vessels belonging to His Majesty. The award was in the form of a special case subject to the opinion of the court on the question of law stated in it. If the court should answer that question in a sense contrary to the opinion of the arbitrator, the award was to be for 6500*l.* Branson, J., before whom the special case came, took the same view as the arbitrator, but his decision was reversed by the Court of Appeal by a majority, composed of Slesser and Scott, L.JJ., Greer, L.J. dissenting.

The central question in the case is the meaning and effect of sect. 557, sub-sect. (1), of the Merchant Shipping Act, 1894. This section is in the following terms :

> " 557. (1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved."

This provision was amended by the Merchant Shipping (Salvage) Act, 1916, which was described in the preamble as " An Act to authorise the recovery of salvage in respect of services rendered by certain ships belonging to His Majesty." Sect. 1 of that Act provided as follows :

> " 1. 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 section five hundred and fifty-seven 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 Admiralty's primary contention was that the operation of sect. 557 was excluded and superseded by a salvage agreement entered into between the Admiralty and the respondents. They alternatively contended that the agreement was not for salvage, but for work and labour, and took the case out of the law of maritime salvage, so that the section did not apply at all. In the further alternative they contended that the section did not prohibit all claims for salvage, but merely excluded certain specific elements, leaving the Admiralty entitled to claim in respect of anything not expressly excluded, in particular for the use or services of the vessels. The dispute did not affect the claims in respect of such of the Admiralty vessels employed in the salvage as fell within the Amending Act of 1916 or the claims of the officers and crews of all the vessels employed. These claims were not contested and were covered by the alternative award of 6500*l.*

The *Valverda* is a motor vessel of 8806 tons gross register. She was at the time of the salvage services on a voyage from Curacoa to Land's End for orders with a cargo of petroleum. Ship, cargo and freight were valued at 92,616*l.* in all. On the 21st January, 1935, when she was in about latitude 25 degrees 17 N., longitude 52 degrees 00 W., a fire broke out in her engine room. She sent out by wireless an SOS signal. H.M.S. *Frobisher*, a cruiser of 9860 tons displacement, proceeded in answer to the signal, reached her on the 22nd January, 1935, took her in tow as she was helpless and towed her to Bermuda, a distance of about 900 miles. The *Guardian*, a smaller cruiser of 3050 tons, also came up to assist and rendered some help. At a later stage, salvage services were also rendered by two craft within the description of the Act of 1916, and some assistance was given by a fleet auxiliary, the *Orangeleaf*. The arbitrator found that the services were difficult and dangerous, and involved serious risk to the salving vessels (save the fleet auxiliary) and their personnel. On the 25th January, 1935, the respondents in England signed the Admiralty Standard Form of Salvage Agreement, which was also signed on behalf of the Admiralty. The parties were by then fully apprised by wireless of the position of the *Valverda* and of the names and character of H.M. vessels which were rendering the salvage services. The respondents made at the time no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services.

The arbitrator found that the Admiralty incurred expenses, which were reasonable expenses, in rendering the salvage services, amounting to 4770*l.* 19*s.* 2*d.* These expenses consisted of extra consumption of fuel and stores, of the value of gear and wires lost, of the cost of repairing damage sustained and other matters in connection with the salving vessels, which in addition to the two cruisers and the *Orangeleaf*, included also H.M.S. *Sandboy* and the yard craft *Creole*. Of the 4770*l.* 19*s.* 2*d.*, 864*l.* 0*s.* 3*d.* was for repairs to the *Sandboy* and 264*l.* 0*s.* 10*d.* was for extra fuel and stores consumed by the *Sandboy* and *Creole*. The arbitrator found that the *Sandboy* and *Creole* were vessels within the Act of 1916, whereas the *Frobisher*, *Guardian* and *Orangeleaf* were not. It was common ground that the Admiralty in their claim were representing also the claims of the officers and crews of the salving vessels, and were trustees *pro tanto* on their behalf of any award, and would apportion and distribute the appropriate amount among them according to the Admiralty rules in that regard. The necessary permission of the Admiralty for the officers and crews to claim was produced *de bene esse* to the arbitrator. The question stated by the arbitrator was whether the Admiralty were entitled in law to salvage remuneration in respect of the services of

H.M.S. *Frobisher*, H.M.S. *Guardian*, and R.F.A. *Orangeleaf*. He made his award of 11,000*l.* on the footing that they were so entitled. His alternative award of 6500*l.* was on the footing that they were not.

The substance of the salvage agreement which was signed may be briefly summarised. It was on the Admiralty Standard Form of Salvage Agreement, described on its face as D.46 (a dockyard form) established October, 1917, revised June, 1934. It bears no relation to, and contains no reference to, sect. 557. It was obviously and admittedly prepared in view, and for purposes, of the Act of 1916. Under the agreement the Admiralty agreed to use such endeavours as they or their officers might in their absolute discretion think fit to salve or assist the ship *Valverda* and her cargo and freight, and the owners engaged the services of the Admiralty for such purposes. It was stipulated that the agreement should relate back to the services already rendered before its execution. The remuneration, if not agreed, was to be fixed by arbitration in accordance with the provisions particularised in the relevant sections of the agreement, and was to consist, if the services were successful or beneficial, of a reasonable amount of salvage. Provision was made for the owners giving security on the termination of the service to the satisfaction of the Committee of Lloyds and pending the completion of the security the Admiralty were to have a maritime lien on the property salved for their remuneration. Clause 5 contained provisions which were to apply if the services were not successful or beneficial. In that event the actual out-of-pocket expenses incurred by or on behalf of the Admiralty in the endeavours to salve the ship, cargo and freight, together with compensation not exceeding 350*l.* for any loss or damage incurred in such endeavours, was to be the measure of the remuneration to the Admiralty, but there was not to be included in the expenses or compensation any charge for the use of any ship or tug belonging to His Majesty.

It was strenuously contended on behalf of the Admiralty that this agreement, which was deliberately entered into by the respondents with full knowledge of all the material facts, overrode the provisions of sect. 557. It was pointed out that the beneficial, onerous and expensive services were rendered in consideration of the respondents' undertakings. His Majesty's vessels, even if by statute bound to stand by, were under no legal obligation to render salvage, and might have left the salvage operations to other vessels. It is true that the Admiralty in the King's Regulations have strongly inculcated on the officers and crews of His Majesty's ships that it is their duty to render assistance to vessels in distress, but that is a moral obligation and gives no legal rights to a shipowner, whereas the agreement did give legal rights to the respondents, but only in consideration of the corresponding legal rights given to the Admiralty. It was urged that the respondents had "contracted out" of the statute or had waived its benefit and that the agreement was enforceable according to its apparent tenor in the events which happened. As the services had been successful and beneficial, the Admiralty, it was urged, were entitled to a reasonable amount of salvage, as if they were private salvors free from any prohibition or limitation under sect. 557. No distinction could be or was drawn between the cruisers and the tug. All the salving vessels were to have the same rights and remedies as if they did not belong to His Majesty. Such were the submissions which found favour with the arbitrator, with Branson, J. and with Greer, L.J. But with all the deference due to such eminent authorities, I cannot agree with their conclusion. Such a conclusion would, in addition to the reasons I shall next state, afford a simple and easy way of evading or nullifying sect. 557 and make it a matter of wonder why the Act of 1916 was necessary. A binding salvage agreement may be entered into (subject, no doubt, to a certain jurisdiction over it vested in the Court of Admiralty) without the formality of any writing or standard form. Thus it may be made by word of mouth between the commander of the King's ship and the master of the ship in distress at the very time and place of the salvage service. The operation of the statute might thus be excluded in every case. But the section is, in my judgment, clearly in its terms imperative and prohibitory, "No claim shall be allowed." It falls into two parts, both equally imperative, the first portion which is general, the second which applies only to claims by the commander or crew, and requires for such claims the consent of the Admiralty. Both equally, in my opinion, are provisions dictated by public policy and are imposed not for the benefit of any individuals or body of individuals, but for considerations of state. The latter provision was apparently inserted to prevent improper claims by officers and crews, such as that which in 1838 invoked the censure of the court in *The Rapid* (3 Hagg. 419). That provision could not, in my opinion, be the subject of contracting out or waiver. The object and policy of the former provision are more difficult to define with any certainty, as will be discussed later. But it is clearly based on public considerations. Wherever there is a question whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute. Little help can in general be derived from other statutes. Thus statutes which deal with procedural or evidential requirements, such as the Statute of Frauds, or the Public Authorities Protection Act, 1893, may in some cases be the subject of waiver, though even in Acts of that character considerations of the purpose of the particular statute may exclude waiver or contracting out. But such Acts are far removed from an imperative public enactment such as sect. 557, which governs the position of a State Department and State servants. The case of *Griffiths* v. *Earl of Dudley* (47 L. T. Rep. 10; 9 Q. B. D. 357) was relied on as a case in which a court held that contracting out of a statute was legitimate and valid. I confess to some doubts whether the case was well decided, but it is not necessary to discuss that further here, because it was a case very unlike the present. The Act in question there, the Employers' Liability Act, 1880, was obviously passed for the benefit of workmen. I am not concerned to say that the benefit of a statute may not be contracted out of or waived in appropriate cases. All I need to say is that this, in my opinion, is not such a case.

But I do not think that the agreement on its true construction involves the question. The agreement does not in terms purport to exclude or waive sect. 557. I see no reason why any such intention should be implied. What is to be given as remuneration in the event of success or benefit is to be a reasonable amount of salvage. That imports, in my opinion, that the remuneration is to be ascertained in accordance with the principles which are applied in fixing salvage rewards according to maritime law. That the services were to be

treated as salvage services is, I think, also clear from the stipulation for a maritime lien. A maritime lien cannot be created by contract. In my opinion this agreement must be construed as governed by the relevant rules of maritime salvage. In the particular case of salvage by His Majesty's ships, one rule which is applicable is that embodied in sect. 557. I venture to quote in this context a sentence from the admirable judgment of Scott, L.J., to which I have been much indebted : " What is there then in the language of the agreement to justify our interpreting it as intended to enlarge the Admiralty's rights, either in their own behalf or on behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which without an agreement they would have no right ? " And I agree with his conclusion that all that the agreement stipulates for is such salvage remuneration as is " not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more." I think no question of contracting out or waiver arises in fact or could in law arise.

This renders it necessary now to deal with the alternative contention. This is directly inconsistent with the first contention which I have rejected. The alternative contention is that sect. 557 does not apply at all to this case because the services were not salvage services under the maritime law but were rendered under the agreement, which was not a salvage agreement but an agreement for work and labour. I have already sufficiently indicated a view that the agreement was an agreement for salvage and that the services were salvage services within sect. 557. The provisions for remuneration as salvage and for a maritime lien would be sufficient in themselves to establish this. Salvage must be voluntary in the sense that it is not rendered under a pre-existing obligation, but it is not deprived of the character of voluntariness merely because the salvor has made an agreement regulating (subject always to the jurisdiction of the Admiralty Court) the conditions under which he renders the salvage services. But I have to note one objection particularly relied on by the Admiralty. The objection is based on clause 5 of the agreement. That clause provides for a remuneration in the event of non-success. It is said to be inconsistent with the nature of salvage, which is necessarily on a " no cure no pay " basis. Its presence, it is said, determines the character of the whole agreement and prevents it from being regarded as an agreement for salvage. This argument is, in my opinion, not only unsound in principle, but contrary to well-established decisions of the Admiralty Court. It was boldly contended that these decisions were wrong, in particular *Kate B. Jones* (7 Asp. Mar. Law Cas. 332 ; 69 L. T. Rep. 197 ; (1892) P. 366) and *Edenmore* (7 Asp. Mar. Law Cas. 334 ; 69 L. T. Rep. 230 ; (1893) P. 79). In the former case Gorell Barnes, J. was of opinion that the salvor would be entitled to some remuneration even in the event of failure, because he was in some respects an agent of the owner of the salved vessel, and accordingly he based his award on the principle that the risk of the entire loss of the salvor's expenditure, if unsuccessful, was a risk which the salvor there did not incur. But that did not lead the judge to treat the services as other than salvage services, though it did affect the amount of the salvage remuneration which was awarded. Similarly in the *Edenmore*, the same learned judge was inclined to the view that the agreement would entitle the salvors to some remuneration even if the services were not successful. But he held that the services were salvage services and made a salvage award, adding that it was very difficult to say what precise effect such a stipulation ought to have in reduction of the sum awarded when the services proved successful. I think the principles accepted by that very learned and experienced judge are sound. The stipulation for some payment in the event of failure is severable. It could not affect the position if the services were successful, save that it might properly be taken into account so as to reduce the amount of the award on the ground that the salvor was not taking the full risk of " no cure no pay." In my judgment the services rendered to the *Valverda* by the Admiralty vessels were salvage services and the agreement was a salvage agreement, so that sect. 557 applied and excluded the appellants' claim.

But even so, the third point remains to be considered. This is that sect. 557 does not exclude all claims for salvage, but only the specific claims enumerated in the section, and that there are other claims beyond these, or at least one important claim, namely, for the use or services of the King's ship as a salving instrument. It is conceded that a King's ship is not a profit-earning vessel. But all the same, it is said, she may properly be taken to have a value to the Admiralty reducible to terms of money, so that they can claim in respect of that value during the period in which the ship was occupied on, and appropriated to, the salvage service. The case, it was contended, was, if not identical with, at least similar to the case where damages are awarded to the Admiralty for loss of time consequent on damage to a King's ship sustained in a collision due to the negligence of the defendants' servants. Such a case was discussed in the *Admiralty Commissioners* v. *Steamship Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450 ; (1926) A. C. 637), where Lord Sumner, while admitting that such damages were claimable, pointed out the difficulties of estimating them. " Sometimes," he said, " the value of the user may really be no more than that of floating accommodation for officers and crew who have among other things to be kept under discipline and busy." On that view it may be said that, so far as user of the vessels is concerned, the Admiralty in this case may have suffered no loss or no appreciable loss, so that this element might not affect the amount awarded. But the amount awarded is a matter for the arbitrator if he acts on correct principles, and the Admiralty relied on the actual language of sect. 557, which did not in terms, they said, prohibit all salvage claims by a King's ship, or in terms exclude a claim for use of the ship, though it excluded claims for use of stores, and claims for loss, damage or risk to the ship or her stores. They contended that damage or risk to the ship may be regarded as an element in salvage distinct in principle from user of the ship, and that the omission of any express reference to the use of the ship is not made good by the general words " any other expense or loss," because these words refer to recoupment, whereas payment for use of the ship is a subject matter of reward, nor could such general words make up for the significant omission of reference to the use of the ship. While it is true that the language of sect. 557, merely on the literal meaning of the actual words, is not free from difficulty, I think that when the practical effect of the section is looked at, its intention is clear, and that it is to exclude all claims for salvage by a King's ship. The enumeration of items or elements, coupled with the general words, was meant to be exhaustive. In fact, the use of the ship was not regarded as a separate element of claim. If items of loss and

expense, out-of-pockets, consumption of stores, actual risk, and so forth were excluded, *a fortiori* must the same be true of any reward for user. User is in truth a difficult idea when applied to non-profit-earning vessels, which, like the cruisers, are dedicated to public service, and for which the Admiralty are trustees for the nation, which is interested in salvage being rendered to vessels in distress. To modern ideas this is not perhaps so obvious as it seems to have been in 1853. It is difficult now to see any decisive reason why the general body of taxpayers should bear the expense of salvage rather than the particular shipowners or underwriters who have benefited by it. The case is even less obvious when the ships salved are foreign or the underwriters are foreign in whole or in part. But so far as has been ascertained, until this case no one has contended that sect. 557 left it open to the Admiralty to make any claim of any kind whatever for salvage services rendered by their ships. It has been consistently accepted by the Admiralty that they are barred from any claim for salvage, subject to the limited exception introduced by the Act of 1916. If the actual words of sect. 557 were regarded as leaving the matter in doubt, the long sequence of authority (or rather want of authority, because the Admiralty never claimed the right to claim) might well be regarded as decisive. But there is another matter to be considered. The construction of a statute like this cannot properly be determined without ascertaining what the state of the law was at the time when the section was originally enacted in 1853. This, I think, makes it clear that sect. 557 was intended to exclude all claims for salvage by the Admiralty and requires that it should be so construed.

The world has become accustomed to heavy claims and awards for salvage being made to shipowners in respect of their vessels, which are regarded as agents or instruments of the salvage. If it were not for the powerful steam or motor vessels of modern days, with their elaborate and valuable machinery and equipment, salvage such as the towage of the *Valverda* could not be achieved. The personal courage and exertions of the salving officers and crew would be of little avail without the aid of the mechanical means and the power supplied by the salving vessel. But this is a modern idea due to modern conditions which did not exist when sect. 39 of the Merchant Shipping Act, 1853, was enacted. That section was re-enacted by sect. 484 of the Merchant Shipping Act, 1854, which again was re-enacted by sect. 557 of the Consolidating Act of 1894. As the language of the three sections is substantially the same, it is essential to observe what the law was in 1853, because it was in view of that state of law that sect. 39 was passed. At that time it is, I think, clear from the cases that the original idea that salvage was personal still retained its force, but was in process of being weakened by the growing sense that private shipowners should in certain cases be given for the services of their steam vessels remuneration which went beyond the awards in respect of demurrage or repairs, actual expenses and perhaps risk, which constituted the limit of what was generally given them in those days. Even in 1831 in *The John* (2 Hagg. 338), the court observed that the claim of owners was generally very slight unless their property became exposed to danger or they incurred real loss and inconvenience. The award given in that case of 700*l.* was to cover demurrage, repairs, risks, and all expenses. A little earlier in *The Vine* (1825, 2 Hagg. 1), it had been laid down that the general rule was that parties not actually occupied in the salvage services were not entitled to salvage, but an exception was made in favour of owners of vessels which in rendering assistance had experienced special mischief and loss. But a special exception had already begun to be made in the case of steamships. A very early instance is *The Raikes* (1 Hagg. 246) in 1824. The reason was explained to be because of their greater power and efficiency. But this practice was not extended to claims in respect of King's ships, whether steam or sailing vessels. It was well recognised that the officers and crew were entitled to claim, but I know of no case before 1853, except *The Thetis* (3 Hagg. 14), decided in 1833, where the Admiralty claimed or were awarded even expenses. This was an exceptional case in which naval crews with the help of naval vessels salved sunken dollars to the value of 157,000*l.* The Admiralty were awarded 12,000*l.* to cover the pay of the men during the eighteen months in which they were employed on the salvage, and also victualling, wear and tear of ships, and all expenses during their prolonged operations. Nothing was claimed or awarded for the user of the vessels. Sir Christopher Robinson said that the case was different from the assistance afforded in ordinary cases by public vessels for which theretofore nothing had been charged. But even in that case, the award was made on the basis of the owners not objecting. It is to be noted that claims made by naval officers and crews were habitually described as claims by ships of His Majesty, but the Admiralty were not claimants. In *The Lustre* (3 Hagg. 154), the Admiral at Portsmouth dispatched His Majesty's steamer *Dee* to assist a vessel in distress on the terms expressly agreed that the owners and underwriters would be responsible for all stores expended or damaged. Sir John Nicholls awarded salvage to the officers and crew, observing that it was a mistake to suppose that the public force was to be employed gratuitously in the service of private individuals to save them from expense. That was a peculiar case, but the Admiralty did not claim in the suit. The claim was by the officers and crew. The Admiralty were paid, it seems, under the express bargain which was only for stores expended and damaged. In *The Iodine* (3 Notes of Cases 140) in 1844, the claim was by the officers and crew as usual and not by the Admiralty. The court observed with regard to His Majesty's vessels that the award would be less, the vessels being at the expense of the country. That must have referred to the award to the officers and crew, as they were the claimants. These and other cases seem to me to show clearly that no one dreamt of any claim by the Admiralty for the use of public vessels in salvage, and that claims by the Admiralty for risk, loss or damage were for all practical purposes never made. The *Thetis* and the *Lustre* seem to be the exceptions which prove the rule. They may have been noticed as cases tending to introduce a new and, as it seemed, objectionable practice, which called for legislative prohibition. Hence sect. 39 of the Act of 1853 took the form it did. It excluded every claim that anyone thought could be made for salvage by a King's ship and I have no doubt was intended to exclude all claims for salvage by the Admiralty and should, I think, be so construed. Meticulous draftsmanship has at times caused difficulty by making an enumeration believed to be exhaustive, where a simple universal would have better served.

That is certainly what has been understood in the reported cases and text writers from the passing

of the Act of 1853, until the question was raised in this case. In 1857 in *The Mary Pleasants* (Swa. 224), His Majesty's vessel *Leopard* had rendered salvage services. The officers and crew with the authority of the Admiralty under the Act of 1854 claimed and were awarded salvage for their personal services. Dr. Lushington added: "When I say personal services I use that expression in order to distinguish it from other cases, inasmuch as it has been observed by Dr. Twiss that no claim could be made on account of the assistance given by the vessel herself for any risk or damage she had incurred." Dr. Lushington is plainly negativing any claim whatever by the Admiralty. The Admiralty have sought since then to claim salvage on the ground, not that salvage was claimable in respect of a King's ship, but that the salving vessel was not a King's ship. Such a claim failed in *The Matti* ((1918) P. 314), where salvage was rendered by a requisitioned ship. The Admiralty claimed a salvage award, but their claim was rejected *in toto* because it was held that the *Matti* was a King's ship, so that the Admiralty claim failed because of sect. 557, though the claim of officers and crew was allowed. It was not suggested that, though the Admiralty had no general claim for salvage, at least there was a limited claim for the use of the ship. There are other cases to the same effect which I need not cite. In 1916 in *The Sarpen* (13 Asp. Mar. Law Cas. 320; 114 L. T. Rep. 1011; (1916) P. 306), it was held that the salving tug was not a King's ship, but Swinfen Eady, L.J. thus stated the law: "Where salvage services are rendered by a King's ship no claim to salvage can be made in respect of the ship, but the commander and crew may prosecute a claim with the consent of the Admiralty (sect. 557 of the Act of 1894)." It is interesting to compare these words with the words of Dr. Lushington in 1857. Pickford, L.J. states the law to the same effect, and so, I think, did Bankes, L.J., though he uses the word "restricting." There is in fact no exception on this matter to the course of authority.

The same view of the law was, I think, taken by the Legislature when they passed the Act of 1916 set out above. That Act clearly presupposes that without it the Admiralty could have no claim at all for salvage. The Act, so far as the special classes of vessels are concerned, gives to the Admiralty (1) a claim for salvage; (2) a claim on the same footing as if the vessels were not vessels belonging to His Majesty. The Act was no doubt passed because of the decision in *The Sarpen*. The change which it made when applied to the case of tugs requisitioned under T 99 was pointed out in *Page* v. *Admiralty Commissioners* (15 Asp. Mar. Law Cas. 81; 123 L. T. Rep. 754, at p. 755; (1921) 1 A. C. 137, at p. 142), by Lord Birkenhead, in agreement with what had been held in the Court of Appeal in the same case, *Admiralty Commissioners* v. *Page* (120 L. T. Rep. 137; (1919) 1 K. B. 299). In *The Morgana* (124 L. T. Rep. 254; (1920) P. 442), a cable ship was held disentitled to any salvage under sect. 557 as being a King's ship.

The long and unbroken sequence of cases in which the statutory prohibition against the Admiralty claiming any salvage of any kind at all has been assumed or enforced without the contrary ever being suggested by the Admiralty, and the recognition of the prohibition by the Legislature in 1916 would, in my judgment, in any event make it impossible for this House to hold now that the Admiralty have the right to claim anything for salvage for the use of the vessel.

I have given reasons for the view that the true construction of the clause is to exclude all claims whatsoever for salvage by the Admiralty, but even if I were wrong in this, it would, I think, be too late for this House to set aside the consistent and unbroken authority of the Admiralty Court and the Court of Appeal, and depart from the established rule and practice, even though the question has not been determined by this House. This House has no doubt power to overrule even a long established course of decisions of the courts, provided it has not itself determined the question. It is impossible to lay down precise rules according to which this power will be exercised. But in general this House will adopt this course only in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law. This is not such a case. The Admiralty, on whom rested the responsibility for all these years of correcting the error, if error there was, have abstained until now from attempting to do so. When in 1916 the Government introduced legislation which was based on, but intended to vary, the prevailing view of the law, the departure from the existing rule was of strictly limited extent and left the main bulk of the rule unaffected. If the law is now to be declared in a different sense, it must be by the Legislature.

This point does not seem to have been raised as a substantive question on these proceedings until the appeal came before this House, though it seems to have been adverted to before Branson, J. Your Lordships are asked to remit the case to the arbitrator and re-open what would, in effect, be a new inquiry. No doubt your Lordships have jurisdiction to remit, but I should not think it would be a proper case in which to exercise that discretionary jurisdiction. However, I think the point is bad in law.

In my judgment the appeal fails, the order of the Court of Appeal should be affirmed and the Admiralty should pay and bear the costs of the appeal to this House.

Lord Maugham (read by Lord RUSSELL).—The opinion of my noble and learned friend Lord Wright contains an ample statement of the facts, and an elaborate examination of the authorities, both of which I am happy to be able to adopt without qualification. The importance of the case and the able arguments of counsel are my excuse for adding some remarks, shortly stating in my own language the reasons which have led me to the same conclusions. Three points of general interest arise on this appeal:

First, are the provisions of sect. 557, sub-sect. (1), of the Merchant Shipping Act, 1894, excluded by a contract of the nature of a salvage agreement made between the Admiralty and the owners of the vessel salved?

Secondly, does an agreement for rendering services to a vessel in distress cease to be an agreement for salvage under the maritime law if there is found in it a provision for some recoupment or remuneration being paid to the salvor if the services turn out to be wholly unsuccessful?

Thirdly, does sect. 557, sub-sect. (1), upon its true construction exclude claims by the Admiralty to remuneration of any kind for salvage services successfully rendered?

While adding a few remarks on each of the questions, I desire to make it clear that I entirely agree with the views expressed by my noble and learned friend.

On the first point it is to be observed that sect. 557, sub-sect. (1), contains without ambiguity two prohibitions. The first prohibits a claim on behalf

of the Crown for the enumerated losses and expenses sustained by the Crown in rendering salvage services and for the risk to which the ship and her contents have been exposed: the second prohibits claims by the commander or crew unless the consent of the Admiralty to the prosecution of the claim is proved. It seems to be evident that the second prohibition cannot be avoided by a contract between the commander and the master of the ship. No one indeed suggests that that is possible. Why is a different rule as a matter of implication to be applied to the first prohibition? This alone seems to me to be a sufficient reason for answering the first question in the negative; but there are other reasons equally decisive. Nothing in the language of the section suggests that a salvage agreement will take the case out of the statute. The section can only be explained on the hypothesis that the Legislature thought that such claims by the Admiralty were not in the public interest. Sects. 557 to 564 are prefaced by the heading "Salvage by Her Majesty's Ships." A mere perusal of them tends to show that they are general and not intended to be excluded by a salvage agreement. If such an exclusion had been intended it would have found an appropriate and a suitable place in sect. 562. Finally, it is legitimate to consider the position as it was in 1853 when the relevant part of sect. 557 was first enacted (sect. 39 of the Merchant Shipping Act, 1853). At that date there was no such device as that of wireless communication. Is it to be supposed that the framers of the section conceived that the commander of one of Her Majesty's ships was to be at liberty, for the benefit of the Crown, to negotiate an agreement ousting the section with the master of a vessel in grievous distress on the high seas? If an answer in the affirmative were possible, it would seem to follow that such a commander ought always in carrying out his duty to the Crown to do his best to secure such an agreement. In my opinion it is clear that the answer must be in the negative; and if so it follows that, since the prohibition is absolute in its terms, there can be no ground for implying such a term as is suggested, namely, an exception or qualification in the case where there is an agreement. Unless such a term can be implied I think that no question of "contracting out" of the section arises at all. We have to deal with an imperative prohibition binding the Crown in its relation with subjects, and I am unable to understand how it could be right to hold that the prohibition is to cease to have effect if the Admiralty, being in control of the situation, insisted on a salvage contract. So to hold would be to make the prohibition futile.

On the second point it should be noted that the question of the effect of a stipulation that certain expenses or losses incurred by the salvor should be paid for in any event is of a general character, and not confined to the services of the King's ships. If there had been any sound reason behind the argument that such a clause was wholly inconsistent with the nature of salvage, no doubt we should have been bound to give the contention its effect; but the examination of the matter in the speech of my noble and learned friend seems to me a sufficient answer to that contention. I can see no reason for holding that the master or owner of a ship cannot enter into a true salvage agreement, for example, in Lloyd's well-known form and at the same time enter into another agreement with the salvor that certain definite expenses which he expects to incur in any event shall be recouped to him whether his services are fruitful or not. If this be so, such a clause as clause 5 in the Admiralty Standard Form of Salvage Agreement is clearly severable from the true salvage agreement. For myself I will add that it would be unfortunate if the contention that an agreement in the Admiralty Form (with clause 5 in it) is not a salvage agreement at all were to prevail. The master of a commercial vessel may well be willing to enter upon a salving enterprise possessing very doubtful prospects of success if he can secure an agreement that a certain expense or loss in which the job will involve his ship will in any event be repaid. It would not be in the true interests of shipping if this were held to be impossible.

The third point has occasioned your Lordships some trouble and has involved much consideration of the authorities. The difficulty has been caused by the defective form of the first part of sect. 557, sub-sect. (1). On the one hand the question leaps to the mind, why did not the Legislature simply enact that in the case of services being rendered by any ship belonging to Her Majesty no claim for salvage services should be made? On the other, one asks oneself why should the Admiralty be deprived of precisely that recoupment which one would have thought reasonable, that is, recoupment in respect of actual expenses and loss incurred by the salving vessel, and yet be left to make some claim for remuneration? And finally, if there is to be some remuneration, how is it to be estimated or assessed if not only all expenses and loss sustained by reason of the services are to be excluded, but also any consideration based on the risk caused to the ship and her stores, tackle, and machinery? I am not sure that wholly satisfactory answers can be given to all these questions, but on the conclusion of the arguments of counsel and after reading all the authorities they referred to, it seemed to me reasonably clear that the specific exclusions enumerated in the section were designed to leave nothing upon which a salvage award could properly be founded. The only item or element in the assessment which the words of the material part of the section do not specifically include is the "use" of the salving vessel. The arbitrator concerned would certainly have to omit from his estimate the whole of the expenses and losses incidental to such use of a ship belonging to the Crown and also the risk incurred. I do not suppose that he would be unable, on some such lines as those indicated, not without some characteristic sarcasm, by Lord Sumner in *Admiralty Commissioners* v. *Steamship Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450; (1926) A. C. 637), to name a figure for what I may call the barren use—the skin of the plum without either the fruit or the kernel—but I think we have to ask ourselves whether in 1853 the words of the section placed such a curious burden on him. When once it is established that before that date no such claim had ever been made in respect of a ship belonging to Her Majesty, and that the awards which had been made in respect of them were limited to such matters as victualling, wear and tear, and actual losses and expenses, all of which are prohibited since 1853, we are led a long way towards a negative answer. It is, I think, relevant to consider that the owners of sailing ships did not very often render such services, apart from the services of their crews, as to entitle them to salvage awards. With the coming of steamships and the increased possibilities of towage the situation gradually altered. But at first the element in the services of a ship and its owners which was mainly, if not solely, regarded was the element of special loss and expense incurred: (see *The Vine* (2 Hagg. 1) and the very remarkable case of *The Thetis* (3 Hagg. 14)).

It should be observed that in 1853 steam navigation was still in its infancy. The majority of Her Majesty's ships and the overwhelming majority of commercial ships were still sailing vessels. The early paddle-steamers were of small size. In 1853 only three or four line-of-battle ships were propelled by a screw, and they were converted sailing-ships: (see Clowes, History of the Royal Navy, Vol. VI., pp. 196 *et seq.*). In view of these facts it would seem unlikely that the wording of the section, which makes no distinction between steamships and sailing ships, was designed to permit a special allowance for the use of steamships belonging to the Crown, while precluding any claim for (among other things) the prodigal expenditure of coal which the engines of that day required. This consideration may perhaps serve as an addition to the reasons given by my noble and learned friend derived from his careful examination of the authorities. Having regard to those reasons, including the amending Act of 1916 and the unbroken chain of authority in which the statutory prohibition against claims by the Admiralty of salvage of any kind (except under the Act of 1916) has been assumed, it is in my view impossible to come to any conclusion except that the section now bars any claim by the Admiralty for salvage by ships which are neither tugs nor specially equipped with salvage plant.

My Lords, this concludes what I have to say on the three main points. I have nothing to add on the question of the true construction of the salvage agreement in the Admiralty Standard Form to what has been said by my noble and learned friend and to the reasons given in the able and exhaustive judgment of Scott, L.J. I concur in the proposed motion.

Lord Roche (read by Lord RUSSELL).—My Lords, had the argument for the appellants in this House rested where it stood before the arbitrator, and before Branson, J. and the Court of Appeal, I should have been content to say that I was satisfied with the reasoning of the majority judgments in the Court of Appeal and most fully developed in the lucid and learned judgment of Scott, L.J. But the argument has assumed a wider range and I think it right to state shortly my reasons for agreement with the conclusions set out in the opinion of my noble friend Lord Wright which I have had the advantage of perusing.

The last point taken in your Lordships' House, and not taken at any earlier stage in the proceedings, is perhaps logically the first point in the case. It is that the statutes relevant to be considered do not forbid claims for salvage by the Admiralty for the services of a ship, but only forbid the consideration of certain elements which would otherwise fall for consideration in the making of a salvage award. It would, I think, be a sufficient answer to say that the point was taken altogether too late and that the award ought not now to be remitted for consideration. But the point has been fully argued and it is more satisfactory that it should be dealt with on its merits. It was urged that the statutes did not forbid a claim or an award which, neglecting the specifically forbidden elements, took into account the time and the use of a salving vessel and the benefit conferred on a salved vessel. This contention is in my judgment unsound and is only plausible if the history of the matter is ignored. The law of salvage as administered by the Court of Admiralty is a maritime law derived from ancient and various sources and developed and built up by decisions of the court. Various kinds of salvage services and various classes of salvors have been recognised by the court as entitled to salvage remuneration. Prior to the year 1853 those responsible for the navy of this country and therefore to be regarded as interested in the vessels under their charge were not so recognised, save that in isolated cases, of which *The Thetis* (3 Hagg. 154) is certainly one, remuneration was claimed and awarded in consideration of or based upon what I may call out-of-pocket expenses. Then in 1853 Parliament stepped in and forbade such claims. The prohibition was repeated in the Act of 1854 and in the Consolidation Act of 1894 and was recognised by the Act of 1916 as a general prohibition of claims for salvage services. The language of the Acts may not be very apt to prohibit claims which had never been thought of or made when the statutes were passed. But it is in my opinion quite sufficient to prevent any court or arbitrator exercising Admiralty jurisdiction from doing what might have been done before 1853, that is to say, making an award in respect of salvage claims of the Crown and probably also in proper circumstances extending the grounds and basis of such an award by the inclusion of elements not previously taken into consideration. But there is a long and unbroken stream of decisions and dicta treating the statutes of 1853, 1854, 1894, and 1916 as precluding all claims for salvage on behalf of the Crown, save of course in so far as certain claims are now authorised by the Act of 1916. I am satisfied that this view of the effect of the statutes is correct. My noble friend Lord Maugham has assigned forcible reasons for holding that the express words of the statute cover the case; but I hold the view that the same result follows by necessary implication. If I may use a familiar illustration I would say that if a man when he received services from the servant of another were told that he was not even to pay such servant his out-of-pocket expenses incurred in connection with such services, he would know quite well that still less must he remunerate the servant for those services. So here where a claim for salvage remuneration in respect of out-of-pocket expenses is forbidden, it would in my judgment be quite improper for any tribunal to entertain a claim for salvage remuneration in another form.

My Lords, holding this view on a point which goes to the root of the controversy in the present case, I am in no doubt as to the proper answer to the other contentions of the appellants. As to the construction of the agreement, I think it is an agreement that the Admiralty should receive and the shipowners pay an amount of salvage to be assessed in accordance with the law as administered by the Court of Admiralty and as regulated by statute. If it stipulated for an assessment on some other basis ignoring the statutes, as I think it does not, then I think it cannot be given effect to. The statutes are statutes regulating the public service and, with all respect to those who have thought otherwise, their provisions seem to me quite inescapable by any process of contracting out or of waiver at the will of either a public officer or a private person.

There remain two other contentions. The first was one which found favour with Greer, L.J. and was much pressed in this House, namely, that the agreement was not an agreement for salvage, and that inasmuch as there was an agreement for payment, the payment stipulated for was not salvage remuneration. It is true enough that the right to salvage arises independently of and is not based upon contract; but it is untrue to say that where there is a contract as to salvage, it ceases to be salvage.

Counsel for the respondents was probably not far from the mark in saying that in these days of Lloyd's salvage agreements the larger number of salvages are regulated by agreement. Nevertheless they do not cease to be salvages and they are dealt with and paid for in accordance with the maritime law of salvage. The task would be endless to cite the cases in which the Court of Admiralty has administered the law upon this basis and by so doing has negatived the contention now put forward.

There remains the contention that this particular agreement, by reason of its nature and in particular by reason of the presence of clause 5, is an agreement which was not a salvage agreement and therefore is free of the rules of salvage law. It is true enough that "no cure no pay" is of the essence of salvage. Unless the *res* is saved and a claimant to salvage brings about or contributes to its safety, he is not ordinarily entitled to salvage remuneration in the proper sense; but there is no reason in principle or upon any authority why a person should not alternatively be a salvor entitled to salvage remuneration or a labourer worthy of some hire. That alternative position may arise by reason of an agreement antecedent to any salvage services, as in the familiar case of a towage agreement: (see *The Five Steel Barges*, 6 Asp. Mar. Law Cas. 580; 63 L. T. Rep. 499; 15 P. D. 142). In such a case salvage remuneration may be earned if the circumstances warrant it, but if it is not, the towage money will be payable. Similarly with an agreement made contemporaneously with or subsequent to the rendering of services I see no obstacle in the way of alternative and truly severable stipulations for remuneration on different bases according as the facts turn out. That is the situation I find here upon the plain terms of the agreement. One basis stipulated for is a salvage basis and it does not change its character because of the presence of a stipulation for some remuneration on another basis if there is no salvage. The true effect of such stipulations in a case of salvage has been dealt with by a judge of the highest authority in these matters, Gorell Barnes, J., in the two cases discussed by my noble friend, Lord Wright—*The Kate B. Jones* (7 Asp. Mar. Law Cas. 332; 69 L. T. Rep. 197; (1892) P. 366) and *The Edenmore* (7 Asp. Mar. Law Cas. 334; 69 L. T. Rep. 230; (1893) P. 79). In the former case the argument now presented to your Lordships appears to have been taken, though slightly, but was rejected by the learned judge, in whose view the only materiality of the alternative stipulations was that the stipulation for some remuneration in case there was no salvage was a factor tending to diminish the award proper to be made in case salvage was earned. The ground for this view was that the salvor in such circumstances never ran the risk of losing all his pains.

My Lords, I prefer this reasoning to the argument for the appellants and think this point also fails them. For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Treasury Solicitor; William H. Crump* and *Son*.

Judicial Committee of the Privy Council.

Friday, March 11, 1938.

(Present: Lords WRIGHT and ROMER, Sir LANCELOT SANDERSON, Lord NORMAND (Lord President of the Court of Session), and Sir SHADI LAL.)

Nippon Yusen Kaisha v. Ramjiban Serowgee. (*a*)

Shipping—Goods—Unpaid vendor's lien—Possession of mate's receipts—Goods actually shipped by purchaser—Delivery of bill of lading to shipper by shipowner without receiving mate's receipt in exchange—Whether a wrongful act as against vendor—Nature of unpaid vendor's right in respect of goods after property and possession have passed—Whether sufficient to support claim for conversion—Pledging of goods—Bad faith—Burden of proof—Indian Contract Act (IX. of 1872), *s.* 178.

The plaintiff-respondents, a firm of brokers, entered into contracts with three mills to buy a quantity of jute gunnies, and at once resold them to an export company. Each contract provided by clause 3 *that the purchasers, on paying the vendors, were to receive from them the mate's receipts which would have been issued by the ships in which the goods might be shipped, which mate's receipts, when the goods were loaded, were in the first place to be handed by a ship's officer to the vendors. Each contract also provided by clause* 4 *that the vendors should have a lien on the goods for payment as long as the mate's receipts remained in their possession. The plaintiff brokers having, on the same day as they purchased the goods, sold them to the export company, the latter engaged freight with a shipping company, the defendant-appellants, a condition of the engagement or shipping order being that receipt by the export company of bills of lading in respect of the goods must be in exchange for the mate's receipts. In respect of certain parcels of the goods, instead of following that procedure, the defendant shipowners' servants, after issuing mate's receipts to the vendors at the time when the respective goods were loaded, issued to the export company bills of lading describing the goods as shipped by them, without receiving the mate's receipts from them in exchange as was provided in the shipping contract. The sale of the goods was free alongside. The goods were delivered to the ship as being shipped by the export company, and the mate's receipts expressly stated the name of the export company as shippers. The plaintiff brokers having in due course presented the mate's receipts to the export company for payment, that company defaulted, whereupon the brokers notified the shipowners of their unsatisfied claim, of their lien on the mate's receipts, and that bills of lading must not be issued by them until they received the*

(*a*) Reported by R. C. CALBURN, Esq., Barrister-at-Law.

mate's receipts. Meanwhile, however, the export company, having the bills of lading in their possession, had resold the goods to purchasers in Japan, and had drawn on them bills of exchange which they had discounted with a bank. The vessels in which the goods were shipped having reached their destination, the goods were there delivered on presentation of the bills of lading. The plaintiff brokers accordingly brought an action against the shipowners claiming damages.

Held, (1) *that, inasmuch as a mate's receipt is not a document of title to the goods shipped, its transfer does not pass property in the goods, and its possession is not equivalent to possession of the goods; the brokers' possession of or lien on the mate's receipts did not justify a claim against the shipowners for having deprived the brokers of their security on the goods and caused them damage equivalent to their value.*

Held, further, that, on the facts relating to the particular mate's receipts, and in the absence of express notice not to deliver the bills of lading without receiving the mate's receipts, the shipowners were entitled, and indeed bound, to deliver the bills of lading to the export company as shippers whose name appeared on the mate's receipts and who had engaged the freight. Hathesing *v.* Laing (29 *L. T. Rep.* 734; (1873) *L. R.* 17 *Eq.* 92) *followed.*

(2) *That, as a common law lien presupposes that the property in the goods the subject of the lien has passed, clause* 4 *of the contracts of sale accordingly imported that the property in the goods had passed notwithstanding the restrictions on the power of disposing of it contained in clause* 3. *The brokers, having thus parted with the property in and the possession of the goods, had nothing left except an equitable charge which was only enforceable with equitable remedies against the person taking with notice of the equity.*

(3) *That the brokers' mere equitable rights in respect of the goods did not entitle them to maintain a claim against the shipowners for conversion of the goods. The rule that the transferee of a bill of lading, which is not a negotiable instrument like a bill of exchange, does not obtain a better title than his transferor, applies to title in law, but not to equitable rights over the goods in question.* Pease *v.* Gloahec (2 *Asp. Mar. Law Cas.* (*O.S.*) 394; 15 *L. T. Rep.* 6; (1866) *L. R.* 1 *P. C.* 219) *followed.*

In respect of these matters there is no difference in substance between English and Indian law.

Sect. 178 *of the Indian Contract Act,* 1872, *provides:* "*A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:*

Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud."

Semble, *that where a plaintiff seeks to impugn what is* ex facie *a valid disposition, the burden is on him of proving bad faith and the other matters required by both those provisos to be established in the particular case.*

APPEAL from two judgments of the High Court, Fort William, in its appellate jurisdiction, delivered on the 22nd July, 1930 (Sir George Rankin, C.J., Ghose and Lort Williams, JJ.) and the 18th March, 1936 (Derbyshire, C.J., Costello and Panckridge, JJ.), and a decree of that court of the 18th March, 1936, reversing two decisions dated respectively the 16th July, 1929, and the 7th March, 1932, of the same court in its original civil jurisdiction (Buckland, J.).

The facts relating to the different issues tried in India and giving rise to the present appeal are fully stated in the judgment of their Lordships.

Sir *Robert Aske*, K.C. and *W. L. McNair* for the appellants.

A. M. Dunne, K.C. and *J. M. Pringle* for the respondents.

Cur. adv. vult.

March 11.—The following reserved judgment of the Board was delivered by

Lord Wright.—The appellants in this appeal, Nippon Yusen Kaisha, a Japanese ship-owning company, have been held liable to pay to the respondents, who are brokers and merchants at Calcutta, damages representing the value of certain consignments of jute gunny bags. Before explaining the issues in the case it will be convenient to state in briefest possible outline the material facts and documents.

On the 4th May, 1926, the respondents entered into three contracts with three mills respectively for the purchase of a total quantity of 250 bales of jute gunnies. On the same day they sold the same quantity of 250 bales to a company called the International Export Company Limited, carrying on business in Calcutta, who will be referred to as the export company. The conditions of all the contracts were identical, the form used being the ordinary form approved by the Indian Jute Manufacturers' Association. This is the form under which the entire export business in gunnies in Calcutta is conducted. Clauses 3 and 4 of the terms and conditions are material:—

"3. Payments to be made in cash in exchange for delivery order on sellers or for railway receipts or for dock receipts or mates' receipts (which dock receipts or mates' receipts are to be handed by a dock or ship's officer to the sellers' representatives).

"4. The buyers hereby acknowledge that so long as such railway receipts or mates' receipts (whether in sellers' or buyers' name) are in possession of the sellers, the lien of the sellers as unpaid vendors subsists both on such railway receipts or dock or mates' receipts and the goods they represent until payment in full."

The contracts stipulated for delivery free alongside export vessel in the port of Calcutta. The export company in due course had engaged freight

from the appellants. The terms of the engagement are taken as evidenced by a document called a shipping order from the appellants' Calcutta branch to the ship's commanding officer. It was there stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta, and that the receipt of cargo issued by the ship (that is the mate's receipt) must be exchanged for bill of lading. On the 4th May, 1926, the export company gave shipping instructions to the respondents, which they passed on in the same terms to the three mills. On the 17th and 18th May, 1926, two of the mills sent alongside certain parcels to the *Moji Maru*, and the remaining quantities were sent to the *Hokata Maru*. These two vessels were owned by the appellants, who received the parcels in accordance with the shipping engagement between themselves and the export company, and issued mate's receipts as presented to them for signature by the mills; these receipts were in the following terms:—

"Received on board . . . for conveyance to Kobe from the export company the undermentioned goods subject to the terms and conditions of the company's bills of lading."

These receipts were severally delivered to the mills' sircars, who had tendered with the goods a request to the steamer in the following terms:—

"Please receive on board from the above mills the undernoted goods, shipping documents for which have been taken out in the name of Messrs. International Export Company Limited, and hand the mate's receipt to our sircar."

In three cases on the same day as the mate's receipts were severally given, and in one case on the following day, the appellants issued the respective bills of lading describing the goods as shipped by the export company and deliverable to order at Kobe, without the mate's receipts being given in exchange, but a letter of guarantee or indemnity was in each case taken from the export company by the appellants. At these several dates the respondents were not themselves in possession of the mate's receipts, which they obtained from the mills a few days later against payment. When they thus obtained the mate's receipts, they tendered them to the export company, who defaulted in payment. Thereupon the respondents, on the 27th May, 1926, gave notice in writing to the appellants that they had an unsatisfied lien or claim for the price and were entitled to retain the relative mate's receipts, and that bills of lading must not be issued by the appellants until mate's receipts were surrendered to them. By that time, however, the export company, having the bills of lading in their possession, had resold the goods to purchasers in Japan and had drawn bills of exchange for the price on the purchasers. These bills of exchange they had discounted with a bank (sometimes referred to in the proceedings as the Taiwan Bank, but in fact the International Banking Corporation, a subsidiary of the National City Bank of New York), and had endorsed to them by way of security the bills of lading. On the 12th June, 1926, the respondents, as they could get no satisfaction from the export company, and as the appellants replied that they had passed bills of lading on the shipper's (that is, the export company's) own letter of guarantee, and referred the respondents to the shippers, issued their writ, claiming payment of the price from the export company and damages from the appellants. In due course the vessels, the *Moji Maru* having sailed on the 19th and the *Hokata Maru* on the 4th June, 1926, proceeded to their destination, and the goods were delivered at Kobe on presentation of the bills of lading. An application which had been made by the respondents for an injunction and interim receivership of the goods while the ships were still at sea had been ordered to stand over till the trial.

At the trial, which took place in July, 1929, the export company did not appear, and judgment went against them. But the judge, Buckland, J., dismissed the suit as against the appellants. He held that the appellants could not be held liable to the respondents for issuing the bills of lading without having the mate's receipts unless they had received notice of the respondents' lien or claim before they did so. For this purpose the written notice of the 27th May, 1926, was too late. He rejected the respondents' evidence that oral notice had been given on the 14th May, 1926. "Admittedly," he held on the evidence, "it was a common practice" at the port of Calcutta to issue bills of lading without mate's receipt. He curtly negatived the contention that the respondents had a special property in the goods which was violated by the delivery at Kobe to the bill of lading holders, so that the respondents were entitled to damages as in trespass or conversion.

The respondents having appealed, judgment was given by the Court of Appeal on the 22nd July, 1930. Rankin, C.J., who delivered the leading judgment, agreed with the trial judge that the appellants were guilty of no breach of duty in issuing the bills of lading to the export company which was named as shipper in the mate's receipts. He gave his reasons for this conclusion shortly, as he had already more fully discussed the point in giving judgment in an appeal heard by the court immediately before, *Nippon Yusen Kaisha* v. *Mahaliram Ramjidas* (52 Cal. L. J. 365). But he held that the respondents had a special property or right of possession in the goods, and that the notice of lien and other demands were sufficient to render the appellants guilty of conversion for that, notwithstanding the notice and demands, they delivered the goods under the bills of lading, because, he said, "an indorsee of a bill of lading cannot make a better title to the goods than his indorser upon the principle of purchaser for value without notice." But as he was of opinion that sect. 178 of the Indian Contract Act might entitle the bank to claim as against the respondents a better title than the export company to the goods, he ordered a remand to determine that issue. Ghose, J. concurred with the Chief Justice, while Lort Williams, J. dissented.

Buckland, J., who tried the issue, held that the transaction was of the most ordinary and normal kind in every way, and that there was no question on the evidence before him of any want of good faith or of any circumstance that would raise any presumption whatever that the bank was acting improperly. This finding came before the Court of Appeal, which reversed the finding of the judge and held that judgment should be entered for the respondents against the appellants for a sum to be agreed or ascertained. Derbyshire, C.J., with whom the other members of the court agreed, held that the onus was on a party seeking to rely on sect. 178, to establish affirmatively that he acted in good faith and in circumstances which were not such as to raise a reasonable presumption that he acted improperly, and that the appellants had failed to discharge that onus.

The present appeal is from the judgment so entered against the appellants.

The matters to be decided in the appeal are, first, whether the appellants, in issuing bills of

lading without having the mate's receipts, committed a wrong as against the respondents, and secondly, whether, by delivering to the bill of lading holders, they converted the respondents' goods, that is, goods in which the respondents had an immediate right of possession as against the indorsees of the bill of lading, which was infringed by the delivery from the ships at Kobe. If both these questions are answered in the negative, the third question which has been dealt with by the Court of Appeal and debated before this Board, does not arise.

The first issue to be determined is when under the contract the property passed. The sale was of unascertained goods. *Primâ facie* on such a sale the property in the goods passes when goods answering to the contract description are unconditionally appropriated to the contract with the assent of the buyer, which in this connection does not mean expressed assent, but simply that the appropriation has been made in the manner contemplated by the parties. This *primâ facie* rule may, however, be varied by the terms of the contract, or even by a reservation made by the seller in the act of appropriation. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property *primâ facie* passes when the goods are appropriated by delivery alongside in implement of the contracts. It is, however, said that clause 3 of the contract precludes the passing of the property until the price is paid against the mate's receipts or the other documents specified. That would no doubt be so if clause 3 were not followed by clause 4. The contract must, however, be read as a whole. Clause 4 provides for a lien of the sellers as unpaid vendors on the mate's receipts or other documents so long as they remain in the sellers' possession, and on the goods, until payment in full. Can this be reconciled with the reservation of the *jus disponendi* which clause 3 would import if it stood alone? That depends on the meaning to be attributed to the word "lien" as used in regard to the goods. A common law lien is possessory and depends on possession, but it also presupposes that the property in the goods has passed. A person cannot have a lien on his own goods. Thus clause 4 imports that, notwithstanding clause 3, the property has passed when the goods were delivered alongside, that is, placed in possession of the shipowners. The result is that the sellers have parted with both property and possession. "Lien" must therefore be used in a different sense, as meaning either an equitable lien or a hypothecation such as that discussed by this Board in *Madras Official Assignee* v. *Mercantile Bank* (152 L. T. Rep. 170; (1935) A. C. 53), or the common law right or licence to resume possession, such as that discussed in *Howes* v. *Ball* (1827, 7 B. & C. 481). The result is that the sellers had, after delivery alongside, nothing left except the equitable charge which is only enforceable by equitable remedies against the buyers or person taking with notice of the equity, or a licence to resume possession which is personal or contractual as between the sellers and buyers. In neither case was there left to the sellers a common law or possessory lien, which, if it had existed, would have been a right in the nature of property and would have supported an action in conversion or trespass. The importance of this conclusion in the present case will appear later.

A different state of things would have resulted if the sellers had delivered the goods to the ship in their own name as shippers, so that the ship would have held the goods on their behalf. But they did not. They delivered the goods as being shipped by the export company, and took a mate's receipt which expressly stated the name of the export company as shippers. In this way the ship received the goods on behalf of the export company who had booked the freight from the shipowners. All that the sellers had was possession of, or a lien on, the mate's receipt. It is, however, on this fact, coupled with the terms of the challan or document delivered to the ship by the mills with the goods, and also on the course of business, that the respondents rely as justifying their first claim, which is that the issue of the bills of lading to the export company, without production of the mate's receipt, was a wrongful act by the appellants as against them, which deprived them of their security on the goods and caused them damage equivalent to the full value.

The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however, *primâ facie* evidence of the quantity and condition of the goods received, and *primâ facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him. But if the mate's receipt acknowledges receipt from a shipper other than the person who actually receives the mate's receipt, and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will *primâ facie* be entitled and indeed bound to deliver the bill of lading to that person. So it was held by Bacon, V.C. in *Hathesing* v. *Laing* (29 L. T. Rep. 734; (1873) L. R. 17 Eq. 92), a case in principle not different on its facts from the present. It was held that the indorsement of the mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the mate's receipt, though the latter was held as security by the person to whom it had been issued. In that case, as in this, the person who delivered the goods to the ship took the mate's receipt describing the debtors as the shippers. No doubt, if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the mate's receipt, or to anyone but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. *Hathesing* v. *Laing* (*sup.*) was decided in 1873 and has been treated as good law ever since, as for instance in the late Carver, J.'s Carriage of Goods by Sea, sect. 60. Indeed it is difficult to see what other course a shipowner in a case like this could, in the absence of notice, adopt. He is bound to deliver bills of lading for the goods to the shipper; the shipper here is beyond question the export company who engaged the freight, who are owners of the goods, who are described in the document presented by the mills as the persons in whose name shipping documents have been taken out, and whose names appeared in the mate's receipts as the persons from whom the goods were received. The mills, who, at the respective dates of the mate's receipts, had not been paid by the respondents, might have given notice of lien on their own or the respondents' behalf, or they might have inserted the names of themselves or the respondents as persons shipping the goods and persons to whom the mate's receipts were to be given. If that had been done, the appellants could not properly have issued bills of lading to the

export company. But if the mills or the respondents had taken the bills of lading in their own name as shippers, they would have become liable on the bill of lading contract and in particular for payment of advance freight. It was not till the 27th May, 1926, that express notice was given to the appellants not to issue bills of lading, but it was then too late to close the stable door. An attempt to prove express notice given on the 14th May, 1926, which would have been in time, completely failed. Various matters were relied upon as amounting to implied or indirect notice. It was said that the direction in the mills' document that the receipts were to be given to the mills' sircars amounted to sufficient notice, especially when coupled with the course of business in the trade according to which payment is to be made against the mate's receipts, which thus constitute a sort of security. But as the receipt itself acknowledges shipment by the export company, the mere direction to give the receipt to the mills' sircar appears to be too obscure and ambiguous to countervail the clear recognition of property in the export company. There might be many reasons why the receipt should be given to the person who actually delivered the goods to the ship. It is admitted by witnesses on both sides that bills of lading were frequently issued without mate's receipts against an indemnity. Such an indemnity is a common commercial precaution in use all over the world whenever bills of lading are issued without mate's receipts, and no sinister inference can be drawn from its being taken. It is true that the export company had obtained bills of lading in several cases from the appellants against an indemnity without producing mate's receipts, and that the appellants had been complaining, and demanding delivery of the mate's receipts; but the vendors must have been in some measure aware of what was being done; it is suggested that they did not wish to make trouble with the shippers, the export company, who seem to have been doing a large business until the crash came at about the end of May, 1926. There is no finding of any fraudulent collusion between the export company and the appellants, or indeed any evidence of that nature.

In all the circumstances of the case not only was there no timeous express notice to the appellants, but there is no ground for imputing implied notice. The case must be regarded as one in which shipowners, who for their own protection stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, waived that provision, and without notice issued bills of lading to the named shippers and owners of the cargo. It would impose an unprecedented burden on shipowners if, in such circumstances, they were held responsible. Their Lordships agree with the conclusion of Sir George Rankin, C.J. on this issue.

The second issue is alternative. It proceeds on the footing that bills of lading were delivered to the export company; but none the less, it is contended, the bills of lading in the export company's hands did not dispossess the respondents of their unpaid vendor's lien, or of the lien for which they stipulated, because they continued to hold the mate's receipt, and thus they had a right to immediate possession as against the appellants, so that they were entitled to sue in conversion when their notice of the 27th May, 1926, and their subsequent demands for the goods were refused by the appellants. The primary question thus is whether the respondents still possessed a right to possession sufficient to found a claim in conversion. The appellants, in reply, not merely contest the contention that, by the possession of the mate's receipts, the respondents retained their lien, but say that the bills of lading had been endorsed to the bank so as to put an end to the right (if any) of stoppage *in transitu*, and that they were bound to deliver the goods to the endorsees of the bills of lading, which they duly did.

The learned Chief Justice on this point was in favour of the respondents, though, as already stated, he ordered a remand on the issue based on sect. 178 of the Indian Contract Act, 1872, which was then in force, though since repealed in 1930. Their Lordships, with all deference, find themselves unable to concur in this conclusion in the respondents' favour. It seems to be based on two propositions, first, that under the contractual terms, coupled with the retention of the mate's receipts, the respondents retained a lien or immediate right to possession, which was a property interest and not merely an equitable or personal right or licence; and secondly, that, as the endorsement of a bill of lading passed no better title than the endorser had, the endorsement and transfer to the bank passed no greater rights than the export company had, so that the bank could not claim delivery from the shipowners in defeasance of the respondents' possessory title. It is, however, clear that the conclusion of Sir George Rankin, C.J. depended on his view that the respondents had a right in law to immediate possession: indeed, it was properly conceded before their Lordships that only such a right would entitle the respondents to claim in conversion, and that a merely equitable right or contractual right or licence would not do. Their Lordships agree with Sir George Rankin in his view that the general property passed to the export company, but differ from him, for reasons stated earlier in this judgment, in his view that a right at law to possession remained in the respondents. Thus the whole basis of his conclusion fails. It is true generally that a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better title than his transferor. But while that is true of title in law, it cannot be asserted in regard to equitable rights. The legal right given by a possessory lien can indeed be distinguished from the general legal property in a thing. This is illustrated by *Pease* v. *Gloahec* (2 Asp. Mar. Law Cas. (O.S.) 394; 15 L. T. Rep. 6; 1866, L. Rep. 1 P. C. 219). That case, however, also illustrates the distinction between legal and equitable rights. The documents of title there had been obtained by fraud from the lawful possessor, who had not the general property which belonged to those guilty of the fraud. It was held that an endorsee from those latter persons in good faith for value received a good title, and not a merely defeasible title, and in that sense received a better title than his transferors, whose possession was defeasible. This is the general rule where the transferor has a title defeasible for fraud but the transferee takes in good faith and for value. Another illustration of an equitable right which is defeated by the transfer of a bill of lading to a *bona fide* endorsee for value is the right of stoppage *in transitu*. It follows from the same general rule that the equitable lien or personal licence which, in their Lordships' judgment, was all that remained with the respondents when the goods were delivered to the ship, did not affect the transferee of the bill of lading so as to found a claim for conversion, though it might indeed found a claim for breach of contract against the export company, or a claim for equitable relief against them or any assignees subject to the same equities, a category which would not include the appellants.

In respect of the matters discussed above, there is no difference in substance between English and Indian law.

This conclusion renders it unnecessary for this Board to give a decision on the issue raised on the remand under sect. 178. It seems, however, proper for their Lordships to say that, as at present advised, they would prefer the judgment of Buckland, J. to that of the Court of Appeal. Even assuming that the onus of proof under the section is on the appellants, it would seem that they discharged it by the evidence of the bank, which showed that the transaction was a banking transaction of the most ordinary and normal character. If it were necessary to look further, the presumption of good faith would complete the proof. But their Lordships are far from satisfied that under the section the onus would have lain with the defendants. There are in the section two separate provisos. The onus of proof under the second proviso cannot, it seems, be on persons in the position of the defendants, and if so, it would seem to follow that the onus as to the first proviso must likewise rest in the same quarter. Otherwise an anomalous result would follow. Decisions under other statutes have been cited. But it is always dangerous to seek to construe one statute by reference to the words of another. It may well be that in this section the plaintiff who seeks to impugn what is *ex facie* a valid disposition should be held to assume the burden of showing bad faith and such other matters as the provisos require to be established in the particular case.

Their Lordships, on the whole case, are of opinion that the appeal should be allowed, the orders of the Court of Appeal should be set aside, and the orders of Buckland, J. restored, and that the respondents should pay the appellants' costs in the Court of Appeal and before this Board.

They will humbly so advise His Majesty.

Appeal allowed.

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

Solicitors for the respondents, *Barrow*, *Rogers*, and *Nevill.*

House of Lords.

January 13, 14, 17, 18, 20; *March* 3, 14, 1938.

(Before Lords ATKIN, THANKERTON, MACMILLAN, WRIGHT and MAUGHAM.)

Compania Naviera Vascongada v. Steamship Cristina. (*a*)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

International law—Impleading foreign sovereign—Proceedings against property belonging to or in possession of foreign sovereign—Ship registered in foreign country—Requisitioned by Government of that country—Ship in British port—Proceedings by owners for possession—Jurisdiction of Admiralty Court.

There are two well-established general principles of international law engrafted into the domestic law of this country, (1) *that a foreign sovereign may not be impleaded in the courts of this country without his consent, and* (2) *that the courts of this country will not by their process seize or detain property which belongs to a foreign sovereign or of which he is in possession or control.*

The C., *a ship registered at a Spanish port, was at Cardiff when she was requisitioned by the Consul representing the Spanish Government in virtue of a decree issued by that Government while the* C. *was on the high seas. The owners of the* C. *issued a writ* in rem *against the ship and all persons claiming an interest therein, claiming to have possession of the ship, and the* C. *was arrested. The Spanish Government entered an appearance to the writ and on the same day lodged a notice of motion claiming to have the writ, arrest, and all subsequent proceedings set aside on the ground that the* C. *was in their rightful possession and that the writ impleaded a foreign sovereign State.*

Held, that the writ, arrest, and all subsequent proceedings must be set aside as infringing both the above principles of international law for the reasons (1) *that the issue of the writ by the owners against all persons claiming an interest in the* C., *knowing the Spanish Government to be the only persons so claiming, followed by the entry of an appearance to that writ by the Spanish Government, clearly amounted to impleading a foreign sovereign State, and* (2) *that the proceedings to recover possession of the* C. *after her requisition for public purposes by the Spanish Government were proceedings against property in the possession or control of a foreign sovereign State.*

The Parlement Belge (42 *L. T. Rep.* 273; 5 *P. D.* 197) *discussed.*

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The appellants, a Spanish company, were the owners of the *Cristina*, a Spanish ship registered at Bilbao, which was requisitioned by the Spanish Republican Government while in the port of Cardiff. The appellants issued a writ against the *Cristina* and all persons claiming an interest therein, claiming as sole owners to have possession of the *Cristina* adjudged to them, and the *Cristina* was arrested. The respondents, the Spanish Republican Government, entered a conditional appearance to the writ, and on the same day lodged a notice of motion claiming to have the writ, arrest and all subsequent proceedings set aside on the ground that the action impleaded a foreign government. On the hearing of the motion Bucknill, J. made an order setting aside the writ, arrest and subsequent proceedings, and his decision was affirmed by the Court of Appeal. The appellants appealed to the House of Lords.

The facts of the case are fully stated in the opinion of Lord Wright.

H. U. Willink, K.C., *H. G. Willmer*, and *V. R. Idelson*, for the appellants.

G. St. C. Pilcher, K.C., *Owen Bateson*, and *John Foster*, for the respondents.

The House took time for consideration.

(*a*) Reported by H. A. PALMER, Esq., Barrister-at-Law.

March 3.—The following opinions were read :

Lord Atkin.—My Lords, the circumstances in which the writ in this action was issued and the *Cristina* was arrested have been set out in the opinion of my noble and learned friend Lord Wright, which I have had the advantage of reading, and I need not repeat them.

The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is, in my opinion, well settled that it applies to both. I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns ; for at times they tend to become confused, and it is not always clear from the decisions whether the judges are dealing with one or the other or both. It seems to me clear that in a simple case of a writ *in rem*, issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested both principles are broken. The sovereign is impleaded and his property is seized.

In my opinion the facts of this case establish the same breach of the two principles as in the illustration just given. I entertain no doubt that the effect and the intended effect of the action of the Spanish Consul at Cardiff in July, 1937, was to " purge " the officers and crew of the ship of those who were disaffected to the present Spanish Government and to secure that the new master, officers and crew should hold the ship for the Government ; and that from and after the 14th July, the master, officers and crew held the ship not for the owners but for the Government ; and that by the master, officers and crew the Government were in fact in possession of the ship. I cannot pay serious attention to the suggestion that all that the consul intended to do was to supply a well-affected new master on behalf of the owners.

These being the facts, I come to the conclusion that when the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein, and in the body of which the same ship and all persons claiming an interest therein were commanded within eight days to cause an appearance to be entered for them in the Probate, Divorce and Admiralty Division, and on which they endorsed the claim to have possession adjudged to them of the said steamship or vessel *Cristina*, they were directly impleading the Spanish Government, whom they knew to be the only persons interested in the *Cristina* other than themselves, and from whom they desired that possession should be taken after it was adjudged to them. We have had an interesting exposition of the history of Admiralty practice and the evolution of the writ *in rem*. It is plain that it began with the arrest of a named defendant. In his absence any of his property in the jurisdiction, including his ship or ships, could be arrested. Eventually the ship over which some maritime lien was asserted could alone be arrested. But in all cases, as in the present practice, when a defendant has appeared the claim is against him personally, and though it is enforced in the first instance by sale of the ship or enforcement of the bail, a damage claim is not in our jurisprudence limited to the value of the ship. In these days it is unusual to name defendants. When the defendants are described as " the owners of a vessel " they can be at once identified. When persons are not entitled the defendants, but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case, when they do appear, they appear as defendants, and as such I conceive that they are impleaded. And when they cannot be heard to protect their interest unless they appear as defendants I incline to hold that if they are persons claiming an interest they are by the very terms of the writ impleaded. But in the present case where persons claiming an interest are the only persons entitled defendants, and the Spanish Government are the only persons claiming an interest adverse to the plaintiffs, I have no doubt not only that the Government were in fact impleaded, but were intended by the plaintiffs to be impleaded.

The second point seems to me if possible to be clearer. It is well established that the court will not arrest a ship which is under the control of a sovereign by reason of requisition : *The Broadmayne* (114 L. T. Rep. 891 ; (1916) P. 64) ; *The Messicano* (32 T. L. R. 519 ; *The Crimdon* (35 T. L. R. 81). But the present case is not one of control for public purposes, but of actual possession for public purposes. It is indistinguishable from *The Gagara* (122 L. T. Rep. 498 ; (1919) P. 95), which in the Court of Appeal was decided solely on the ground that the ship was in the actual possession of a foreign sovereign, namely, the State of Esthonia. The courts of our country will not allow their process to be used against such a ship and the arrest cannot be maintained. In the present case I find it unnecessary to decide many of the interesting points raised in the argument for the appellants as to whether the ship was rightly in the possession of the Government ; what was the ex-territorial effect of the Spanish decree ; what implied restrictions in different circumstances might be attached to sovereign immunity ; when, if ever, the assertion of the sovereign as to his property or possession is conclusive. In matters of such grave importance as those involving questions of international law, it seems to me very expedient that courts should refrain from expressing opinions which are beside the question actually to be decided. In the present case in my opinion the decisions of the trial judge and the Court of Appeal were right and should be affirmed ; and this appeal should be dismissed with costs.

Lord Thankerton.—My Lords, in my opinion on the facts in this case, the decisions of the trial judge and of the Court of Appeal were right and should be affirmed. It is admitted that the Government of the Republic of Spain is the Government of a foreign sovereign State fully recognised as such by His Majesty's Government. In my opinion it is sufficiently established that the Spanish Government, without a breach of the

peace, obtained by their agents *de facto* possession of the ship on the 14th July, 1937, and have since remained in *de facto* possession. I am further of opinion that it is sufficiently established that such possession is for public uses, for the purposes of prosecution of the civil war in Spain. The Spanish Government decline to submit to the jurisdiction, and it has not been maintained by the appellants that there are any facts from which such submission can be implied.

I agree with my noble and learned friend on the Woolsack that in the present case not only were the Spanish Government in fact impleaded, but they were intended to be so impleaded. Further, the order sought in the present case would necessarily displace the *de facto* possession of the Spanish Government, and I agree with my noble and learned friend that the doctrine of immunity of the property of a foreign sovereign State dedicated to public uses includes the case of actual possession for public uses. In this view, the case clearly comes within the principles laid down in *The Parlement Belge* (42 L. T. Rep. 273 ; 5 P. D. 197) by Brett, L.J.

But, my Lords, I have some doubt whether the proposition that the foreign sovereign State cannot be impleaded is an absolute one, the real criterion being the nature of the remedy sought. To indicate this, let me quote the principles laid down in *The Parlement Belge*. Brett, L.J. states (42 L. T. Rep. at p. 280 ; 5 P. D. at p. 205) : " The first question really raises this, whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or, in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any court of some property of every sovereign is admitted to be a part of the law of nations." This passage suggests that the absolute exemption is of the person of the sovereign from adverse suit, but that in the case where property of a sovereign is not admitted by the agreement of nations to be exempt, action *in rem* against such property which is within the territorial jurisdiction is available, even if the sovereign be invited to contest the suit, if he so choose.

It happens that the *Parlement Belge* affords an interesting illustration, for Sir Robert Phillimore, in the Probate Division (40 L. T. Rep. 222 ; 4 P. D. 129), had rejected the claim to exemption, and his grounds are stated in the following passage (40 L. T. Rep. at p. 231 ; 4 P. D. at p. 148) : " Looking to the character of the suit and to other passages in the judgment " [Judge Story's judgment in *The Santissima Trinidad* (7 Wheaton 283)] " it seems to me clear that by the expression ' public ship of the government ' was meant a ship of war, and not any vessel employed by the government. But even if the term could be treated as more comprehensive and as including public ships such as I have referred to sent by the government on exploring expeditions, it would not include a vessel engaged in commerce, whose owner is (to use the expression of Bynkershoek, *De leg. Mercatore*) *' strenue mercatorem agens.'* Upon the whole I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the *Parlement Belge* as belonging to that category of public vessels which are exempt from process of law and all private claims." In the Court of Appeal, in delivering the judgment of the court, Brett, L.J. held that the exemption was not confined to ships of war, but applied to ships and other property of the sovereign dedicated to public uses. He then went on to consider whether the *Parlement Belge* was so dedicated, and came to the conclusion that it was so dedicated, because its use for purposes of trade was only subservient to the main purpose of carrying the mails. Then comes a striking passage in the judgment (42 L. T. Rep. at p. 285 ; 5 P. D. at p. 220) : " The ship is not in fact brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded ; and in both cases because such a suit would be inconsistent with the independence and equality of the State which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the State which is represented by such owner." It may be argued, as a logical inference from this passage, that an action *in rem* against property of the sovereign which is engaged in private trading, and which is not dedicated to public uses, is not to be regarded as inconsistent with the independence and equality of the State represented by such owner, and that any other view would lead to absolute exemption of all property owned by the sovereign, and not the exemption of some property only. If that were the correct inference, it would not justify the view of the Court of Appeal in the case of *The Porto Alexandre* (122 L. T. Rep. 661 ; (1920) P. 30), where the ship was being used in ordinary commerce, the earning of freight being the sole interest of the Portuguese Government, who owned it, that they were bound to hold it exempt by reason of the decision in *The Parlement Belge* (*sup.*). They made no inquiry as to whether such an exemption was generally agreed to by the nations, and it seems to be common knowledge that they have not so agreed. This question, which has come to be of increasing importance of recent years, has not been considered by this House, and as I hold that the *Cristina* was dedicated to public uses, I find it unnecessary to decide it in this appeal. Accordingly, I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The Porto Alexandre* (*sup.*). In the later case of *The Jupiter* (132 L. T. Rep. 624 ; (1924) P. 236), counsel for the appellants conceded that he was precluded by the decision in *The Porto Alexandre* from raising this question in the Court of Appeal.

I concur in the motion proposed by the noble and learned Lord.

Lord Macmillan.—My Lords, various topics of the first importance were mooted in the course of the argument on this appeal which it is unnecessary and inexpedient to discuss, but it may not be out of place to indicate the general principles which provide the setting for the particular problem which your Lordships have to solve.

It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits. This jurisdiction is exercised through the instrumentality of the duly constituted tribunals

of the land. But just as individuals living in a community find it expedient to submit to some diminution of their freedom of action in favour of their fellow-citizens, so also the sovereign States which constitute the community of nations have been led by courtesy as well as by self-interest to waive in favour of each other certain of their sovereign rights. The extent of these mutual concessions and their recognition is primarily a matter of international, not of domestic, law, and as must necessarily be the case with all international law, which has neither tribunals nor Legislatures to define its principles with binding authority, there may be considerable divergence of view and of practice among the nations. Hence when questions involving international law arise in the domestic courts of a State problems of great difficulty and gravity may emerge. " It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland." These are the well-chosen words of Lord Dunedin, when Lord President of the Court of Session in Scotland, in a case which raised important issues of international law (*Mortensen* v. *Peters* (1906, 8 F. (J. C.) 93, at p. 101)).

Now it is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the courts of this country, before they give the force of law within this realm to any doctrine of international law, should be satisfied that it has the hall-marks of general assent and reciprocity. I confess that I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect. On the contrary, the subject is one on which divergent views exist, and have been expressed, among the nations. When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the courts of this country was first formulated and accepted, it was a concession to the dignity, equality and independence of foreign sovereigns which the comity of nations enjoyed. It is only in modern times that sovereign States have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances. I recognise that the courts of this country have already, in cases which have been cited at the bar, gone a long way in extending the doctrine of immunity, but the cases which have gone furthest have not been hitherto considered in this House, and, like my noble and learned friend, Lord Thankerton, I desire to reserve my opinion on the question raised in the case of *The Porto Alexandre* (*sup.*).

With these observations I am content to express my agreement with what I understand to be the opinion of all your Lordships, that this action, which is directed to take—ultimately, if necessary, by force—a Spanish ship requisitioned for public purposes by the duly recognised Government of Spain and lying in a British port out of the possession of that Government, cannot be allowed to proceed in the courts of this country.

Lord Wright. — My Lords, the appellants, who are a Spanish company carrying on the business of shipowners at Bilbao in Spain, initiated this action by a writ *in rem* in the Admiralty Division claiming as sole owners of the steamship *Cristina* to have possession adjudged to them of the steamship. The writ was against the steamship or vessel *Cristina* and all persons claiming an interest therein. The *Cristina*, which is a Spanish steamship registered at the port of Bilbao, was on the 22nd July, 1937, the date of the writ, lying in Queens Dock, Cardiff, where she had arrived on the 8th July, 1937. At that latter date she was in charge of a captain named Faustino Frias, appointed by and acting for the appellants who were operating her. On the 9th July, 1937, he attended at the office of the Spanish Consul at Cardiff, as Spanish shipmasters are bound to do by Spanish law on arriving at a foreign port, when he was handed a letter from the consul requiring him to produce at the consulate the " patente de navegacion " so that it could be noted in accordance with a decree of the Spanish Government dated the 28th June, 1937, requisitioning the ship. The captain failed to do so, and on the 13th July, 1937, the consul, by registered letter, dismissed the captain and also all other officers and members of the crew not in sympathy with his government. On the following day the consul went on board with one Santiago Asolo, a new master whom he had appointed in the name of the Government of the Republic of Spain, and broke open the captain's cabin, which was locked, but found that the late captain, who had left the ship, had taken away the " patente de navegacion." The new captain was placed in charge of the vessel on behalf of the Spanish Government and has remained so, save for a period when he was absent for family reasons, when he left the ship in charge of a mate also appointed by the consul for the Spanish Government. The master and mate have sworn that at all material times they and the crew have had continuous possession of the ship on behalf of the Spanish Government and have held themselves and the ship at that government's disposal, subject to the arrest by the court which was effected by a warrant issued on the appellants' application supported by affidavits. It is also sworn that the ship's expenses have been disbursed by the Spanish Government since the new captain took charge.

The Spanish consul at Cardiff, who acted with the authority of the Spanish Consul-General and the Spanish Ambassador in London, claimed to requisition the *Cristina* in virtue of a decree dated at Valencia the 28th June, 1937, and published in the Gaceta de la Republica on the 29th June, 1937, which provided that all the vessels registered at the port of Bilbao should be requisitioned and be at the disposal of " the legitimate Government of the Republic," and that any Spanish shipowner or owner of a vessel so registered should be bound to hand over its administration to the bodies designated by the Government for the purposes of receiving orders and instructions in relation to the service to be rendered by the vessel. The decree recited (*inter alia*) that in order the better to be able to meet the requirements of the war the Government considered it desirable to exercise immediate and direct control over services of marine transport in order to carry into effect the

plans of supplies, evacuation or anything which the Government might wish to carry out. The decree was stated to be directed to control and administer the means of marine transport. It also contained various ancillary provisions, and in particular required entries to be made in the appropriate registers and ships' papers of any requisition under the decree.

On the 27th July, 1937, the respondents entered a conditional appearance "as owners or persons interested in this action, without prejudice to an application to set aside the writ or service thereof." On the same day they lodged a notice of motion claiming that the writ, the arrest and all subsequent proceedings should be set aside on the grounds that the *Cristina* was the property of the Government of Spain, a foreign independent State, which declined to sanction the proceedings, that the *Cristina* was in the possession of the Government by their duly authorised agent, that the Government had a right to the possession of the *Cristina*, and that the action impleaded a foreign sovereign State, namely, the Government of Spain. Among the affidavits in support of the application was one from the Counsellor of the Spanish Embassy in London, affirming on oath that by virtue of the decree the Government of Spain "claims and is entitled to possession of the said ship under the said requisition." He further deposed that the Government of Spain was unwilling to submit to the jurisdiction of the court and that the proceedings impleaded that Government. He also deposed that the requisition had been effected at Cardiff by notices from the consul at Cardiff to the captain, agents and cargo owners of the ship and to the port and immigration authorities there.

At the trial Bucknill, J. granted the application and set aside the writ, arrest and proceedings. His decision was affirmed by the Court of Appeal from whose order this appeal is now brought to this House.

At the trial it was admitted on behalf of the appellants that the respondents, the Republican Government of Spain, are an independent sovereign State, recognised by His Majesty's Government. It was not contested that this admission involved that the Republican Government was the sole Government recognised by His Majesty's Government in and for Spain. The case has accordingly proceeded throughout on that footing. This House and the courts below have thus no judicial knowledge, save as appears from the recitals in the decree, of the conflict which it is general knowledge is going on in Spain, or the division of territory between the contesting forces.

It has also been admitted that the *Cristina* was not in Spanish territorial waters from the date of the decree until the date of the facts alleged to constitute the requisition, when she was in British territorial waters.

The respondents do not contend that they are the owners of the *Cristina*, but say that they are and were at all material times in *de facto* possession of the *Cristina* and were therefore without its consent impleaded by the writ *in rem* claiming possession adversely to their actual possession. Such a proceeding, they contend, is inconsistent with their position as an independent sovereign State recognised by His Majesty's Government. They further contend that the action involved a claim to interfere with their right of direction and control coupled with actual possession, acquired by reason of the requisition. This, though not ownership, is, it is said, a right in the ship in the nature of property, and was, as being the property of an independent sovereign State, immune from the interference of the court either by the arrest or by an order annulling the requisition and giving possession to the appellants and ousting the respondents from possession. The word "requisition," while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government invariably, or at least generally, for public purposes of the user, direction, and control of the ship with or without possession. In my judgment, both contentions are well founded, and the order of the courts below may be sustained on either ground. But the grounds are separate and call for separate analysis, though both alike are based on the general principles of international law according to which a sovereign State is held to be immune from the jurisdiction of another sovereign State. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations. It is binding on the municipal courts of this country in the sense and to the extent that it has been received and enforced by these courts. It is true that it involves a subtraction from the sovereignty of the State, which renounces *pro tanto* the competence of its courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is *primâ facie* an integral part of sovereignty. The rule may be said to be based on the principle *par in parem non habet imperium*: no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal court could not be enforced against a foreign sovereign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights. There may, indeed, be particular and special exceptions not necessary here to discuss. The principle has been received and applied by the courts of this country in many decided cases, and in particular many cases dealing with states of fact similar to the facts here in question. But the rule only applies as between sovereign States recognised as such by His Majesty's Government. For purposes of the present case so far as concerns Spain, the respondents are such a sovereign State.

The first of the two rules here relevant, namely, that an independent sovereign may not be directly or indirectly impleaded in the courts of this country without its consent, has been recognised as a general proposition in many cases, as, for instance, *Mighell* v. *Sultan of Johore* (70 L. T. Rep. 64; (1894) 1 Q. B. 149), an action *in personam*. Similarly in *Duff Development Company* v. *Kelantan Government* (131 L. T. Rep. 676, at p. 678; (1924) A. C. 797, at p. 805), Lord Cave referred to the right of an independent sovereign State by international law to the immunity against legal process which was defined in *The Parlement Belge* (4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273), and Lord Sumner said (129 L. T. Rep. at p. 683; (1924) A. C. at p. 822): "The principle is well settled that a foreign sovereign is not liable to be impleaded in the municipal courts of this country but is subject to their jurisdiction only when he submits to it whether by invoking it as a plaintiff or by appearing as a defendant without objection." The principle is stated without any special reference to reciprocity. But

The Parlement Belge (*sup.*) shows clearly that a sovereign may be impleaded as much by an action *in rem* as by an action *in personam*. As was said by the Privy Council in *Young* v. *Steamship Scotia* (89 L. T. Rep. 374, at p. 376; (1903) A. C. 501, at p. 504): "Where you are dealing with an action *in rem* for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the owner." In *The Parlement Belge* (*sup.*), a case to which I shall later refer in connection with the immunity of the sovereign's property, the action *in rem* was brought under a claim for collision damage done by a Belgian State mail packet. It was contended that the sovereign was not impleaded (*sc.* personally), but only the *res*. Brett, L.J., in delivering the judgment of the Court of Appeal (42 L. T. Rep. at p. 284; 5 P. D. at p. 219), said that *The Bold Buccleugh* (7 Moo. P. C. C. 267) "decides that an action *in rem* is a different action from one *in personam* and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is upon this consideration of it brought within the general rule that a sovereign authority cannot be personally impleaded in any court." I think the substantial soundness of this ruling is corroborated by considering the nature of the modern writ *in rem*. The history and effect of that writ have been fully explored by Jeune, J. in *The Dictator* (67 L. T. Rep. 563; (1892) P. 304), approved and followed by the Court of Appeal in *The Gemma* (8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379). It seems that originally the warrant was issued for the purpose of compelling the defendant to appear and submit to the court, and was directed, not merely against the property said to be the instrument of injury, but any property of the defendant, or even himself personally. But the modern writ *in rem* has become a machinery directed against the ship charged to have been the instrument of the wrongdoing in cases where it is sought to enforce a maritime or statutory lien, or in a possessory action against the ship whose possession is claimed. To take the present case, the writ names as defendants the *Cristina* and all persons claiming an interest therein and claims possession. The writ commands an appearance to be entered by the defendants (presumably other than the vessel) and gives notice that, in default of so doing, the plaintiffs may proceed and judgment be given by default, adjudging possession to the plaintiffs. A judgment *in rem* is a judgment against all the world, and if given in favour of the plaintiffs would conclusively oust the defendants from the possession which on the facts I have stated they beyond question *de facto* enjoy. The writ by its express terms commands the defendants to appear or let judgment go by default. They are given the clear alternative of either submitting to the jurisdiction or losing possession. In the words of Brett, L.J., the independent sovereign State is thus called upon to sacrifice either its property or its independence. It is, I think, clear that no such writ can be upheld against the sovereign State unless it consents. It is, therefore, given the right, if it desires neither to appear nor to submit to judgment, to appear under protest and apply to set aside the writ or take other appropriate procedure with the same object. It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded. The defendants cited are "all persons claiming an interest in the *Cristina*," a description which precisely covers on the facts of the case the Spanish Government, and, to judge by the affidavits filed by the appellants in applying to obtain the warrant to arrest, no one else. Under the modern and statutory form of a writ *in rem*, a defendant who appears becomes subject to liability *in personam*. Thus the writ *in rem* becomes in effect also a writ *in personam*. This emphasises the view that the writ directly impleads the Spanish Government.

The crucial fact in this connection is simply that *de facto* possession was enjoyed by the Spanish Government. The position would obviously have been quite different if the respondents were seeking to obtain possession by the process of the court instead of resisting an attempt by the process of the court to oust them from actual possession.

In the present case, the fact of possession was proved. It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondents here have established the necessary facts by evidence.

It is unnecessary to consider by what mode the respondents obtained possession. It is enough to ascertain that they had possession at the time when the claim to immunity was made. Nor is it necessary to consider here whether any particular person not entitled to diplomatic immunity has made himself liable to English law.

The appellants have contended that the rule that the sovereign cannot be impleaded is not absolute or universal, and have instanced as possible exceptions cases in which title to real property in the jurisdiction is in question, or suits to administer a fund in court in which the foreign sovereign is interested, or representative actions such as debenture-holders' actions where the sovereign holds debentures. Whatever may be the position in such cases, they are essentially different from, and afford no guidance for the present case, and I do not need here to discuss them.

This ground would by itself, subject to some questions to be considered below, be enough to entitle the respondents to succeed, but there is a second ground on which the writ should, in my judgment, be set aside, which is that it claims to interfere with the property of the foreign sovereign. That the court has in general no jurisdiction to do this is illustrated by *The Parlement Belge* (*sup.*). One ground of the decision that the writ should be set aside was that it was *in rem* against the Belgian packet. Brett, L.J. enforces the principle by a copious citation of English and United States authorities, and rightly concludes (42 L. T. Rep. at p. 283; 5 P. D. at p. 214): "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place, they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina*, whereas in the *Parlement Belge* the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders. That was a separate ground in *The Porto Alexandre* (15 Asp. Mar. Law Cas. 1 ; 122 L. T. Rep. 661), apart from the question whether, or fact that, the vessel had actually become the property of the Portuguese Government, which was possessing and employing her. A similar immunity from arrest was upheld in favour of the British Crown in *The Broadmayne* (114 L. T. Rep. 891 ; (1916) P. 64), a vessel requisitioned by the British Government under what was in fact a compulsory charter-party and hiring. The Government, it was held, could not be deprived by the order of the court of her services nor could the court interfere with her so long as she was in the Crown's employment, though any rights against the owners not affecting the user by the Crown were preserved. This latter point does not arise in actions for possession, as contrasted with actions claiming a lien. Similarly, in *The Jupiter* (132 L. T. Rep. 624 ; (1924) P. 236), no question of ownership of the vessel was involved. All that clearly appears from the report is that the vessel, being a Russian vessel, was in the possession and subject to the control of the Russian Soviet Government, which claimed the right to possession under a master holding for it. A writ *in rem* for possession was set aside. The Court of Appeal obviously treated the facts as sufficient to bring the case within the rule which Scrutton, L.J. quoted from Dicey (3rd edit., p. 215) : " The court has no jurisdiction to entertain an action against any foreign sovereign. Any action against the property of a foreign sovereign is an action or proceeding against such person." In my judgment, on the facts of the present case, the requisitioning of the *Cristina* under the decree of the 28th June, 1937, gave the Spanish Government a right or interest in the *Cristina*, whether called property or not, which was immune from interference by the courts of this country.

The Court of Appeal rightly, as I think, treated the case as concluded in substance by *The Jupiter* (*sup.*). It has, however, been strenuously contended that the decision in *The Jupiter* does not govern this case because the requisition was there effected within the jurisdiction of the requisitioning State, whereas in the present case the Spanish Government seized the *Cristina* in British territorial waters. It was said that such seizure constituted a wrongful act which was a breach of international comity and excluded a right to claim the reciprocal comity of immunity. The famous judgment of Marshall, C.J. in *The Exchange* (7 Cranch 116), was also relied on as resting the immunity on a licence in favour of the sovereign State which brings its own property within the alien jurisdiction on the footing of the licence, whereas no such licence can be implied when the vessel has entered the jurisdiction in the owner's possession and has then been wrongly seized. It was also said that the judgment of the courts below, if upheld, would enable a foreign sovereign State to effect unlawful seizures in this realm of chattels or property without either the State itself or its agents being under any liability civil or criminal. But, in my judgment, these objections are ill-conceived. I do not think Marshall, C.J. had any such idea in mind when he referred to an implied licence under which the foreign vessel entered the jurisdiction. His expressions were apt in regard to the facts before him, but were not intended to limit or define the immunity which follows, not so much from the fiction of a licence, as from the independent status in international law of the foreign sovereign. This gives the sovereign, so far as concerns courts of law, an immunity even in respect of conduct in breach of the municipal law. The remedy, if any, is *primâ facie* by diplomatic representation or other action between the sovereign States, not by litigation in municipal courts. Whatever the consequences which in any particular case may follow from this immunity, it is too well established in the law of this country to admit of being infringed. It must also be noted in the present case that the *Cristina*, even when in Cardiff Docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land. But as the relevant fact here is that the Spanish Government had in fact requisitioned her, there is no need to consider whether in any sense or to any extent she was subject while in English territorial waters to the law of her flag or to the operation of the Spanish decree. Nor is it necessary, even if it be competent, for the court to debate whether the decree was validly made under Spanish law. I do not think that *The Jupiter* (*sup.*) admits of any solid distinction because of the fact that the *Jupiter* was requisitioned within the territorial jurisdiction of the Soviet State.

A further point raised by the appellants was that the *Cristina* was a private merchant vessel employed in trading, whereas in *The Parlement Belge* (*sup.*) the Court of Appeal was careful to point out that the vessel was mainly used for carrying the mails and that the carrying of passengers and merchandise was subsidiary, and it is said that the Court of Appeal in *The Parlement Belge* would have refused to recognise the respondents' immunity in the facts of this case. The contention seems to be that the *Cristina* was a tramp steamer which its owners had employed in ordinary trading and in the carriage of commercial cargoes, and that in regard to such a vessel the foreign sovereign State could not claim immunity either on the ground of property or possession, nor could it claim immunity from being impleaded by an action *in rem* against the ship. It might be enough to say in answer to these arguments that the circumstances under which the respondents took possession of the *Cristina*, particularly in view of the recitals to the decree, sufficiently bring the *Cristina* within the description of public property of the State destined to public use. This is the general criterion postulated by the Court of Appeal in *The Parlement Belge*, but that court never intended to lay down that a trading vessel must be deemed to be as a matter of law outside the sphere of immunity. The main contention of the plaintiffs in that case was that the immunity was limited to ships of war and a few other types of vessels such as royal yachts, transports, and a few others. It was no doubt in regard to armed ships of war that the immunity of ships was first recognised, as in *The Exchange* (*sup.*). But as Sir H. S. Giffard (S.-G.) pungently pointed out in argument in *The Parlement Belge* (5 P. D. at p. 202) : " The privilege depends on the immunity of the sovereign, not on anything

peculiar to a ship of war, though it seldom arises as to anything else because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts." Times, however, have changed, and the general principle must override the particular instance and be adapted to the new conditions. Indeed the *Parlement Belge* might be fairly described as a commercial vessel, since mails are more often than not carried by private ships. In *Young* v. *Steamship Scotia* (*sup.*) the vessel held to be immune as a public vessel was a train ferry owned by the Crown and employed to carry trains between two points on a railway owned by the Government of Canada. In *The Jassy* (10 Asp. Mar. Law Cas. 278; 95 L. T. Rep. 363), Sir Gorell Barnes, P. upheld the immunity in the case of a vessel which was the property of the State of Roumania and employed for the public purposes of the State in connection with the national railways of Roumania. But the most signal development of the principle has been during the Great War, during which the importance to the State of trading vessels became fully realised. This development was most uncompromisingly expressed in a judgment of the Supreme Court of the United States in *Beriggi* v. *Pisaro* (271 U. S. 562). That was an action *in rem* brought against an Italian ship for damages for failure to carry a parcel of silk shipped for carriage from Italy to New York. The ship belonged to the Italian Government and was a general ship engaged in the common carriage of merchandise for hire. The court said, "We think the principles [of immunity] are applicable alike to all ships held and used by the Government for a public purpose, and that when for the purpose of advancing the trade of its people or providing revenue for its treasury, it acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force." This was in 1925. The court cited as recent authorities *Young* v. *Steamship Scotia* (*sup.*), *The Jassy* (*sup.*), *The Gagara* (14 Asp. Mar. Law Cas. 547; 122 L. T. Rep. 498), *The Porto Alexandre* (*sup.*), and *The Jupiter* (*sup.*). This judgment seems to represent the impact of modern ideas on the doctrines of *The Parlement Belge* (*sup.*), but I cannot regard it as other than representing logical evolution. The decision of the United States Court agrees with that of the Court of Appeal in *The Porto Alexandre* (*sup.*), where the ship was one which had been requisitioned by the Portuguese Government and was being employed by them in the carriage for reward of ordinary commercial cargoes, and the Court of Appeal held that the case came within the principle of *The Parlement Belge*. Warrington, L.J. referred to *Briggs* v. *Light Boats* (93 Mass. 157), where immunity was granted in respect of a Government lightship, and quoted the words of the Court of Appeal in *The Parlement Belge* with reference to that case (122 L. T. Rep. at p. 663; (1920) P. at p. 35): "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 ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property," the reason being "that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State." In view of what I regard as the nature and purpose of the possession held by the respondents of the *Cristina*, it is not necessary to express a final opinion on the question, but as at present advised I am of opinion that these decisions of the United States Supreme Court and of the Court of Appeal correctly state the English law on this point.

This modern development of the immunity of public ships has not escaped severe, and in my opinion justifiable, criticism on practical grounds of policy, at least as applied in times of peace. The result that follows is that governments may use vessels for trading purposes, in competition with private ship owners, and escape liability for damage and similar salvage claims. Various international conventions have discussed this problem and have culminated in the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, of the 10th April, 1926. The general purport of the Convention was to provide that ships owned or operated by States were to be subject to the same rules of liability as privately-owned vessels. Ships of war, State-owned yachts, and various other vessels owned or operated by a State Government and non-commercial service were excepted. There was power for a State to suspend the operation of the Convention in time of war. Great Britain, along with the majority of modern States, signed the Convention, but has not yet ratified it or enacted any legislation to bring it into effect in this country. But even if the provisions of the Convention were made law here, it is not clear that it would affect the position in the present case, because its effect is apparently limited to claims in respect of the operation of such ships or in respect of the carriage of cargoes in them. Thus it would affect claims *in rem* for collision damage such as the claim in *The Parlement Belge* (*sup.*), or for salvage as in *The Broadmayne* (*sup.*), and *The Porto Alexandre* (*sup.*), or for cargo damage, as in *Beriggi* v. *Pisaro* (*sup.*), but, it may be, not claims for possession such as that in the present case or *The Gagara* (*sup.*) or *The Jupiter* (*sup.*).

I may add that in the present case it is, in my opinion, sufficiently shown by the evidence before the court that the Spanish Government had actually requisitioned, and taken possession and control of, the *Cristina*. That is all that is needed to justify the claim to immunity on the ground of "property." The question how far a mere claim or assertion by that Government would be conclusive on the court does not arise here.

For the reasons which I have stated, the decision of Bucknill, J. and of the Court of Appeal was, in my judgment, on the materials of fact upon which the court must act, a decision which flowed inevitably from the application of the principles of international law as recognised by the courts of this country. In my judgment the appeal must fail.

Lord Maugham.—My Lords, the claim of the respondents, who are the Government of the Spanish Republic, and who entered a conditional appearance to the writ *in rem*, is based upon their immunity as an independent sovereign State. The facts are fully stated in the opinion of my noble and learned friend Lord Wright, and it is unnecessary to repeat them at length. The appellants, the plaintiffs in the action, were at all material times and still are the sole owners of the *Cristina*. While it remained in their hands it was a private vessel registered at the port of Bilbao. A decree was made in Spain on the 28th June, 1937, requisitioning all vessels registered in the port of Bilbao. The *Cristina* at that date was not within the

territorial jurisdiction of Spain. She arrived at the port of Cardiff on the 8th July. On the 14th July the respondents, by their agents, and, it should be mentioned, without a breach of the peace, took possession of the vessel. For the reasons given by your Lordships I accept the view that since the 14th July the respondents, by their agents, have been in *de facto* possession of the ship. The writ was dated the 22nd July. According to a not unusual form the defendants were "the steamship or vessel *Cristina* and all persons claiming an interest therein." The endorsement on the writ was a claim by the plaintiffs as sole owners of the ship "to have possession adjudged to them" of the same. There was an arrest of the vessel in due course. The respondents entered a conditional appearance on the 27th July and moved to set aside the writ and arrest for the following reasons:

"That the steamship *Cristina* was at the time the writ in this action was issued the property of the Government of Spain, a recognised foreign independent State, and that the said State declines to sanction the institution of these proceedings in this court;

"That at the time of the issue of the writ in this action the steamship *Cristina* was in the possession of the Spanish Government by its duly authorised agent;

"That at the time of the issue of the writ in this action the Spanish Republican Government had a right to the possession of the steamship *Cristina;*

"That this action impleads a foreign sovereign State, namely, the Government of Spain."

The first reason has been abandoned. The respondents relied on the circumstance that by a decree of the 28th June, 1937, they had purported to requisition all vessels registered in the Port of Bilbao (including the *Cristina*) and by reason thereof they claimed that they were entitled to possession of the *Cristina* and that they were therefore impleaded by the proceedings. It was alleged that the Spanish Consul at Cardiff had requisitioned the *Cristina* in pursuance of this decree and that the Spanish Government were in fact in possession of her through a new master appointed by the said Spanish Consul.

Bucknill, J. and the Court of Appeal held themselves bound by authority to decide that the court must decline jurisdiction on the ground that a foreign sovereign State, namely, the Republic of Spain, was asserting a possessory interest in the *Cristina* and objected to the jurisdiction of the court. Hence the present appeal. If it were successful the result would be that our courts would have to determine the legal effect in this country of the decree of the 28th June, 1937, as regards a ship under the Spanish flag which was not at that date within Spanish territorial jurisdiction. This question has not been argued and I shall abstain from expressing any opinion on it. But it seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions *in rem* against vessels belonging to a foreign Government and employed in the ordinary operations of commerce. For my part I think such a claim ought to be scrutinised with the greatest care. In these days and in the present state of the world diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign Government. Moreover, the persons entrusted with the making of diplomatic representations cannot try an action. If a foreign Government ship has been involved in a collision at sea due as alleged to the negligence of her captain and crew, the foreign Government has only to dispute liability to render further diplomatic correspondence a waste of time.

My Lords, it is not in doubt that an action *in personam* against a foreign Government will not be entertained in our courts unless the Government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign Government or sovereign, or, to use the language of the future Lord Esher, delivering judgment in the great case of *The Parlement Belge* (42 L. T. Rep. 273, at p. 281; 5 P. D. 197, at p. 207), "the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority." This immunity, be it noted, has been admitted in all civilised countries on similar principles and with nearly the same limits. It had been by implication admitted in this country by the Statute 7 Anne, c. 12, passed in consequence of the taking of the Russian Ambassador from his coach and his imprisonment under the old law by a private suitor. The statute has always been regarded as merely declaratory of the common law. The settled practice of the court to take judicial notice of the status of any foreign Government (and it may be added of its ambassador) was finally established in this House in the case of the *Duff Development Company Limited* v. *Government of Kelantan* (131 L. T. Rep. 676; (1924) A. C. 797). The present Government of the Republic of Spain has been recognised as being an independent sovereign State.

The immunity of a foreign Government and its Ambassador as regards property does not stand on the same footing. The Statute of Anne protects the goods and chattels of "the Ambassador or other public Minister . . . received as such . . . or the domestic or domestic servant of any such Ambassador or other public Minister." It is clear, I think, that the property in the goods and chattels would have to be established if necessary in our courts before the immunity could be claimed. The Ambassador could not be sued in trover or detinue; but if the property were not in his possession and he had to bring an action to recover it, I am of opinion that he would have to prove in the usual way that the goods were his property. Speaking for myself, I think the position of a foreign Government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a Government or any Ambassador or by one of his servants would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State. Professor Dicey has been relied on in favour of another view; but his proposition, founded on existing authorities, was that "an action or proceeding against the property" of a foreign sovereign or an Ambassador or his suite was for the purpose of the general rule "an action or proceeding against such person" (Dicey, Chapter IV., rule 52). He did not (as he showed in the notes to the rule) mean by this that an action against property claimed by such a person is beyond the jurisdiction of our courts. An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction; but there is no authority for the view that if he wrong-

fully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule, he would in my opinion be bound to prove his title.

The result so far, in my opinion, is that whilst in this country no action can be brought against a foreign government or its accredited representative or persons who may be described as belonging to his suite, still, if the foreign government (I need not further mention the other persons with a right to immunity) wishes to recover property in the hands of some third party, an action must be brought in the usual way and there must therefore be a submission to the jurisdiction up to the judgment. Whether the government has by that submission submitted to execution for costs under the judgment on its property in this country is not yet settled (*Duff Development Company Limited* v. *Government of Kelantan* (131 L. T. Rep. at pp. 679, 683, 686; (1924) A. C. at pp. 810, 819, 822 and 830)). If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property.

I now approach one of the main questions involved in this appeal; what is the position as regards an action *in rem* in relation to a ship lying in a British port or in British waters which at the date of the writ happens to be in the possession of a foreign government? In the present case two additional facts should be remembered: first, that the *Cristina*, before seizure on behalf of the Spanish Government, was an ordinary steamship employed in commerce, and, secondly, that she was registered at Bilbao and sailed under the Spanish flag.

The leading authority in this country is the above-mentioned case of *The Parlement Belge* (*sup.*) decided in the year 1880 by James, Baggallay and Brett, L.JJ., overruling Sir R Phillimore. It related to a Belgian steam-packet plying between Dover and Ostend belonging to the Belgian Government, manned by commissioned officers and employed to carry the mails as well as passengers and cargo. The trial judge, Sir Robert Phillimore, had decided that the action would lie because the ship was employed in commerce. In the Court of Appeal it was not in dispute that ships of war belonging to a foreign government are exempt from our jurisdiction, and the elaborate judgment delivered by Brett, L.J. was devoted to a consideration of the principles on which immunity could properly be based in order to determine whether public ships could claim the same immunity. As I read the judgment, which largely followed the reasoning of a remarkable judgment of Marshall, C.J. in the Supreme Court of U.S.A. in *The Exchange* (7 Cranch 116), two things have to be established to found the immunity, first, that to permit the action to proceed would be incompatible with the royal dignity of the foreign sovereign or government, and secondly, that the immunity was one universally recognised in foreign countries. I would myself prefer to say "almost universally" recognised, for a few exceptions would not, I think, affect the matter; but I hold a strong opinion that the Court of Appeal was right in insisting as a condition of immunity on the adherence of other foreign governments to the same rule as to immunity. In relation to such a rule as the one now under consideration, the word "comity," whatever may be its defects in regard to other rules of private international law, has a very powerful significance. Neither justice nor convenience requires that a particular State should decline to grant justice to its own nationals who have been injured by ordinary commercial vessels belonging to foreign governments, if those governments are not willing to extend a similar immunity to the similar vessels of the first State. Nor can anything much more absurd be imagined than that, for example, England should decline to give legal redress against a Spanish trading ship belonging to that Government while such an action would be allowed to proceed if the ship were found in port at Genoa, or indeed, for all we know, at Valencia.

Having thus laid down the principles, the judgment proceeds to deal with the question whether the *Parlement Belge* was within them; and the conclusion was in these words (42 L. T. Rep. at p. 285; 5 P. D. at p. 220): "The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity." My Lords, I cannot myself doubt that, if the *Parlement Belge* had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgment would have been otiose if the view of the court had been that all ships belonging to a foreign government, even if used purely for commerce, were entitled to immunity, and the same is true as regards the judgment of the Supreme Court of the U.S.A. I must admit that some judges have taken another view; and the decision of the Court of Appeal in *The Porto Alexandre* (122 L. T. Rep. 661; (1920) P. 30) is a clear decision in a sense opposite to the opinion I have expressed. After much consideration I can only express my own conclusion. The judgments in *The Porto Alexandre* seem to me to have omitted any consideration of what I deem to be a vital point, namely, the fact that other countries, while they admit the immunity as regards ships of war and other public ships, have not been at all agreed that the same immunity ought to be granted to ships and cargoes engaged in ordinary trading voyages.

It is objected that an action *in rem* is one in which the foreign government, if in possession of the ship or if it has an interest in the ship, is impleaded. That I think in a sense is true; but I do not think many competent jurists are of opinion that in such a case anything more is sought, or at any rate can be obtained, than a remedy against the *res*. When Sir Robert Phillimore, equally distinguished as a judge in maritime and in international law, decided in *The Parlement Belge* (*sup.*) (contrary to his first opinion) that the proceeding *in rem* should proceed, he was not deciding that a personal remedy could be enforced against the King of Belgium. For my part I can see no sufficient reason for not following in the case of a State-owned vessel, being neither a ship of war nor in any true sense a vessel *publicis usibus destinata*, the decision of Sir Robert Phillimore. The effect would be that these State-owned ships would be treated as exceptions to the general rule to this extent, that proceedings against the ships themselves might be brought and prosecuted to a conclusion. Other exceptions are to be found in cases where proceedings are brought and continued

for administration of a trust, or an estate, or for the winding up of a company, even though a foreign government is interested (*Larivière* v. *Morgan* (26 L. T. Rep. 859; 7 Ch. App. 550, affirmed in H. L., 32 L. T. Rep. 41; L. R. 7 H. L. 423); In *Re Russian Bank for Foreign Trade* (149 L. T. Rep. 65; (1933) Ch. 745)). Moreover, no court has yet held that a foreign Government can object to an action against a company in which it owns a number of shares.

I hesitate to take the view that a requisitioning decree relating to all vessels registered in an important port, whether large or small, whether built for pleasure or profit, is itself sufficient evidence of an intention to devote the vessels to public uses. On the other hand, there are special circumstances in the present case. The Government of Spain is engaged in civil war and is entitled to take exceptional and drastic measures to defend itself. The ships mentioned in the requisitioning decree are Spanish ships. There may be public uses for any of such ships, *e.g.*, in carrying stores, munitions, men, orders and the like for the purposes of defence or attack. On the whole, I think the circumstances of the case justify the inference that the *Cristina* is intended to be used for some of such purposes, and is therefore brought within the description *publicis usibus destinata*. She is as already stated in the possession of the Spanish Government. On these grounds I think she is entitled to the immunity claimed, and this is sufficient to dispose of the appeal.

My Lords, I have indicated my unwillingness to follow what I must admit to be the recent current of authority in our courts as regards State-owned trading ships. In what follows I shall merely be indicating the opinion I have formed—one which I believe is shared by many judges and by nearly all persons engaged in maritime pursuits—that it is high time steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to our own nationals.

Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships, and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and shipowners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or for that matter is international comity being followed, in permitting a foreign Government, while insisting on its own right of indemnity, to bring actions *in rem* or *in personam* against our own nationals?

My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign Governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if Governments or corporations formed by them choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner. This was the effect of the various resolutions of the Conference of London of 1922, of the Conference of Gothenburg of 1923, and of the Genoa Conference of 1925. Three conferences not being deemed sufficient, there was yet another in Brussels in the year 1926. It was attended by Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Poland, Japan, and a number of other countries. The United States explained their absence by the statement that they had already given effect to the wish for uniformity in the laws relating to State-owned ships by the Public Vessels Act, 1925 (1925, c. 428). The Brussels Conference was unanimously in favour of the view that in times of peace there should be no immunity as regards State-owned ships engaged in commerce; and the resolution was ratified by Germany, Italy, Holland, Belgium, Esthonia, Poland, Brazil, and other countries, but not so far by Great Britain: (Oppenheim, International Law, 5th edit., vol. I., p. 670).

It must not be supposed that all the countries attending the conferences I have referred to were bound by their municipal laws to grant the immunity in question. There is no doubt that the practice as to the immunity of State-owned merchant ships has been and still is far from uniform: (Oppenheim, vol. I., p. 669). France and Belgium, for example, grant only a limited immunity, and Italy no immunity at all. I have not been able to ascertain the position taken up by Spain. The Soviet Republic has apparently adopted the admirable practice of owning its merchant ships through limited companies, and does not claim—even if it could, which for my part I should doubt—any immunity whatever in relation to such ships.

I should add that it appears that the United States courts still adhere to the practice of granting immunity to foreign State-owned ships engaged in commerce. The statute above referred to (1925, c. 428) permits (sect. 1) actions to be brought for damages "caused by a public vessel of the United States and for compensation for towage and salvage services including contract salvage rendered to a public vessel of the United States." This it will be noted does not refer in terms to State-owned vessels engaged in trade, but in other respects it extends much further than many countries would be prepared to go, and sect. 5 of the statute gives a right of action under the Act to nationals of a foreign Government only if it is proved that such Government "under similar circumstances allows nationals of the United States to sue in its courts." It would seem that the Legislature of the United States, like that of all or nearly all other civilised countries, is disposed to the view that the immunity of State-owned private vessels ought not to be continued.

A number of other points were ably argued for the appellants, and I have not dealt with them only because I am unable usefully to add anything on those points to what has fallen from my noble and learned friend Lord Wright. I concur in the proposed motion.

Appeal dismissed.

Solicitors for the appellants, *Ince, Roscoe, Wilson,* and *Glover.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

November 26, 29 *and* 30, *and December* 1 *and* 20, 1937.

(Before GREER, SLESSER and SCOTT, L.JJ., sitting with Nautical Assessors.)

The Eurymedon. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision in Long Reach, River Thames, between vessel going up-river and vessel at anchor—Improper anchoring in fairway—Sufficiency of anchor lights—Failure of up-going vessel to identify anchor lights partly due to unusual position of anchored vessel—Duty of up-going vessel to reduce speed on seeing ship's lights ahead, although unidentified—Higher degree of care required when approaching locality where visibility known to be made more difficult by glare of shore lights—Decision of court below holding both vessels equally to blame, upheld.

These were cross-appeals from the judgment of Bucknill, J. (19 *Asp. Mar. Law Cas.* 121; 157 *L. T. Rep., p.* 457) *in an action* in rem *brought by the owners of the steamship* C. *against the owners of the twin-screw motor vessel* E. *for damages in respect of a collision between the* C. *and the* E. *which occurred about opposite the eastern end of Cory's Jetty, Long Reach, River Thames, at about* 6 *a.m. on the* 6*th January,* 1937. *The* E. *was bound up-river on a voyage from Amsterdam to London, and the* C. *was riding to her starboard anchor and lying about athwart the river with her stern about* 350 *ft. from the edge of the jetty. The* E. *with her port side about* 56*ft. forward of her stern struck the port counter of the* C., *and immediately afterwards hit with her stem the starboard side of another vessel—belonging to the same owners as the* C.*—which was at the time lying moored alongside Cory's Jetty.*

According to the plaintiffs' case, shortly before 6.10 *a.m. on the* 6*th January,* 1937, *the weather at such time being overcast and rainy, the wind S.S.W., a strong breeze and squally, and the tide flood of about one knot's force, the* C. (2337 *tons gross,* 300*ft. in length, and* 45*ft. in beam*) *was in Long Reach, River Thames, lying to her starboard anchor with* 45 *fathoms of cable a little below the Smallpox Hospital and to the southward of mid-channel, and, being wind-rode, was angled about three to four points to starboard of a down-river heading. The* C. *was exhibiting the regulation lights for a steamship at anchor, which were burning brightly, and a good look-out was being kept on board her. In these circumstances, the masthead lights and the red light of the* E. *coming up-river in about mid-channel were observed, distant about one mile and bearing a little on the* C.*'s port bow. Thereafter the* E. *was so negligently navigated that, instead of passing all clear to the northward of the* C., *as she could and ought to have done, she came on, and, swinging rapidly to starboard at the last, with her port quarter struck the port quarter of the* C., *doing damage. The* E. *was heard to sound three short blasts at about the time of the collision, but these three blasts were not heard by those on board the* C. *The plaintiffs charged the defendants or their servants on board the* E. *with failing to keep the* E. *clear of the* C.*; failing to pass to the northward of the* C., *as they could and ought to have done; causing and allowing the stern of the* E. *to fall or swing to port; failing to keep to their own starboard side of mid-channel sufficiently or at all; failing to starboard the wheel of the* E. *in due time or sufficiently; improperly putting and keeping their wheel to starboard; failing to put their wheel to port in due time or sufficiently or at all; failing to keep the* E. *under any or proper control; proceeding at an excessive speed; failing to ease, stop or reverse the* E.*'s engines in due time or at all; improperly and at an improper time reversing the* E.*'s engines; attempting to pass too close to the* C., *and failing to comply with rules* 33, 39, 41 *and* 42 *of the Port of London River By-laws,* 1914-1934. *The defendants' case was that, shortly before* 6.21½ *a.m. on the day in question, the* E. (6224 *tons gross,* 431.8*ft. in length and* 54.7*ft. in beam*) *was in Long Reach, River Thames, proceeding up-river on a voyage from Amsterdam to London, partly laden. The weather was fine and clear, but dark, the wind was S.W. of gale force, and the tide flood of about one knot's force. The* E. *was keeping to the northward of mid-channel, and, with her engines working half-speed ahead, was making about seven to eight knots. She was exhibiting the regulation masthead light, additional optional masthead light, side lights and fixed stern light, all of which were burning brightly, and a good look-out was being kept on board her. In these circumstances, a dim white light, which proved to be the forward anchor light of the* C., *was observed by those on board the* E. *distant about a cable or a little more and bearing one to one-and-a-half points on the* E.*'s port bow, and immediately afterwards the outline of the* C. *was made out lying athwart the river right across the head of the* E., *and a very dim white light aft on the* C. *was also made out. Thereupon the wheel of the* E. *was immediately put hard a-starboard, one short blast was sounded on her whistle, her engines were stopped and put full speed astern, and three short blasts were sounded on her whistle. The head of the* E. *swung clear of the stern of the* C., *and the wheel of the* E. *was then hard-a-ported in an endeavour to swing her stern clear of the* C. *and also to prevent the* E.*'s head from fouling another vessel which was lying at Cory's Jetty, but, in spite of these manœuvres, it*

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

proved impossible to prevent the port side of the E. *in way of the break of the poop from fouling the stern of the* C., *and at the same time the* E.'s *starboard bow came into contact with the starboard side of the other vessel which was lying at the jetty, whereby the* E. *sustained damage. The defendants charged those on board the* C., inter alia, *with failing to keep a good look-out; with failing to exhibit anchor lights of sufficient brightness in accordance with the by-laws; with being improperly at anchor in the fairway; failing to anchor the* C. *on the south side of the river, as in the circumstances they could and ought to have done; with improperly causing or allowing the* C. *to lie athwart the river and in a position where her lights were liable to be confused with surrounding shore lights, and to constitute an obstruction to vessels lawfully navigating in the river; and with failing to comply with rules* 24, 41, *and* 42 *of the Port of London River By-laws*, 1914–1934.

Held, by Bucknill, J., that at the time of the collision the C.'s *stern was about* 350*ft. from Cory's Jetty on the north shore; that the* C. *was occupying about* 300*ft. of the deep-water channel which at this place is* 1000*ft. wide, and that this was an unusual position for a vessel to lie in—that those in charge of the* C. *were lacking in good seamanship in allowing their vessel to lie athwart the river in this place and at this time, as not only did the* C. *lying in this position constitute a dangerous obstruction to vessels going up and down the river, but she was lying at a place where the brilliant lights on the north shore in the vicinity of the collision and the light and shadow caused by these lights on the water would probably make it more difficult to pick up the* C.'s *lights;* (2) *that the* E. *was negligent in that upon approaching a locality where visibility was known to be made more difficult by the glare of shore lights and approaching unidentified white lights ahead, she did not reduce her speed immediately (which the learned judge found to be at least ten knots over the ground) at the first appearance of the white lights ahead;* (3) *that in the circumstances of this case the negligence of the* C. *in taking up the position she did contributed to the failure of those in charge of the* E. *to take appropriate action to avoid a collision until they were too close to clear the* C. *and the other vessel lying alongside the jetty;* (4) *that both vessels were to blame in equal degrees.*

Appeal and cross-appeal dismissed with costs.

DAMAGE BY COLLISION.

The appellants (plaintiffs in the court below) were Cory Colliers Limited, of London, owners of the steel screw steamship *Corstar* of 2337 tons gross and 1336 tons net register, 300ft. in length, 45ft. in beam, and fitted with triple expansion engines of 266 h.p. nom. The respondents and cross-appellants (defendants in the court below) were the Ocean Steamship Company Limited, of Liverpool, owners of the twin screw motor vessel *Eurymedon* of 6223 tons gross and 3858 tons net, 436.8ft. in length and 54.7ft. in beam, fitted with motor engines of 951 h.p. nom. The collision occurred in Long Reach, River Thames, about opposite the eastern end of Cory's Jetty, on the north side of the river, at about 6 a.m. on the 6th January, 1937. The weather was overcast, and it was raining. The wind was south-westerly, of almost gale force, and the tide was flood of force about one knot. The *Corstar* was riding to her starboard anchor with 45 fathoms of cable and was lying almost athwart the river. The *Eurymedon* was proceeding up-river on her proper side of mid-channel in the course of a voyage from Amsterdam to London, and was partly laden. The facts appear from the headnote and are fully set out, together with the arguments in their Lordships' judgments.

In the course of the hearing counsel for the appellants (plaintiffs below) referred to the following cases: *Davies* v. *Mann* (10 M. & W. 546), *The Volute* (126 L. T. Rep. 425; (1922) 1 A. C. 129, 136), *Baker* v. *Longhurst and Sons* (149 L. T. Rep. 264, C. A.; (1933) 2 K. B. 461), *McLean* v. *Bell* (147 L. T. Rep. 262), *Cayzer* v. *Carron Company* (*The Margaret*) (9 Asp. Mar. Law Cas. 873; 52 L. T. Rep. 361; (1884) 9 A. C. 873), *Swadling* v. *Cooper* (143 L. T. Rep. 732, H. L.; (1931) A. C. 1), *Hillen* v. *I.C.I.* (*Alkali*) *Limited* (153 L. T. Rep. 403; (1936) A. C. 65), *Tuff* v. *Worman* (1858, 5 C. B. (N. S.), 573), *British Columbia Electric Railway Company* v. *Loach* (113 L. T. Rep. 946; (1916) 1 A. C. 719), *Kantarah* v. *Samurai* (1920, 5 Ll. L. Rep. 333), *The Batavier* (1845, 2 W. Rob. 407), *Mersey Docks Trustees* v. *Gibbs* (14 L. T. Rep. 677; (1866) L. R. 1, H. L. 93), *Mayor of Colchester* v. *Brooke* (1845, 7 Q. B. 339, 376), *H.M.S. Sans Pareil* (9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267), *The Margaret* (4 Asp. Mar. Law Cas. 375; 44 L. T. Rep. 291; (1881) 6 P. D. 76), *The Monte Rosa* (7 Asp. Mar. Law Cas. 326; 68 L. T. Rep. 290; (1893) P. 23), *The Cachapool* (4 Asp. Mar. Law Cas. 502; 46 L. T. Rep. 171; (1881) 7 P. D. 217), *The Highland Loch* (12 Asp. Mar. Law Cas. 106; 106 L. T. Rep. 81; (1912) A. C. 312), and *Heaven* v. *Pender* (49 L. T. Rep. 357; (1883) 11 Q. B. D. 503, at 508). In considering the effect of the principles laid down in *Davies* v. *Mann* (*sup.*), Slesser, L.J. referred to *Butterfield* v. *Forrester* (1809, 11 East. 60) and *Radley* v. *London and North-Western Railway Company* (35 L. T. Rep. 637; (1876) 1 A. C. 754).

K. S. Carpmael, K.C. and *Owen L. Bateson* for the appellants (the owners of the *Corstar*).

H. G. Willmer and *Vere Hunt* for the respondents and cross-appellants (the owners of the *Eurymedon*).

Cur. adv. vult.

Greer, L.J. (whose judgment was read by Slesser, L.J.).—Shortly after 6 a.m. on the 6th January, 1937, the plaintiffs' steamship *Corstar* and the defendants' motor vessel *Eurymedon* came into collision in Long Reach, River Thames, which is shown on the charts put in evidence. Bucknill, J. held both vessels to blame, and apportioned the damages equally. The owners of the *Corstar* appeal on the ground that the negligence of those on board the *Corstar* was not a contributing cause of the collision, because those in charge of the *Eurymedon* saw, or ought to have seen, her riding lights in time to take action to avoid colliding with her. The owners of the *Eurymedon* cross-appeal on the ground that the sole cause of the collision was the negligence of the *Corstar*.

The material facts proved, and the findings of the learned judge, are summarised in a very clear judgment, and I find it unnecessary to repeat them in my judgment. I read the judgment as meaning

that those in charge of the *Eurymedon* saw the riding lights of the *Corstar* earlier than they said in their evidence, but that they did not identify them as the lights of a vessel at anchor because they were not expecting to see a vessel anchored in the position in which the *Corstar* had been put and allowed to remain. I think the learned judge found the *Eurymedon* partly to blame on the ground that, seeing the lights and not knowing what they indicated, those in charge of the *Eurymedon* should have reduced her speed. The learned judge in his judgment says (19 Asp. Mar. Law Cas. 121, at p. 125 ; 157 L. T. Rep. at p. 461) :

'The first question which I now have to consider is whether the *Eurymedon* was negligently navigated. The conclusion to which I have come is that the failure on the part of those in charge of the *Eurymedon* to identify the anchor lights of the *Corstar* as such in time to avoid a collision with her was partly due to the *Corstar's* unusual and improper and therefore unexpected position in the river, and was partly due to the fact that those on board the *Eurymedon* as they approached the place of collision were not sufficiently alert to the possibility of danger ahead and did not take proper action to reduce their speed in due time. I doubt whether I have heard from the *Eurymedon* a complete account of the observations made on board her with reference to the *Corstar's* lights. The conclusion I have come to after hearing all the evidence is that those in charge of the *Eurymedon* became aware, or should have become aware of white lights ahead which proved to be those of the *Corstar* at a distance greatly in excess of 650ft., and in ample time to avoid a collision with her, and that they did not take any action until the hull of the *Corstar* was sighted at about 650ft., because they did not realise until they saw the hull that the lights were the riding lights of a vessel at anchor athwart the fairway.

" On seeing these lights, I am advised that those in charge of the *Eurymedon* should have realised the possibility of a ship or ships ahead the precise position of which was obscure, and should have made a reduction of speed immediately."

I entirely agree with this decision as to the fault of the *Eurymedon*.

The learned judge's decision with regard to the negligence of the *Corstar* is stated on the same page as follows :

" In my view, and in this also I am supported by the advice of the Elder Brethren, those in charge of the *Corstar* were lacking in good seamanship in allowing the *Corstar* to lie athwart in the river in this place and at this time in the position as found by me. The fact that the master and the chief officer of the *Corstar* have denied that their ship ever got into this position indicates what their own opinion on this point is. If they had taken any care to ascertain their position at anchor, which I think they did not do, they would have known that the vessel under the prevailing conditions of wind and tide would be lying athwart the fairway on the last of the flood and at a time when vessels would be coming up and down river, and that they would be an obstruction to them as well as being in a very unusual position. There was no necessity whatever for the *Corstar* to be there, and after those in charge of her became alive to her position they moved away to a proper anchorage on the south side of the river. The *Corstar* had a very indifferent anchor watch, a man who apparently did not realise that the vessel was athwart the river. In my view, the conduct of those in charge of the *Corstar* in lying in this position was negligent. They were behaving in such a way as to make a collision probable with vessels proceeding up or down the river, and their conduct was not caused by any necessity but merely by lack of good seamanship and failure to take ordinary precautions to avoid the risk of collision."

That those in charge of the *Corstar* were guilty of great negligence in so anchoring their ship as to allow it to get into the position athwart the fairway cannot be disputed. But the learned judge had to deal with the contention put forward on behalf of the *Corstar* that the negligence referred to was not a contributing cause of the collision because those in charge of the *Eurymedon* could, by the exercise of reasonable care, have avoided colliding with the *Corstar*. The learned judge deals with the question in the words following (*sup.*, at pp. 125 and 461 respectively) :

" The third issue that arises is whether, assuming the position of the *Corstar* was improper and those in charge of her were guilty of negligence in allowing her to get in that position, such negligence contributed to the collision, or whether the principle laid down in *Cayzer* v. *Carron Company* (52 L. T. Rep. 361 ; 9 App. Cas. 873) applies. In my view, that issue depends to some extent upon the question whether the negligence of the *Corstar* in taking up that position contributed to the failure of those in charge of the *Eurymedon* to take appropriate action to avoid a collision until they were too close to clear her and the *Corchester*. If these incidents had occurred by day, and those in charge of the *Eurymedon* had known that the *Corstar* was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the *Corstar's* negligence one of the contributory causes of the collision. The knowledge, or lack of knowledge, of the *Eurymedon* as to the improper position of the *Corstar* appears to me to be a cardinal fact on this issue as to the liability of the *Corstar*. The crucial factor of such knowledge appears to explain the difference between the decision in *The Margaret* (4 Asp. Mar. Law Cas. 375 ; 44 L. T. Rep. 291 ; 6 P. D. 76) and in *The Monte Rosa* (7 Asp. Mar. Law Cas. 326 ; 68 L. T. Rep. 299 ; (1893) P. 23), as Lord Birkenhead pointed out at p. 137 of his speech in *The Volute* (126 L. T. Rep. 425 ; (1922) 1 A. C. 129).

" In this case, those in charge of the *Eurymedon* did not appreciate the fact that the *Corstar* was at anchor until it was too late to avoid her. I have already decided that the *Eurymedon* was to blame for not taking earlier action by reducing her speed, but the negligence of the *Corstar*, in allowing herself to get into an improper position, does seem to me to be so much mixed up with, and part of the state of affairs brought about by the *Eurymedon*, to apply the words of Lord Birkenhead in *The Volute*, that, to borrow, again, from the same speech : ' In the ordinary plain common sense of the business the *Corstar* has contributed to the accident by her negligence.'

" I therefore find both vessels to blame."

I understand the judge's decision to be that the failure of those in charge of the *Eurymedon* to identify the *Corstar* as a vessel at anchor in the fairway was in part caused by the negligence of those in charge of the *Corstar* in so anchoring her that she got into, and was allowed to remain in, a position in which no vessel navigating Long Reach would expect her to be, and caused those on the *Eurymedon* to fail to identify the meaning of her lights. Having regard to the express findings of the learned judge, I do not feel it necessary to consider in any detail the numerous cases cited to us by Mr. Carpmael for the appellants. I think

the judge's finding of both vessels to blame was in accordance with the evidence, and his judgment ought not to be disturbed.

I think the law arising out of what is usually called the *Davies* v. *Mann* principle may be stated as follows :

(1) If, as I think was the case in *Davies* v. *Mann* (1842, 10 M. & W. 546), one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff.

(2) Rule No. (1) also applies where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it, and could, by exercising reasonable care, have avoided causing damage to the other negligent party.

(3) The above rules apply in Admiralty with regard to collisions between two ships as they apply where the question arises in a common law action.

(4) But if the negligence of both parties to the litigation continues right up to the moment of the collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

(5) If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

In my judgment the present case comes within the 4th and 5th rules above stated. Rules 1 to 4 have been established beyond question by the long line of cases cited by Mr. Carpmael for the appellants.

There has been no case before the present expressly based on rule 5, but I think rule 5 is a necessary corollary to rule 4, and it is implicitly involved in the decision of the court in *Dowell* v. *General Steam Navigation Company* (1855, 5 L. T. Rep. 146 ; 5 E. & B. 195), which was approved in *The Volute* (126 L. T. Rep. 425 ; (1922) 1 A. C. 129, at p. 138) in the decision of the Privy Council in *British Columbia Electric Railway Company Limited* v. *Loach* (113 L. T. Rep. 946 ; (1916) 1 A. C. 179), and in the decision of the House of Lords in *Swadling* v. *Cooper* (143 L. T. Rep. 732 ; (1931) A. C. 1).

For these reasons I think that the decision of Bucknill, J. was right, and that this appeal should be dismissed with costs.

Slesser, L.J.—In this case, which has arisen out of a collision between two vessels in Long Reach, River Thames, shortly after 6 a.m. on the 6th January, 1937, it is not disputed that the vessel, the *Corstar*, at the time of the casualty, was at anchor, and the learned judge has found that those in charge of her were lacking in good seamanship in allowing her to lie athwart the river in a very unusual position ; improper and dangerous from the point of view of traffic up and down. The learned judge accepted the evidence of the pilots of several vessels who had succeeded, some with great difficulty, in passing the *Corstar*, that instead of complying with the practice in Long Reach of anchoring to the southward of mid-channel so that large vessels proceeding up and down river could pass to the northward, the *Corstar* was lying with her whole length to the north of mid-river, and across the fairway in such a position that she was obstructing a large part of the fairway used by traffic up and down the river. Subject to this condemnation, the learned judge has found that the *Corstar* was exhibiting anchor lights which complied with the by-laws, and that she was not to blame in that respect, but that she was negligent in that there was no necessity whatever for her to be in that dangerous place, and that she had a very indifferent anchor watch—a man who apparently did not realise that the vessel was athwart the river or take steps to prevent it. This was the negligence found on the part of the plaintiffs.

As to the defendants, the owners of the *Eurymedon*, she, the learned judge said, was negligently navigated in that there was a failure on the part of those in charge of the *Eurymedon* to identify the anchor lights of the *Corstar* as such, in time to avoid the collision. The reason why they did not identify the lights until they were comparatively close to the *Corstar*, he finds, was because they were not expecting to see a vessel anchored in this position and were not looking out for or expecting to see the anchor lights of a ship lying across the fairway there. Finally, on this head, he thinks that those in charge of the *Eurymedon* became aware, or should have become aware, of the lights ahead which proved to be those of the *Corstar*, at a distance in ample time to avoid the collision with her, and that they did not take any action until the hull of the *Corstar* was sighted at 650ft. because they did not realise until they saw the hull that the lights were the riding lights of a vessel at anchor athwart the fairway.

The learned judge on these findings came to the conclusion that both vessels were to blame and that the negligence of the *Corstar* in taking up her position contributed to the failure of those in charge of the *Eurymedon* to take proper action, and that this negligence of the *Corstar* was so wrapped up with and part of the negligence of the *Eurymedon* as to compel him to say that in the ordinary common sense of the business, the *Corstar* contributed to the accident by her own negligence.

In these circumstances, the causal argument not unfamiliar, but always difficult to determine, was raised by Mr. Carpmael for the appellants, the plaintiffs. He says, endeavouring to bring the case within the doctrine of last opportunity, that on the finding of the learned judge such last opportunity was with the *Eurymedon*, who, had she kept a proper look-out, would have seen or ought to have seen the lights of the ship at anchor, and had she seen them ought to have appreciated from their presence that there was a ship athwart the fairway, in which case she could have avoided the vessel by passing her to the north of the reach in that part of the river which was still unobstructed. He invokes the well-known authority of *Davies* v. *Mann* (10 M. & W. 546), to the effect that where an accident arises through the combined negligence of two persons the liability is on him who had last opportunity of avoiding the accident.

In *Davies* v. *Mann*, it is not clear, as I read the case, whether the driver of the defendants' wagon which ran against the plaintiff's fettered ass did or did not see the donkey. I think from the judgment of Parke, B., at p. 549, that it was found that he probably did so see the ass, though too late. On the other hand, in *Butterfield* v. *Forrester* (11 East. 60), the plaintiff, who was riding at a time when there was light enough to discern an obstruction 100 yds. distant, rode violently and did not observe it, the evidence being that if he had not ridden very hard he might have avoided the obstruction. In the language of Bayley, J. : " If he had used ordinary care he must have seen the obstruction." As against this view, the learned judge, as I have said, in this case, has found in effect that there was here such a continuing

negligence on the part of the plaintiffs as to make it proper to say in the language of Lord Birkenhead in *The Volute* (1922, 1 A. C. 129, at p. 145), that there does not seem to be a sufficient separation of circumstance between the negligent navigation of the one ship and that of the other to make it right to treat the negligence of the one as the sole cause of the collision.

In the present case, the learned judge has come to the conclusion that if the *Eurymedon* had known by day that the *Corstar* was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the *Corstar's* negligence one of the contributory causes of the collision. But he thinks that the *Corstar* in this accident at night has contributed to the collision by being in a place so unexpected that the *Eurymedon* was not looking out for or expecting to see her anchor lights.

I appreciate the difficulty that was urged upon us by Mr. Carpmael in accepting this view. Both in *Davies* v. *Mann* and in *Butterfield* v. *Forrester*, obstructions were left in a position where they were not reasonably to be expected. Indeed, anything less likely than that a fettered ass would be found upon a highway it is difficult to imagine ; and were the matter to end here I should have the greatest difficulty in coming to the same conclusion as the learned judge. The case of *Tuff* v. *Warman* (5 C. B. (N. S.) 573), supports the view that if the absence of a look-out was negligence on the part of the plaintiffs, still, if the defendant also had a look-out and nevertheless persisted in a course that would inflict an injury they would be liable though the plaintiffs had no look-out, for that neglect of the plaintiffs would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened : (per Whiteman, J., at p. 586).

But in the present case, there is another ground for asserting a continuing negligence on the part of the plaintiffs. In my view, the plaintiffs, by failing to prevent the vessel getting across the river under the prevailing conditions of wind and tide on the last of the flood, in that they had not any competent anchor watch and failed to use their engines from the time when the vessel started to go athwart as they might have done, have by their own negligence denied themselves the opportunity of avoiding the accident, and this opportunity which they have prevented themselves from using (though their engines were kept handy for the tide turning and main steam had been maintained and the engineer was in charge of the engines) would had they not been negligent have continued throughout the night up to the time of collision. This would appear to be the effect of *Loach's* case (1916, 1 A. C. 719), where the railway company would have had the last opportunity of avoiding the accident, but for their sending out a car with a defective brake ; the Judicial Committee there holding the company liable, although the last actual negligence was in the plaintiff, on the ground that the opportunity which the railway company ought to have had but for their negligence must be deemed to be a continuing opportunity. Despite some doubts formerly expressed as to this case, it now appears from the speech of Lord Wright in *McLean* v. *Bell* (147 L. T. Rep. 262, at p. 264), that *Loach's* case is to be regarded as good law—binding upon this court—a view with which the other learned and noble Lords associated themselves.

In the result, I have come to the same conclusion, though in part for different reasons, as the learned judge, that in all the circumstances of the case both parties to the action are to be held to blame.

Scott, L.J.—In my opinion, this appeal should be dismissed. I agree with the conclusion reached by Bucknill, J., that both vessels were to blame, and I do not think we should alter his apportionment. I see no ground for thinking that in holding both vessels to blame he acted on any wrong view of the law, and I am satisfied that the evidence amply warranted his findings of fact. As has been pointed out in both the judgments already delivered, the appeal of the *Corstar* was based on the contention that the facts disclosed a *Davies* v. *Mann* case, entitling the *Corstar* to a judgment that the *Eurymedon* was alone to blame.

I will state my views upon the facts before I discuss the question of law. Upon most of the facts there was no dispute, but there was one question which was in direct controversy, and another which raised some degree of doubt. The controversy turned on an attack by witnesses from the *Eurymedon* upon the *Corstar's* anchor lights as being insufficiently bright to satisfy rule 14 of the Thames by-laws. The learned judge, however, went into the evidence with great care, believed the *Corstar's* lamp man who gave evidence before him, and finally disposed of the attack by holding that the *Corstar* was duly exhibiting anchor lights which complied with the by-law. That finding was not contested before us. The question upon which there was doubt was as to the time when the *Eurymedon* in fact saw the anchor lights of the *Corstar* and realised what they were and whether at that time it was still possible for her by helm and engine action to avoid a collision.

The language of the judgment is not quite definite on this point, but as I read this I think the learned judge intended to find that those on the *Eurymedon* saw both the lights of the *Corstar* when the *Eurymedon* was still a considerable distance away (although he did not say how far), but he says that they did not then "identify" them. By his finding I think he meant that those responsible for the navigation of the *Eurymedon* actually saw the two lights of the *Corstar*, but did not realise that they were the anchor lights of a ship of the sort of size of the *Corstar*, lying athwart the fairway. He does not go so far as to find the *Eurymedon* guilty of a bad look-out; indeed, he rather goes out of his way to minimise the blame which would normally attach to the failure to identify the lights, by suggesting that it may have been due partly to the abnormal position of the *Corstar* in the river, *i.e.*, lying right athwart the northern half of the fairway and blocking the usual route for traffic—a position where no up-coming steamer would expect an anchored vessel to be—and partly to the glare of the shore lights extending in alternating patches of light and dark along the north shore up to and past Cory's Jetty. Had the learned judge definitely found that, when the *Eurymedon* was first within the range of full visibility of the *Corstar's* lights, *i.e.*, a mile away, she then fully realised what the *Corstar's* lights were and meant, he could hardly help holding her alone to blame, on the reasoning of *Davies* v. *Mann* (10 M. & W. 546) and *Cayzer* v. *Carron Company* (9 Asp. Mar. Law Cas. 873 ; 52 L. T. Rep. 361 ; 9 App. Cas. 873) (second *Margaret* case). And on similar reasoning if he had found her definitely guilty of bad look-out throughout with no extenuating circumstances, and had also found that with a proper look-out she would have had ample time and opportunity to keep out of the *Corstar's*

way, then again it may be that he ought to have held her alone to blame—see *Butterfield* v. *Forrester* (11 East 60), to which Slesser, L.J. has referred; but he makes no such finding, nor was there, in my opinion, evidence upon which we can say that he ought to have so found. The question, therefore, of what legal conclusion ought to follow upon such a finding of fact does not arise.

On the evidence and on the learned judge's actual findings of fact I cannot see how he could attribute all the blame to the *Eurymedon*, or avoid holding that the *Corstar* was in part responsible for the collision. As I read his judgment his conclusion was one of pure fact. From the first moment that the *Eurymedon* began to approach the *Corstar* with a view to passing up the Reach along its northern half, which the evidence showed to be the usual track of vessels in the fairway, the *Corstar's* disregard of the obligation of good seamanship (which was a merely abstract obligation as long as no ship wanted to pass) became a breach of positive duty towards the *Eurymedon*. The *Corstar* was lying in a position which was to the pilot of the *Eurymedon* so unprecedented as to be wholly unexpected—and he had been a Thames pilot for thirty years; and it struck four wholly independent pilots with similar experience in just the same way. The common-sense view of the effect of this negligence seems to me to be that it was throughout the period when the *Eurymedon* was approaching her down to the moment of impact a continuing source of embarrassment to the *Eurymedon*, and, therefore, of necessity a contributing factor for which the *Corstar* cannot escape responsibility.

That the *Eurymedon* was also to blame, as held by the learned judge, seems to me obvious. Even assuming, as I do assume, that he was justified in not finding her guilty of bad look-out when she first came within the minimum range of the *Corstar's* lights under the by-law—one mile—there must have been a point, much farther from the *Corstar* than the 650ft. at which they began to see the loom of her hull, when those on the *Eurymedon* ought to have seen and identified her anchor lights; and from that time she came under a definite duty to take helm and engine action in order to avoid or minimise the effect of a collision with a ship at anchor. For this the *Eurymedon* was clearly to blame. This negligence of the *Eurymedon* was from that time a continuing negligence, just as the failure of the *Corstar* to rectify her position in the river was a continuing negligence; and both continued till the collision. It follows that each ship was guilty of negligence towards the other, that each ship thereby contributed to the collision, and that each ship must consequently be held to share the legal responsibility for the result.

I now deal with the legal arguments addressed to us. Greer, L.J., has stated the gist of the law applicable to the solution of cases like the present in the form of five rules. His propositions do not, as I understand them, purport to be a codification of the branch of law embodied in *Davies* v. *Mann*, and the innumerable cases which have either followed or distinguished it; but only to state shortly those aspects of that branch of law which are germane to the present controversy. With the first four I agree, but the fifth rule can in my view only be regarded as a statement of the legal result of the facts of the present case; and as a general rule it would, I think, need some elaboration and qualification.

During the hearing of the appeal Mr. Carpmael for the *Corstar* cited to us most of the cases in which the principle of *Davies* v. *Mann* has been discussed, but in my view the broad feature which results from the cases is, alike in Admiralty and at common law, that the final question is one of fact, to be decided by the tribunal of fact, with due regard to all the circumstances of the case, as Bucknill, J. pointed out at the end of his judgment. I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of Lord Wright in *McLean* v. *Bell* (147 L. T. 262, at p. 264).

The decision, however, of the case must turn not simply on causation, but on responsibility.

When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since *ex hypothesi*, but for that last link, the result would never have happened. But legal responsibility does not necessarily depend only on the last link. This is especially so in maritime collisions, just because in the behaviour of large vessels the effect of a given cause may for physical reasons continue in operation for a long time, or may not show itself at all till after a considerable interval of time. And if the cause was set in operation by negligence, it will not lose that characteristic merely through the lapse of time. Until some other person comes "into range," as it were—I include the personified ship of Admiralty parlance—the duty of proper navigation is doubtless abstract, for a breach of it affects no one; but, as was said by Anglin, J. in the judgment quoted with approval by Lord Sumner in *British Columbia Electric Railway Company Limited* v. *Loach* (113 L. T. Rep. 946; (1916) 1 A. C. 719, at pp. 726–7) on the emergency happening the abstract obligation becomes a concrete duty towards the person affected by it. In that case the action was by the administrator of the estate of a man who had been killed by a train at a level crossing. The deceased was found by the jury to have contributed to the accident by his own negligence, namely, in crossing without looking out, but they also found that the reason the brakesman failed to stop the train was that by anterior negligence of the company's servants the brake was in a defective condition. In his judgment Anglin, J. said (pp. 726–7):

"But there is a class of cases where a situation of imminent peril has been created either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely *sine qua non*—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence, constitute 'ultimate'

negligence rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. . . ."

The Privy Council approved that passage, saying that "on the facts of the present case, the above observations apply and are correct"; and the House of Lords have subsequently recognised that Privy Council decision as consonant with English law. In *Loach's* case the Privy Council held that it was the company's negligence which was the effective cause of the accident. A comparable and not infrequent illustration of the continuing character of maritime negligence is defective steering gear, for which many ships have been held to blame in the Admiralty Court. In such cases the negligence often happens before the voyage begins.

The idea that the last act of negligence is necessarily or even presumably to be regarded as "the efficient, proximate, or decisive" cause of the collision, imputing a legal conclusion of sole responsibility, was rejected by Lord Birkenhead in his opinion in *The Volute* (126 L. T. Rep. 425; (1922) 1 A. C. 129, at pp. 141 to 144). He there pointed out that there are many cases where the two negligences—of plaintiff and defendant—are not synchronous but successive; and yet that in these cases it may be right for the court to hold both parties to blame, because on the broad commonsense view both contributed to the result.

That *locus classicus* is so much quoted that I venture a parenthetical note in order to call attention to what is, I think, a printing error on p. 143, as it slightly affects the run of the sentence. The penultimate paragraph should apparently have been printed as part of the preceding sentence, following on a semi-colon, and not as a separate paragraph after a full stop. The noble Earl was referring to cases where a decision of one alone to blame would be justifiable; he, however, observes that "it would be difficult to find an instance of such a decision, but many decisions will be found of both to blame." And on p. 144 he says in effect that where "a clear line" cannot be drawn 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* (4 Asp. Mar. Law Cas. 207; 41 L. T. Rep. 747; (1879) 4 P. D. 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.

I venture to add two final observations. The first is that the regime of the proportional rule has freed the Admiralty Court from an undue temptation to shut its eyes to minor degrees of negligence, involving, as was often the case under the half-and-half rule, an unjust degree of punishment. The second is that the spirit of the proportional rule, in my opinion, calls for the sort of wide view of joint responsibility which Lord Birkenhead thought right. Indeed, his Lordship's remark about the proportional rule which I have quoted seems rather to support what I have just said. Such a view of the proportional rule has a further advantage. I believe it would be consonant with the juridical attitude and practice of other nations who are parties to the Collision Convention to which legislative effect was given in England by our Act of 1911. The object of that convention was to effect a step towards the international unification of maritime law, and the proportional rule was a most important feature of it. The maintenance of uniformity in the interpretation of a rule of law after its international adoption is just as important as the initial removal of divergence, but never easy to achieve. From my experience of the views of continental jurists about the proportional rule, I feel sure that the broad view of the proportional rule is their view; and, if we maintain it here, we shall hope to preserve that international uniformity which was the object of the Convention on Collisions at Sea. I do not, of course, suggest that we should judicially mould English law by reference to foreign practice; but that we should in a branch of law covered by international convention preserve uniformity is an obvious advantage, if it is judicially possible.

In the present case, there was on the part of each ship a breach of good seamanship, which, as soon as the *Eurymedon* came within range of the *Corstar*, became a breach of definite duty by the one to the other. On the part of the *Corstar*, the breach was a combination on the one hand of initial carelessness in anchoring in such a position, and with such a length of cable, that with the prevailing wind the ship would obstruct that part of the fairway which it was imperatively necessary should be kept unobstructed, because it was the usual route for traffic both up and down, and on the other of a continuing subsequent failure to correct her position. I do not suggest that she could have corrected it *after* the *Eurymedon* began to get "into range," as I call it; but there was a breach of good seamanship in failing to do it earlier, the effect of which could not be remedied when risk of collision had actually arisen. Once the *Eurymedon* was "in range," a duty to her arose, and the *Corstar* cannot escape blame in the Admiralty sense for the resultant collision. The negligence of the *Eurymedon*, on the other hand, as a continuing cause down to the collision is self-evident.

I think this appeal should be dismissed with costs.

Carpmael.—The appeal and cross-appeal will be dismissed with costs? I ask for leave to appeal. It is an important matter as it deals with this branch of the law.

Slesser, L.J.—We have considered this matter. We have decided that we will not grant leave to appeal in this case as it is primarily a question of fact.

Solicitors for the appellants, the owners of the *Corstar*, *Ince*, *Roscoe*, *Wilson*, and *Glover*.

Solicitors for the respondents and cross-appellants, the owners of the *Eurymedon*, *Bentleys*, *Stokes*, and *Lowless*, agents for *Alsop*, *Stevens*, and *Collins Robinson*, of Liverpool.

December 9, 10, 13, *and* 20, 1937.

(Before GREER, SLESSER, and SCOTT, L.JJ., assisted by Nautical Assessors.)

The Umtali. (*a*)

[This decision was reversed by the House of Lords on 15th Dec., 1938.—ED.]

Collision in St. Clement's Reach, River Thames, just below Stone Ness Point—Down-going vessel and up-coming vessel approaching each other at high speed on the south side of mid-

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

channel—Porting by down-going vessel, starboarding by up-coming vessel—Failure to pass port-side to port-side—Failure of up-coming vessel, navigating against the ebb-tide, to "ease her speed or stop on approaching . . . bend . . ." Port of London River By-laws, 1914-1934, *by-laws* 4 (a) *and* 33—*By-law* 4 (a) *contrasted with by-law* 36 *which it has superseded—Judgment of the court below reversed.*

These were cross-appeals by the D. South American Line Limited of Glasgow, owners of the steamship C. (6863 *tons gross*), *and Messrs. B., K., and Co. Limited, of London, owners of the steamship* U. (8158 *tons gross*) *from the judgment of Bucknill, J.* (19 *Asp. Mar. Law Cas.* 133) *holding both vessels to blame in equal degrees for collision between them which occurred on the morning of the* 16*th May,* 1937, *in St. Clement's Reach, River Thames, off Greenhithe, about two cables below Stone Ness Point and to the north of mid-channel. The facts as found by the learned trial judge and fully adopted by the Court of Appeal were as follows: The* C. *was proceeding up-river to the south of mid-channel and against the tide, which was a quarter ebb and of about* 1 *knot's force. The* U. *was proceeding down-river, from the north, in her own water. Each vessel was in charge of a duly licensed Trinity House pilot, and up to within half a mile of the collision, which occurred to the north of mid-channel, and about two cables below the bend at Stone Ness Point, was doing about* 10 *knots over the ground. At about half a mile apart, the* U. *sounded two short blasts, ported her wheel, and put her engines to half speed ahead, the* C. *being then fine on the* U.*'s port bow. The* C. *replied with one short blast and repeated that signal ten seconds later, indicating that she was directing her course to starboard; but the* U., *whose pilot had meanwhile ordered the wheel amidships, very shortly afterwards again altered course to port. Almost immediately afterwards, the* C. *put her wheel hard-a-starboard and again sounded one short blast. When the vessels were about* 1000*ft. apart, the* U. *put her engines full speed astern, but at collision her speed was still* 5 *knots. The* C., *on the other hand, although approaching a bend in the river, did not reduce her speed from the time the* U. *was first rounding the point up to the time of impact.*

Held, by the Court of Appeal, that by failing to keep to her proper side as she came round the outer curve of the bend, the U. *had committed a flagrant breach of rule* 33; *that but for this initial error, which was the real* causa malorum, *the two vessels would have passed clear port to port; that the* C., *being only slightly on the wrong side of mid-channel up to the time when the vessels were about half a mile apart, and in a position to cross the middle line on to her proper side by a mere touch of starboard wheel, had up to that time committed no breach of duty to the* U.; *that in the absence of evidence to the contrary, it must be presumed that before the time when the* C. *heard the* U.*'s first signal, it was the* C.*'s intention to get into her proper water without delay; that the* C. *was entitled to expect the* U. *to correct her initial error, especially after the* C. *had blown her a second one-blast signal and the* U. *was seen to be steadying; that had the* C. *stopped her engines she would have reduced her way very little, and that as the* U. *had altered course to starboard, she would have run into the* U. (*a vessel full of passengers*) *if she had reversed them; that but for the* U.*'s sudden porting, the necessity for the* C. *to ease her speed or stop as described in rule* 4 (3) *would never have arisen, and that accordingly the* U. *must be held alone to blame;* U.*'s appeal dismissed, and the* C.*'s appeal allowed.*

DAMAGE BY COLLISION.

This was an appeal by the Donaldson South American Line Limited of Glasgow, the owners of the steamship *Corrientes* (6863 tons gross) from the judgment of Bucknill, J. (19 Asp. Mar. Law Cas. 133; 158 L. T. Rep. 72) delivered on the 21st July, 1937, in an action brought by them, in the Admiralty Court, against Messrs. Bullard, King, and Co., Limited, the owners of the steamship *Umtali* (8158 tons gross) in respect of a collision between these two vessels which occurred shortly before 7 a.m. B.S.T. on the 16th May, 1937, in fine and clear weather, in St. Clement's Reach, River Thames, about two cables below Stone Ness Point to the northward of mid-channel. The learned trial judge had held both vessels equally to blame. There was a cross-appeal by the owners of the *Umtali*. The facts in regard to the navigation of the vessels, as found by the learned trial judge, were adopted by the Court of Appeal, and are fully set out in the reserved judgment of Scott, L.J., with which the other members of the court concurred.

R. H. Hayward, K.C. and *Owen L. Bateson*, for the owners of the *Corrientes*.

G. St. C. Pilcher, K.C., *H. G. Willmer*, and *Peter Bucknill*, for the owners of the *Umtali*.

Slesser, L.J.—The judgment of the court will be read by Scott, L.J.

Scott, L.J.—In this case a very serious collision took place between the *Corrientes* and the *Umtali*, two fully laden steamships, the former of nearly 7000 tons and the latter 8000 tons, in the River Thames in broad daylight on a fine day in May last to the north of mid-channel about two cables below the point called Stone Ness on the north bank, which lies opposite Greenhithe on the south bank. There is a bend of the river there of about seven points from Long Reach into St. Clement's Reach. The collision caused the loss of one life, and very grave damage to both ships. Bucknill, J., who tried the case, held both ships equally to blame. The *Corrientes* appealed asking that the *Umtali* should be held alone to blame, and the *Umtali* cross-appealed asking that the *Corrientes* should be held alone to blame. The main cause of the collision was undoubtedly a flagrant breach by the *Umtali* of the Thames narrow channel rule, by-law 33, which requires vessels bound in opposite directions to keep to their own starboard-hand side of the channel and pass port to port. This rule is of the very greatest importance to the safety of navigation, and the present case is a striking illustration of the danger of breaking it. The rule is as follows: "Every steam vessel proceeding up or

down the river shall when it is safe and practicable keep to that side of mid-channel which lies on the starboard side of such vessel and when two steam vessels proceeding in opposite directions the one up and the other down the river are approaching each other so as to involve risk of collision they shall pass port side to port side unless the special circumstances of the case make departure from this by-law necessary."

There is another rule which was discussed in the case, but does not really, in our opinion, apply to the facts as proved in evidence. It is, however, convenient to quote it here. It is known as 4A, being a comparatively recent substitute of the old Thames rule No. 36. It is as follows: "Every steam vessel navigating against the tidal stream shall, if necessary, in order to avoid risk of collision, ease her speed or stop on approaching or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear of her."

For reasons which will appear at a later stage of this judgment, it is material to notice the precise change made when rule 4A was adopted. Art. 36 reads as follows: "Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and, if necessary, stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

It will be observed that under the old wording it was made obligatory on every steamer approaching a point to ease her speed, but only "if necessary" to stop and wait. In the new rule the peremptory direction is cut out altogether and the discretionary "if necessary" applies to easing speed as to stopping altogether.

The present case also illustrates another maxim of maritime conduct. You are entitled to assume that the other ship will do the right thing—and indeed it is your duty to assume it—until he has made it quite plain that he is going to do the wrong thing. Premature departure from your own duty, in order to avoid the results of a possible wrong action by the other ship, is itself a source of danger.

There was a considerable conflict of testimony, but the learned judge's judgment is very clear and, except for one or two particular points of degree, we see no reason to differ from any of his findings of fact. The collision occurred at 6.55 a.m. on Whit Sunday, the 16th May, 1937. It was fine and clear, with light northerly wind, and the tide was one quarter ebb, force about one knot. The *Umtali* was coming down Long Reach on her proper starboard-hand side and said that as she came down she saw the *Corrientes* over the land about one-and-a-half to two miles away. When she got just past Stone Court Wharf on the south bank, about half a mile above the western end of Greenhithe, and still on her straight course down the reach, she said she observed the *Corrientes* fine on her *starboard* bow, about half-a-mile away, coming up St. Clement's Reach. This was an obviously untrue statement. The *Corrientes* must in those positions have been on her *port* bow. This will be seen at once if the positions are marked on the chart and a ruler laid on. She says the *Corrientes* was then coming up on her wrong side and apparently concluded that it would be convenient for both of them to break the rule and pass starboard to starboard. I say "convenient" because there was no shadow of necessity, the only excuse for departing from the starboard-hand course which the rule permits. All the *Umtali* had to do was to follow round the bend in the southern half of the channel. It was for the *Corrientes* to carry out her part under the rule by getting over into the northern half. There was any amount of space and no other traffic in the way.

But for what we are bound to consider were reasons of mere convenience the *Umtali* decided to go against the rule. She accordingly blew a port helm signal of two short blasts. The probability is that this was an invitation to the *Corrientes* to make an informal bargain then and there to disregard the rule. We have been told in this and other cases that there is an illicit practice for this to be done from time to time; although apparently it is for the vessel navigating against the tide to signal the offer. Anyhow, it takes two to make a bargain, and we have gathered that the convention is never treated as made unless there is a definite acceptance by a two-blast signal, and that if there is no accepting signal it is understood that there is no bargain, and that the rule must be kept. The witnesses from the *Umtali* denied any such intention; but if so, it leaves them without any excuse whatever for their two-blast signal. The learned judge found that the *Corrientes* replied with a single short blast and put her wheel to starboard accordingly. That signal, if heard by the *Umtali*, was a definite refusal of any offer to pass starboard to starboard, if made. It was also a plain and deliberate protest against any porting by the *Umtali*. We disapprove this illicit river practice because we think it both improper and dangerous.

In the present case the witnesses from the *Corrientes* swore that they did not distinguish the two blasts, and thought it was a single blast which the *Umtali* gave. Conversely the witnesses from the *Umtali* swore they heard a two-blast and not a one-blast signal from the *Corrientes*. The learned judge found that, whether heard or not by the other ship, each ship did give the signal to which it swore, although the other professed not to have heard it. In regard to the signalling generally, the learned judge said this: "In my view it is impossible to come to any satisfactory conclusion as to what signals those in charge of each ship thought they heard from the other ship. I must leave that aspect of the case, and it is an unpleasant aspect, with my findings as to the whistle signals in fact sounded by each vessel, which I have already given."

The judgment is so clear that we think it both unnecessary and undesirable to put forward any detailed account of our own of what happened. It is sufficient if we state what we consider to be the salient features.

The first point is that in our opinion the statement by the *Umtali* that when still on her straight course down Long Reach she had the *Corrientes* on her starboard bow was a falsehood; we cannot help suspecting that it was told in order to give some colour of excuse for her breach of the rule. When the *Umtali* was just getting to the beginning of the bend a little below Stone Court Wharf, the *Corrientes* was coming up St. Clement's Reach on a course which the judge found was about S.W.$\frac{1}{2}$W. magnetic. She must then have been still some little way below the Lower Swanscombe buoy at a distance from the *Umtali* of nearer a mile than half a mile. The learned judge found that the opening signal by the *Umtali* was given when they were about half a mile apart; that the *Corrientes* was then a little south of mid-channel—*i.e.*, well out in the river—and that at that moment the *Umtali* had the *Corrientes* fine on her port—not her starboard bow. We wholly accept the finding that at the moment of the *Umtali's* first signal the *Corrientes* was only a little south of mid-

channel because any other position would be most improbable. The *Corrientes* had just come round Broad Ness; she was making for Stone Ness; the river was empty except for the *Umtali*, and the *Umtali* was coming down on the south side. There was absolutely no reason whatever for the *Corrientes* to do anything but edge over to her proper side, although very likely keeping well out in the river so as to have a comfortably wide turn round the point. It was her duty to get to that side in order to comply with by-law 33; it was her most convenient route; and it is difficult to see any reason why she should linger unnecessarily on the wrong side of mid-channel. Her route of S.W.½W. from Broad Ness—it was not a set course as she was steering by the land—may have been chosen in order to get room for a wide swing round the point. But we are wholly unable to see any reason whatever for the *Umtali* expecting her to continue on her wrong side.

The excuse put forward by the *Umtali* for giving the two-blast signal was, as the learned judge points out on the top of p. 213, that she had the *Corrientes* on her starboard bow: (see her pilot, at p. 109, Questions 2255 to 2261). But the *Corrientes* could not be on the *Umtali's* starboard bow unless the *Umtali* had already begun to come round the bend on port helm. Until her head had swung considerably to port the *Corrientes* must have continued on her port bow. And this conclusion tallies essentially with the evidence given by the independent witness, Morgan, master of a tug lying off Greenhithe: (see p. 96, Questions 1985–91). He maintained that view in cross-examination: (p. 98, Questions 2031–37). The learned judge definitely rejected the story of the *Umtali* having the *Corrientes* on her starboard bow when the first signal was given.

I will now read the judge's description of what happened in fact from the time of the first signal to the collision. He prefaced it by pointing out that the speed over the ground of each ship at the critical time was 10 knots, and that that meant closing in on each other at 2200ft. a minute.

"There is, therefore, a wide discrepancy as to the position of the *Corrientes* coming up the river, and as to the whistle signals given and heard by each vessel, and as to the place of collision and as to the heading of the vessels at collision and as to the speed of the *Umtali* at the time of collision. After considering all the evidence and the probabilities of the case, and after discussing the matter fully with the Elder Brethren, these are my findings of fact on these issues. When the *Umtali* sounded her first signal the *Corrientes* was coming up St. Clement's Reach a little to the southward of mid-river and a little below the lower Swanscombe buoy and was steering a course of S.W. by W. The *Umtali* was coming down on her proper side at a speed of about 9 knots through the water and was gathering way with engines at full-speed ahead. The two ships were, therefore, each doing about the same speed over the ground, namely, 10 knots. When the vessels were about half a mile apart the *Umtali* sounded two short blasts and ported her wheel, and her engines were put half-speed ahead. At this time the *Corrientes* was fine on the port bow of the *Umtali*, and the *Umtali* was fine on the starboard bow of the *Corrientes*, and the vessels were on headings which, if continued, would cut one another at an angle of about 2 points. The *Corrientes* answered the *Umtali's* signal of two short blasts with one short blast, and about ten seconds after her first signal the *Corrientes* again sounded one short blast. This second signal was given before the *Corrientes* had made much noticeable turn to starboard under the starboard wheel order. The pilot of the *Umtali* then ordered the wheel amidships. He did not sound a short blast, as alleged by those on the *Corrientes*. Very shortly afterwards, seeing that the *Corrientes* was turning to starboard or continuing to so turn, the *Umtali* again altered course to port. This manœuvre was denied by those in charge of the *Umtali*, but I am satisfied that some action was taken on board her which had this effect—probably by use of the engines as well as helm. Almost immediately afterwards the wheel of the *Corrientes* was put hard-a-starboard and one short blast was again sounded on her whistle. By this time the ships were approximately 1000ft. apart, and there was imminent risk of collision, both engines of the *Umtali* were stopped, and very shortly afterwards put full-speed astern and the whistle was sounded three short blasts. It is impossible to say how much speed was taken off the *Umtali* by reversed engines before collision. I think her speed was substantial at collision but had been somewhat reduced, probably to about 5 knots, having regard to the nature of the damage. The speed of the *Corrientes* was still about 11 knots. Each vessel altered in all about 4 points under port and starboard wheels respectively from the time when the *Umtali* sounded her signal of two short blasts and ported. The collision occurred to the northward of mid-river and about 2 cables below the Stone Ness Light, but not so far over as the *Corrientes'* pilot asserted."

At p. 212 (of the Record) there are certain additional findings: (see *sup.*, at p. 73): "The helmsman of the *Corrientes*, whose evidence on this point seemed to me to be reliable, said that under the orders of starboard and hard-a-starboard the vessel paid off about 4–5 points altogether. If the *Corrientes* was heading S.W.½W. before she started to starboard this would bring her head to about W. by N. at collision. I find that this was approximately her heading at the collision. The angle of the blow being 6 points leading aft on the *Corrientes*, the heading of the *Umtali* at collision was about N.E. by N., and I find that these were the headings of the two ships at collision, *Corrientes* W. by N., and *Umtali* N.E. by N."

On these findings the learned judge held the two ships equally to blame. We entirely agree with him as to the *Umtali*. There was a glaring breach of that very important rule 33; it was her act that in fact created all the trouble. Until the vessels were about to pass—say within half a mile or so of each other—the *Corrientes* was committing no breach of duty to the *Umtali*. She was only slightly on the wrong side of mid-channel at that time, and was in a position by a mere touch of starboard wheel (which at her speed would have the maximum effect) to cross the middle line on to her proper side, so that if the *Umtali* had kept to her proper side, as she came round the outer curve of the bend, the two vessels would have passed well clear port to port. In addition to that initial error—which was the real *causa malorum*—the learned judge found the *Umtali* guilty of at least three other acts or omissions which were wrong. It is not necessary to dwell on them further.

But was the *Corrientes* to blame also? In our view she was not. With the momentum of her great mass at 11 knots through the water, stopping her engines, as we were advised by our assessors, would have reduced her way very little, possibly a knot and a half. To have reversed would in their opinion merely have meant the *Corrientes* running into the *Umtali*—a ship full of passengers—instead of being run into by the *Umtali*. Our

question and their answer, so far as relevant to this point, were as follows :

(Q.) " Assume that the *Corrientes* was proceeding up river at a speed of 11 knots in about mid stream on a course of about S.W.½W. magnetic, could she (when the vessels were half a mile apart) by reversing (instead of crossing to the northward at full speed) have avoided colliding with the *Umtali* ? "

(A.) " On the assumption that *Umtali* altered course to port as accepted, and *Corrientes* reversed her engines, we are of opinion that a collision would probably have taken place by *Corrientes* striking the starboard side of *Umtali*—observing that the action of *Corrientes* reversing her turbine engines would not be very effective in reducing her speed in so short a time, and would have the effect of canting her head to starboard."

We put to them a further question, but their answer to the first question made it, in our view, irrelevant ; and we did not discuss it further with them. The question and answer were as follows :

(Q.) " If the *Corrientes* was in fact engaged in getting closer to the northern side of the channel, was it safer for her to reverse when she first saw that the *Umtali* was altering course to port, or to keep her speed until the final porting by the *Umtali* after steadying ? "

(A.) " In the circumstances stated we consider it was safer for her to reverse her engines."

Perhaps they meant that reversing at either stage was dangerous, though less so at the earlier stage.

But apart from the advice of the assessors, we think there is a legal ground for not holding the *Corrientes* in fault. Her duty was to do everything possible to pass clear port to port. But for the sudden porting of the *Umtali* the necessity described in the rule would never have arisen. After the porting of the *Umtali* it was too late for the rule to have any application.

In the circumstances we feel bound to presume in the absence of evidence to the contrary that before the time when the *Corrientes* heard the *Umtali's* first signal it was already her intention to get into her proper water without delay. The fact, if it was a fact, that she mistook that signal for a single blast would be not unnatural if she was already on the way across the river towards her proper water. The moment she saw the *Umtali* was not starboarding, but porting, she blew a second one-blast signal—within 10 seconds of the first. Then the *Umtali* was seen (by her masts) to be steadying, a manœuvre which provoked and justified the inference that she had abandoned her design of porting. Then she suddenly repeated her wrong manœuvre when it was too late for anything to be done. The right view is, we think, this : the *Corrientes* was entitled to expect the *Umtali* to correct her blunder, especially after the *Corrientes* had blown her second one-blast signal 10 seconds after the first, and the *Umtali* was seen to be steadying. There had been nothing wrong in the *Corrientes'* speed until then ; and when the need for reversing arose it was then too late, as we are satisfied on the advice of our assessors, that it would have meant the passenger ship being run down. The best chance then was to hard-a-starboard and continue at full speed.

We, therefore, think that the *Corrientes* should be held free from blame, the *Umtali* held alone to blame ; the appeal of the *Corrientes* allowed with costs here and below and the cross-appeal dismissed with costs. The *Corrientes'* damage will be referred to the registrar and merchants.

That is the judgment of the court, as Slesser, L.J. has intimated, but Greer, L.J. desires to add this observation : " I concur in the judgment after considerable hesitation and doubt, which has not yet been entirely removed. My doubt, however, is not strong enough to justify me in differing."

Slesser, L.J.—Having regard to the observations of Greer, L.J., I should say that I do not share the doubt which he has expressed, but I agree exactly with the reasons and conclusions as stated by Scott, L.J.

Willmer.—I ask your Lordships for leave to appeal to the House of Lords ?

Slesser, L.J.—Yes, we grant you leave in this case.

Solicitors for the owners of the *Corrientes*, *William A. Crump* and *Son*.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, February 3, 1938.

(Before BRANSON, J.)

Kawasaki Kisen Kabushi Kaisha v. Bantham Steamship Company Limited. (No. 1.) (*a*)

[This decision was affirmed by the Court of Appeal on 22nd July, 1938, *post*, p. 233.—ED.]

Charter-party—Construction—Payment of hire—Payment to be made monthly in advance—Hire at rate per ton deadweight—Deadweight not ascertained—Owners' claim to withdraw vessel.

A charter-party provided that the charterers should pay for the use and hire of a ship at a rate per ton on deadweight, that the payments should be made monthly in advance, and that if the payments were not punctually made the owners might withdraw the vessel from the service of the charterers.

When the first month's hire became due, the deadweight had not been ascertained. The charterers failed to pay the hire in advance, and the owners thereupon re-took possession of the ship.

Held, that, as it was impossible for the charterers to know how much they had to pay until the owners informed them what the deadweight was, there must be implied in the charter-party a term that the deadweight must be ascertained before the hire became payable, and, therefore, that the charterers were not in default, although loading had begun before they tendered the hire.

SPECIAL case stated by an umpire on a reference involving the construction of a charter-party. The charter-party, which was a time charter, provided that the charterers should pay for the use and hire of the ship at a rate per ton on deadweight ; that the payments for hire should be made in London in cash monthly in advance ; and that if the payments were not punctually made the owners should be at

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

liberty to withdraw the ship from the service of the charterers.

The ship arrived at her loading port on the 13th April, 1937. The charterers' agent accepted her and requested the captain to begin loading at once, which he did. A written certificate of delivery was drawn up on that day, but was not signed until the 15th April. No statement of the ship's deadweight had been delivered by the owners to the charterers.

On the 14th April the owners applied to the charterers in London for the first month's hire. Not having received it by the 15th August, they gave notice on that day withdrawing the ship from hire. Later on the same day the charterers tendered a cheque for the hire which was not accepted. The charterers now submitted that the owners had no right to withdraw the ship from hire, on the ground that no hire became due until the owners had notified them of the deadweight, and also on other grounds, which, in the view which the learned judge took of the case, did not become material.

A. T. Miller, K.C. and *Cyril Miller* for the shipowners.

Sir *Robert Aske*, K.C. and *W. L. McNair* for the charterers.

Branson, J.—This is an appeal by way of case stated from a decision of two arbitrators and an umpire who decided that the respondents, the owners, were not entitled to withdraw their ship, the *Nailsea Meadow*, from work under a time charter-party dated the 2nd June, 1936, and made between the claimants and themselves.

The facts are, of course, fully set out in the special case, but for the purposes of my judgment I think they may be more shortly stated as follows. Clause 5 of the case set out the material parts of the charter-party under which it was agreed that the ship "estimated about 8,950 tons deadweight capacity . . . actual deadweight and cubic to be ascertained from builders' yard," was to "proceed across the Atlantic in ballast to port of delivery," which, by a subsequent arrangement, became the port of Houston in Texas. The charter-party went on further to provide that "the said owners agree to let and the said charterers agree to hire the said vessel from the time of delivery for twelve calendar months"—and clause 4 of the charter-party provided: "That the charterers shall pay for the use and hire of the said vessel 3*s.* 9*d.* per ton on deadweight as ascertained on delivery from builders' yard, British sterling per calendar month on and from the day of her delivery as aforesaid and at and after the same rate for any part of a month hire to continue until the hour of the day of her redelivery." Then clause 5 provided: "Payment of the said hire to be made in London in cash monthly in advance, and for the last half month, or part of same, the approximate amount of hire and should same not cover the actual time, hire is to be paid for the balance day by day as it becomes due, if so required by the owners, unless bank guarantee or deposit is made by the charterers otherwise, failing the punctual and regular payment of hire or bank guarantee . . . the owners shall be at liberty to withdraw the vessel from the service of the charterers"—and the last sentence of that clause reads: "Delivery to count from 7 a.m. on the working day following that on which written notice has been given before 4 p.m., but if required by charterers, loading to commence at once, such time to count as hire."

The vessel arrived at Houston on the morning of Tuesday, the 13th April, 1937, and at the request of the charterers' agent at Houston, a Captain Wynne attended on board for the purpose of certifying the amount of bunkers and fresh water on board and of passing the vessel as fit to load. The certificate of the amount of bunkers and water on board was necessary because the charterers had agreed to pay for such amounts as were found to be on board the ship when she was handed over, and certificates were given to the effect that the ship was fit to load and certifying the total quantities of fuel oil and water on board. The special case finds in clause 10: "At the same time as the said certificate of fitness to load was issued, Mr. S. A. Dunlap, of Texas Transport, accepted the said vessel on behalf of the claimants, and requested the captain of the said vessel to commence loading at once, and agreed with the captain that the said vessel should be considered as having been delivered at 3 p.m. on the 13th April." Now, that having been done, loading commenced at 3 p.m. on the 13th April. The contention of the owners is that at that moment the ship had been delivered and hire had begun to run. No payment was made in respect of the chartered hire of the ship until the afternoon of the 15th April, and at that time the London agents of the charterers tendered a cheque for the first month's hire less an amount of 450*l.*, which had to be deducted by reason of the fact that the ship went to Houston instead of to the original port which was specified in the charter-party, and as to which no question arises. That was refused upon the ground that it was out of time and that the owners intended to, and in fact then and there did, withdraw the vessel from the service of the charterers. The question is whether, in those circumstances, they were entitled so to withdraw her. The arbitrators have found that they were not, and though they have stated the facts very completely, they have not, as indeed there was no need that they should, stated the grounds upon which they have come to the conclusion that the owners were not entitled to withdraw the ship.

The way the case is put on behalf of the owners is this. First of all, it is said that delivery of the ship was taken at 3 p.m. on the 13th April, and it is said that under the charter-party the first month's hire became due in advance, and, therefore, should have been paid before delivery was taken, and that it not having been paid before delivery was taken, the charterers had failed in the punctual and regular payment of hire within the meaning of clause 5, and consequently that the owners were at liberty to withdraw the vessel from the service of the charterers.

The objections taken by the charterers to the case so put forward are, first, that under the true construction of clause 5 "delivery" within the meaning of the charter-party does not take place until 7 a.m. upon the working day following that upon which a notice of readiness is given, and as, in this case, no notice of readiness was given until the 15th April, that payment of the chartered hire did not become due until 2 p.m. in London upon the 16th April, and by that time a tender had been made. It is also said that the clause in the charter-party relating to punctual and regular payment has no application to the first month's payment of hire. It is also said that when one finds a word like "punctual" in a commercial document it does not mean "punctual" but it means something more elastic—something giving an option to pay within two or three days of the named date. Finally, on behalf of the charterers,

it is said that upon the true construction of this charter-party the obligation to pay hire could not arise, and did not arise, until the owners had informed the charterers of the amount of the actual deadweight which was ascertained upon delivery from the builders' yard. That is put upon the ground that although there is no such provision in the charter-party it follows by necessary implication because until the owners have informed the charterers of the deadweight capacity, it is impossible for the charterers to know how much they have to pay, the amount which they have to pay being 3*s.* 9*d.* per ton on the deadweight as ascertained on delivery from the builders' yard.

Now as, in my view, the last point is really the point which is decisive of this case, I propose to deal with it first. The authority upon which I am asked to imply into this charter-party a term that payment is not to become due until that information has been given to the charterers, is the case of *Makin* v. *Watkinson* (L. R. 6 Ex. 25). That case arose upon a question between a lessor and a lessee. There was a covenant in the lease by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises. The court held in that case that there must be implied into that contract a term that the obligation to repair could only arise after notice had been given that repair was needed. The grounds upon which the court made that implication have an application which is perfectly general to all contracts, as it seems to me, and which is in no way confined to contracts as between landlord and tenant. It is expressed by Channell, B. (at p. 27) in the following language. Referring to the case of *Vyse* v. *Wakefield*, he says there : "It is to some extent an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable"—and Bramwell, B. later on in the same case says : "If we look to the reason of the rule, it is that when a thing is in the knowledge of the plaintiff, but the defendants can only guess or speculate about the matter, then notice is necessary." Now it is said that this is not a case in which any implication of an obligation to give notice is necessary to the proper fulfilment of the contract. It appears to me that if the parties are standing upon their strict rights, there must be an obligation upon the owners to give to the charterers the actual deadweight which was ascertained on delivery from the builders' yard because the amount for which they have to make out their cheque is, and can only be, ascertained on the basis of the knowledge of the actual deadweight. It is said that there is no need to imply a term that the owners should give that information before their right arises to receive the money because there are other ways in which the charterers might have found out what the deadweight capacity was. I do not think that in looking at a contract of this kind in order to see what is the fair implication to be made, one can have regard to such possibilities as that an application to the builders by the charterers might have led to discovery of this figure ; or that when Captain Wynne went on board he might have asked to see the deadweight scale and ascertain it for himself. I think there must be implied into this contract an obligation upon the owners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers, namely, the correct amount of deadweight capacity, in order to enable the charterers to put themselves into a position to discharge their obligation to pay the chartered hire. No such communication was made until after the date which the owners rely upon as the date when they were entitled to withdraw the ship from the service of the charterers, and upon that ground I think that this award must be supported.

A good deal of argument has been directed to the other points in the case, and I think that it is only right, therefore, although I think that the point with which I have already dealt with is sufficient to decide the case, that I should express my view upon the other matters which have been argued before me.

With regard to these points, the first to be dealt with is the argument that notwithstanding what took place on the 13th April at Houston, that is to say, notwithstanding that the agent of the charterers asked to have the ship handed over to him, and that the ship was handed over to him and loading commenced at 3 p.m. on the 13th April, by reason of the fact that the captain concluded that delivery having been taken no notice of readiness was required, the period of twelve months provided for by the charter commenced. In my view it commenced at 3 p.m. on the 13th April, and I fail to follow the force of the argument which suggests that upon the true construction of the last paragraph of clause 5 of the charter-party the period does not commence until 7 o'clock in the morning after the notice of readiness has been given. It seems to me that the words, "but if required by the charterers loading to commence at once, such time to count as hire," is an alternative provided by the charter to the giving of the notice. The business of it is this, that when the ship arrives, the ship can put upon the charterers the obligation to take delivery by giving this notice. They give notice at 4 p.m. and then, whether the charterers take delivery or not, at 7 a.m. on the next working day the period begins to run ; but, on the other hand, the charterers may be very anxious to get possession of the ship, and then there is the alternative that they can come and ask for it, and if they come and ask for it, it is to be handed over at once, and loading is to commence at once. But then, of course, with the commencement of the loading commences the period of the charter and the obligation to pay chartered hire. The view which has been taken of this case, as it seems to me, leads to a somewhat ridiculous position. The charterers say "the period only commenced at 7 a.m. on the 16th because the captain only gave us notice at 3.55 p.m. on the 15th." The case finds that the captain only gave the notice because the charterers' agents asked for it and not because he wanted it. I cannot see any business man can have any notion that there is any need to give a notice of readiness when the ship is already being loaded as hard as it can be by the charterers, and that seems to me to be unpractical and absurd.

I think, therefore, that upon the true construction of this charter-party it provided for the delivery of the ship to be given, if the charterers so wished, before the expiration of a notice of readiness. In this case they took that alternative and the period of the twelve months commenced at 3 o'clock on the 13th April.

That being so, the next question is : Is there anything, apart from the question which I have already dealt with, to prevent the obligation to pay hire from arising also upon that day. It is said that the provision as to payment of hire in advance

does not apply to the first instalment and in support of that two cases have been cited to me: first, the case of *Nova Scotia Steel Company Limited* v. *Sutherland Steam Shipping Company Limited* (5 Com. Cas. 106), which was decided by Bigham, J., as he then was, and the other was the case of *Budd and Co. Limited* v. *Johnson Englehart and Co. Limited* (2 Lloyd's List Reports 27), which was decided by Roche, J., as he then was. No words of mine are needed to emphasise the authority of those two learned judges in commercial matters. In those cases they had the charter-parties before them, and upon those charter-parties, weighing one word with another, they came to certain conclusions, and I have another charter-party before me which is not expressed in the same language although here and there you can pick out a word or two of the same kind. It seems to me that it is my duty to construe the charter-party before me looking at the language which is used in it, and not to try and put on to phrases in it language which other learned judges have thought should properly be put on similar phrases in different settings, both of language and of surrounding circumstances. It is not as if either of those learned judges had laid down anything as a general proposition; they were deciding the individual cases upon the language used and the collocations in which that language was used. I confess I think it would be very unwise, and very improper, to try and construe this contract as though any particular words which were used in it must necessarily have the same meaning as those words used in different settings in different contracts. I prefer to construe this contract, treating it as a document written in English, to which the ordinary meaning of ordinary words must be given. Now, looked at in that way, I ask myself this question: first of all, what right have I to say that the provisions as to the payment of the hire are not to apply to the first instalment? Plainly, "payment of the hire to be made in London in cash monthly" must apply all through. Upon what criterion of construction can I rely to say that the words "in advance" shall not be equally applicable? It is said that there is some difficulty in paying in advance and that there must be a difficulty in having the money ready, because it is not clear when the ship will arrive. The answer to that again is in the last paragraph of clause 5 of the charter-party, which says that if the ship is insisting upon delivery commencing it has to give its notice, and then there is from 4 p.m. on the one day until 7 a.m. on the next working day in which payment in advance can be made. If the other limb of that sentence is to be operated, then the charterers who are going to ask for delivery of the ship can go with their money in their hands and pay it before they take delivery. I see no reason, therefore, for deciding that whereas the provision that payment is to be made in London in cash should apply and the very next words in the same sentence should not apply. I think, therefore, that the contract provides for payment in advance, even of the first instalment.

Then it is said that even though that may be the case, the provisions about liberty to withdraw upon failure to pay punctually and regularly cannot apply to the first instalment. Again I fail to see the difficulty. It is argued, I suppose, that a payment may be made in advance if it is a payment for the first month's hire, even though it is not made before the actual moment that the first month commences. It may be, in a sense, in advance if it is paid at the end of the first week or the second week, because *qua* some part of the payment is still being paid in advance. But then one has to look at the particular provisions of the particular clause which is being construed, and one finds in this clause provisions which seem to me to emphasise the rigidity of the word "punctual" in a manner which makes it impossible to construe it as loosely as I am urged by the charterers to construe it. I see no reason for supposing that there was to be more laxity in the first month than there was to be in the last month, particularly having regard to the fact that clause 5 of the charter-party says: "Payment of the said hire to be made in London in cash monthly, in advance, and for the last half month or part of the same the approximate amount of hire, and should same not cover the actual time hire is to be paid for the balance day by day as it becomes due." Therefore, these parties are providing there that when the charter is coming to an end and there is an odd bit of time still to run, perhaps because the ship is late or because she has not finished loading or something of that kind, day by day this hire has to be paid in advance. I find it impossible, in a clause which contains that provision, to say that at the beginning the parties were so careless as to when the money was to be paid in advance that they never intended that any payment in advance should be necessary at all with regard to the first instalment, or, that if it was, they did not mind whether it was paid at the end of the first week or the second week or the third week—and if so, why not at the end of the fourth week, which would make it in arrear. Whatever may be the view on other contracts with different language, I cannot see upon this contract any means of extending the meaning of the word "punctual" in the way I am asked to extend it in the present case. I suffer under the same difficulty in that respect as Lord Shaw of Dunfermline did in the case of *Maclaine and others* v. *Gatty and another* ((1921) 1 A. C. 376, at p. 393) where he says, "My Lord, my mind cannot comprehend the elasticity of punctuality; I know of no method of construction of a contract by way of contradiction of it."

Therefore, on those grounds it appears to me that if these owners had given to the charterers the information with regard to the deadweight capacity, which they should have done under the charter-party, and done that on delivery from the builders' yard as the charter provides that they should do, they would have been entitled to withdraw the ship upon the ground that the charterers had failed in their obligations under clause 5 of the charter and had given rise to the owner's liberty to withdraw the vessel which that clause confers upon them in the circumstances therein mentioned, but, as I have already said, it appears to me that the failure to let the charterers know what was the deadweight capacity, and therefore the failure to put them in a position to fulfil their obligation to pay in advance, has rendered it impossible for the owners to withdraw the vessel. Therefore, the conclusion of the award as expressed in par. 27 thereof is, I think, correct.

Award upheld.

Solicitors: for the shipowners, *Ince, Roscoe, Wilson,* and *Glover,* for *Allen, Pratt,* and *Geldard,* Cardiff; for the charterers, *Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 1 *and* 2, 1938.

(Before Greer, Slesser, and Clauson, L.JJ.)

E. Timm and Son Limited v. Northumbrian Shipping Company Limited. (*a*)

[This decision was affirmed by the House of Lords on 8th May, 1939.—Ed.]

Contract for carriage of goods—Loss of ship and cargo by stranding—Deviation to obtain coal—Liability of shipowners—Canada Water Carriage of Goods Act, 1910 (*R. S. C.*, 1927, *c.* 207), *ss.* 6. 7.

The owners of a steamship, which loaded a cargo of wheat at Vancouver for carriage to Hull, intended the ship to proceed to St. Thomas and coal there, but on the way, although the ship did not encounter abnormal weather, it was found that she had not sufficient coal to reach that port, and a deviation was made in order to obtain coal at Jamaica. While on the way to Jamaica the ship stranded, and both ship and cargo were totally lost. The bill of lading issued by the owners with respect to the cargo incorporated the Canada Water Carriage of Goods Act, 1910, *under which a shipowner transporting merchandise from Canada is excused from liability for loss or damage resulting from faults or errors in navigation if he exercises due diligence to make the ship in all respects seaworthy and properly equipped and supplied. On a claim by the endorsees of the bill of lading, the court found as a fact that the ship left Vancouver with insufficient coal to reach St. Thomas, and gave judgment for the plaintiffs.*

Held, that the ship having left the port of loading with insufficient coal to enable her to reach the end of the first stage of the voyage, she was not properly equipped, and the owners were not protected by the provisions of the statute incorporated in the bill of lading, but were liable for the loss of the wheat.

The Vortigern (8 *Asp. Mar. Law Cas.* 523; 80 *L. T. Rep.* 382; (1899) *P.* 140) *applied.*

Decision of MacKinnon, L.J. affirmed.

Appeal from a decision of MacKinnon, L.J., sitting as an additional judge of the King's Bench Division.

The appellants were the owners of a steamship which loaded a cargo of wheat at Vancouver for carriage to Hull. The respondents were endorsees of the bill of lading relating to the wheat. The appellants had intended that the ship should proceed from Vancouver to St. Thomas and coal at the latter port, but on the way, although the ship did not encounter abnormal weather, it was found that she had not sufficient coal to reach St. Thomas, and a deviation was made in order to obtain coal at Jamaica. While on the way to Jamaica the ship stranded, and both ship and cargo were totally lost. The respondents claimed damages from the appellants for breach of contract or duty to deliver the wheat. The appellants pleaded that they were protected by the terms of the bill of lading, which incorporated the Canada Water Carriage of Goods Act, 1910.

By sect. 6 of that Act: "If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied neither the ship nor the owner agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship . . ." By sect. 7 of that Act: "The ship the owner charterer agent or master shall not be held liable for loss arising from fire, dangers of the sea . . . or for loss resulting . . . from saving or attempting to save life or property at sea, or from any deviation in rendering such service or other reasonable deviation, or from strikes, or for loss arising without their actual fault or priority or without the fault or neglect of their agents servants or employees."

MacKinnon, L.J. found as a fact that the ship left Vancouver with insufficient coal to reach St. Thomas, and held that the appellants were not protected by sects. 6 and 7 of the Canada Water Carriage of Goods Act, 1910, but were liable for the loss of the wheat.

The appellants appealed.

F. A. Sellers, K.C. and *Cyril Miller* for the appellants.

A. T. Miller, K.C., Sir *Robert Aske*, K.C., and *A. J. Hodgson* for the respondents.

Greer, L.J.—This case turns on one question of fact and one question of law. It is provided by sect. 6 of the Canada Water Carriage of Goods Act, 1910, which was applicable to the voyage with which this appeal is concerned: "If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship or from latent defect." To succeed on that clause the appellants have to make out that when the vessel left Vancouver she was properly equipped with regard to the coal on board for the voyage which she had undertaken. Originally that was to be considered as the whole voyage from Vancouver to the port of destination, but by reason of the change which took place from sail to steam a rule was established that a voyage might be regarded as a voyage to be taken in stages, and that, if the owner satisfied the *onus* on him of showing that he had taken sufficient precautions to see that the vessel was adequately equipped for each stage, that would be a sufficient protection to him. But *The Vortigern* (8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140) and other cases make it quite clear that what the owner has to do is to make his vessel properly equipped for the stage which he has set for her on her voyage.

The question of fact to be determined in this case is, first, was the vessel properly equipped with regard to the coal for the first stage of her voyage, which was from Vancouver to St. Thomas? In fact, it is quite clear that she was not properly

(*a*) Reported by H. A. Palmer, Esq., Barrister-at-Law.

equipped, because she could not get to St. Thomas as she had not enough coal on board to take her there, and she, therefore, failed to be properly equipped for the voyage to St. Thomas. But it is argued, on the basis of certain evidence given before the learned judge in the court below, that she was properly equipped because she had a margin which she was entitled to consider sufficient, having regard to the fact that if she proved to be short of the necessary amount of coal, she could have obtained some additional coal at Colon, which was not one of the stages contemplated by the contract. If it had been established that the weather which she met and could not have anticipated was abnormal weather, then it may well be that the learned judge would have been entitled, and perhaps bound, to come to the conclusion that she was properly equipped. But he had to deal with the question of seamanship, that is to say, with the question what a prudent owner would anticipate he would have to encounter on the voyage from Vancouver, and dealing with that question, he said in his judgment: "It is, therefore, the fact, and the indisputable fact, that you did start from Vancouver with an insufficiency of coal for this stage to St. Thomas; and if you did that, then you can only escape the conclusion that you did not make the ship seaworthy in respect of bunkers if you can make out that there was anything abnormal or unexpected or anything in the way of a cataclysm or disaster on this voyage." I understand the learned judge by that to mean that every prudent owner should make provision for weather conditions which might be a little more troublesome than he would normally expect them to be. He then said: "There is nothing of the sort. There was the usual winter weather in the Pacific part of the passage; there was the usual blowing of the trade winds and currents in the Caribbean Sea. There was nothing really abnormal in the voyage, and yet that which you took"—that is, which you, the shipowners, took—"was insufficient." Further down he dealt in a little more detail with the events of the voyage and said: "I have considered this matter and I do not want to go into it in great detail. I do not think it has been made out that she had more than 675 tons at Vancouver. Was that enough? That question has been debated from various points of view and various aspects. Here, again, I do not want to go into all those details. My conclusion is that if it be a question of supplying this vessel at Vancouver with a sufficiency of coal to take her to St. Thomas and with a reasonable margin in addition to the likely minimum amount required for that—a reasonable margin for the contingencies to which any voyage must be subject—I think that she did not have enough coal in starting with 675 tons." That was the conclusion to which the learned judge came after giving due weight to the evidence called before him.

So far as the evidence of the experts was concerned, it is quite clear that they thought, in considering whether there was a sufficiency of coal to get the vessel to St. Thomas, that the master, on behalf of his owners, was entitled to take into consideration the fact that she might, if she found herself short, have obtained some more coal at Colon. That is a question of law to be determined by this court—whether or not on the authorities as they stand it could be possible to take the view that the voyage is to be regarded as a voyage in two stages to St. Thomas, one to Colon and the other from Colon to St. Thomas. The decision of the court in *The Vortigern* (*sup.*) appears to me to put the owners in a dilemma, because if they regarded the voyage which they were preparing for as a voyage to St. Thomas, having regard to the kind of weather which a prudent owner would anticipate, the obvious result would be that, upon the facts, they had not a sufficient margin. But, on the other hand, if they were entitled to take into consideration the fact that they could get coal at Colon, then it is quite clear that they ought to have taken in coal at Colon sufficient for the rest of the voyage, and they did not do so. On the law as it stands I think that there is no possibility of deciding the question otherwise than as it was decided in *The Vortigern* (*sup.*), which case is exactly in point.

I was to some extent impressed by the able and forcible argument which has been put, under very considerable difficulties, by Mr. Sellers, on behalf of the appellants, as indicating the view that, taking the facts as the learned judge found them, there was a sufficient margin when the vessel started from Vancouver. But though, in a sense, we are entitled to try the whole question of fact and law over again, this being a re-hearing, one must attach the greatest possible weight to the learned judge's view of the evidence which was called before him, including his refusal to accept the calculation which was made by the officers of the ship as to what coal the vessel had on board in the shape of something which is said to be "up their sleeve." The learned judge did not accept those witnesses as giving a reliable account of the method of calculation which they adopted. I myself find it quite impossible to differ from the learned judge's conclusion in that respect.

For these reasons I think that we are unable to disturb either the learned judge's finding of fact or his application of the law as laid down in *The Vortigern* (*sup.*), and I, therefore, think that the appeal must be dismissed with costs.

Slesser, L.J.—I agree that this appeal fails for the reasons stated by my Lord, which I think are also in substance the reasons stated by MacKinnon, L.J. who heard this case. I propose, therefore, only to deal with one argument of Mr. Sellers founded on the Canada Water Carriage of Goods Act, 1910, which is incorporated, so far as its terms are concerned, into this bill of lading. As I understand it, his case under that Act is this: assuming that there was an opportunity to obtain coal at Colon, and admitting that no coal was there obtained, he says that that failure was an act of negligence on the part of the captain which therefore falls, not within sect. 6, but within sect. 7, for which the owners, under the terms of the statute as incorporated in the bill of lading, are not responsible. In my view, that argument is fallacious. When the reasoning in the cases, particularly of *The Vortigern* (8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140), to which my Lord has referred, and the earlier case of *Thin and Sinclair* v. *Richards and Co.* (66 L. T. Rep. 584; (1892) 2 Q. B. 141), and more particularly the observations of Fry, L.J. (66 L. T. Rep. at p. 585; (1892) 2 Q. B. at p. 144), are considered, they show, as I think is clear, that the law imposes a warranty of seaworthiness for the entire voyage contemplated by the parties, and the shipowner ought not to be able to escape from this liability by dividing the voyage into stages. In other words, it is incumbent on the owner to show, in the language of sect. 6, that he has exercised "due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied." If he fails so to show, on the basis that he might have conceivably so equipped the ship at Colon—if that

were treated as a second stage—and did not, his failure is a failure to comply with his obligation to exercise due diligence, albeit that that failure was in fact due to the negligence of the captain—that is to say, the fact that the captain was negligent does not excuse the owner from the obligation to exercise due diligence in having the ship properly equipped on that second stage, assuming that a second stage did start at Colon.

Clauson, L.J.—I agree. The argument on behalf of the appellants fails to induce in my mind any doubts whatever as to the correctness of the learned judge's decision on the facts, and as regards the law applicable to the case I should be content myself to adopt the statement with regard to the law in the learned judge's judgment.

Appeal dismissed.

Solicitors for the appellants, *Middleton, Lewis,* and *Clarke,* agents for *Middleton* and *Co.*, Sunderland.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, March 14, 1938.

(Before PORTER, J.)

Compania Naviera Bachi v. Henry Hosegood and Son Limited. (*a*)

Charter-party — Construction — Barratry — Crew of ship refusing to permit her to be unloaded—Act to prejudice of owners.

A charter-party provided that the ship should not be liable for loss by barratry. In the course of a dispute with the captain with regard to their wages, the crew refused to allow the ship to be unloaded, and prevented the stevedores from approaching the cargo by disconnecting the suction pipes of the grain elevator and by replacing the hatch covers.

Held, that the conduct of the crew constituted barratry, and that the ship was not liable for the loss thereby sustained by the cargo owners.

ACTION in which the plaintiffs claimed a balance of freight due to them as shipowners from the defendants as cargo owners. The defendants claimed to set off against the freight a sum which they said represented damage they had sustained through the crew of the ship refusing to allow her to be unloaded. The ship had carried a cargo of maize from the Argentine to Falmouth and proceeded to Sharpness to be unloaded. After the unloading had proceeded for some time the crew, who were dissatisfied owing to the alleged failure of the owners to pay them their wages, replaced the hatch covers, disconnected the elevator pipes, and refused to allow the unloading to proceed. After some days an injunction was obtained in the High Court, and the unloading was completed. It was found that the attitude of the captain in resisting the claim for wages was reasonable.

The defendants said that they had suffered damage and been put to expense by the delay, for which the ship was responsible. Their bills of lading incorporated all the terms of the charter-party, and the latter provided that the ship was not to be liable for, *inter alia*, barratry. The question in dispute was whether the conduct of the crew amounted to barratry.

A. J. Hodgson for the plaintiffs.

Carpmael, K.C. and *H. L. Parker* for the defendants.

Porter, J.—This is a claim by a Spanish company domiciled, I understand, at Bilbao, against Messrs. Henry Hosegood and Son Limited. The plaintiffs I may refer to as the ship for the purposes of this action, because in fact they are carriers of grain, and Messrs. Henry Hosegood and Son Limited I shall refer to as the receivers, because they are the persons receiving under the bill of lading, and bound by the bill of lading in respect of that grain. The ship was a Spanish ship, and was on a voyage in respect of which the claim arises, carrying maize from South America to Sharpness in this country. While she was on that voyage, Bilbao fell to General Franco's forces, and thereupon the Republican Government in Spain determined on the requisition of any ships which they could which were either in a port or on the high seas. The vessel arrived at Sharpness on the 22nd August, 1937. Already, by the 18th August, the Republican Government of Spain had indicated their intention to requisition the ship, and an intimation to that effect was given by the ship's agents in Cardiff. On the 23rd August, after her arrival, notice of requisition was given to the captain by a body which appears to have been acting on behalf of the Spanish Government. On the day of her arrival, or the day after, Señor Sasieta came on board; he had an interview with the captain and indicated that he was the person representing the Spanish Government, and whose orders must be obeyed. Thereupon the crew and the officers, if one may describe it, took sides in the dispute between the shipowners and the body requisitioning the ship; the captain, the chief engineer, the second engineer, and a steward determining to follow the fortunes of the owners, and the rest of the crew—some twenty-seven, I think, in number—determining to stand by the Republican Government. On the 24th August the ship was berthed and the Spanish Consul demanded the ship's papers in order that he might take note of them. Prior to her discharge on the 23rd August the captain borrowed 200*l.* from his agents, and paid the crew 2*l.* 10*s.* a month as part of their wages and allowances, that sum being paid at an exchange of 36.5 pesetas to the £—that is to say, the men's wages being payable in pesetas they received the equivalent sterling value at 36.5 pesetas to the £. There was some trouble with the men, who were not inclined, now that the ship had been taken over, to obey the orders of the captain, but the ship was berthed and discharge began on the 27th August, 1937. On that day the crew indicated to the captain that they did not propose to allow the discharge to continue unless they were paid the rest of their wages at the then rate of exchange.

The letter is as follows—it was addressed by a gentleman who calls himself the delegate, whom I am told was in fact the third engineer: "One hundred and ten thousand pesetas is the approximate amount due to us in respect of wages. We bring to your notice that if within 24 hours from this moment we do not receive settlement of our wages in English currency at the rate of exchange of 45 per 1*l.* we shall find ourselves compelled to stop the discharging operations. We bring this to your notice for you to act accordingly. On

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

behalf of the crew of the *Juan De Astigarrage*," and it was signed on behalf of the men by this gentleman. That gentleman was, as I understand, officially a delegate of the crew, and, indeed, was so appointed under a decree of the Spanish Government. Notwithstanding the letter, the men were persuaded to allow discharge, though they said that if payment was not made by the following Monday they would flood the holds and make trouble generally. The method of discharging at Sharpness is that when the ship is put alongside the hatches are first removed by the crew, and then a suction pipe is put into the hold and the grain (in this case maize) sucked up through the pipe and discharged either on shore or into barges. Therefore, after the first taking off of the hatches the crew have not any specific act to do in reference to the discharge because when the hatches are put on at night the coverings are merely placed upon the hatches and a tarpaulin placed over them, and they are so placed, and removed again the next day by the stevedores discharging the ship. The discharge proceeded until Monday, the 30th, when it lasted for about twenty minutes. The crew asked the stevedores how to disconnect the suction pipe, and on being told how it was done the crew immediately proceeded to disconnect the suction pipe, whereupon discharging ceased. The master at once made a protest against the failure of the crew to permit the discharging to be continued. Work then ceased for the time being, the men's attitude not permitting any further work to be done. Immediately the work ceased, protests were made by the receivers to the shipowners, and were declared by the shipowners to be unacceptable on the ground that the ship was protected against any claim by its charter-party and the bill of lading. The agents suggested that the obligation to overcome the difficulty in discharging was for the master, and that, by way of overcoming it, the master ought to prosecute the men for disobeying his lawful commands, and they so suggested to the master and that attitude was also taken up by the receivers. The ship's agents, speaking to the receivers over the telephone, told them that the men would not allow the discharge. The receivers' agents, hearing that the crew would not allow the discharge, thought that that referred to the captain, and thereupon they took proceedings for an injunction against the captain to prevent him from refusing to discharge the cargo. The original application was made on the 4th September and was against the master only. It was supported by an affidavit by Mr. Watson setting out the method of discharging generally, and setting out the disconnection of the discharging pipes. Par. 6 is as follows: "I am further informed by the said Roberts"—that is, the ship's agent—"and verily believe that the defendant and (or) his servants and agents threaten that if the said suction pipes are reconnected by the plaintiffs' stevedores he and (or) they will disconnect them forthwith and will not allow the remainder of the cargo to be discharged pending the settlement of some dispute between the defendant, his servants and agents, and the owners of the said steamer. (7) As a result the plaintiffs continue to be unable to obtain their maize and the same is being and threatens to continue to be withheld from them. The plaintiffs are suffering damage in that, *inter alia*, maize is liable to deteriorate to a serious extent"—and he ends up by saying there are possibilities of a breach of the peace.

The injunction was granted, and it was served on the master. Then the stevedores returned again on the 7th September to continue the discharge. The men, however, said that they intended to prevent the discharge, and, in fact, when an attempt was made to move the hatches they replaced the hatches, put the tarpaulin over them, and stood and sat upon the hatches, and offered violence to one man, a member of the stevedores' crew, who showed an intention to continue the discharge. The police were present on that occasion, but were unwilling to go on board the steamer, and were unwilling to exercise any authority over the crew unless an injunction were first obtained preventing the crew from interfering with the discharge. Meantime negotiations had been going on between the master and the crew with regard to the payment of wages. The facts, as I find them, on the matter of wages are these. It is the practice on Spanish ships to pay the wages to the men after a round voyage when they return to Spain, and as a rule no trouble arises from that method of paying wages, nor is it usual for the owners to make any special provision for the payment of wages in a foreign port. It is quite true that by a regulation passed by the Republican Government, and by the contract between the men and the shipowners, the men are entitled to receive their wages monthly. In fact, the failure to do so leads to no trouble. There is a further provision of the Spanish law by which the first 2*l.* 10*s.* a month is payable to the crew at a fixed rate of exchange, which, in this case, was 36.5; otherwise by the contract between the crew and the shipowners the rate of exchange of the day is to prevail. The trouble in this case which took place between the men and the ship was twofold. In the first place, whereas normally the ship was going back to Spain and wages would be paid there, the shipowners were ceasing to be shipowners at Sharpness, and the Republican Government was taking over, and therefore the men were to some extent anxious about their wages, but primarily it was with regard to the rate of exchange. The men, seeing that there was a possibility of getting some advantage from their owners, and that when the Republican Government were taking over the authority of the owners that possibility would not be so readily exercised, were determined also to try and get the best rate of exchange which in fact they could. The result was that the owners, as I find reasonably, had not made any special provision for the payment of wages at Sharpness, and that it was natural to wait until the freight was collected in order to pay the men their wages. The men knew that and were anxious to get what benefit they could from that fact, even to the extent of getting more wages in sterling than in fact they were entitled to. Both the shipowners' representative, Mr. Roberts, and the master did not think they could prosecute the men successfully in an English court, because they thought, and I think rightly thought, that they had not the backing of the Spanish Consular authorities in England to support a claim to do so, and, indeed, the English police in fact took the same view because they were unwilling to proceed on board unless they were backed by the authority of an English court with an injunction to prevent the men from interfering with the discharge. In those circumstances, all the time that the discharge had ceased, negotiations were going on between the men, the master, and the ship's agent, negotiations which involved a discussion as to what the correct amount of wages was and also as to the proper rate of exchange, and until the 9th September the men were never willing to take the proper rate of exchange, and the actual amount due had not been definitely determined. Indeed, if one may consider

the reasonableness of the owners with regard to that period, in my finding the owners did behave reasonably in continuing those negotiations, and at times they offered more than the men ultimately found themselves compelled to accept.

In those circumstances, the receivers say: "You took from us the cargo which you promised to deliver safely; you have not delivered it safely, with the result that we have been put to the expense of 59*l.* 5*s.* 7*d.* additional cost for discharging. We have also been put to the expense of 130*l.* in getting an injunction in order to enable us to have the cargo discharged, an obligation which is yours which we should not have to pay for." The plaintiffs, on the other hand, say: "We are excused by the terms of our bill of lading which incorporates the charter-party."

I need not trouble with the bill of lading for this purpose, but I need refer only to clauses 29 and 30 of the charter-party. Clause 29 is: "The steamer shall not be liable for loss or damage occasioned by . . . barratry of the master or the crew . . . by riots, strikes or stoppages of labour . . . even when occasioned by the negligence, default or error of judgment of the pilot, mariners, or other servants of the shipowners or persons for whom they be responsible," and then the owners shall not be liable for any delay in the commencement or prosecution of the voyage due to a general strike or lock-out of seamen or other persons necessary for the movement or navigation of the vessel. I ought to have read this before: "But nothing herein contained shall exempt the shipowners from liability for damage or loss to cargo occasioned by bad stowage, by improper or insufficient dunnage, by absence of efficient ventilation," and so on. Then, finally, clause 30: "If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen essential to the loading of the cargo, or by reason of obstruction on the railways, or in the docks, or other loading places, and if the cargo cannot be discharged by reason of riots, civil commotion, or of a strike or lock-out of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike or lock-out of the shippers, and (or) receivers, shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lock-out. In the case of any delay by reason of the before-mentioned causes, no claim for damage or demurrage shall be made by the charterers, receivers of the cargo . . . " Those are said to be a protection to the ship. Substantially, the protection is barratry. There is a further clause specially added to the charter-party, which is the ordinary charter-party in these terms: "The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or persons having, under the terms of the war risks insurance on the ship, the right to give such orders or directions, and if by reason of compliance with any such orders anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

Taking those exceptions in order, the first exception which is claimed is that the shipowners are protected because the extra cost of discharging was due to the barratry of the crew. It is plain that barratry can be committed by the crew; indeed, there have been cases where some or even one of the crew who has obtained authority has been found to have committed barratry, and that the owners are entitled to recover as for barratry. It is true that in this particular case "barratry" is used in a charter-party and not in an insurance policy, but the meaning is the same in both. The matter is discussed somewhat fully in Chalmers on Marine Insurance, and a digest is given on p. 161. Perhaps the nearest case is the case of *Mentz, Decker, and Co.* v. *Maritime Insurance Company Limited* (101 L. T. Rep. 808, at p. 811) by Hamilton, J. (as he then was): "The authorities prior to the Act show that where the captain is engaged in doing that which as an ordinary man of common sense he must know to be a serious breach of his duties to the owners, and is engaged in doing that for his own benefit, then he is acting barratrously." In my view it was barratry on this occasion. I do not think that for the purpose of barratry the commission of a crime is necessary; it must be a wilful act deliberately done, and to the prejudice of the owners. It is not necessary that the persons doing it should desire to injure the owners if in fact there is an intention to do an act which will cause an injury, even if the act be done to the benefit of persons who are guilty of barratry.

If, then, there was barratry, was there a loss by barratry? As far as the injunction is concerned, the receivers' claim for the expenses incurred in obtaining the injunction was a quite reasonable action to prevent loss; much in the same way as in a fire claim, damage by water is possible as a reasonable method of preventing the spread of the fire. The owners retort that the action is reasonable, was taken by reason of the barratry of the crew, and is therefore a loss by barratry, and that the extra expense of discharging may not have caused the cargo to be physically lost to them, and that the word "lost" in clause 29 is used quite generally and is not confined to physical loss. Clause 29 is an exception in favour of the ship and not in favour of the receiver, and the loss or damage is used without qualification; whereas at the latter stage in the clause where loss by bad stowage, and so forth, is spoken of, the words "loss of cargo" are in fact inserted. It is quite true that in clause 30 delay is specifically dealt with, and it is said on behalf of the receivers that if loss or damage by delay was intended to be included, the best way of ensuring that would have been by inserting the words. I think, however, that the reason for inserting "delay" in clause 30 is because prevention of loading or discharging has already been provided for. It may be that the more usual causes of delay are dealt with in clause 30, but I do not see that loss by such causes as barratry or quarantine need necessarily be purely physical, nor do I think the wording of clauses 20 or 30 naturally so limits the meaning of "loss" in clause 29. It is said, however, that the owners cannot recover because they were themselves in fault; firstly, in not paying the crew at the proper time, and, secondly, in not taking steps either to arrest the crew or to obtain an injunction. So far as the question of pay is concerned, I have already found what the practice on Spanish ships is, and I do not find that the shipowners were in fault as to their method of paying the crew. Secondly, so far as non-arrest is concerned, both the master and Mr. Roberts thought they could not act without the

authority of the Spanish authorities. I do not think that they were unreasonable in endeavouring to persuade the men and in not taking steps to have them arrested. If they had tried to arrest one of them they might have provoked immediate violence.

Finally, as regards the injunction, I do not myself see why the owners should be compelled to incur an expense in order to overcome a matter which is not for them to pay for, but for others. I think it would be equally proper to allege that the owners could by paying the men's demands have immediately obtained the completion of the discharge. I see no obligation on their part to do that, nor do I see any obligation on their part to spend money in obtaining a result against which they are protected by the terms of their contract, and, as I further say, in my view, they acted not unreasonably in endeavouring to make terms with the men. It was admitted that the shipowners were not protected by the words "civil commotion." As far as the words "strikes or stoppages of labour" are concerned, the crew were not discharging nor required for the purpose of discharging. Neither strike nor stoppage of labour, in my view, caused the loss; it was rather an interference with those endeavouring to discharge by an outside body than a withholding of labour by the workmen engaged in the discharge themselves. I find no intention of violence, which is one of the necessary ingredients required to constitute a riot, as held in *Field and others* v. *The Receivers of Metropolitan Police* (97 L. T. Rep. 639; (1907) 2 K. B. 853).

Finally, as far as the claim that the shipowner is protected by the orders of a foreign government, or someone purporting to act on behalf of a foreign government is concerned, making every assumption in favour of the authority or the purported authority of Señor Sasieta, I can find no evidence that he in any way ever suggested to the crew or indicated to the crew that they should refuse to discharge.

In those circumstances, I hold it to be a loss by barratry and not to be a loss by the other matters relied upon. However, that holding is sufficient for the plaintiffs' purposes, the actual form of action being as follows: The plaintiffs sue for the rest of their freight, the defendants reply that they are entitled to set off the amount which they spent in obtaining the injunction and the extra cost of discharge. Technically I think the answer of the defendants is a counterclaim and not a set-off, but that is quite immaterial for any purposes of this action, but, so regarding it, I think the owners are protected by the clauses in their charter-party as incorporated in the bill of lading. The receivers cannot recover, therefore the owners are entitled to recover their freight, and the receivers are not to recover the damages which they claim. In those circumstances there must be judgment for the plaintiffs, with costs.

Solicitors: for the plaintiffs, *Ince, Roscoe*, and *Co.*; for the defendants, *Thomas Cooper* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

February 21, 22, 23, 24 *and* 25, *and March* 22, 1938.

(Before Sir Boyd Merriman, P., assisted by Elder Brethren of Trinity House.)

The Manchester Regiment. (*a*)

Collision in Liverpool Bay between vessel outward bound from Mersey and vessel manœuvring for adjustment of compasses to northward and westward of Bar Light Vessel—Regulations for Preventing Collisions at Sea, rules 19, 21 *and Note*, 22, 23, 24 *and* 29*—Time of applicability of rule* 24*—Whether exhibition of "J.I." flag signal on manœuvring vessel imposes on other vessel any obligation overriding Regulations—"Crossing" or "overtaking" vessels?—Respective duties of "stand-on" and "give-way" ships—Apportionment of blame, four-fifths and one-fifth—Costs in same proportions.*

This was a claim by the owners of the steamship C. M. *against the owners of the steamship* M. R. *for damages in respect of a collision which occurred between the two vessels on the* 23*rd October*, 1937, *at* 2.20 *p.m., in Liverpool Bay, about two miles to the northward and westward of the Bar Light Vessel. The defendants denied liability and alleged that the collision was solely caused by the negligence of those on board the* C. M., *and they counterclaimed for the amount of the damage sustained by the* M. R.

The C. M., *which was outward bound from Liverpool, approached the Bar Light Vessel at full speed ahead. At* 1.57 *p.m. she had stopped at a point about one mile to the eastward of the Bar Light Vessel in order to drop her pilot, and at about that time her master had observed the* M. R. *about two points on his vessel's port bow, distant about three miles, and heading approximately west-north-west, but apparently swinging towards the north. Shortly afterwards, the master of the* C. M. *had gone to his cabin, leaving the second and fourth officers on the bridge. The master of the* C. M. *did not at that time take any particular notice of the other vessel and he gave no particular instructions in regard to the navigation of his ship with reference to her. He did, however, leave instructions that he was to be called when the* C. M. *had the North-West Buoy abeam. The second officer left the bridge soon after and went to the chart room, leaving the fourth officer in sole charge of the navigation. At about* 2.08 *p.m. the* C. M. *was in a position about one mile to the north of the Bar Light Vessel, and she covered the distance between that position and the place of collision at an average speed of ten knots, which was also approximately her speed at the moment of impact, twelve minutes later. Meanwhile, the* M. R., *which was in process of adjusting*

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

her compasses and was exhibiting the appropriate "J.I." two-flag signal for this manœuvre, had got on to a northerly course, and at 2.10 *p.m. was about one mile to the southward of the place of collision, doing between five-and-a-half and six knots. She was then almost at right angles to the* C. M. *and slightly over two miles away from her. The* M. R. *had a pilot on board. It was not clear from the evidence whether she was actually in charge of the pilot or of her master, but, whoever was in charge (and the inference was that no one was in charge), the position was allowed to develop into one in which there was imminent risk of collision before any action was taken with reference to the* C. M. *At* 2.19 *p.m., that is, one minute before the collision, the engines of the* M. R. *were put "full speed astern" and three short blasts were sounded on her whistle. Almost immediately afterwards one short blast was sounded on the whistle of the* C. M., *indicating to those on board the* M. R. *that the* C. M. *was directing her course to starboard. The evidence showed that the master of the* C. M. *had left his cabin at* 2.19, *not having received the call which he expected, and that as he came on deck he saw the other vessel less than a quarter of a mile away, coming straight at the* C. M.'s *port side. The master of the* C. M. *leapt on to the bridge, rushed to the wheel-house, ordered the wheel hard a-starboard and blew one short blast in a last-minute attempt to avoid a collision, it being clear to him at that moment that the* M. R. *could no longer avoid the collision by her own action alone. This effectually prevented the* C. M. *from being struck at right angles and caused the impact, which occurred a minute later, to be at a more obtuse angle.*

Held, (1) *that there is no difference between the overtaking rule and the other steering and sailing rules as to the moment at which they apply;* (2) *that mere visibility is not the test for the applicability of rule* 24; (3) *that the distance astern at which the overtaking rule becomes applicable must vary according to circumstances;* (4) *that on the authority of* The Beryl (5 *Asp. Mar. Law Cas.* 321 (*C.A.*); 51 *L. T. Rep.* 554; 9 *P.* 137, *per Lord Esher at p.* 140) *and* The Banshee (No. 2) (6 *Asp. Mar. Law Cas.* 221 (*C.A.*); 57 *L. T. Rep.* 841), *the steering and sailing rules are all applicable at a time, not when the risk of collision is already fixed and determined, but when, if either vessel does anything contrary to the Regulations, it will cause danger of collision;* (5) *that in the present case the earliest time at which the vessels would need to take any notice of each other would be when they were about one mile from each other, when whichever vessel was obliged to keep out of the way of the other could have done so easily and with perfect safety and ample time to spare;* (6) *that, as at that time the vessels were on crossing courses, the crossing rule applied;* (7) *that the manœuvre of adjusting compasses although a "nautical manœuvre" within the meaning of that phrase as used in* The Roanoke (11 *Asp. Mar. Law Cas.* 253 (*C.A.*); 99 *L. T. Rep.* 78; (1908) *P.* 231) *does not involve that a vessel whilst performing it is keeping her course and speed, inasmuch as a vessel need not take the cardinal points in any given order and is not bound to perform the manœuvre in any given way, or at any given place or moment;* (8) *that the exhibition of the "J.I." signal by one vessel does not impose on any other vessel any obligation which overrides, or is in conflict with, the Regulations; and* (9) *that on account of her bad look-out, and her failure, as the give-way vessel, to keep clear or to ease her speed so as not to cross the other vessel's course, or to take any action at all with reference to the* C. M. *until that vessel was no more than a quarter of a mile away, the* M. R. *was heavily to blame for the collision, but that the* C. M. *could not escape all responsibility because, in starboarding, as she did, when the* M. R. *was only a quarter of a mile away, she, as the stand-on vessel, acted much too late after a position had arisen in which the collision could not be avoided by the action of the* M. R. *alone. His Lordship apportioned the blame as to four-fifths to the* M. R. *and one-fifth to the* C. M., *and ordered that the costs be paid in the same proportions.*

DAMAGE BY COLLISION.

The plaintiffs were the Clan Line Steamers Limited, owners of the steamship *Clan Mackenzie* (6554 tons gross). The defendants were the Manchester Liners Limited, owners of the steamship *Manchester Regiment* (5989 tons gross). The collision occurred in broad daylight, namely, at 2.20 p.m., on the 23rd October, 1937, in Liverpool Bay, about two miles to the northward and westward of the Bar Light Vessel, at the mouth of the River Mersey. The *Clan Mackenzie*, which was proceeding out to sea, laden with a general cargo of about 5000 tons, on a journey from Glasgow and Liverpool to South Africa, was struck about amidships on her port side by the stem of the *Manchester Regiment*, which was manœuvring for the adjustment of her compasses, and was exhibiting for that purpose the "J.I." flag signal. The *Clan Mackenzie* was so severely damaged that she had to be beached on Burbo Bank, where she became a total loss. Each party blamed the other for the collision and damage.

The facts as they emerged from the evidence are sufficiently set out in the headnote, and also appear from the judgment.

It was argued on behalf of the plaintiffs that the vessels were on crossing courses; that the *Clan Mackenzie* was the stand-on vessel and was obliged to keep her course and speed, and that such action as she took just before the collision, when it was realised that the other vessel could not by her own action alone avoid striking her, was not taken too late. On behalf of the defendants, it was contended that when the *Manchester Regiment* was first seen by those on board the *Clan Mackenzie* she, the *Manchester Regiment*, was being overtaken by the *Clan Mackenzie*, and that under Rule 24 of the Regulations, whatever the *Manchester Regiment* did thereafter could not cause the *Clan Mackenzie* to cease to be an overtaking vessel or release her from the obligation of keeping out of the way; that a distinction must be drawn between Rules 17

and 18 (the meeting rules), and 19 and 20 (the crossing rules) on the one hand, and Rule 24 (the overtaking rule) on the other hand, in that the latter rule, unlike the former ones, applied independently of the question whether the vessels were approaching one another so as to involve risk of collision, and that the applicability of Rule 24 was a mere matter of visibility. If that contention were wrong, the defendants said that there was risk of collision, even when the *Manchester Regiment* was two-and-a-half to three miles away on a westerly heading, because the fact that she was flying the "J.I." signal indicated that she would shortly be turning to a northerly heading. It was argued that the *Manchester Regiment* was engaged on the well-known manœuvre of adjusting her compasses which necessarily involved successive changes of heading, and that in making a change from a westerly to a northerly heading she was keeping her course and speed as the overtaken vessel and did not bring the crossing rule into play. The "J.I." signal itself, apart from the Regulations, obliged the *Clan Mackenzie* to keep out of the way. Alternatively, if the *Manchester Regiment* as the overtaken vessel had not maintained her course so as to absolve the *Clan Mackenzie* from an absolute duty to keep out of the way, the latter vessel, whose ordinary duty it was, on the authority of *The Saragossa* (7 Asp. Mar. Law Cas. 289; 69 L. T. Rep. 664), to take care to avoid the collision, was negligent in that she had not taken such care. If the above contentions failed, and the *Manchester Regiment* was held to be the give-way ship, the defendants said that the *Clan Mackenzie* had herself acted too late.

G. St. C. Pilcher, K.C. and *Cyril Miller* for the plaintiffs.

K. S. Carpmael, K.C. and *H. G. Willmer* for the defendants.

Sir Boyd Merriman, P.—About 2.20 in the afternoon of the 23rd October, 1937, in broad daylight, two large steamships, the *Clan Mackenzie* of about 6500 tons gross, and the *Manchester Regiment* of nearly 6000 tons gross, came into collision in Liverpool Bay, about two miles from the Bar Light Vessel at the mouth of the Mersey. The *Clan Mackenzie* was so severely damaged that she had to be beached on the Burbo Bank, where she became a total loss. It was only by what was literally last-minute action on the part of both ships that a collision at right angles was avoided. It was a perfectly disgraceful collision, about which it will be necessary for me to speak quite plainly in the course of this judgment. Each ship claims that the collision was caused by the fault of the other. The question which I have to decide is which of these ships was to blame, or, if both were to blame, to apportion the blame between them.

In the course of the argument Mr. Carpmael, for the *Manchester Regiment*, quoted a remark of the late Bailhache, J., to the effect that the case would have been quite easy but for the evidence. I agree. But I would add that it would have been easier still but for the fact that I have to deal with rival contentions urged with great force on the one side and on the other, which are either unsupported by, or, as I think, appear upon examination to be contrary to authority. For this reason, but not because I think there is any real difficulty in the case, I shall be obliged to examine the evidence in greater detail than would otherwise be necessary.

There was considerable conflict of evidence and some of the evidence was palpably unreliable. I do not think that it is actually possible to rely upon any single witness as giving a completely accurate account of the facts, but having regard to the certainty with which some facts have been established it is possible to arrive at a reasonably close approximation to the sequence of events. It is only right to say, however, that although there were the inevitable inaccuracies of recollection, and some inaccuracies which were not inevitable, there was no challenge of the substantial accuracy of the contemporary records of times on either ship. It is plain on the face of those contemporary records that the clocks on the *Clan Mackenzie* were three minutes ahead of those on the *Manchester Regiment* and, though it is immaterial which set of times is taken, I propose to take the time of collision at 2.20 as recorded by the *Manchester Regiment* and, for the purpose of correlation, to make the corresponding deduction of three minutes from the various times recorded by the *Clan Mackenzie*.

I take this opportunity of saying that in all matters of seamanship in this case, even though their advice is not specifically mentioned on any given point, the Elder Brethren and I are in complete agreement, and they have had an opportunity of checking the various calculations contained in this judgment.

For about an hour before 2.20 the *Manchester Regiment* had been cruising round in Liverpool Bay, adjusting her compasses and flying the appropriate two-flag signal, "J.I." For part of that time an oil tanker was similarly engaged in the same area; but, except that she may have affected one turning movement of the *Manchester Regiment* slightly, she may be ignored. Otherwise, so far as I have been informed, there were no other vessels in the neighbourhood at the time.

As is usual, but not obligatory, the compass adjuster, Mr. Bruce, was making the adjustments clockwise on the cardinal points, beginning with west on the standard compass. The adjustment of the standard compass took, on each heading, an appreciably longer time than the corresponding adjustment of the steering compass, that is to say, about five or six minutes as compared with some three minutes. The actual adjustment was made while the ship was being run at "Slow," to avoid vibration, but during the relevant time there had been three periods of five minutes each during which she had been run at "Half-Speed," probably in each case with a view to bringing her round more quickly on to a new heading.

As regards the speed made by the *Manchester Regiment*, when her engines are at "Slow," I find that the range of revolutions is between 30 and 40; that it is likely to be higher in that range if the engines have been brought down from "Half-Speed" than if they have been brought up from "Dead Slow." I find that it is untrue, as her second officer said, that when she was adjusting compass she was using an abnormally slow "Slow" of about three-and-a-half knots. The chief engineer admitted that she was using the usual "Slow" speed at which she would come down the river. I find that it is untrue, as her chief engineer at one time asserted, that at 40 revolutions she would only do three-and-three-quarter knots. In fact she would do more than six-and-a-half knots at that number of revolutions in favourable conditions, after allowing for "Slip." I may add, as I said in the course of the argument, that when the chief engineer was being cross-examined I actually heard him make the calculation of six-and-a-half knots under his breath, before saying out loud that the result was three-and-three-quarter knots. I find, as a fact, that when the engines were being run at "Slow" during this period they were making

about 36 revolutions and the ship was doing little, if anything, less than six knots, and at the very least five-and-a-half knots. In the period before she went astern with reference to the impending collision, the engines had been worked for five minutes, from 1.57, at "Half-Speed," and then for about seventeen minutes at "Slow." There is, therefore, in my opinion, every reason to suppose that she was going ahead at not less than five-and-a-half knots at the time when the engines were put astern, and I so find.

From the same moment, 1.57, at which the engines of the *Manchester Regiment* were put for five minutes to "Half-Speed," the *Clan Mackenzie* was going at "Full Speed," and so continued up to the very moment of impact. When her engines have got going she can do thirteen knots, but her engines were only set going, after stopping to drop the pilot, about three miles before the point of the collision. I am advised that she probably would not use the low-pressure turbines with which she was fitted before dropping the pilot, but this is immaterial. It is plain, if the position at which the pilot was dropped is correctly estimated as being a mile east of the Bar Light Vessel, it took her eleven minutes, namely, from 1.57 to 2.08, to get to the position a mile to the north of the Bar Light Vessel at which she had that vessel abeam, set her course and streamed her log. But I find, as has been assumed throughout the case, that a fair estimate of her speed from the Bar Light Vessel to the point of collision is ten knots. In round figures it will suffice to treat their respective speeds as being during the last fifteen minutes before action was taken, in the proportions of five to three. I wish to make it clear, however, that this is only to be used for the purpose of making rough calculations as to the relative positions of the two ships at any given time, and that I do not propose to decide this case as if it were a mathematical problem depending upon a minutely exact calculation of angles and speeds.

With this preface I find that the sequence of events at the material times was, approximately, as follows:

From 1.44 to 1.57 the *Clan Mackenzie* was manœuvring to drop her pilot. The *Manchester Regiment*, on the other hand, was engaged in doing the last half of the process of adjusting her standard compass, and was actually seen by the second officer of the *Clan Mackenzie* heading between east and south. She had in fact also been noticed, before the pilot was dropped, by the master of the *Clan Mackenzie* at roughly two points on the port bow, and as she was then heading apparently West-North-West, and at two to three miles distance, and as she was making her adjustment clockwise this was probably while she was making her first turn from a westerly heading to a northerly heading after adjusting the standard compass on the west, and, in point of time, would be between 1.32 and 1.40. At 1.57, as I have already said, the engines of the *Clan Mackenzie* were put "Full Ahead" from "Stop" about a mile to the east of the Bar Light Vessel, and the engines of the *Manchester Regiment* were put at "Half-Speed" as she turned after the adjustment of the standard compass on "South" to a westerly heading in order to begin the adjustment of the steering compass. It was stated incidentally, though the matter is of no importance, that an additional reason for going "Half-Ahead" at that time was to keep well clear of the oil tanker which, as I have already said, was similarly engaged. At 2.02 the *Clan Mackenzie* was making to the northward of the Bar Light Vessel and at that time the engines of the *Manchester Regiment* were put to "Slow," and, having been delayed a little by clearing the tanker, she was steadying on a westerly heading for the second time. Between 2.02 and 2.08 the *Clan Mackenzie* was still working up to a position north of the Bar Light Vessel, while on board the *Manchester Regiment* the following events were happening: Mr. Bruce made a quick verification, but no adjustment, of the standard compass on the westerly heading, and, having got wet on the upper bridge owing to a short rain squall, came down as quickly as possible. After a short delay in which Mr. Bruce took off his wet muffler, wiped his glasses and put his magnets in order, the second officer, Mr. Espley, changed places with Mr. Bruce and went up to the upper bridge to co-operate with him during the adjustment of the steering compass, and the wheel was taken over by a seaman named Goodall. There is some conflict about the moment at which this relief occurred. I prefer the evidence of Goodall himself to the effect that the positions of Mr. Bruce and Mr. Espley had already been reversed when he took over the wheel. Finally, Mr. Bruce adjusted the steering compass on West, an operation which, as I have already said, occupied a substantially shorter time than the corresponding adjustment of the standard compass. At 2.08 the *Clan Mackenzie* passed the Bar Light Vessel abeam on the port side at about a mile, and set her course South 88 West true. The *Manchester Regiment* was already beginning to swing to the northward and was so seen by the master of the *Clan Mackenzie*, her second officer and her fourth officer, the latter of whom had come on the bridge, one minute earlier, at 2.07. Both the second officer and the fourth officer thought that she was stopped in the water. As regards her bearing, the master, who took no particular notice of her, for reasons which I shall discuss later, gave no estimate of her bearing at this moment, the second officer put her at about three points and the fourth officer about two points upon the port bow. Apart from the normal variations of an estimate of bearing as between two observers, when ships are at a distance which cannot then have been less than two miles, it may well be that one of these officers is speaking of the moment when the *Clan Mackenzie* had steadied on her course and the other at a moment before she had done so. Be this as it may, I think that the bearing of the *Manchester Regiment* at the time the *Clan Mackenzie* had steadied on her course was nearer three points than two points on the *Clan Mackenzie's* port bow. The second officer saw the "J.I." signal. He informed the fourth officer, but not the master.

By 2.10 the master of the *Clan Mackenzie* had gone to his cabin below the bridge in ignorance of the fact that the *Manchester Regiment* was flying the "J.I." signal. The second officer earlier, and for a longer period than he was prepared to admit in chief, had gone to the chart room, having told the fourth officer about the "J.I." signal, and had left him in charge of the bridge. The *Manchester Regiment*, on the other hand, had already steadied on her northerly heading. A temporary confusion was caused by the way the rough bridge book of the *Manchester Regiment* was kept. When this had been cleared up, however, both counsel expressly stated that they were content to treat it as established that the *Manchester Regiment* was on a northerly heading at the earliest by 2.08 and at latest by 2.10. As the last estimate which the second officer of the *Clan Mackenzie* formed of her heading before he went into the chart room was North-North-West it follows that either he

was in the chart room by 2.10 or his estimate of her heading was wrong. The precise moment at which he left the bridge, however, is not a matter of vital importance.

The situation at 2.10 (to take the time most favourable to the contentions on behalf of the *Manchester Regiment*) was, therefore, as follows: this time being ten minutes before the collision, the *Clan Mackenzie*, steaming at ten knots, was one and two-thirds miles from the point of collision. Adopting the rough calculation to which I have referred, she would have to do five units of one-third of a mile each while the *Manchester Regiment* would do three units, that is to say, a mile; and as they were then approximately at a right angle the distance between them was a little, but not much, under two miles. In this position the *Manchester Regiment* would bear about 30 degrees on the *Clan Mackenzie's* port bow; but by this time at any rate the *Clan Mackenzie* was doing fully ten knots and the *Manchester Regiment* may not have been doing more than five-and-a-half; and so, allowing for the fact that the angle was not exactly a right angle, the *Manchester Regiment* was probably in fact only a little over 1800 yds., while the *Clan Mackenzie* was one and two-thirds miles, from the point of intersection, and the bearings were nearer five-and-a-half and two and two-and-a-half points respectively, the ships being, as I have said, at a distance of little less than two miles apart: and I find this to be roughly the position at 2.10. These bearings are consistent with the evidence of the master of the *Manchester Regiment*, who had spoken of five points in his deposition, though he gave six points as his estimate in court, and with that of the pilot, who spoke of five points.

The *Clan Mackenzie* was left in sole charge of the fourth officer. That young man was spending the first quarter of an hour of his life as an officer in charge of the bridge at sea when he was confronted with the situation thus created. He had just passed his Board of Trade examination for a second mate's certificate. I expect that he passed it very well. Certainly he stood up to what must have seemed very like a repetition of his *viva voce* examination on the collision regulations better than his own master; and as against the pitiable exhibition given by the Mersey pilot of three times his age he came off with flying colours. I was sorry for Mr. Barry. He was obviously an intelligent, and, I think, a courageous young man, and I hope that he has a very distinguished career at sea before him, and that nothing in my judgment will militate against that career. But of necessity he had had no practical experience whatever as officer of the watch, as his superior officers well knew. If Mr. Carpmael is right in the contentions with which I shall have to deal presently, he was called upon to appreciate the novel point that, in relation to a vessel which he had first seen with his own eyes establishing a course at right angles on his port bow, and with regard to which he had been told nothing to disabuse him of the notion, to which he adhered tenaciously, that she was a crossing vessel whose duty it was to give way, he was in fact in charge of an overtaking vessel, that the other ship in turning to starboard was keeping her course, and that all the time it was his own duty to keep out of the way.

On the other hand, if Mr. Pilcher is right in his contentions, this young officer was called upon to make the decision which generations of judges have acknowledged is the most difficult which an experienced sailor is called upon to make, namely, an appreciation of the precise moment at which the stand-on vessel must abandon her obligation to keep her course and speed and take some action to avoid an impending collision. Though in fact it was this inexperienced officer who was left in charge of the situation it cannot be, nor has it been, contended that the standard of care and judgment required is to be decided in relation to his individual qualifications. The standard is objective and impersonal. In this respect the analogy to *McCrone* v. *Riding* (158 L. T. Rep. 253) decided by a King's Bench Divisional Court in relation to the standard of care required of a learner in charge of a motor car appears to be complete.

The master of the *Clan Mackenzie* said that if he had known of the "J.I." signal he would probably have stayed on the bridge, as he would have had an idea that the other ship might want watching. But he had the same opportunity of seeing that a two-flag signal was flying as the second officer had; and in any case the second officer could have told the master before he left the bridge what the signal was; or, if he did not consider it necessary to do this, he might at least have done as the master himself would have done had he known of the signal and kept an eye on the situation himself, instead of leaving the bridge to Mr. Barry. I cannot help feeling that some lack of co-ordination and discipline is here apparent.

Soon after 2.10 Mr. Barry appreciated that the *Manchester Regiment* was in fact under way approximately at right angles to his own course; and as the minutes passed he realised that the ships were getting closer, that the bearing was not changing, and that risk of collision was, therefore, arising; meanwhile, as regards the *Manchester Regiment*, the adjustment of the steering compass on "North" had been completed. I am satisfied that the evidence that this was at 2.15 was an estimate made after the event, and that the time cannot be fixed exactly, but at least it is clear that it was several minutes before the time when action was taken with reference to the *Clan Mackenzie*. I shall have something to say later about the state of things on the bridge of the *Manchester Regiment*. For the moment it is sufficient to say as part of the narrative that Mr. Bruce asked that the vessel should be put on an easterly heading, but that it was decided to delay doing so expressly because of the proximity of the *Clan Mackenzie*. Incidentally, I reject the evidence of the pilot that he had begun to put her head to starboard and that she had actually gone off about a point. No other witness speaks of this and at least two contradict him on this point. It is quite clear, however, and I so find, that the northerly adjustment had been completed before the situation had become really dangerous, though there was, of course, by that time "risk of collision." But though the *Manchester Regiment* could have stopped her engines, or have reversed her engines, with or without starboarding her wheel, or have turned away to port and come round on to an easterly heading anti-clockwise, with perfect safety and without any serious interference with the operation of adjusting compasses, those in charge of her allowed her to go straight ahead without reduction of speed, at right angles to a vessel which was obviously coming on at "Full Speed," hoping against hope that for some reason or another the other vessel would do something.

At 2.19 the master and the pilot of the *Manchester Regiment*, having for several minutes seen the *Clan Mackenzie* coming on as I have just described, appear simultaneously to have made up their minds that it was time to act. They both went to the telegraph and one or other of them rang the

engines "Full Astern," giving at the same time the regulation three blasts. The time is fixed as being 2.19 by the second officer, who, having heard through the speaking tube the conversation postponing the change to an easterly heading, was waiting for this change to occur, in due course, when he heard the three blasts given. Up to that moment he had been unable to see the *Clan Mackenzie* from the upper bridge owing to the "dodger" or screen. He automatically pulled out his watch, noted the time, and with his watch still in his hand ran to the edge of the bridge where he saw the *Clan Mackenzie* very close, and at the same moment saw the steam from her whistle and heard the one short blast which was then given by the *Clan Mackenzie*. In respect of the order in which these signals were given I accept the evidence of Mr. Espley and of the other witnesses on the *Manchester Regiment* that her signal was given first, though there was only a lapse of a few seconds between the two, and I reject the evidence from the *Clan Mackenzie* that it was she who first gave a whistle signal. The significance of the attempt by the witnesses of the *Clan Mackenzie* to reverse the order will be apparent when it becomes necessary to discuss her share of the responsibility for this collision. The explanation of the *Clan Mackenzie's* signal is as follows: Mr. Barry, still in sole charge of the bridge, had begun to feel a little nervous about the approach of the *Manchester Regiment*, estimating the distance of the vessels apart to be about half a mile. He was just thinking that it would be wiser to call the second officer from the chart room when the master, who had given orders that he was to be recalled to the bridge when the North-West Buoy came in sight, was beginning to wonder why he had not been called. He came out of his cabin on to the port side of the deck and saw practically the same situation as Mr. Espley had seen a moment or two earlier. He leapt on to the bridge, rushed to the wheel-house, ordered the wheel hard a-starboard and blew one short blast; and about that time the second officer, attracted as he says by the noise of the master coming on to the bridge or, as I think is more probable, by one or other of these whistle signals, emerged from the chart room. Mr. Pilcher asks me to find that by a fortunate chance, or fluke, the master happened to come on to the bridge at the precise moment, neither sooner nor later, which a prudent sailor would have selected as the moment at which to take the action the stand-on ship is obliged by the rules to take, when the give-way vessel can no longer avoid collision by her own action alone. This contention will have to be examined in its turn. Meanwhile I must discuss what was the situation which Mr. Espley and the master of the *Clan Mackenzie*, who were the two witnesses who were suddenly confronted with it, actually found. As I have already said, the collision was recorded in the books of the *Manchester Regiment* as having occurred at 2.20, that is to say, one minute after the first of this exchange of signals was blown by the *Manchester Regiment*. Mr. Espley says that with his watch in his hand he noted the time of the collision, but does not fix it precisely beyond saying that it was after 2.20 but was not 2.21. The master of the *Clan Mackenzie* estimated the distance between the two ships when he saw them as being less than a quarter of a mile; so did Mr. Espley. The master and pilot of the *Manchester Regiment* put it at about a quarter of a mile. As the courses were approximately at right angles the distance of the *Clan Mackenzie* from the point of intersection would be slightly but not substantially less. On the other hand it was agreed by the surveyors called by either side that the angle of the blow was between 42 degrees and 45 degrees or thereabouts. No evidence was given as to the turning circle of the *Clan Mackenzie*, but the Elder Brethren made a calculation that at ten knots she would probably require 1500ft. in distance and one-and-a-half minutes in time to go off four points. Having regard to the approximately right-angled position of the two ships before action was taken it follows that the more obtuse the angle of the blow the less the *Clan Mackenzie* had gone off. One of the factors put forward by the surveyors in calculating the angle assumes that the damage caused to the deckhouse of the *Clan Mackenzie* by the starboard anchor of the *Manchester Regiment* was at the first point of contact; the chief officer of the *Manchester Regiment*, however, proves that this was not the first point of contact, but that it occurred when the vessels fell on to each other again after the first shock. If this is so, and I see no reason to disbelieve this evidence, the angle was appreciably more obtuse than the 42 degrees which this calculation gives. Moreover, Mr. Espley completed the entries in the bridge book after the collision; and although he had seen that the first signal was given at 2.19 he did not think it worth while to correct, at the time, the record of the apprentice that the collision had occurred at 2.20. Finally in this connection it is worth noting that both ships in turn are claiming to be the stand-on ship and, in that capacity to have acted, not indeed too early as is painfully evident, but not too late and, therefore, it is in the interests of neither of them to minimise the time between the whistle signals and the impact. It was very noticeable, also, that the master of the *Clan Mackenzie*, with every inducement to prove that he had acted in time, gave at first a very hesitating affirmative to the question whether she had begun to swing; then said that she had "started to swing" to starboard but, finally, that she had gone off over three points. His estimate of the angle of the blow, on the other hand, was that it was practically a right angle. It may very well be that her actual turning circle is narrower than the estimate, and that she would go off sooner; and it goes without saying that by the time she has gone off as much as three points her heading is beginning to change rapidly every moment. Against all this must be set the evidence of the helmsman of the *Manchester Regiment*, which I see no reason to doubt, that her head had gone off not eleven degrees or twelve degrees as the result of starboarding as stated by the pilot, but six degrees, presumably as the result of her engines working astern, thus tending to that extent to re-establish the right-angle position; and that, as the *Clan Mackenzie* was struck amidships, the blow would have no appreciable effect upon her swing. Taking all these factors into consideration I am satisfied that the first blow was at a rather blunter angle than the final blow and that the estimate of the time and distance given by the principal witnesses is substantially correct, and I find accordingly that the distance between the two ships when the first whistle signal was blown was under a quarter of a mile and that the time that elapsed between then and the collision was very little, if any, more than a minute. In that situation I am satisfied beyond doubt that, as the master of the *Manchester Regiment* admitted, the only thing that the master of the *Clan Mackenzie* could do was to put the wheel hard a-starboard.

Finally, I must state my findings as to the respective speeds at the moment of impact. As

regards the *Clan Mackenzie*, there is no difficulty. Her engines were kept at "Full Speed Ahead" until the moment of impact, and the only reduction in her speed would be that caused by the resistance of her rudder owing to the wheel being put hard a-starboard, as described, in the last minute. I am advised that this reduction can, for practical purposes, be ignored, and that there is no reason to estimate her speed at the moment of the impact at appreciably less than ten knots.

As regards the *Manchester Regiment*, more than one of her witnesses has estimated that she had no headway at the time of the impact. I reject this evidence altogether. Mr. Pilcher submitted in argument that her speed would probably have been reduced by about two knots as the result of her engines working astern. I am advised that this is approximately correct, and I find that her forward speed at the moment of impact was about three-and-a-half knots. In this connection I have had evidence from the rival surveyors called on either side. So that I may not be misunderstood with regard to the services which these persons, eminent in their profession, are capable of rendering, and have rendered in this case, I have no doubt that, subject to the qualifications which I have already mentioned, the conclusions that they draw from the survey as to the approximate angle of the blow have saved a good deal of unnecessary conflict of evidence. I have also no doubt that their survey will be extremely useful when the appraisement of damages comes to be made. But, for the third or fourth time this term, I have witnessed the spectacle of two eminent surveyors, upon precisely the same data, asserting with every possible assurance that these data prove widely differing conclusions in respect of speed. This is by no means the most glaring instance of divergent views; but the surveyor for the *Clan Mackenzie* asserted that the speed of the *Manchester Regiment* must have been five to six knots at the moment of impact. The surveyor for the *Manchester Regiment*, on the other hand, asserted, on precisely the same material, that it could not have been more than one to two knots. Questions were put in cross-examination of the witnesses for the *Manchester Regiment* tending, as it appeared, to support the estimate of speed given by the surveyor called by the *Clan Mackenzie*, and some of the *Clan Mackenzie's* witnesses gave the same estimate; but, as I have said, Mr. Pilcher does not now seek to put her speed so high. The surveyor admitted that in his calculation he had not, in the first place, allowed for any lateral swing on the part of the *Clan Mackenzie*. He justified this by propounding the unusual theory that the point on which a ship pivots is just abaft amidships, and that as the impact was in approximately the same part of the *Clan Mackenzie* there could be no lateral movement. My limited experience in these matters, however, has led me to believe that although there is, of course, no fixed point upon which any given ship pivots (for various factors, including her trim, enter into the calculation) there is a general consensus of opinion that in normal trim a steamship's pivoting point is somewhere about one-third of her length from forward. I am advised that there is no reason to doubt that this would be so in the case of the *Clan Mackenzie*, laden as she was; nor has anyone, except the surveyor, sought to challenge the propriety of that advice. As the point of impact was some 70ft. aft of the notional pivoting point, and as the *Clan Mackenzie* was swinging rapidly to starboard at "Full Speed," it follows that there was an appreciable lateral swing on her part, contributing to the force of the impact. Secondly, the surveyor had ignored any starboard swing on the part of the *Manchester Regiment*, as the result of reversing her engines, which would have to be overcome before her stem could be thrown to port, as it was; and, lastly, he had taken no account of the forward movement of the *Clan Mackenzie* while the ships were in contact, in spite of the fact that the *Manchester Regiment* had made an indentation of a maximum depth of 14in. and a minimum depth of 7in. in the side of the *Clan Mackenzie*, out of which the *Manchester Regiment* had, so to speak, to escape before the vessels got clear. On the other hand, the surveyor called by the *Manchester Regiment*, coming prepared to meet a charge that the vessel whose case he was supporting was doing five or six knots, called attention to the fact that there was no buckling of the plates on the starboard bow and no actual holing of the side of the *Clan Mackenzie* as he would have expected if the *Manchester Regiment* was doing five-and-a-half to six knots. But, assuming that to be so, I am bound to say that, although he was given several opportunities of making the attempt, he did not succeed in convincing me that there was any reason why the damage actually done should indicate a speed of one to two knots, rather than two to three knots, or even three to four knots. I must say that this much too familiar spectacle is not very edifying. It was to meet this kind of situation that the Rule Committee recently passed Order XXXVIIA, and this court may have to consider whether it will not be necessary to use its powers of invoking the assistance of a court expert. For the moment it is sufficient to say that in this case I have not been assisted, in the matter of speed, by the expert evidence.

I must now state the rival contentions. Mr. Pilcher contended that the rule applicable is the crossing rule and that on this basis the master of the *Clan Mackenzie* acted at the right moment in accordance with the duty imposed on the stand-on vessel: he contended, alternatively, that if he was the overtaking ship and, therefore, bound to give way, the *Manchester Regiment* had not acted in time under the rules. Mr. Carpmael, on the other hand, contended that as the *Manchester Regiment* was first seen from the *Clan Mackenzie* at about two or three points on her port bow at a distance not exceeding three miles, and on approximately the same heading, the *Clan Mackenzie* was an overtaking vessel within the meaning of the rules; that by virtue of the overtaking rule itself she could never lose the character of the overtaking ship and was, therefore, obliged to keep out of the way. As regards the *Manchester Regiment*, as the overtaken vessel, he contended that she was engaged on the well-known nautical manœuvre of adjusting her compasses, which necessarily involved successive changes of heading, and that in making the change from a westerly to a northerly heading she was keeping her course and speed, as the overtaken vessel, and did not bring the crossing rule into play. At one time he even went so far as to suggest that a further turn on to an easterly heading, provided it was done in the course of adjusting compasses and not on a return to the Mersey, would still leave the *Manchester Regiment* the overtaking vessel, though they were in fact meeting head on. But he subsequently qualified this apparently absurd result of his contention by saying that in such a case the *Clan Mackenzie* would no longer be "coming up with" the *Manchester Regiment*. He called attention to the difference between arts. 17, 18, 19, and 20 on the one hand and art. 24 on the other. With regard to the first four rules he pointed

out that the words "so as to involve risk of collision" occurred in every one, and he laid special stress on the preliminary headnote to the Steering and Sailing Rules which indicates that risk of collision can be ascertained by the fact that the bearing of an approaching vessel does not appreciably change, which would not apply to a vessel being overtaken. In rule 24, on the other hand, he pointed out that risk of collision was not mentioned at all, but that the test was that a vessel was coming up with another from any direction more than two points abaft her beam, and this, he contended, was a mere matter of visibility, whether by night or by day. Mr. Carpmael further contended that if he could not maintain that rule 24 applied in all circumstances independently of risk of collision there was in this case risk of collision even when the *Manchester Regiment* was two-and-a-half to three miles away on a westerly heading, because the fact that she was flying the "J.I." signal indicated that she would shortly be turning on to a northerly heading; that risk of collision was, therefore, established in the overtaking position and that the *Clan Mackenzie*, being once an overtaking vessel, remained always an overtaking vessel.

He also reserved the point that the "J.I." signal itself, apart from the regulations, obliged the *Clan Mackenzie* to keep out of the way. He admitted that he had no authority in support of the proposition, and that what authority there was was to the opposite effect (see *The Treherbert*, 18 Asp. Mar. Law Cas. 458 (C. A.); 1934, P. 31), and, therefore, that it would be impossible for me to accept this contention, even if he could persuade higher authority to do so.

He further contended that if, as overtaken vessel, the *Manchester Regiment* could not be said to have maintained her course, so as to absolve the *Clan Mackenzie* from an absolute duty to keep out of the way, the latter had the ordinary duty to take care to avoid the collision, as laid down in *The Saragossa* (7 Asp. Mar. Law Cas. 289; 69 L. T. Rep. 664), and affirmed that she had been negligent in this respect.

Finally, if all these contentions failed, and he was to blame as the "give-way" ship, he contended that the *Clan Mackenzie* had herself acted too late.

I asked Mr. Carpmael to give me any authority for the proposition that art. 24 comes into operation under conditions differing from those applicable to the earlier articles, and that it is not qualified by implication by the words appearing in the earlier rules, "so as to involve risk of collision." He admitted that he could give me no such authority, but he maintained that the proposition was self-evident from the wording of art. 24 itself. I am bound to say that even if the matter were, as I think it is not, entirely free of authority, I should come to exactly the opposite conclusion. I should have thought it was reasonably clear from the opening words of art. 24, "notwithstanding anything contained in these rules," that all the Steering and Sailing Rules became applicable in the same conditions, namely, in relation to risk of collision, but that art. 24 contained an overriding exception, laying down that when once the rules have become applicable in relation to risk of collision the relations between an overtaking and an overtaken vessel shall not be changed by any subsequent alteration of bearing so as to leave it indefinite whether, for example, at any given moment the overtaking or the crossing rule applies. But the matter is, in my opinion, concluded by authority. In *The Beryl* (9 P. 137, at p. 140) Lord Esher laid it down that these rules are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed and determined. He added: "We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted." In *The Bellanoch* (10 Asp. Mar. Law Cas. 483; 97 L. T. Rep. 315; (1907) P. 170, at p. 192) Kennedy, L.J. said: "Nobody can dispute, in this court" (that is, the Court of Appeal) "the judgment which has been given in the case of *The Beryl*, which dealt authoritatively with the question of the time at which a vessel with whom a duty to act lies, ought to take steps, in accordance with the rules, to fulfil her duty, and nobody disputes that the time is when it is, or ought to be, apparent that there will be risk if nothing is done to prevent it." But it is said that these were both cases of crossing vessels. However, in the earlier case of *The Banshee* (*sup.*), an overtaking case, Lord Esher had said: "Now at what period of time is it that the regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. Nobody could seriously contend that, if two ships are six miles apart, the regulations for preventing collisions are applicable to them. They only apply at a time when, if either of them does anything contrary to the regulations, it will cause danger of collision. None of the regulations apply unless that period of time has arrived. It follows that anything done before the time arrives at which the regulations apply is immaterial, because anything done before that time cannot produce risk of collision within the meaning of the regulations."

There is nothing in any of these observations, by which I am bound, which hints at any difference between the overtaking rule and the other rules as to the moment at which they apply. The test is stated in different forms, but with no difference in substance, and it is applied universally; nor is there anything in the case of *The Banshee* itself to give the slightest warrant for Mr. Carpmael's contention that mere visibility is the test for the applicability of rule 24. Indeed, in the circumstances of that case the Court of Appeal held that, though the vessels had been in sight of each other for some time, the regulations had not begun to apply when the overtaking was within 800yds. of the overtaken vessel. But although 800yds. was taken in that case as being a distance at which the rules had not begun to apply, I appreciate that that finding is not to be applied arbitrarily; for example, nothing is said in the report about the relative speeds of the vessels, though it appears that both were small ships. It is obvious that the distance astern at which the overtaking rule becomes applicable must vary according to circumstances. Eight hundred yards astern may be a long distance between two tramps steaming respectively at six and seven knots, but it would be a very short distance if the *Queen Mary*, at speed, was overhauling one of them. Likewise the lateral interval between the courses would be a factor of importance. It is the principle laid down in *The Banshee* and the other cases which matters.

With that principle in mind I will now examine Mr. Carpmael's submission in the light of the circumstances of this case. He argued that as the master of the *Clan Mackenzie* admitted that he had seen the *Manchester Regiment* roughly two points on his port bow at two to three miles, the overtaking position was established once

and for all within the meaning of rule 24; and, although his own pilot and master did not help him, he was able, as will appear, to invoke some admissions of the rival master in aid of his argument.

Now, if it is assumed that vessels are on exactly parallel courses, that the hindermost vessel is two-and-a-half miles from the point at which she would be opposite the leading vessel, and that the lateral interval is a mile, she has the leading vessel about two points on her port bow. The distance between the two ships is, of course, considerably more than two-and-a-half miles. At the supposed speeds of ten and six knots respectively, in fifteen minutes the hindermost vessel will have covered the two-and-a-half miles to the point opposite the original position of the leading vessel; but the leading vessel has moved forward one-and-a-half miles, the bearing has broadened correspondingly, and the ships are still well over one-and-a-half miles apart. After another quarter of an hour the hindermost vessel is still half a mile astern of the position in which she would be opposite the other vessel. She has the leading vessel just under six points on her port bow, and they are still over a mile apart. Even in this last position I am advised, as a matter of seamanship, that the two vessels would have no concern with each other at all, and that from the seaman's point of view it would be absurd, in the original position half an hour earlier, to treat them as being affected by any of the Steering or Sailing Rules. But, as a matter of fact, when the *Manchester Regiment* was actually on a westerly heading she was on West, magnetic; but when some minutes later the *Clan Mackenzie* took up her course South 88 West true, her magnetic heading is stated to have been North 77 West. Had these vessels continued on these respective headings they would have been not on parallel courses, but on courses diverging by about a point, so that the lateral interval would be increasing all the time and the vessels would be by that much the less concerned with each other.

In his argument on this point, Mr. Carpmael referred me to the following passage at p. 428 of the article on shipping in the original edition of Halsbury:

> "The time to look at is, therefore, intermediate between the time when collision is a mere possibility and the time when the risk is immediate. The rules referring to risk of collision apply as soon as there is a reasonable probability of risk of collision."

While maintaining that this summary of the law does not apply to rule 24 because that is not a rule referring to "risk of collision," he very frankly admitted that if the circumstances in which rule 24 applies is governed by the principle laid down in *The Beryl* and the other cases to which I have referred, it would be impossible to say of two ships steaming on parallel courses as described in the illustration just given, that in their first position they had passed out of the time when collision was a mere possibility and into the intermediate period between that time and the time when the risk is immediate. But he contended that, even if this was an approximate illustration of the position when the *Manchester Regiment* was first seen, it had no bearing on the case by reason of the admission, which he obtained from the master of the *Clan Mackenzie*, to the effect that if he had known that the other ship was flying the "J.I." signal he would probably have stayed on the bridge, because he would have had an idea that she might want watching. Therefore, even if risk of collision must exist before rule 24 applies, Mr. Carpmael argued that this admission proved that risk of collision already existed when the master of the *Clan Mackenzie* last saw the *Manchester Regiment* before leaving the bridge, and that it followed that the *Clan Mackenzie* was the overtaking vessel, because during the early part of the turn by the *Manchester Regiment* to a northerly heading, the *Clan Mackenzie* must be still more than two points abaft her beam. Now I think that this argument involves a fallacy, which is that, fairly interpreted, the master's admission of potential danger was not made in relation to a ship which had altered her course in the ordinary course of navigation about two miles ahead, as is shown by the fact that he actually left the bridge because he was unaware of the "J.I." signal; but was made in relation to a ship of which it was assumed to be known that she was actually turning in the course of the compass adjusting operation, first on to a course crossing his course at right angles and thence possibly on to an opposite course to his. In other words, it would not be the mere turn in a northerly direction from a westerly heading by a vessel far enough away to be ignored which would cause him to watch her—as in fact he did not, on the supposition that this was the case—but the turn to the north by a vessel known to be flying the "J.I." signal; that is to say, it is the very fact that she would be known to be taking up a crossing course which, according to his admission, would give rise to the necessity for watching her. This does not involve an admission that he left the bridge at "the moment before the risk of collision was constituted." This may be tested by seeing what would be the position at the end of the ten minutes after the master of the *Clan Mackenzie* left the bridge on the assumption that the situation, when he did so, was as it must have appeared to him to be; that is to say, the lateral interval still being assumed at that moment to be a mile, that his vessel has now reached a point only ten minutes steaming, or one-and-two-thirds miles, from the point at which she will be opposite the leading vessel, the bearing of which has broadened correspondingly to about 30 degrees, and which has just turned from a westerly heading two or three points in a northerly direction and is assumed to be continuing on that new heading whatever it may be. An alteration of course of two points from her heading West magnetic puts the *Manchester Regiment* on a course approximately one point off the parallel courses. In those ten minutes the *Clan Mackenzie* would have done the mile and two-thirds to the point opposite that in which the *Manchester Regiment* is assumed to have been last observed by the master. In the same time the *Manchester Regiment* would have done one mile and would be nearly that distance ahead at a lateral interval of well over two-thirds of a mile. The actual distance between the ships would still be over a mile. If she had turned three points, that is to say, two points off the parallel course, she would still be not much less than a mile ahead, the lateral interval would be nearly two-thirds of a mile, and the distance between the vessels would still be over a mile. If she had gone off four points, that is, three points from the parallel, she would be about five-sixths of a mile ahead, the lateral interval would be about one-third of a mile and the distance between the vessels would be just under a mile. If she had turned at five points, that is to say, four points off the parallel, an overtaking position would not be established by the turn unless it had been established already, as in this position the hindermost vessel would be less

than two points abaft the beam. But, leaving this aside, at the end of the ten minutes the lateral interval would be just over a quarter of a mile, the leading vessel would be about two-thirds of a mile ahead and the distance between them would be over two-thirds of a mile. In none of these positions, whichever is the supposed heading of the leading vessel, am I advised, as a matter of seamanship, that they would have any concern with each other at the beginning, or for the major part, of that ten minutes; and I am of opinion that at the time when he left the bridge, in that supposed situation, the master of the *Clan Mackenzie* would be justified in thinking that the ship had not passed out of the stage in which collision was a mere possibility. Fairly interpreted, his admission meant no more than that, assuming the situation when he left the bridge to be that which it actually proved to be, he would know that if the heading on north was maintained and the bearing did not change and the ships got within, say, about a mile of each other, a situation would arise in which the *Manchester Regiment* needed watching because it would be "intermediate between the time when collision was a mere possibility and the time when the risk was immediate." That time would be some four or five minutes after the *Manchester Regiment* had actually established her northerly heading, and five or six minutes before the collision; and in the view of the Elder Brethren, as a matter of seamanship, the time when the vessels were about a mile from each other, with five or six minutes to spare, is the earliest time at which they would need to take any notice of each other; and with that time, and at that distance, whichever of these vessels was obliged to do so could easily have kept out of the way of the other with perfect safety and with ample time to spare. Before that, they would be just two ships in sight of each other. This happens also to be in accordance with the evidence of the pilot of the *Manchester Regiment*. Asked when he had first seen the *Clan Mackenzie*, he replied that he had first seen her before she reached the Bar Light Vessel, but added that he was really "concerned with" the oil tanker which was also going to adjust compasses. He also said that before the second adjustment he saw her but did not "examine" her; that would be while the *Manchester Regiment* was on a westerly heading between 2.02 and 2.08. Finally, in the early part of his cross-examination, speaking of the time when he had already turned on to the northerly heading, he said that he saw the *Clan Mackenzie*, but was "not concerned with her"—she was still to the east of him, coming on her course roughly about one-and-a-half miles away and coming along at a good speed. Seeing that the course at a right angle, to use a neutral phrase, had been established, as is conceded, not less than ten nor more than twelve minutes before the collision at a time when, as already stated, the one was one-and-two-thirds miles from the point of intersection, the other very little less than a mile, and the distance between them was very nearly two miles, I have no hesitation whatever in holding that, in these circumstances, it is not the overtaking rule, but the crossing rule that, in accordance with the principles laid down by the Court of Appeal, must be applied to this case. If further authority is needed, I think that it is provided by the case of *The Roanoke* (*sup.*), which Mr. Carpmael cited in support of the proposition with which I shall next have to deal. The point for which I am now referring to the case was not the subject of the decision in the Court of Appeal, because there was no appeal from the decision of the late Bucknill, J. on this point. The actual point of the decision was whether the *Roanoke*, going into Dungeness East Bay to pick up a pilot and reducing speed for that purpose, was keeping her speed in relation to the *Windsor*, which had gone into the bay just ahead of her for the same purpose, but was coming out of the bay in a position which made her the give-way vessel on crossing courses. But in the court below it had apparently been contended, as Mr. Carpmael now contends, that all the time the *Roanoke* was an overtaking vessel because she had come up channel in full sight of the *Windsor* and astern of her. With regard to this Bucknill, J. says as follows: "Now, that being so, what was the course of the other ship? I have said what it was, and I have found where the collision took place and, that being so, I find as a fact that the *Roanoke* and the *Windsor* were so proceeding that the *Windsor* had the *Roanoke* on her starboard bow or side, and that they were proceeding so as to involve risk of collision at the material time before the collision happened. It follows, therefore, that I find that they were not overtaken and overtaking ships. At one moment in a sense they were. When they passed Dungeness, the *Windsor* had passed at 8.15 and the *Roanoke* had passed at 8.35, and if, as I suspect, what was nearer the truth than as stated by the witnesses from the *Windsor*, the *Windsor* was very much nearer in than she says she was to Dungeness at that moment, it may be then that they were overtaken and overtaking ships; but that position was discontinued by those on board the *Windsor*, who deviated from their course and took their ship into the East Bay and came out again, porting a sufficient number of points—four, I should think, at least—to bring her out from the bay until she was heading East-South-East or South-East."

Against this decision there was no appeal and the case proceeded in the Court of Appeal on the basis that the crossing rule applied. Even so, however, at p. 245, Kennedy, L.J. expressed a doubt whether, although the vessels were in crossing positions at the time when the *Roanoke* reduced her speed, *The Banshee* did not compel him to hold that even the crossing rule had not then become applicable. After analysing the decision in *The Banshee*, he says:

"In the present case, when the *Roanoke* put her engines to half speed, the *Windsor* was no less than three-quarters of a mile away on her port side, and those who were in charge of the *Windsor* could have found no real difficulty in avoiding the *Roanoke*. According, therefore, to the judgment of the Court of Appeal in *The Banshee*, the *Roanoke* did not violate art. 21 in slackening speed, because then no risk of collision between the crossing steamships was involved. The stopping of the engines three minutes later might reasonably be regarded only as a further step in the same gradual process of taking off the way of the *Roanoke* for the purpose of picking up the pilot."

In other words, he only declined to follow *The Banshee* and to hold that the crossing rules had not begun to apply at a time when, the ships being on crossing courses, but at three-quarters of a mile distance, the *Roanoke* had reduced her speed, because the case has been fought in both courts on the footing that the crossing rule had then begun to apply. It is quite evident how that experienced judge would have applied, to the facts of this case, the principles which he himself repeatedly laid down.

But to take Mr. Carpmael's next point; on the assumption that I am wrong and the *Manchester*

Regiment was the overtaken ship, it is conceded that she failed to keep her course and speed, unless the fact that she was flying the "J.I." signal enables her to say, after the overtaking rule has begun to apply, that in going from "Half Speed" to "Slow Speed" and turning eight points to northward she was "keeping her course and speed." Mr. Carpmael admitted that he had no authority bearing directly on this result of flying the "J.I." signal, but he said that this case was a perfect analogy to *The Roanoke*. Now *The Roanoke* decided, not for the first time, that course and speed in this connection mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. The simplest illustration, perhaps, is that a vessel keeps her course if she follows the proper up-river course on the Thames, notwithstanding that she turns nearly sixteen points round the Isle of Dogs (see, for example, *The Taunton*, 31 LL. L. Rep. 119, at p. 120, per Scrutton, L.J.); and it is easy to see the analogy between such a case and that of picking up a pilot at the mouth of a harbour (see *The Albano*, 10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193); nor can it make any difference in principle that in *The Roanoke* itself the area in which the pilot was to be picked up was less defined. Dungeness East Bay was still, to use the words of Lord Alverstone on p. 238, a known and recognised place for an operation which must be undertaken by vessels in the ordinary course of their navigation; and it will be observed that throughout the judgments in *The Roanoke* stress is laid on the manœuvre requiring an alteration of course and speed. For example, on p. 246 Kennedy, L.J. says: "If a vessel, in order successfully and in the ordinary and proper way to perform a proper nautical manœuvre, must alter her speed": and lower down on the same page, "the necessity of altering speed which the manœuvre involves": and again, on p. 247, "as the proper execution of the nautical manœuvre in which she is obviously and visibly engaged may dictate": and lower down on the same page, "Where the exigencies of the nautical manœuvre in which she is engaged are visible to the vessel which is bound under the regulations to keep out of her way."

But in my opinion it is obvious, and the Elder Brethren so advise me, that the manœuvre of adjusting compasses, even if it is a "nautical manœuvre" within the meaning of that phrase as used in *The Roanoke*, does not involve that the vessel need turn at any given moment, or at any given place, or take the cardinal points in any given order: nothing of the sort is required, exacted, dictated or necessitated. At any time she can stop, reverse, turn away at any speed, or even come about the reverse way to her next heading, or change the order of "the manœuvre" without more than a trifling inconvenience or a momentary interruption of the operations. Mr. Bruce said that he was often delayed like that when adjusting compasses. In particular in this case, the *Manchester Regiment* could have done any of these things when the northerly adjustment was finished, several minutes before the collision. Moreover, the argument, pressed to a logical conclusion, defeats itself; since maintaining a northerly heading for several minutes after that adjustment was finished, instead of turning easterly, would not, according to the argument, be "keeping her course." In my opinion, if I were to hold that the manœuvres convenient for adjusting compasses are in the same category as the recognised nautical manœuvre of picking up a pilot, I should be tearing up the Steering and Sailing Rules without the slightest warrant.

I think that the evidence as to the effect of the "J.I." signal which it is possible to regard seriously is all one way, and that it amounts to no more than this, that other ships are usually willing to extend a certain amount of courtesy to a vessel flying the signal, but that it imposes no obligation to do anything but to keep an extra good look-out; and that, of course, is for the purpose of ascertaining that the courtesy is not being abused so as to incur danger or, if it is abused, of ensuring that action can be taken promptly by the stand-on ship at the right moment to avoid collision.

This is the highest at which the Elder Brethren, from the point of view of seamanship, regard the obligation upon a vessel which observes another flying the "J.I." signal. With regard to the contention that it imposes any obligation overriding the regulations, they point out that there are several two-flag signals, which are undoubtedly urgent and important, but that none of them have ever been regarded by seamen as imposing any obligation in conflict with the regulations. On the contrary, seeing that flags may droop in a calm so as to be difficult to decipher and, in any case, are comparatively small, whenever a signal is prescribed which really does impose some obligation on other vessels, such for example as the "out of control" signal, the use of "shapes" and not flags is always prescribed.

I must now consider what was happening on the bridge of the *Manchester Regiment*. The pilot was asked in cross-examination whether he was in charge or the master. His answer was that it was never clearly defined; that he "assumed charge, put it that way." He added that the pilot is generally in charge of compass adjusting. Asked who was on the look-out he said he was, adding "those who were on the bridge I take it were." The master said in cross-examination that the pilot was in charge of the navigation; that there was no division of opinion on the bridge; but he admitted later that he always had a responsibility to take over the bridge. Describing the moment when the engines were put "Astern" the pilot said the captain put the engines "Astern"—the captain was always in charge. "I gave the orders—it was never clearly defined who was in charge. I gave orders for 'Full Astern.' I gave them to the captain. He carried them out." The captain described how they had kept on a northerly course at "Slow" until, to use his own words, "we got the order 'Full Astern.' The pilot and I both practically shouted it out together when we saw she was not going to do anything."

The inference that I draw, having seen and heard these witnesses, is that nobody was definitely in charge of the bridge at all; but as the evidence, to some of which I shall have to refer, shows, they were just blundering ahead without paying the slightest attention to a vessel coming at "Full Speed," at right angles, on their starboard hand. And here it is necessary to refer to what I regard as a very serious aspect of this matter. I asked the master whether he had seen the pilot, as, of course he had, during the time they had been in the precincts of the court together and whether, if his condition on the day of the collision was as I saw it in court, he had confidence in the pilot. His reply was that he thought the pilot was in a fit state in every respect on the day when he was on his bridge and that he had complete confidence in him. I can only say that I did not share that

confidence. I must speak plainly. The pilot when he gave his evidence was not actually drunk, but he was manifestly sodden with drink, and looked as if that condition was chronic. This was apparent not only when he was in the box but during the later time when he was sitting in court. I asked the question I did because this condition was so plain to all of us on the Bench. Before the case concluded Mr. Carpmael expressed the regret of his clients that the witness should have been in that condition in court, adding that he was not one of the pilots regularly employed by them. I am glad that he did so, as I should not have wished a matter like this to depend only upon my own opinion, even shared, as it was emphatically, by those sitting with me. If his condition on the day of the collision was anything like that which was apparent in court, it is impossible not to regard it as an important factor in this deplorable affair.

In his evidence, the pilot, after referring to Mr. Bruce's request that the ship should be headed on an easterly course, described how he looked round to see if the conditions were favourable, and saw the *Clan Mackenzie* approaching roughly three-quarters to one mile away on his starboard side, bearing about six points on the bow. He described how he altered course roughly 12 degrees to starboard. I have already said that I reject this evidence. No other witness speaks of it, the order was not recorded, nor was this alteration of course pleaded. It is perhaps worth noticing in passing, however, that when he was asked in cross-examination why he never gave a whistle for this supposed alteration, he said that a whistle signal was not necessary in daylight for every movement. This is in conflict with *The Karamea* (1922, 1 A. C. 68), but that is immaterial as the action was not in fact taken. What is significant, in relation to the question which rule applies, is that even at that time and distance the pilot's answer implies that he would not have regarded it as necessary to signal his starboarding to the *Clan Mackenzie*. He then went on to say that he was hoping that the *Clan Mackenzie* would make some definite alteration on her course; that she never made any apparent to him, but he never lost hope that she would. He admitted that he never took any action beyond (as he said) starboarding a little, and then when the *Clan Mackenzie* came close, going "Full Astern." He said that as she was coming so fast they thought they could not possibly carry on the way they were doing and that somebody had to do something, and, as I have already described, he and the captain, or both simultaneously, telegraphed "Full Astern" and blew three blasts. He said that her speed was three knots, at a rough estimate, when he first saw the *Clan Mackenzie*; about this I have already made my finding; and that he understood the engines were going "astern" before the collision, but was not prepared to say that the way was entirely off the ship. Cross-examined, he said that when he turned to a northerly course he did not claim, by which he meant "admit," that the *Clan Mackenzie* ceased to be the overtaking vessel. He claimed that she was always coming up with him, that is to say, he was west of her and she was coming west. He said that the courses were at right angles for seventeen to eighteen minutes. This was in fact a mistake, based on the confusion with regard to the entry in the bridge book to which I have already alluded. The entry was explained later by Mr. Espley, and the explanation was accepted. He went on to say that the *Clan Mackenzie* was always an overtaker. Asked whether it was for that reason that he thought she would get out of the way, he said, he "hoped," he "thought," he "expected" that she would take some definite action, because she was an overtaker; but when asked whether the vessels were not on crossing courses he said: "Oh, yes—I agree we were vessels on crossing courses." When asked in those circumstances whose duty it was to keep out of the way, he said, "I have found it customary in these circumstances for the vessel approaching a vessel adjusting compasses to get out of the way, but I would have said that apart from that it was my duty to keep out of the way; definitely." He admitted that he did not claim that the *Clan Mackenzie* was an overtaker so as to have the sole responsibility of keeping out of the way. Asked whether she had this responsibility because he was flying the "J.I." signal, he said, "Well, yes, it is because of the 'J.I.' signal he ought to keep out of the way. In the past it has always had that significance." But he added that he did not say that the exhibition of the "J.I." signal entitled him to disobey the Steering and Sailing Rules. He said that it was a courtesy which did not entitle him to disobey the rules, and that apart from the "J.I." signal he ought to have acted when the vessels were over a mile apart, and, also apart from the "J.I." signal, there was no obligation on the *Clan Mackenzie* to act until she could see that the collision could not be avoided by the *Manchester Regiment's* action alone. Finally, after saying that the *Clan Mackenzie* was about a quarter of a mile away when he gave the order, he was asked point blank whether he considered he was the stand-on or the give-way vessel. He said that he only claimed, by displaying these flags, that vessels would take notice of them and take precautions, accordingly. He did not claim that he was immune from any action at all. It was because of the way the *Clan Mackenzie* acted in keeping her course and speed that he put his engines "Full Astern," as the *Clan Mackenzie* could no longer avoid collision by her own action.

The master said that he first became aware of the *Clan Mackenzie* on coming round to the northerly heading for the second time, when she was about two miles away, heading to the west, six points on his starboard bow. After dealing with his own speed, about which I have already stated my finding, he said that the *Clan Mackenzie* was about a mile away when the pilot said that he could not turn easterly until she got out of the way. He said, "We had thought she might go astern of us, but seeing her come on that mile we thought she might go to the northward; she had time to do so." And then he described how the engines were put "astern." He was prepared to say that he thought his ship was stopped in the water or practically stopped. Asked whether the "J.I." signal altered the rules, he said, "In Liverpool Bay, when a ship is adjusting compasses all ships keep clear of her. This is practically a rule amongst all pilots. When you see a man adjusting you get out of his way." Asked whether flying the "J.I." signal entitled him to disobey the rules, he first said that they looked to the *Clan Mackenzie* to clear them when she saw their flag, and then committed himself definitely to the opinion that it did entitle him to disobey the rules. At first he said that he did not think there was any danger of collision when they were a quarter of a mile off, but he qualified this statement later, and admitted that if he was the give-way ship he would have acted at not less than a mile to go under the *Clan Mackenzie's* stern. Asked why he did not ease, so as not to cross her course, he repeated that he expected her to get out of the way. When it was pointed out to

him that she had come on from two miles distance to one mile without getting out of the way, and therefore had not accorded him the courtesy extended to a compass-adjusting ship, he admitted that it did occur to him that she was going to insist on her rights. Asked why he did not take action when they had finished adjusting on a northerly heading, he said that they could not starboard to the east because they had no speed, they could not reverse because they would have had to blow and would not know what the *Clan Mackenzie* would do, though with regard to this he admitted that if they had blown three blasts at anything like a mile the *Clan Mackenzie* could not have done anything wrong. He admitted that even if the *Clan Mackenzie* had kept on there would have been no collision if the *Manchester Regiment* had taken either engine action or helm action at a mile, and that at half a mile if the *Manchester Regiment* had gone "full astern," and the *Clan Mackenzie* had kept straight on, he did not think there would have been a collision. But instead of that he admitted that he did nothing until they were a quarter of a mile away. At that distance he admitted that the collision could not be avoided by their merely going "astern" and the *Clan Mackenzie* had to do something; and he admitted that she could only go hard a-starboard. It is unnecessary to multiply quotations to show the faulty look-out, indecision or, in the Johnsonian phrase, "stark insensibility" which prevailed on the bridge of the *Manchester Regiment*.

Having shown the destructive effect on Mr. Carpmael's main submission of Mr. Pilcher's cross-examination of the master and pilot, it is only fair to give Mr. Carpmael the full credit of the admissions that he has extracted from the master of the *Clan Mackenzie* on this subject. Having repeated that when he had first seen the *Manchester Regiment* she was, as already stated, heading approximately in the same direction, at two or three miles distance, he said that he "supposed" that at that time he might have been overtaking her. I observe in passing that the rest of his answers follow inevitably from this qualified admission. Having made it, he admitted that in those circumstances it was his duty to keep out of the way; that he would have kept out of her way if she had kept her course and speed, and that it remained his duty to keep clear until he was clear of her; that if he had seen the "J.I." signal two or two-and-a-half miles away he would know that she would be likely to alter her heading; that compasses were generally adjusted clockwise on the cardinal points and, therefore, if she was on westerly heading one would expect her probably to go next to the north; that the only instructions that he gave to the second officer were to call him when the North-West Buoy was sighted; that he did not give him any special instructions to keep clear, but relied on his carrying out the regulations. He then admitted categorically that when he left the bridge the circumstances obliged him to keep clear; that as he left the bridge the *Manchester Regiment* had come two or three points more to the north; that it was still his duty to keep clear and he would have gone clear even though she had altered two to three points; but that it was still his duty to keep clear, even though she altered to a northerly heading to adjust compasses, and that he "supposed" that all the time it was his duty to keep out of her way. Finally, when par. 12 of his deposition was put to him and he was asked to reconcile it with the answers to which I have just referred, he said that in making these admissions he had meant that it was his duty to keep clear of the *Manchester Regiment*, but that when he came out of his cabin he did not know that the ship was the *Manchester Regiment*, but naturally took her to be a crossing ship. He had not recognised her as being the same vessel he had previously seen; and when I asked for an explanation of this answer, he said that he did not mean that the fact that she was the *Manchester Regiment* could make any difference to the action he would take at that moment; what he meant was that as it turned out that she was the *Manchester Regiment*, it had been his duty all the time to keep clear.

Nevertheless both counsel, with these triumphs of the art of cross-examination to their respective credits, admitted that the question remained one for the court, assisted, of course, by the advice of the Elder Brethren; and, to put it quite plainly, I regard the whole of this contention that the *Manchester Regiment* was an overtaken vessel engaged in keeping her course and speed as an afterthought designed to clothe with some pretence of legality an act of negligence of the grossest kind.

Upon the assumption that the overtaking rule applies, but that the *Manchester Regiment* did not keep her course and speed, Mr. Carpmael next maintained that, on the principles laid down in *The Saragossa* (*sup.*), the *Clan Mackenzie* was liable for failure to take reasonable care to keep out of his way. I may say at once that, if this were the basis on which the case fell to be decided, both ships would be so grossly negligent in failing to avoid the consequences of each other's obvious negligence for many minutes before the collision that I should not be able to find, and neither counsel has been able to suggest, any intelligent reason for not holding them to blame in equal degrees. On the other hand, if the *Clan Mackenzie* were the overtaker and the *Manchester Regiment* was maintaining her course and speed in spite of the change to a northerly heading, the *Manchester Regiment*, in my opinion, would be to blame as the stand-on vessel, for not acting soon enough when the *Clan Mackenzie* could no longer avoid the collision by her own action alone. As Kennedy, L.J. in *The Roanoke* at p. 248 says:

"The manœuvring vessel is bound under art. 29 to take all steps that good seamanship and reasonable carefulness would dictate promptly to apprise the vessel which has to keep out of her way of what she is about, and, further, even to desist from the manœuvre if that is obviously necessary in order to avoid a collision."

In that event her share of blame would be nothing like so heavy, and I should see no reason for awarding her a larger measure of responsibility than in the converse case with which I have now to deal.

I must now consider what was happening on the bridge of the *Clan Mackenzie* from the time when she passed the Bar Light Vessel at 2.08. Mr. Barry, who, as I have said, had come on the bridge at 2.07, described how he was looking out ahead from the wheel-house window and saw the *Manchester Regiment* about two points on his port bow, when she seemed to be heading about north and west and to be stopped. He remembered seeing that the captain was not there any more. He noted up the bridge book and had his attention drawn to the *Manchester Regiment* and to the fact that she was flying the "J.I." signal by the second officer before he, too, left the bridge. He estimated that she was then two miles off. Then he described how after a while he noticed that the *Manchester Regiment* was under way, that she was getting closer, that she was still bearing on his port bow

on the same course, that he knew that it was his duty to stand-on, and did so. He watched her; she got closer and her bearing remained the same; that told him that there would be a collision, but he knew that he was stand-on ship and, therefore, his duty was to keep his course and speed. The next thing he knew was that the captain came on to the bridge. Up to then he had not thought it necessary to summon anyone to share his responsibility. He thought she was half a mile off when the captain gave the order "hard a-starboard," and he, in common with the master and the other witnesses for the *Clan Mackenzie*, said that he heard her short blast before the *Manchester Regiment's* three blasts. It is unfortunate that there is this acute conflict of evidence as to the order in which the signals were given between the witnesses from the two ships. In this respect, as I have already said, I accept the evidence from the *Manchester Regiment* that her whistle signals were given first. There was only a matter of a few seconds between the two signals, but the significance of the point is that the *Clan Mackenzie's* witnesses were trying to show that they had acted before the *Manchester Regiment* and to support their contention that they had acted in time. Mr. Barry added that he could have got the second officer by stepping three or four paces to the chart-room, but that the master was on the bridge before the second officer returned from the chart-room. Finally, in chief, he said that when the master came on the bridge he did not think that the time had arrived for the stand-on ship to do anything in order to avoid collision. In cross-examination, after admitting that the constant bearing had indicated danger, that it had shown him that the *Manchester Regiment* was going ahead at a constant speed and slower than the *Clan Mackenzie*, he said that he did not think that a position of danger had actually arisen until she began to get closer; that at what he thought was half a mile he had begun to get anxious and was just going to call the second officer when the captain came on the bridge. He added that when the captain came on the bridge he acted pretty quickly and that everything happened very quickly after that, and that there was considerable excitement. Finally, for what it is worth, he said, after considerable reflection, that if he had seen her when she was on a westerly heading he would have regarded it as his duty to keep clear, but that nobody told him that she had been heading west.

The master described how he came out of his cabin on the port side of the deck and saw the *Manchester Regiment*, at speed, dangerously close. She was under a quarter of a mile away and at least three points on the port bow. By her bow-wave he estimated her speed at five or six knots, as I have already found to be the fact. He described how he rushed up on to the bridge and ordered the wheel hard a-starboard, rang "Stand-by" on the engines and blew one short blast. He said that he did this because he could see by then that the *Manchester Regiment* could not keep out of his way by her own action. She seemed to be heading pretty well at right angles. He then described how the ship answered the wheel in terms to which I have already referred. He made it quite clear, both in chief and in cross-examination, and I accept his evidence in this respect, that he came out of his cabin because he had not been called, as he expected, for the sighting of the North-West Buoy, and not because he had already heard the *Manchester Regiment's* whistle signals. Nor, in my opinion, was he shaken in his estimate of the distance at which he saw the *Manchester Regiment* when he came on deck. He gave one other answer in cross-examination to which I attach importance, when he said that he gave his orders to the wheel without consulting the officer of the watch because he knew he had to do something to avoid collision.

I do not propose to go through the evidence of the second officer in detail. At the end of his evidence he said, in answer to me, "If I had been on the bridge all the time I should have gone to starboard, as we did, but not so late. As it turns out," he added, "I do not think that it was wise to leave the fourth officer on the bridge alone."

Upon this evidence I find as a fact, without any hesitation whatever, that the *Clan Mackenzie*, as stand-on vessel, acted much too late, and I reject Mr. Pilcher's contention that, though it was the merest chance which enabled him to do so, the master acted at precisely the right moment. It is quite clear to my mind that Mr. Barry over-estimated, by about double, the distance between the ships at the time when he was beginning to get anxious, and that the master realised, on the instant, that the time for him to take action had already passed, and acted accordingly. It is significant that, both in the preliminary act and in the statement of claim, it is stated that the wheel was put hard a-starboard not at a quarter of a mile, or even at half a mile, but at three-quarters of a mile; and that in his sworn protest, within six days of the event, the master put the distance at which he first saw the *Manchester Regiment* at "about half to three-quarters of a mile." In fact the wheel action was only effective to get her head less than four points to starboard; and because her head was beginning to swing rapidly to starboard, and her stern to port, an attempt to port her wheel so as to swing her stern clear as she crossed the bows of the *Manchester Regiment* was admittedly ineffective. Nevertheless Mr. Pilcher submitted that, supposing it could be shown, as a matter of calculation, that the *Manchester Regiment* by putting her wheel hard a-starboard as well as going full astern at the distance of a quarter of a mile could have gone under the *Clan Mackenzie's* stern, then under the rules the *Clan Mackenzie* acted in time; and he added, as a corollary to this, that if at the time the *Clan Mackenzie* acted it was even doubtful whether the *Manchester Regiment* by the same combination of action would have gone under her stern, she could not be to blame for deferring action until that moment. But even assuming that it can be proved mathematically that at the exact distance of a quarter of a mile and with one-and-a-half minutes to spare the *Manchester Regiment* by putting the wheel hard a-starboard as well as going "Full Astern" could have gone safely under the *Clan Mackenzie's* stern, which, however, on the advice of the Elder Brethren, I very much doubt, I am satisfied that no seaman, in the actual circumstances prevailing at the moment when action was actually taken, would have been justified in attempting to starboard his wheel, and that no seaman would have been justified in relying on such action being taken. I am advised that it would have been a desperate thing to do, and it is obvious that unless by some miracle it had the effect of avoiding the collision any swing of the *Manchester Regiment's* head to starboard would tend proportionately to re-establish the right-angle position, which the action of the *Clan Mackenzie* was calculated to avoid, and so to aggravate the severity of the blow. I am advised by the Elder Brethren, and their advice is in complete accord with my own opinion, that at the time when action was taken by these two ships

collision could not be avoided by any action of both combined, and that if any wheel action was to be taken by those on board the *Manchester Regiment* they ought, for what it was worth, to have ported the wheel in order to minimise so far as possible the angle of the blow; but it is only fair to say that in the time available and with the engines going astern, it is improbable that port wheel action would have had much effect in this respect, and I am not prepared to attribute any extra measure of blame to the *Manchester Regiment* in respect of her failure to port her wheel at that moment, though I have already expressed my view of her failure to take that, or some other appropriate action, earlier. But apart from this I do not think that Mr. Pilcher was propounding the right tests in accordance with established authority. In the well-known passage on this point in Lord Buckmaster's opinion in *The Otranto* (142 L. T. Rep. 544; (1931) A. C. at pp. 201 and 202) he says:

"The rule was designed to secure that the stand-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in face of all the existing facts. Subsequent examination may show that his judgment could not properly have been formed, in which case the rule has been broken without excuse, but the ultimate decision is not to be settled merely by exact calculations made after the event, but by considering these facts as they presented themselves to a skilled man at the time."

He goes on to refer with approval to a passage from the judgment of Vaughan-Williams, L.J. in *The Olympic* (108 L. T. Rep. 592; (1913) P. 214, at p. 245). The full meaning of this latter passage is made clearer if one substitutes for the reference to "the exception" the material words themselves from the note to art. 21. The passage will then read as follows:

"It seems uncertain on the cases whether the direction that the stand-on vessel 'also shall take such action as will best aid to avert collision' only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the direction that the stand-on ship 'also shall take such action as will best aid to avert collision' applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship bound to keep her course, to avert collision. I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the give-way vessel alone, the case falls within the direction that the stand-on ship 'also shall take such action as will best aid to avert collision,' even though in fact the give-way vessel could by her own action have averted collision."

It is clear that all reasonable latitude must be allowed to the man who has to make this difficult decision (see *The Albano* (*sup.*) and *The Gulf of Suez*, 125 L. T. Rep. 653; (1921) P. at p. 331); but, as Lord Buckmaster says, if subsequent examination shows that the judgment actually formed could not properly have been formed, the rule has been broken without excuse. In that case the subsequent examination shows that the judgment actually formed, allowing reasonable latitude, was not, in that respect, the "judgment of a competent sailor." In this case I am satisfied that no seaman really qualified to form a judgment could have decided to act as late as the *Clan Mackenzie* acted; and that her master acted when he did simply because in the circumstances which actually occurred he had no opportunity of judging earlier that the time had come to act, as I have no reason to doubt he would have done had he been on the bridge. The judgment formed by Mr. Barry cannot be held to have been properly formed.

For these reasons I find it impossible to absolve the *Clan Mackenzie* from some share of responsibility for this collision. There is no question in my mind but that the responsibility of the *Manchester Regiment* is much heavier, and I apportion the blame as to four-fifths to the *Manchester Regiment* and one-fifth to the *Clan Mackenzie*, and order that the costs be paid in the same proportions.

Solicitors for the plaintiffs, *Coward, Chance, and Co.*

Solicitors for the defendants, *Botterell* and *Roche*, agents for *Vaudrey, Osborne, and Mellor*, of Manchester.

Monday, April 11, 1938.

(Before Sir BOYD MERRIMAN, P.)

The Inna. (*a*)

Practice—Maritime liens—Priorities—Earlier damage lien postponed to lien of subsequent salvors—Circumstances in which court entitled to review salvage remuneration fixed by contract and to reopen judgment by default—"Inequitable" contracts—Costs.

This was a motion by the salvors of the Norwegian steamship I. *for payment out of* 578*l., being the proceeds of the sale of that vessel, by order of the Admiralty Court, and for the determination of priorities as between the salvors and the owners of property ashore damaged as the result of an explosion which occurred on board the* I. *whilst she was lying in Poole Harbour for the purpose of discharging a cargo of* 200 *tons of calcium cyanamide. In consequence of the explosion the* I. *sank in Poole Harbour. She was subsequently raised by the salvors and towed by them to Southampton for repairs. These services were performed in pursuance of a contract of salvage entered into on the* 5*th January,* 1938, *between the claimants and the master of the* I., *under which the salvors, if successful, were to receive the sum of* 1250*l. The damage claimants, who were the lessees and occupiers of West Shore Wharf, Poole, intervened in the motion in respect of damage amounting to* 576*l.* 10*s., which they had sustained to warehouses and other property ashore as the result of the explosion, and claimed that as innocent victims of the accident their claim should be preferred to that of the salvors. They also contended that, having arrested the vessel before the salvage services were completed, it was only*

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

by their consent that the removal of the vessel was effected, thus enabling the salvors to tow the vessel to the repairing port after she had been raised and so complete the performance of their contract.

Held, (1) *that although the damage claimants' lien was earlier in date, it must be postponed to that of the salvors whose services had preserved the* RES *; (2) that, assuming the court has the power to review the salvage agreement and substitute some other sum for the remuneration provided therein, the mere fact that the salved value has proved less than the agreed remuneration and that that remuneration absorbs the whole fund is not sufficient reason for the court to proceed to such a review and substitution where, as here, there is nothing to show that the contract was inequitable or that the parties to it contracted otherwise than on equal terms ; and (3) that the salvors were entitled to payment out to them of the whole fund, less the interveners' costs up to the arrest of the vessel, and, having regard to the special circumstances of the present case, their costs of the motion.*

MOTION for payment out and determination of priorities.

The claimants were the Liverpool and Glasgow Salvage Association. The interveners were the Southern Roadways (1936) Limited, lessees and occupiers of West Shore Wharf, Poole. The motion arose in connection with the priorities as between the claimants as salvors of the Norwegian steamship *Inna* (489 tons gross), which sank in Poole Harbour on the 28th December, 1937, as the result of an explosion in her after hold, and the interveners, whose premises at West Shore Wharf, Poole, were damaged in consequence of that explosion. The wharf in front of which the *Inna* sank was blocked for a month, and the loss and damage claimed amounted to 576*l.* 10*s.* 2*d.* The claimants, who on the 5th January, 1938, had entered into a contract with the master of the *Inna* to salve the ship for 1250*l.*, completed the salvage on the 28th January ; on the 24th February, 1938, they instituted salvage proceedings in the Admiralty Court, and in that action obtained judgment by default for 1250*l.* and an order for the sale of the *Inna*. They now moved to have the proceeds of the sale paid out to them. The interveners, on the other hand, had issued a writ *in rem* in respect of their damage and arrested the *Inna* at Poole on the 26th January, 1938. By that date the vessel had been raised by the salvors, but in order to complete their services and tow the *Inna* to Southampton for repairs they applied for and obtained the interveners' consent to the vessel's removal from Poole to Southampton. The interveners disputed the claimants' right to priority and in any event their right to the whole of the fund in court, because (*a*) the agreed remuneration was largely in excess of the whole value of the *res*, and (*b*) the salvors had not "preserved" the fund since they claimed the whole of it. It was contended on the interveners' behalf that on the authority of *The Veritas* (9 Asp. Mar. Law Cas. 237 ; 85 L. T. Rep. 136 ; (1901) P. 304) and *The Stream Fisher* (17 Asp. Mar. Law Cas. 159 ; 136 L. T. Rep. 189 ; (1927) P. 73) liens *ex delicto* take priority over liens *ex contractu* or *quasi-contractu*. They also referred to *The Linda Flor* ((1857) Swa. 306) ; and *The Elin* (5 Asp. Mar. Law Cas. 120 ; (1883) 8 P. D. 39). The claimants' contention, on the other hand, was that the lien for subsequent salvage takes precedence over the lien for prior damage, and they relied on the cases of *Attorney-General* v. *Norstedt* ((1816) 3 Price 97, at p. 136) and *Cargo ex Galam* ((1863) Br. & Lush 167, at p. 181).

Owen L. Bateson for the claimants (salvors).

H. G. Willmer for the interveners (damage claimants).

Sir Boyd Merriman, P. — This motion raises an interesting point in connection with the priorities as between the salvors of the *res* and those who have a claim for damages against the *res*. On the 28th December, 1937, some of the cargo of the Norwegian ship, the *Inna*, exploded in Poole Harbour, with the result that she was sunk, and damage was done to the property of the plaintiffs, Southern Roadways (1936) Limited. On the 5th January, 1938, the other claimants, the Liverpool and Glasgow Salvage Association, entered into a contract to salve the ship for the fixed remuneration of 1250*l.*, and on the 8th January salvage work began, but it was not completed until the 28th January. Meanwhile, on the 26th January, after a great deal of the salvage work had been done—the most important part, that of raising the ship from the bottom of Poole Harbour—the plaintiffs in the damage action, Southern Roadways (1936) Limited, issued a writ and arrested the ship. The writ in the salvage action was not issued until the 24th February, and on the 7th March, on the motion of the salvors, an order was made for sale. On the 28th March the salvors obtained judgment by default for 1250*l.* ; and they now move the court to have out the proceeds of the sale.

I now have a rough approximation of the figures before me, which show that, after payment of the marshal's account and various expenses, the sale may be expected to produce, net, about 578*l.*, which is less than was expected on the appraisement. But even the appraised value itself, as events have turned out, is less than the amount of the salvage contract. I wish, however, to say this about the salvage contract before I go any further. There is not the slightest suggestion that this contract was not perfectly open and aboveboard in every way. True that it has turned out badly for all parties concerned, other than the salvors, but there is no suggestion that there was any fraud, misrepresentation, or any sort of compulsion which induced the owners to enter into the contract. The ship was lying at the bottom of Poole Harbour, and I am told that, after having the opportunity for some eight or nine days of consulting the owners, the master signed this contract on the instructions of the owners or their representatives, without any sort of pressure being brought to bear upon the owners by the salvors. I think it very important to bear that fact in mind, having regard to one of Mr. Willmer's arguments.

In this state of things, where the proceeds of the *res* in fact are very greatly less than the amount of the salvage claim, and, no doubt, equally are considerably less than the damage claim—at any rate of the damage claim and costs—there arises the question, Which of these two claimants has priority ? It is common ground that it has been assumed for a very long time by text writers and practitioners in Admiralty, that as between claimants for salvage services and those who have a lien for damage, the lien for damage

is preferred to prior salvage claimants and is postponed to later salvage claimants. There is ample authority for the proposition that the damage claim is preferred to prior salvage claims, but there is less authority for the other proposition, which is the one I have to decide. Nevertheless, I should feel that I was somewhat bold, having regard to the consensus of professional opinion on this matter, if I were to hold that those who have a lien for damage obtain priority over those who subsequently perform salvage services which preserve the property over which the lien is claimed. I do not think, however, that the matter is devoid of authority, as is illustrated by a passage in *Attorney-General* v. *Norstedt* (*sup.*) : " In the present case, before they proceeded to this sale (a public sale under the order of the Instance Court of Admiralty), there was no prohibition, and, indeed, no seizure had been then made ; but if the seizure had been made before, it appears to me it would have been a good ground for their coming and praying a prohibition, as they did in the case cited, on the footing of the Crown having a right by forfeiture—a right prior to that which the other claimants had, and therefore prohibiting the proceeding there ; at the same time it seems to me to be clear that the salvors, even in that case, would have been entitled to salvage ; and if that were not paid, they would, of course, have been entitled to a sale, in order to make good that salvage, for whosesoever property that ship may be taken to be, still, they who meritoriously preserved it from destruction would be entitled to compensation in the shape of salvage."

I think that that is a very strong case illustrating the great weight to be attached to the claim of salvors. I agree with Mr. Willmer that it does not decide any question of priority as between salvors and those who have a claim for damage, and it may be it does not decide it because, at that time, the existence of a maritime lien for damage was not clearly established. But, at least, it shows the very great claim which salvors have to priority even against the claim of the Crown, for the Crown's claim was postponed to those who had rendered a meritorious service which had preserved the property from destruction after the other claim had accrued. It is true that that case by no means goes the whole way, and Mr. Willmer is entitled to say that *The Elin* (*sup.*) on the other hand shows, in a case where there was no rival claim for salvage, how high the rights of the claimants to priority in respect of a lien for damage are rated. But with those two cases on the one side and the other I think that the other case which is cited in the text-books as authority for the priority of the salvors is important, namely, *Cargo ex Galam* (*sup.*) a decision of the Privy Council. It is true to say that the actual question of the priority of salvage, as distinct from damage, was not in question. But after discussing the circumstances in which a respondentia bond had been given, Lord Kingsdown, delivering the judgment of the Privy Council, goes on : " The subsequent carrying on of the cargo was essential to making it available either for the owner of the respondentia bond, or for anybody else. It was in the nature of salvage service, and in a competition of liens the shipowner who has rendered a service of this description is entitled to priority over the holder of a respondentia bond who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination. It is upon this sound principle of justice and common sense that, by the regular practice of the Admiralty Court, a prior bottomry bond is postponed to a subsequent one, and both to claims of salvage afterwards arising, and that wages are also entitled to preference. These demands are all for services rendered to the owner of the bottomry bond, as well as to other persons interested in the ship and cargo. We think, therefore, that the claim for freight is entitled to priority over the respondentia bond."

Now although there was no claim for priority in respect of salvage, it is impossible not to regard that passage as being very high authority for the proposition for which Mr. Bateson has contended. I think really that the truth of the matter is that this is one of the things for which it is difficult to find authority, because it has been assumed, I was going to say for generations, that it is the law. It was quite plainly assumed in the case to which Mr. Willmer called my attention, *The Elin* (1), where, on the basis of the authorities which I have quoted, the salvors had been paid by consent before the question of priority between the others was considered. I think that it is also implicit in everything that Gorell Barnes, J., as he then was, said in *The Veritas* (*sup.*).

In these circumstances I think I should be wasting time in analysing the authorities further, and it must be for some other court to say that the time has come to decide that the maritime lien in respect of damage is to be preferred to a lien for subsequent salvage services which, in fact, alone produce any *res* at all for the other lien to take effect upon. I, therefore, have no hesitation in deciding that, on that point, Mr. Bateson is right.

Then there remains Mr. Willmer's second point. He says that that is all very well if, in fact, any *res* has been preserved for the other lien to take effect upon, but, in this case, no *res* has been preserved, because the amount of the *res* is very greatly less than the agreed award for salvage services. He contends, therefore, that I ought to ensure that the whole of the *res* is not swallowed up by this prior claim for a salvage award and that, standing as the interveners do in the shoes of the owners of the ship, they are entitled to ask me to reopen and review the judgment and to award such an amount to the salvors as will ensure that something is left in the fund to meet the damage claim.

Now I will assume for the purpose of the argument, not merely that I have power, in general, to review a contract for salvage fixing the amount of the award, and also that I have power under the rules of the Supreme Court to reopen any judgment by default—of both those two things there is no doubt whatever—but also that these interveners are entitled to ask me to reopen this particular judgment. Mr. Bateson has contended, on the authority of *The Lord Strathcona* (16 Asp. Mar. Law Cas. 536 ; 133 L. T. Rep. 765 ; (1925) P. 142), that they are not in a position to ask me to do that. I do not propose to decide that point. I propose to assume that I have got the power to do it ; but before I could possibly review the judgment, and substitute any other amount for that which has been awarded, it is obvious that I should have to have a great deal more material before me. But I do not think that I need postpone dealing with it on that account. The broad question here raised by Mr. Willmer is simply this : he says, in effect, the matter speaks for itself. It is immaterial how much these people expended, or how much it cost them to perform this service, or whether they are in pocket or out of pocket by reason of it. There is one thing which is decisive in this matter ; and that is that the award exceeds the value of the ship, and that, he contends, entitles me, in the circumstances of

the case, to substitute some other judgment for that which I have already given.

Now if I thought that that was right, I should still have to have more information before I could fix any alternative amount. But, in my opinion, the whole of Mr. Willmer's argument on this point is fundamentally unsound. There is no question whatever that the court can review agreements and substitute some other sum; and there is no doubt that, among other things which would be taken into account in any such review, would be the value of the property salved. But the court must act upon some principle in these matters, and I cannot find the slightest authority for the suggestion that the mere fact that the salved value of the ship turns out to be less than the amount of the agreed award is, of itself, any ground whatever for setting aside the agreement and substituting some other sums. In Kennedy's Civil Salvage, 3rd edit., pp. 249, 250, the principles upon which the court acts are set out. If the agreement is tainted by fraud, if there was any sort of misrepresentation, if the agreement has been cancelled by consent of the parties, there is no doubt about the powers of the court to act. The only other ground, and the one on which Mr. Willmer relies, is if the terms of the agreement are inequitable. I have looked at the authorities which are set out in the books. Mr. Willmer admits that he cannot give me any authority for the proposition that the mere fact that the salved value is less than the agreed remuneration brings the case within the category that the terms of the agreement are inequitable. The class of case relied upon to raise the question of equity seems to me to be entirely different, the class of case where, coupled with the fact that the agreed award is large, there is some element of compulsion, something which shows that the parties were not dealing on equal terms, something of which the remarks of Butt, J. in *The Mark Lane* (6 Asp. Mar. Law Cas. 540; 63 L. T. Rep. 468; (1880) 15 P. D. 135) would be true, where he says: "In the cases referred to by counsel, the word 'inequitable' has been used. But I think that what is at the root of the question is this—where it is found that a wholly unreasonable price has been insisted upon by the salvors and an agreement incorporating it has been signed, the court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount. Were the parties, in fact, contracting on equal terms?" That is what is meant by the agreement being inequitable; not that the parties with their eyes open made a bargain which turned out to be unprofitable. The owners here could perfectly well have had an inspection of the state of the ship and have decided before they agreed to the 1250*l.* that it was not worth their while to pay anything like that, and that they would prefer to leave her at the bottom of Poole harbour. Equally the salvors probably took a considerable risk in fixing upon that figure, for the adventure might turn out to be very much more expensive than it did. About that I have no material to go upon. The point is that the parties were on equal terms; there was no question here of any sort of compulsion, or anything to raise any question of equity whatever. In these circumstances, it seems to me that it is quite impossible for Mr. Willmer, even if he is otherwise entitled to do so, to ask me to reopen this agreement and to give judgment for some other sum to be ascertained on principles which have not yet been explained.

The result will be that the question of priorities will be decided as follows. It is conceded that the damage claimants are entitled to the costs of the arrest. Those costs will come first. Then the salvors will be entitled to their claim for salvage, but I will allow the interveners their costs of the motion out of the fund in court.

Solicitors for the claimants (salvors): *Pritchard, Sons, Parlington*, and *Holland*, agents for *Batesons* and *Co.*, of Liverpool.

Solicitors for the interveners (damage claimants): *Bennison, Garrett*, and *Co.*, agents for *Dickinson, Yeatman*, and *Mauser*, of Poole.

May 16 *and* 20, 1938.

(Before BUCKNILL, J.)

The Theems. (*a*)

Collision—Limitation of liability in respect of loss of and damage to property and loss of life and personal injury—Rate of interest—Admiralty practice—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503—*R. S. C., Order XLII., r.* 16.

This was a suit instituted by the owners of the steamship T. *to limit their liability in respect of a collision between that vessel and the steam trawler* N. D. de L. *In consequence of the collision the* N. D. de L. *was sunk and seven members of the crew lost their lives. In their prayer the plaintiffs offered to pay into court a sum of* 3705*l.* 15*s.* 2*d., being* 8*l. per ton of the registered tonnage of the* T. *as computed for limitation purposes under the provisions of sect.* 503 *of the Merchant Shipping Act*, 1894, *together with interest at the rate of* 4 *per cent. per annum from the date of the collision until payment into court, and further to go bail in respect of the life claims for a sum of* 3242*l.* 10*s.* 10*d., being* 7*l. per ton on the above tonnage and interest thereon at the same rate, namely,* 4 *per cent. per annum, from the date of the collision until payment into court. The defendants contended that the rate of interest should be* 5 *per cent., that being the usual rate of interest which had been awarded by the registrar and merchants in respect of damage claims ever since* 1922: (The Joannis Vatis (No. 2), 16 *Asp. Mar. Law Cas.* 13; 127 *L. T. Rep.* 494; (1922) *P.* 213).

Held, that although, in some cases where there is no limitation, interest at the rate of 5 *per cent. is awarded in the registry by way of damages, such a course cannot be right in a limitation action, because sect.* 503 *of the Merchant Shipping Act*, 1894, *limits the liability of a shipowner in terms to a sum per ton beyond which he shall not be liable to damages, and to make him liable, by way of damages, for interest in addition to that sum would be to impose upon him a burden heavier than that imposed upon him by the statute; that the ground on which interest is given in a limitation action is that the wrongdoer has had the use of*

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

the money since the collision, and must pay to the injured party the sum which in theory he, the wrongdoer, has made out of that money; and that the proper rate of interest to be paid, in a case such as this, by a man who, notionally at any rate, has been in possession of moneys which he ought to have paid to the injured party, is 4 per cent. per annum, having regard to the fact that (a) *4 per cent. is the rate provided in a general way by R. S. C., Order 42, r. 16, and* (b) *in no limitation action during the last 150 years has a higher rate of interest than 4 per cent. per annum been allowed.*

ACTION for limitation of liability.

The plaintiffs were Walford Lines Limited of London, owners of the steamship *Theems*. The defendants were the owners of the steam trawler *Notre Dame de Lourdes*, of Boulogne. This action arose as the result of a collision which occurred between the two vessels in the North Sea on the 10th January, 1937, when the trawler was sunk and seven of her crew were drowned. Actions which had been begun by the owners of the *Notre Dame de Lourdes* and by her master, officers, and crew, and the legal representatives and dependants of those members of that vessel's crew who had lost their lives, were settled on the basis that Walford Lines Limited should pay the present defendants 85 per cent. in respect of loss of or damage to property, and 100 per cent. for the loss of life and personal injury. The present suit was instituted because the claims exceeded the amount of the statutory limit of liability. The contentions of the parties appear sufficiently from the headnote and judgment.

Owen L. Bateson and *Norman V. Craig* for the plaintiffs.

H. G. Willmer for the defendants.

Bucknill, J.—This is a very interesting point, and I am very much obliged to learned counsel for the able way in which they have dealt with it.

The point arises in this way. The Walford Lines Limited are the plaintiffs in a limitation suit in respect of a collision between the *Theems* and the *Notre Dame de Lourdes*. In consequence of the collision, the *Notre Dame de Lourdes* was sunk, and seven of the crew were drowned. The plaintiffs started this limitation suit, and in their prayer they offered to pay into court a total sum of 3705*l.* odd, based on 8*l.* per ton of the *Theems*, together with interest at the rate of 4 per cent. per annum from the 10th January, 1937, the date of the collision, until payment into court, and to go bail for a further sum of 3242*l.* odd, the aggregate amount at 7*l.* per ton on the registered tonnage, and interest as aforesaid, namely, from the 10th January, 1937, until payment into court.

Now, when the case came before the court, Mr. Willmer, on behalf of the defendants, whilst he did not contest the salient points of the case, raised the point, and I think quite properly, that the interest should be at the rate of 5 per cent., and he said, and there is no doubt about this, that in the registry the usual rate of interest in respect of damage claims has been 5 per cent. since about 1922. That figure of 5 per cent. is referred to by Lord Merrivale in *The Joannis Vatis* (*No.* 2) (127 L. T. Rep. 494; (1922) P. 213; 16 Asp. Mar. Law Cas. 13), and I understand that it is the rate at present, although I do not think it is any absolutely fixed amount, and it is in the discretion of the learned registrar and merchants.

However that may be, it seems to me quite clear that the principle upon which interest is paid in these limitation suits is not by way of damages, but on the principle that the wrongdoer has been in possession of the money since the date of the collision, and that, having had that money, he has had the use of it, instead of the injured parties. That is the principle of limitation suits. At any rate, it seems to me quite clear from the judgment of Sir Robert Phillimore in *The Northumbria* (1869, 21 L. T. Rep. 681; L. R. 3 A. & E. 6). In that case Sir Robert Phillimore says (at p. 10): "The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that whether the obligation arose *ex contractu* or *ex delicto*," and he cites in that case the judgment of his predecessor, Dr. Lushington, in *The Amalia* (10 L. T. Rep. 826; 5 N. R. 164*n*), where Dr. Lushington says: "Upon what ground, then, was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision.

And Sir Robert Phillimore, in another part of that judgment, says (at p. 12): "The principle still remains (in limitation actions) that the liability to this amount attaches from the time of the collision; and there seems no reason why interest should not accrue on the delay to pay that limited amount, as well as in the case where the amount is unlimited."

Now, it may be that in some cases the registrar, in fixing the amount of interest in actions where there is no limitation, does take the view that he ought to award interest by way of damages, but it seems to me quite clear that in a limitation action that cannot be right, because the section which limits the liability of the shipowner limits it in terms to a sum of so much per ton. Sect. 503 says he shall not be liable to damages beyond this 8*l.* and 7*l.* per ton, and if one were to say that in addition to that by way of damages he was liable for interest, it would be imposing on him a burden heavier than the statute imposes, and the grounds on which interest is given in a limitation action is, as I have said, that the wrongdoer has had the use of the money since the collision and must pay to the injured party that sum which he in theory has made out of that money. Strictly speaking, in this case the plaintiff is offering more interest than he would have to pay if there was no limitation at all, because it is quite clear from Mr. Roscoe's work on the practice of the courts, that in ordinary cases where there is loss of life, but no limitation suit, interest is only payable from the date of the report.

In this case, as I have already stated, the plaintiff is offering, in accordance with the practice and in accordance with the decision of Sir Gorell Barnes in *The Crathie* (8 Asp. Mar. Law Cas. 256; 76 L. T. Rep. 534; (1897) P. 178) to pay interest on the life claims from the date of the loss. Now, that being so, what is the proper rate of interest? It is significant, I think, that in Mr. Roscoe's Admiralty Practice, published in 1931, although at p. 364 he says: "By the report interest, usually at the rate of 5 per cent. per annum, is allowed on the amount awarded from a date stated in the

report," when he is dealing with actions for limitation of liability he says, at p. 244 : " The rate of interest under the present practice is 4 per cent. per annum."

What, then, is the proper rate of interest to be paid by a man who has, notionally at any rate, been in possession of money which he ought to have paid to the injured party ? That seems to me to be clearly stated in Order XLII., r. 16, which says in a perfectly general way that the rate is 4 per cent., and I see no reason why that should not be the rate in this case. No case has been brought to my notice in which in any limitation action for the last 150 years, more than 4 per cent. has been charged. It was 4 per cent. in the case of *The Dundee* (2 Hagg. Adm. 137) in 1827, and I think it ought to be 4 per cent. to-day.

I shall therefore grant that. I hold that 4 per cent. is the proper amount.

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

Solicitors for the defendants, *Bentleys, Stokes,* and *Lawless*.

Supreme Court of Judicature.

COURT OF APPEAL.

May 5, 6, 10 *and* 23, 1938.

(Before GREER, SLESSER, and MACKINNON, L.JJ.)

Petros M. Nomikos Limited v. Robertson. (*a*)

[This decision was affirmed by the House of Lords on 8th May, 1939.—ED.]

Insurance (Marine)—Freight policy—Construction—Institute Time Clauses—Freight, clause 5 *—" In the event of the total loss, whether absolute or constructive, of the steamer "—Constructive total loss—To recover on freight policy—Whether vessel must be in fact abandoned to underwriters on hull.*

Shipowners insured the hull of a steamer by policies in which her value for constructive total loss was 28,000*l. By a Lloyd's policy they insured for* 4110*l. in respect of the vessel on " freight chartered or otherwise." This policy was subject to the Institute Time Clauses —Freight by which* (5), " *In the event of the total loss whether absolute or constructive of the steamer the amount underwritten by the policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.*" (6) " *In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value.*" (8) " *Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.*" *The owners chartered the vessel to carry a cargo of crude oil from Venezuela to the United Kingdom or the Continent during the currency of the hull policies and the policy on freight. Before proceeding to the port of loading the steamer went to Rotterdam for repairs, where, owing to explosion followed by a fire, the after-part of the steamer was burnt out. The owners accepted a tender for the repairs for* 37,000*l., did not abandon this vessel to their hull underwriters, but claimed from them as for a partial loss* 28,000*l. less a deductible franchise of* 1000*l. The value of the vessel when repaired was about* 45,000*l. The freight under the charter was never earned, and the owners sued the defendant, one of the underwriters, on the freight policy under clause* 5 *of the Institute Time Clauses—Freight, for his proportion of the* 4110*l. The defendant, the respondent in the Court of Appeal, contended* (i.) *that there had never been a constructive total loss as the vessel had not been abandoned to the hull underwriters ;* (ii.) *that there was only one case in which freight was lost by the vessel becoming a constructive total loss and that was where a vessel carried freight after its abandonment to hull underwriters ; and* (iii.), *in the Court of Appeal only, that, having regard to the terms of clause* 8 *of the Institute Time Clauses—Freight* (sup.), *the assured could not recover under clause* 5 *unless the actual or constructive loss had resulted in loss of freight.*

Held, that no one of these contentions could be accepted. On the construction of the policy the words " in the event of the total loss, whether absolute or constructive, of the steamer," meant only if the vessel was so damaged that the owners would have the right to abandon the vessel ; they did not imply that the owners should also have exercised that right.

Decision of Roche, J. in Roura and Forgas *v.* Townend (120 *L. T. Rep.* 116 ; (1919) 1 *K. B.* 189) *approved.*

Per Greer, L.J.—He desired to add, without finally deciding the point, that the inclination of his mind was to hold that abandonment and notice of abandonment were not part of the definition of " constructive total loss," but were conditions subsequent which had to be performed before a claim could be made against underwriters. In his view this question did not arise here as in the Institute Time Clauses —Freight, in this freight policy, the parties had defined, as between themselves, what was to be a constructive total loss.

APPEAL from a decision of Goddard, J., sitting in the Commercial Court.

The action was tried on the following agreed statement of facts :

1. By policies of marine insurance dated the 28th August, 1936, subscribed by various Lloyd's underwriters and London insurance companies, the plaintiffs . . . [shipowners] . . . were insured in respect of the *Petrakis Nomikos* on hull, machinery, &c., valued at 28,000*l.*, for and during the space of

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

twelve calendar months from the 20th July, 1936, as employment might offer. The said policies further provided that in the event of the total or constructive total loss of the vessel, the policies were only to pay their proportion of 14,000*l.*, and that for valuation and disbursements clause purposes, the insured value of the vessel was to be taken as 28,000*l.*, so that the value for constructive total loss purposes was 28,000*l.*

In respect of particular average, the policies stipulated for a deductible franchise of 1000*l.*

2. By a Lloyd's policy dated the 28th August, 1936, subscribed by the defendants and others, the plaintiffs were insured in respect of the *Petrakis Nomikos* in the sum of 4110*l.* on "freight chartered or otherwise in and (or) over," for and during the space of twelve calendar months from the 20th July, 1936, as employment might offer. The said policy was subject to the Institute Time Clauses—Freight, which provided, *inter alia*, as follows:

(5) In the event of the total loss, whether absolute or constructive of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

(6) In ascertaining whether the vessel is a constructive total loss, the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

Of the said sum of 4110*l.* the defendant subscribed for 18*l.* 5*s.* 4½*d.* At all material times the plaintiffs, as owners of the vessel, were fully interested in the said policy.

3. By a charter-party dated the 23rd September, 1936, the plaintiffs chartered the *Petrakis Nomikos* to carry a full cargo of crude oil from Venezuela to the United Kingdom or Continent; lay days were not to begin before the 25th October, and the cancelling date was the 10th November.

4. The steamer went to Rotterdam for certain repairs before proceeding to her port of loading under the charter-party. While she was undergoing those repairs, on the 31st October, a violent explosion occurred on board, followed by a fire by which the after-part of the steamer was burnt out.

5. The plaintiffs obtained tenders for repairing the steamer, and the lowest tender was 37,000*l.* The plaintiffs estimated that owing to the increase in tonnage values the steamer, when repaired, would be worth about 45,000*l.*, and they accordingly decided on the 18th December, 1936, to accept the tender and not abandon to their hull underwriters. The plaintiffs thereupon claimed as for a partial loss from their underwriters on the hull and machinery policies, who paid 27,000*l.* (28,000*l.* less the 1000*l.* franchise). The repairs were completed on the 31st May, 1937, and the steamer has since been used as a freight-earning instrument by her owners.

6. It was agreed that the steamer could not have been repaired for less than 37,000*l.*, and that her value when repaired would be about 45,000*l.* The charter-party was never performed, and the plaintiffs have not received any part of the freight payable thereunder.

7. The plaintiffs about the 26th February, 1937, claimed 4110*l.* under clause 5 of the Institute Time Clauses of the freight-policy from their insurers including the defendant, but their insurers refused to pay.

The question for decision by the court was whether in the circumstances set out in the above agreed statement of facts the plaintiffs were entitled to recover 18*l.* 5*s.* 4½*d.*, being the defendant's proportion of the 4110*l.* insured under the freight policy.

The plaintiffs' contentions were as follows:

(*a*) That though in certain circumstances, the giving of notice of abandonment is a condition precedent to recovery under a hull policy, on the ground of constructive total loss, such notice is not an integral element of a constructive total loss.

(*b*) That the fact that the plaintiffs did not give notice of abandonment to their insurers, under their hull policies, but treated the loss thereunder as a partial loss is irrelevant in considering whether the plaintiffs are entitled to recover under clause 5 of the Institute Time Clauses in the freight policy.

(*c*) That the *Petrakis Nomikos* was a constructive total loss under the hull policies.

(*d*) That the *Petrakis Nomikos* was a constructive total loss within the meaning of those words, in clauses 5 and 6 of the Institute Time Clauses in the freight policy.

(*e*) That in the circumstances set out in the agreed statement of facts, it was unnecessary for the plaintiffs to give notice of abandonment to their insurers under the freight policy in order for them to be able to recover in full thereon.

(*f*) That there was no possibility of benefit to the insurers under the freight policy had the plaintiffs given them notice of abandonment of the chartered freight.

(*g*) That the said chartered freight was insured under the freight policy and was never earned.

(*h*) That in the premises the insurers under the freight policy were liable under clause 5 of the Institute Time Clauses—Freight, to pay the plaintiffs the amount underwritten by the policy in full, to wit, 4110*l.*

The defendant's contentions were as follows:

(*a*) That there can be no constructive total loss on hull policies, unless timely notice of abandonment is given.

(*b*) That there can only be a constructive total loss where the subject matter insured is "reasonably abandoned" on account of the matters set out in sect. 60, sub-sects. (1) and (2), of the Marine Insurance Act, 1906. That "reasonable abandonment" is an essential preliminary to the establishment of a constructive total loss in relation to any of the states of affairs mentioned in that section.

(*c*) That the term "constructive total loss" applies only to matters of marine insurance and that there cannot be a constructive total loss unless the requirements of the Marine Insurance Act, 1906, to constitute such a loss are complied with. In this case the assured did not in fact claim as for a constructive total loss under their hull policies. Having made their election they cannot now say that there was a constructive total loss of the steamer.

(*d*) That alternatively, and in any event, it is necessary for the assured in order to recover on freight policies on a constructive total loss basis to give notice of abandonment to freight underwriters, and this the assured has failed to do.

(*e*) That the steamer remains at the present time the property of the assured; she has been repaired and is being used as a freight-earning instrument for her owners; she was neither an absolute nor a constructive total loss, and therefore no claim under clause 5, based on absolute or constructive total loss, can arise.

The defendant took the following additional point on appeal:

(*f*) That having regard to the terms of clause 8

of the Institute Time Clauses—Freight, assured cannot recover under clause 5 thereof, unless the actual or constructive loss has resulted in loss of freight.

The Institute Time Clauses—Freight provide :

7. " In calculating the amount due under this policy in respect of any claim except under clauses 3 and 5 all insurances on freight (including honour policies on freight) shall be taken into consideration and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein."

8. " Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

By sect. 60 of the Marine Insurance Act, 1906 :

(1) " Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) " In particular, there is a constructive total loss—

(i.) " Where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods, as the case may be, or the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered ; or

(ii.) " In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

" In estimating the cost of repairs no deduction is to be made in respect of general average contributions to these repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired ; or

(iii.) " In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."

By sect. 61 : " Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject matter insured to the insurer and treat the loss as if it were an actual total loss."

[Sect. 62 deals with notice of abandonment.]

By sect. 63, sub-sect. (1) : " Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter insured, and all proprietary rights incidental thereto."

(2) " Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty ; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss."

Goddard, J. held, firstly, purporting to follow *Carras* v. *The London and Scottish Assurance Corporation* (18 Asp. Mar. Law Cas. 581 ; 154 L. T. Rep. 69 ; (1936) 1 K. B. 291), that to succeed under clause 5, the plaintiffs, the shipowners, had to prove that the loss of freight was caused by the ship becoming a constructive total loss and that this they had failed to do, as there was only one case in which freight was lost by this cause and that was where a ship earned freight after its abandonment to hull underwriters. He also held that on these facts there never had been a constructive total loss, since the vessel had not been abandoned to the underwriters. Accordingly he gave judgment for the defendant.

The plaintiffs appealed.

H. U. Willink, K.C. and *Mocatta* for the appellants.

Sir *Robert Aske*, K.C. and *W. L. McNair* for the respondent.

Cur. adv. vult.

Greer, L.J.—This is an appeal from a decision of Goddard, J. as to the meaning and effect of certain clauses contained in a policy of insurance on freight, the contract of insurance being between the plaintiffs and the defendant as one of the underwriters. The plaintiffs, besides insuring the freight, had insured the hull with a number of Lloyd's underwriters, of which the defendant was one, for twelve months from the 20th July, 1936, valued at 28,000*l.* The policy provided that in the event of total or constructive total loss of the vessel, the underwriters were only to pay their proportion of 14,000*l.*, and that for valuation and disbursements clause purposes the insured value of the vessel was to be taken as 28,000*l.*

Under the charter-party dated the 23rd September, 1936, the plaintiffs chartered the vessel *Petrakis Nomikos* to carry a cargo of oil for a voyage from Venezuela or alternative ports in South America to the United Kingdom. The vessel discharged a cargo of fuel oil at Havre and left in ballast for Rotterdam for repairs. An explosion took place while the vessel was being repaired, and a claim came into existence against the underwriters on the hull as well as against the underwriters on freight inasmuch as it became impossible for the vessel to get to the port of loading in time, the adventure being thus frustrated. Though for the purposes of the contract the value of the vessel for constructive total loss was contractually fixed at 28,000*l.*, the vessel when repaired was worth at current values at the time of repair 45,000*l.* It was obviously to the advantage of the plaintiffs to have the vessel repaired and not to abandon her to underwriters. The policy of freight contained the following clauses, which are part of the Institute Time Clauses :

5. " In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered."

6. " In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

7. " In calculating the amount due under this policy in respect of any claim except under clauses 3 and 5 all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein."

8. "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

It seems to me that the effect of these clauses is to define as between the insurers and the insured what is to be a constructive total loss. If the effect of the clauses would be to give to the plaintiffs an indemnity in respect of freight which they had not in fact lost, it might to that extent be held to be an honour policy to the extent to which it provided more than an indemnity, but the parties have themselves chosen an agreed definition of a constructive total loss, and no point was taken either before the learned judge or in argument in this court that the policy was unenforceable as being either wholly or in part an honour policy. Assuming, though without deciding the point, that where there is a real constructive total loss on hull, abandonment to the insurers and notice of abandonment are required, these conditions can have no application to a conventional constructive total loss which on the facts of the case is necessarily less than a real constructive total loss. I desire to add, without finally deciding the point, that the inclination of my mind is to hold that abandonment and notice of abandonment are not part of the definition of constructive total loss, but are conditions subsequent which have to be performed before a claim can be made against underwriters. But, in my view, this question does not arise, and for my part I desire to reserve my decision with regard to it.

For these reasons, having, for the purposes of the freight policy, defined by reference to the hull policy, what is to be regarded between the parties as a constructive total loss, I think the learned judge was wrong in dismissing the plaintiffs' claim, and that this appeal is entitled to succeed on the ground that in this particular instance the parties had agreed upon their own definition as to what was to amount to a constructive total loss, and the appeal succeeds notwithstanding that on the true facts the vessel never was a constructive total loss, and the claim against the hull insurers was expressly a claim for particular average. This appeal must be allowed with costs here and below. I should like to add that I congratulate the parties on the sensible and businesslike way in which they have raised the question for the determination of the court. My brother, Slesser, L.J., has read the two judgments in this case. He asks me to state that he agrees with them, and has nothing to add.

MacKinnon, L.J.—The plaintiffs and the defendant entered into a contract in writing, dated the 28th August, 1936. The question that arises is what is the proper construction of that written contract.

The contract happens to be an insurance policy for 4110*l.* on "Freight, chartered or otherwise, in and (or) over" upon the tank steamer *Petrakis Nomikos*. We have had cited to us a great many cases dealing with what is called the law of marine insurance. All those cases (and, indeed, almost all of the Law of Marine Insurance) concern the construction of the terms of written contracts. Except in so far as the contracts, or policies, in those cases are to any extent in the same terms as the contract we have now to construe, they are of little assistance.

The case was heard upon an agreed statement of facts. This will, no doubt, be set out by anyone who thinks this case is worth reporting, and I need not trouble to state it. The plaintiffs make their claim on clause 5 of the Institute Time Clauses—Freight, which are attached to the policy, and supplement its general terms. They say: "You promised to pay the amount underwritten by this policy in the event of the total or of the constructive total loss of the steamer by insured perils within the insured period. One of those events, namely, a constructive total loss, has happened. Therefore you must pay." The defendant answers: "That event has not happened, therefore I need not pay." The question for us is "Has that event happened?"

The passage to be construed consists really only of the eleven words, "In the event of the constructive total loss of the vessel." The plaintiffs say that the proper meaning of these words is, "if the steamer is so damaged by insured perils that her owners would be entitled on giving notice of abandonment to recover a total loss from their hull underwriters." The defendants say that the proper meaning is, "if the steamer is so damaged that the owners would have that right, and if they exercise that right and do recover for a total loss from their hull underwriters." For several reasons I think the former meaning—that put forward by the plaintiffs—is the one to be preferred. In the first place, if by this clause 5 the underwriters meant to promise only that they will pay if underwriters on hull pay, or are liable to pay, for a constructive total loss, it would have been easy to say so. They do not by any words make payment of a total loss by hull underwriters a condition of their promise. The event their words refer to is damage to the ship by insured perils.

Secondly, if the defendant is right, the case of *Roura and Forgas* v. *Townend and others* (120 L. T. Rep. 116; (1919) 1 K. B. 189) must have been wrongly decided by Roche, J. That was a policy on "profit on charter," which is an interest akin to freight. And it was "against the total or constructive total loss of the steamer only." The steamer was not a total loss, for she was in existence, and after romantic experiences, repaired and in good order. The claim was for a loss by reason of the constructive total loss of the steamer. It was argued that there had been no constructive total loss of the steamer because her owners had not given notice of abandonment and recovered for a total loss. As, in fact, they were uninsured, of course, they had not achieved the impossible. Roche, J. held that the plaintiffs could none the less recover. I think still (as I am sure I thought at the time) that his judgment was perfectly correct. And if it was so, it is fatal to the present defendant's contention.

In this case the policy sued on recognises the existence of a policy or policies on hull. Clause 6 stipulates that in ascertaining whether the constructive total loss referred to in clause 5 has occurred the insured value in the hull policy shall be taken as the repaired value. And at the foot of the body of the policy there is a warranty that 50 per cent. of the valuation in the hull policy is uninsured against total or constructive total loss. Consistently with any obligation of the plaintiffs to the defendant, by warranty or otherwise, the plaintiffs might have taken out their hull policies for 50 per cent. of the insured value, but "against the risk of absolute total loss only": (see sect. 902 of Arnould on Marine Insurance, 11th edit., at p. 1164). And as I do not think the warranty as to 50 per cent. being uninsured imports any implied warranty that the other 50 per cent. is insured, they could also, consistently with any obligation to the defendant, have had their hull policy on the terms that it was only to cover particular average, general average, and salvage. All this supports me in the view that the promise in clause 5 is not to be construed as meaning, "In the event of your

recovering 50 per cent. of the insured value in your hull policies as for a constructive total loss." But the real question is what is the meaning of the seven words, "the constructive total loss of the steamer"? Counsel for the respondent says that they mean "the ship being damaged to a certain extent and her owners giving notice of abandonment." And he says, "abandonment is an essential element in the definition of a constructive total loss." He relies on the passage in sub-sect. (1) of sect. 60 of the Marine Insurance Act, 1906, which reads: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." But that does not help him very much, since sub-sect. (2) (ii.), of the same section is in terms on which counsel for the appellants could rely with equal vigour. (2) "In particular, there is a constructive total loss . . . (ii.) In the case of damage to a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired . . ." And sect. 61 is still more in favour of the plaintiffs' contention, by which: "Where there is a constructive total loss the assured may either treat the loss as a partial loss or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss." I say it is still more in their favour, because if counsel for the respondent is right in the definition for which he contends, sect. 61 must be paraphrased, "if the assured abandons the ship as not worth repairing, he may either treat the loss as partial or may abandon the ship"—which is absurd: his right to abandon appears in both *protasis* and *apodosis*.

The truth is that "loss" is a word of double import. It may mean objectively the disaster that has befallen the subject-matter of the insurance; or it may mean, from the underwriters' point of view, the claim that is payable on the policy—that which the underwriter has to enter in his loss book. In the first sense, disaster to the ship, constructive total loss means the ship being so damaged that the cost of repair will exceed her repaired value; in the second sense—claim recoverable—it, no doubt, means that, plus notice of abandonment. I think this clause 5, in speaking of "the event of the steamer being a constructive total loss," is using the phrase in the first sense, and in the precise words of sect. 60, sub-sect. (2) (ii.), of the Act, "In the case of damage to a ship where she is so damaged . . . that the cost of repairing the damage would exceed the value of the ship when repaired." And I think it is wrong, and confusing, to bring in the second sense, so that "in the event of the constructive total loss of the steamer" is made to mean "in the event of the hull underwriters being made liable for a constructive total loss." It results that, in my opinion, Goddard, J. was wrong in upholding this contention of the defendant.

The learned judge also relied upon another argument of the defendant. He said that for the plaintiff to recover under clause 5, "it must be proved that the loss of freight was caused by the ship becoming a constructive total loss"; and "there is only one case in which freight is lost by this cause, and that is where a ship earns freight after abandonment to the hull underwriters, and the latter are consequently entitled to keep it." If I understand this rightly, it means that clause (5), when it promises a payment "in the event of the constructive total loss of the steamer," can only have any effect in one very rare event, namely, if freight earned by the steamer has been received by hull underwriters, who have accepted notice of abandonment of the hull, or have been judicially held liable for a constructive total loss. I cannot agree with this suggestion. It is absolutely certain that those who drafted these Institute Time Clauses could never have intended, or even dreamed of, any such meaning. The contemporaneous hull policy on this vessel is in evidence, and that has attached to it "Institute Time Clauses. Hulls." No. 18 of these is: "In the event of total or constructive total loss no claim to be made by the underwriters for freight whether notice of abandonment has been given or not." If, therefore, clause 5 of the Freight Clauses only means, "To pay a total loss in the event of hull underwriters becoming entitled to freight upon the steamer being abandoned to them," it is promising to pay a loss that under the machinery of the Institute Clauses can never happen, and the underwriter is taking *pro tanto* a premium for nothing. For No. 18 of the Institute Clauses for Hulls stipulates that such a form of loss never shall happen! Yet another consideration shows the impossibility of this construction. The right of hull underwriters to whom the ship is abandoned to receive freight arises as an incident of the property in the ship which is transferred to them: (see Marine Insurance Act, s. 63, sub-s. (2), by which: "Upon the abandonment of a ship the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration, for the carriage of them subsequent to the casualty causing the loss."). But the underwriters do not in any way become parties to the shipowner's contracts of affreightment. So that if the captain tranships the cargo, and earns freight by so doing, the underwriters, as abandonees of the ship, have no claim for the freight so earned: (see *Hickie* v. *Rodocanachi*, 1859, 4 H. and N. 455). But this clause 5, which is said only to promise to pay for freight lost through its being earned by hull underwriters, adds that the payment will be made even if the vessel is "in ballast." It is utterly impossible for underwriters on hull to have any right to freight on accepting abandonment of a vessel "in ballast." So that again, in this part, the clause must promise nothing and the premium *pro tanto* be asked for nothing in return.

It is, of course, possible that the framers of the clause, though they cannot decently have intended the suggested effect of it, may have used inadvertently words that have that meaning. But I do not think they have. I differ from the learned judge for another reason. He said, "It must be proved that the loss of freight was caused by the ship becoming a constructive total loss . . . and there is only one case in which freight is lost by this cause." I do not think that, under this clause, it is in the least necessary for the assured to prove "that the loss of freight was caused by the constructive total loss of the ship." The underwriter has promised if a certain event happens to pay, not any proved loss of freight, but to pay the whole insured sum, and that "whether the ship be fully or only partly loaded or in ballast, chartered or unchartered." If the event happens, and the assured proves that it has happened, he need prove nothing more, and subject to the possibility (if business decency permitted it) of a defence of

want of insurable interest, the underwriter must implement his promise and pay.

In other words, I think this part of the policy is an example of a very familiar form of insurance. An underwriter, in consideration of a premium, promises to pay a certain sum if a certain event shall happen. The event may be "if you break your leg," or "if Mrs. . . . shall give birth to twins," or "if the Budget adds threepence to the income tax." In this case the event is a double one, "In the event of a total loss, whether absolute or constructive of the steamer." Of those two events one, "the constructive total loss of the steamer," has, I think, happened, and the underwriter must fulfil his promise and pay. Lastly, if this had been an insurance of freight "against the risk of constructive total loss of the steamer" and it had been necessary to prove that freight had been lost by that cause, I do not agree that the only possible loss by that cause would be where freight earned had had to be handed over to the underwriters of the abandoned ship. *Roura and Forgas* v. *Townend*, already cited, is an instance to the contrary. And the principle of *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. R. 10 C. P. 125) affords another. The vessel there was not in fact a constructive total loss, but if her injuries had been greater and she had been, the result would have been the same. And if the policy were in the form "against constructive total loss of the ship" (which, of course, means "against constructive total loss of the ship by perils of the seas or other insured perils") instead of "against perils of the seas," I am clear that it would cover such a loss as in *Jackson* v. *Union Marine Insurance Company* (*sup.*), and not be limited to cover the very remote risk of freight being lost by its having, when paid, to be paid over to the hull underwriters by reason of abandonment to them.

Finally, I should notice that Goddard, J. was of opinion that Lord Wright in *Carras* v. *London and Scottish Assurance Corporation* (18 Asp. Mar. Law Cas. 581; 154 L. T. Rep. 69; (1936) 1 K. B. 291) expressed the view that this clause 5 in regard to constructive total loss of the vessel did have this limited effect, namely, that it insured only against the risk of freight going into the pockets of the hull underwriters. I do not think Lord Wright did mean to say that. If he did it was an *obiter dictum*, and one uttered during the period when he had descended from the House of Lords to this more fallible tribunal. And if he did say it, I hope I may say without impropriety that, for the reasons I have given, I do not agree with him.

One further ground of defence was raised before us, which either was not raised in the court below, or is not noticed in the judgment of Goddard, J. It was suggested that the defendant can rely on clause 8: "Warranted free from any claim consequent on loss of time whether arising from a peril of the seas or otherwise." That clause was invented by underwriters over sixty years ago in order to counteract the result of the decision in *Jackson* v. *Union Marine Insurance Company*. The assured there had an insurance on chartered freight against perils of the seas. In the events that happened it became necessary for him to plead, "The ship was damaged by sea perils. The repairs required to make her able to fulfil her charter-party occupied so much time that the charterer was entitled to, and did, cancel the charter. Therefore, there has been a loss of the insured freight by perils of the seas." And it was held that he was right. The underwriters, being desirous of immunity from any such claim in the future, invented this clause. It will bar any claim whenever it is necessary for the assured to assert the lapse of time as one of the facts establishing his cause of action. In this case the assured is under no such necessity. He need say nothing about any lapse of time, or of the right of any charterers or goods owner to rely on lapse of time. The insurance is on "freight chartered or otherwise," which can only mean "whether there is a charter-party or not;" and the clause promises payment in full "whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered." To a claim under clause 5 the provision in clause 8 can have no application. This, of course, does not mean that clause 8 has no effect on this policy. The policy in its main part is an ordinary policy on freight against the ordinary insured perils. The precise claim made in *Jackson* v. *Union Marine Insurance Company* could be made upon it, and clause 8 would then operate to defeat such a claim. But clause 5 is an added promise to pay a total loss if either of two events happen. To that added promise, when one of the two events is proved to have happened, I think clause 8 can have no application. The claim is in no conceivable sense "consequent on loss of time." It is simply a claim for a payment which is promised on a certain event by reason of the happening of that event.

My conclusion therefore is that this appeal should be allowed.

Appeal allowed.
Judgment for the plaintiffs.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondent, *Ince* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 25 and 26, 1938.

(Before GODDARD, J.)

Kawasaki Kisen Kabushi Kaisha v. Bantham Steamship Company Limited. (No. 2.) (*a*)

[This decision was affirmed by the Court of Appeal on 2nd March, 1939.—ED.]

*Charter-party—Construction—Right to withdraw ship "if war breaks out"—Meaning of "war"—Hostilities begun without declaration of war—No breach of diplomatic relations—*Animus belligerendi*—Jurisdiction of court.*

A charter-party gave liberty to the parties to cancel the contract "if war breaks out involving Japan." On the 18th September, 1937, the owners purported to cancel the contract. On that date hostilities were in progress on three separate fronts between China and Japan, and a number of large-scale military operations were also in progress. The charterers contended that those operations did not constitute a "war," on the grounds that (1) there had been no declaration of war; (2) diplomatic relations

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

between China and Japan had not been broken off; (3) the British Government had not recognised the existence of a state of war; (4) neither party had the animus belligerendi *; and (5) the question of whether a state of war existed could not be decided by the court, but the court was obliged to apply for, and act on, the opinion of the Foreign Office.*

Held, that the word "war" in the charter-party must be construed in the sense in which it would be understood by business men, and that in that sense a war was undoubtedly in progress which justified the withdrawal of the steamer. The question did not arise, therefore, of whether a war existed in the technical legal sense, and it was unnecessary to decide whether the court had jurisdiction to determine that question.

Special Case stated by an umpire.

By a time charter, made on the 2nd June, 1936, the respondents' ship was chartered to the appellants. The charter contained the following clause: "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." Acting under that clause the respondents cancelled the charter on the 18th September, 1937, and the appellants contended that the cancellation was a breach of contract and claimed damages. The question for decision was whether the present hostilities between China and Japan constituted a war. The appellants contended that they did not, on the following grounds, namely, (1) that there had been no declaration of war; (2) that diplomatic relations between China and Japan had not been broken off; (3) that the British Government had not recognised the existence of a state of war; (4) that neither party had the *animus belligerendi*; and (5) that the question of whether a state of war existed could not be determined by the courts, but that the courts were bound to apply for, and act on, the opinion of the Foreign Office on the matter. The respondents contended that the word "war" must be construed in its ordinary and popular sense, and that China and Japan were engaged in large-scale hostilities which would ordinarily and popularly be described as a war. The umpire found that Japan intended to drive the Chinese armies out of North China and defeat them to submission; that China intended to resist the Japanese army to the utmost of her power, and that military operations were in progress which had been undertaken by both parties *animo belligerendi*, and which constituted a war. He therefore dismissed the claim.

Sir *Stafford Cripps*, K.C. and *J. C. Devlin* for the appellants.

Willink, K.C. and *Cyril Miller* for the respondents.

Goddard, J.—On the 2nd June, 1936, a Japanese firm at Kobe chartered from an English firm of shipowners the steamship *Nailsea Meadow* on time charter, and clause 31 of the charter-party provides: "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." On the 18th September, 1937, the owners, contending that war had broken out involving Japan, cancelled the charter-party, and a claim was made by the charterers, which was referred to arbitration, claiming damages for breach of contract in so determining the charter. The arbitrators appointed an umpire, and he has awarded that on the 18th September, 1937, war had broken out involving Japan, and he stated his award in the form of a special case asking whether, on the true construction of the charter-party, he was so entitled to award.

If this case goes higher, as the Court of Appeal will have before it the whole of the facts found in the case, it is unnecessary for me to read them out at length, but I think that it is desirable that I should read two or three paragraphs of the case to make my judgment clear. The umpire finds:

"On the 18th September, 1937, the position in the Shanghai area was as follows: 50,000 men, supported by guns of the Japanese fleet and a strong air arm, were engaged in battle with the Chinese forces of over 150,000 men on a thirty-mile front. Fighting had lasted over three weeks, in the course of which the Japanese had made good their landing from troopships and had pushed the Chinese army back to their prepared lines of defence. Casualties had been very heavy, and many thousands of Japanese and Chinese were killed or wounded. The position on the 18th September, 1937, in North China was as follows: One Japanese army had struck west, carried the Namkou Pass after eleven days of intensive bombing and mass attack, and captured Kalgan. This secured the right flank of the Japanese forces operating in North China. From there the army was striking rapidly south-west into the Shansi province and had advanced 100 miles and so cut road connections with Russia and Mongolia. A second Japanese army was striking south along the Peking-Hankow railway on a fifty-mile front. A third Japanese army was advancing south from Tientsin astride the Tientsin-Nanking railway, and had driven the Chinese back forty miles. These three armies numbered over 100,000 men, fully equipped with aeroplanes, tanks, and heavy artillery. The Japanese advance was effected in the teeth of opposition of Chinese armies numbering 300,000 and, while the latter offered all the resistance they could, they were ill-supplied with artillery, and were driven back. Over fifty battles were fought between the 20th August and the 16th September. The Chinese losses were estimated by the Japanese at 60,000, while the latter also lost heavily. In addition to these major objectives, air operations on an extensive scale had been conducted. The Japanese had gained command of the air and had destroyed a great number of Chinese aeroplanes in the air and in aerodromes. They had not only attacked the Chinese lines of communication but had frequently bombed Chinese cities, including Nanking, Hangchow, Soochow, Kwangteh, and Shanghai, and cities as far south as Canton and Amoy, and the sea ports between Hong Kong and Swatow."

The umpire also refers to the fact that a naval blockade had been maintained over a stretch of 1000 miles of coast line, and that the Japanese Foreign Minister had given notice that foreign ships carrying munitions to China would not pass safely through the blockaded zone. On the 5th September the blockade was extended to all coastal waters from Chinwangtao, on the borders of Manchukuo, to Pakhoi, near the borders of the French Indo-China.

It is, perhaps, also necessary to say that one of the curious facts which emerged in this matter is that diplomatic relations had not, at any rate at this time, been broken off between China and Japan, in the sense that the ambassadors of either country were present at the capitals of the other, and that there had been no declaration of war. The umpire, on these facts, has found, and one is not surprised that he has found, that war in which Japan was

engaged had broken out. There seem to be present all those factors which were dealt with in the one case in which, so far as I know, any definition in English law has been given to the word "war," if one needs to give a definition of that. That case is *Driefontein Consolidated Gold Mines* v. *Janson* (83 L. T. Rep. 79; (1900) 2 Q. B. 339). Mathew, J., quoting with approval from Hall on International Law, said (at pp. 81 and 343):

"What is a state of war is well described in Hall on International Law, 4th edit., p. 63: 'When differences between states reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.'"

As I understand the argument for the charterers here, it is said that, in spite of the acts of force, and the acts of violence which Japan had offered towards China, China had not chosen to look upon it as a breach of the peace, but as the umpire finds that the Japanese had killed many thousands of Chinese, and the Chinese troops were operating, not in hundreds or thousands, but in hundreds of thousands, it would seem perfectly clear that China at this time was looking upon it as a breach of the peace. It is difficult indeed to understand how any ordinary person could regard this state of affairs as other than involving war.

The main point Sir Stafford Cripps has argued, and which he has supported with a wealth of authority, is this. He says that it is my duty as a judge to exercise judicial cognisance on the question as to whether or not the two foreign countries were at war, and that, if my own knowledge does not enable me to answer that question, I must apply to the Crown through the appropriate Minister, and obtain information from him, and that was what was done in this case, in that one of the parties applied to the Foreign Office and asked whether on the 18th September, war was in progress. The answer received from the Foreign Office was this:

"With reference to your communication of the 8th September inquiring whether His Majesty's Government recognise that there was an outbreak of war in which Japan was involved either on or before the 25th August, or at the date of this reply, I am directed by Mr. Neville Chamberlain to inform you that the current situation in China is indeterminate and anomalous and His Majesty's Government are not at present prepared to say that in their view a state of war exists. At the same time I am to suggest that the question of the meaning to be attached to the word 'war' as used in a charter-party may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term 'war' as used in particular documents or statutes."

I have only to say that, as, in my view, the question of judicial cognisance of this matter does not arise, I refrain from expressing any opinion, tempting as it may be, on the main question which Sir Stafford Cripps has argued. I think that it is much better that I should not express any view, although I have formed one, as to whether the question of the existence of a state of war between two foreign countries, has to be proved by evidence in the ordinary way, or whether, if the court is precluded from taking evidence, it must apply to the Secretary of State to enable the judge to take judicial cognisance of that fact. As I take that view, I do not think it is necessary to say more about the letter than that I am far from being of opinion that this letter could be regarded as conclusive one way or the other. The words are: "His Majesty's Government are not at present prepared to say that in their view a state of war exists." It seems to me also to follow from that that His Majesty's Government were not at the time of the letter prepared to say that a state of war did not exist. I think that it merely says: "At the present moment, His Majesty's Government suspend judgment on the question."

Sir Stafford Cripps called attention to passages in many cases which show how inconvenient it would be if courts took one view on such matters as this and the executive took another view, though I do not think that it has gone further than the boundaries of states, or whether or not a State is an independent sovereign State. With regard to the suggestion of how inconvenient it would be if the courts took one view and the executive took another on the subject, one is relieved to find in the second passage of this letter that His Majesty's Principal Secretary of State for Foreign Affairs seems to be of the opinion that the word "war" in the charter-party may very likely be given a different interpretation in construing that document from that which might be given to it in some public document or statute.

It seems to me that what I have to determine is what the parties meant by this clause. I think that they were using the word "war" in this clause, and must be taken as intending it to be construed as war in the sense in which an ordinary commercial man would use it, or, if one may so put it, as the captain of a tramp steamer would interpret it. I have no doubt that the captain of a tramp steamer arriving at Shanghai, and finding the state of things described by the umpire, would have had no difficulty in recognising that a state of war existed. I do not think that the parties in a case of this sort are going into the niceties of international law. There is always a temptation in these cases to turn to the words of great international jurists, such as Grotius and Hall and others, who wrote some time ago when modern conditions did not prevail, though the question whether the state of civilisation which then prevailed was the same as the state of civilisation which prevails now with regard to the methods of warfare is not for me to enter into. At any rate, in those times things were done more formally. In those days there were declarations which one now knows, from recent examples in this century, are often omitted. In my opinion, the parties meant in this charter-party that, if there were a state of conflict going on—not a revolution or a civil conflict—but if there broke out a state of affairs in which there was armed conflict between competing nations, of which Japan was one—that would justify the breaking off of the contract. It is not to be expected that business men can concern themselves with the extraordinarily nice distinctions which are drawn by great international lawyers between reprisals, armed intervention, peaceful penetration and war, definitions which have probably far less importance nowadays than they may have had years ago. No such thing as armed intervention not producing a state of war or a pacific blockade, both of which we know have been much discussed by text-writers, can ever take place except between two States, one of which is far too inferior and weak to resist.

I desire to say that I decide this case exactly

on the same grounds and applying the same rules of construction, as Pickford, J. did in the Court of Appeal in *Republic of Bolivia* v. *Indemnity Marine Assurance Company Limited* (11 Asp. Mar. Law Cas. 218; 100 L. T. Rep. 503; (1909) 1 K. B. 785). In that case the court had to construe what the word "pirates" meant. The court said that one is not to go into niceties or refinements of writers on international law, but that one is to look at it in the broad sense, or in the coarser sense, which is one expression used, and find whether commercial men, using that expression in a commercial document, would mean or would visualise, a state of affairs which was there found to exist. I apply, if I may so put it, the coarser meaning of the word "war." If I had to give a complete definition of the word "war," I do not think that it would be necessary to go further than Professor Hall did in the passage which I read at the beginning of my judgment.

On the facts found by the umpire, I am quite satisfied that he was well justified in coming to the conclusion that, for the purpose of construing this document between the parties, a war had broken out in which Japan was involved. Therefore, I uphold the award of the umpire, and the respondents will have the costs of this argument.

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

Solicitors for the respondents, *Ince, Roscoe, Wilson*, and *Glover*, agents for *Allen Pratt* and *Geldard*, Cardiff.

Monday, May 30, 1938.

(Before Goddard, J.)

W. J. Tatem Limited v. Gamboa. (*a*)

Frustration—Spanish civil war—Hire of ship to carry refugees—Capture of ship by hostile force—Event interrupting performance of contract—Event within contemplation of parties.

The doctrine of frustration of contract is not limited to cases where the event causing the frustration is outside the contemplation of the parties. If the foundation of the contract is destroyed to such an extent that performance would in effect be the performance of a different contract, and the contract does not provide what is to happen in such event, performance is excused even if the event which has happened is one which the parties must have contemplated at the time of contracting.

A ship chartered to the Republican Government of Spain for the carriage of refugees to French ports was captured by Nationalist forces and detained by them until a date beyond the termination of the hiring. The charter-party provided that hire was to be paid until the ship was redelivered to her owners. The owners claimed hire up to the date of redelivery to them.

Held, that the contract had been frustrated and the charterers were excused from the obligation to pay hire until redelivery.

F. A. Tamplin Steamship Company Limited *v.* Anglo-Mexican Petroleum Products Company Limited (115 *L. T. Rep.* 315; (1916) 2 *A. C.* 397) *applied.*

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

Action tried in the Commercial List.

The plaintiffs, the owners of the steamship *Moltan*, chartered her to the defendant, an agent of the Spanish Republican Government, by a charter-party dated the 25th June, 1937, for thirty days from the 1st July, 1937. The charter-party provided that the charterers should pay hire at the rate of 250*l.* per day until redelivery of the ship to her owners. It also provided that the ship should not carry arms or munitions of war. The limits of employment were between Spanish Government ports and French ports "for the evacuation of civil population from North Spain."

The defendant paid the hire up to the 31st July in advance, and the ship was duly delivered to him at Santander, in Spain, on the 1st July. She made one voyage to a French port, but on the 4th July, when on the return journey, she was captured by the Nationalists and detained in custody until the 7th September. She then proceeded to a French port, where she was redelivered to the plaintiffs on the 11th September.

In the present action the plaintiffs claimed hire at the agreed rate from the 1st August to the 11th September. The defendant contended that performance of the contract had been frustrated by the capture of the ship. The plaintiffs replied that the doctrine of frustration had no application where performance had been prevented by an occurrence which was within the contemplation of the parties at the time of contracting. It must at that time have been obvious to both parties that a ship employed by the Spanish Government in that area ran a risk of capture by hostile forces.

Sir *Robert Aske*, K.C. and *Cyril Miller* for the plaintiffs.

Willink, K.C. and *W. L. McNair* for the defendant.

Goddard, J. [after stating the facts continued:] It is said on behalf of the defendant that so soon as this ship was seized there was a frustration of the contract and that the contract became impossible of performance as from that date, and, therefore, that all rights and liabilities under the contract ceased. He admits that he cannot retain any part of the hire he paid in advance, but contends that he is not liable to pay any further additional hire, that is to say, for the time during which the ship was in the hands of the insurgents. Sir Robert Aske, on the other hand, has argued very strongly that the enterprise in this case cannot be said to have been frustrated, because both sides must be taken to have contemplated when they made this contract that the ship might be seized—indeed, that the risk of seizure was plain and obvious to everybody—and that it must be taken that that was one of the risks which the ship was running.

I do not feel that I can hold on the evidence which I have before me that a risk of seizure of the description which took place here, and the detaining of the vessel not only for the period of her charter but for a long period thereafter, was a risk which was contemplated by the parties. It may well be that they thought that the Nationalists might seize the ship and hold it for the chartered period so long as it was under charter to the Republican Government. It may well be that the parties contemplated that the Nationalists would hesitate, after the charter had come to an end, to seize and detain a British ship which had no contraband

on board and which, after the period for which it was chartered, would be most unlikely to be engaged in the work, however humanitarian it may have been, of evacuating civil population. The shipowners, having got the month's hire in their pockets, would not be at all concerned what the fate of the ship might be during the charter, though what the fate of the ship might be after the charter was another matter. But I do not think that these are matters which I have to consider, because in considering the doctrine of frustration these questions, in my opinion, do not arise.

I will assume that the parties contemplated that the ship might be seized and detained, as she was. It is difficult to reconcile all the judgments and speeches which have been made on this difficult subject of frustration, which was very little discussed in the books before the War. There are the well-known cases of *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826), *Jackson* v. *Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 780; L. Rep. 10 C. P. 125), the Coronation seats cases, and so forth. But no one would contend that until the War the subject of frustration often came before the courts, and the development of the doctrine of frustration occurred through the many incidents which happened in the course of the War. Most of it is modern, and indeed its whole history may be said to be found in the various judgments which have been delivered since 1916, to most of which reference has been made in the course of the arguments. Whatever be the true doctrine of frustration, I prefer, if I may, to rely on the passage in Lord Haldane's speech in *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited* (115 L. T. Rep. 315; (1916) 2 A. C. 397), which was quoted by Lord Sumner in *Larrinaga and Co. Limited* v. *Société Franco-Americaine des Phosphates de Medulla, Paris* (16 Asp. Mar. Law Cas. 133; 129 L. T. Rep. 65). Lord Sumner first said: "So far as the ships are concerned, this is not a contract *de certo corpore* at all." I read that because the present case seems to me to be eminently one *de certo corpore*. The *certum corpus* is this particular ship, the *Molton*, chartered for a particular service. Lord Sumner continued: "Nor can it be said that"—he then quoted Lord Haldane—"'the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation.'" That seems to me to be the surest ground on which to rest the doctrine of frustration, and I prefer it to founding it on implied terms. Viscount Finlay said words to the same effect in *Larrinaga and Co. Limited* v. *Société Franco-Americaine des Phosphates de Medulla Paris* (*sup.*): "When certain risks are foreseen the contract may contain conditions providing that in certain events the obligation shall cease to exist. But even when there is no express condition in the contract, it may be clear that the parties contracted on the basis of the continued existence of a certain state of facts, and it is with reference to cases alleged to be of this kind that the doctrine of 'frustration' is most frequently invoked. If the contract be one which for its performance depends on a continued existence of certain buildings or other premises, it is an implied condition that the premises should continue to be in existence, and their total destruction by fire without fault on the part of those who have entered into the contract will be a good defence. Such a contract does not as a matter of law imply a warranty that the buildings or other property shall continue to exist."

Sir Robert Aske meets this point by saying that there cannot be frustration where the circumstances must have been contemplated by the parties. By "circumstances" I mean circumstances which are afterwards relied on as frustrating the contract. It is true that in many of the cases there is found the expression "unforeseen circumstances," and it is argued that "unforeseen circumstances" must mean circumstances which could not have been foreseen. But it seems to me, with respect, that, if the true doctrine be that laid down by Lord Haldane, frustration depends on the absolute disappearance of the contract; or if the true basis be, as Lord Finlay put it, "the continued existence of a certain state of facts," it makes very little difference whether the circumstances are foreseen or not. If the foundation of the contract goes, it goes whether or not the parties have made a provision for it. The parties may make provision about what is to happen in the event of this destruction taking place, but if the true foundation of the doctrine is that once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties. It seems to me, therefore, that when one uses the expression "unforeseen circumstances" in relation to the frustration of the performance of a contract one is really dealing with circumstances which are unprovided for, circumstances for which (and in the case of a written contract one only has to look at the documents) the contract makes no provision.

In support of that I think I need only further refer to the words of Lord Haldane in the *Tamplin* case (*sup.*) which were cited by Pickford, L.J. in *Countess of Warwick Steamship Company* v. *Le Nickel Société Anonyme* (14 Asp. Mar. Law Cas. 242; 118 L. T. Rep. 196; (1918) 1 K. B. 372). Pickford, L. J. said (at pp. 198 and 376 respectively): "Putting it in other words, does it come within the doctrine laid down by Lord Haldane early in his judgment in *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products Company* in these words: 'When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *primâ facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has

disappeared, and the contract itself has vanished with that foundation.' " I regard Pickford, L.J. as saying there that, unless the contrary intention was made plain, the law imposes this doctrine of frustration in the events which have been described. If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated.

To the same effect, I think, are the cases which deal with this doctrine in relation to the requisitioning of ships. When the war had proceeded but a very short time the Admiralty Requisitioning Board was set up. Ships were requisitioned freely, and I suppose it is not putting it too high to say that no shipowner knew when his ship would be requisitioned. Accordingly, one finds, for instance in *Bank Line Limited* v. *Arthur Capel and Company* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435), that the charter-party actually provided for requisition. It provided that the charterers were to have the option of cancelling the charter-party should the steamer be commandeered by the Government during the charter, and yet for reasons which appear in the speeches in the House of Lords it was held that it did not prevent the doctrine of frustration of performance applying. It seems to me that the parties must have had before them the possibility, or the probability, if you will, of requisition every bit as much as the parties had of seizure in this case. I think, therefore, that that case and other cases, for example, the two cases which were tried together, *Anglo-Northern Trading Company* v. *Emlyn Jones and Williams*, and *Countess of Warwick Steamship Company* v. *Le Nickel Société Anonyme* (*sup.*), which were also cases of charter-parties made after the outbreak of war, show in effect that, although the parties may have had or must be deemed to have had the matter in contemplation, the doctrine of frustration is not prevented from applying.

To apply the doctrine as I understand it to this case, what do we find? We find that there is a charter for a month only, a charter at a very high rate of freight. Although it is a time charter, the limits in which it is to trade are very narrow—from the northern ports in the hands of the Republican Government of Spain to ports in France—and the specific purpose of the charter is made plain. It is the evacuation of the civil population from north Spain. It must be obvious, therefore, that the foundation of that contract was destroyed as soon as the insurgent war vessel had seized the ship, which it did after it had performed one voyage and when the period of the charter had but half expired. No more could be done with the ship. The owners were unable to leave it under the control of the charterer. The charterer was unable to make use of it or to return it to the owners. The charterer had paid his month's hire, and that he not only cannot get back, but does not seek to get back. In my opinion, the performance of the charter was frustrated from the time of the seizure, and consequently the reasoning of the cases to which I have referred applies. It follows from that that there must be judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for the plaintiffs, *Sinclair, Roche,* and *Temperly,* for *Vaughan* and *Roche,* Cardiff.

Solicitors for the defendant, *Petch* and *Co.*

May 31 *and June* 1, 1938.

(Before GODDARD, J.)

Hall Brothers Steamship Company Limited v. Young. (*a*)

[This decision was affirmed by the Court of Appeal on 1st March, 1939.—ED.]

Marine insurance—Insurance against liability to pay damages—Ship liable by foreign law to indemnify pilot boat against results of accident—No tort or breach of contract by ship—Meaning of "damages."

By a policy of marine insurance the underwriters agreed to pay the assured three-fourths of any sum they might become liable to pay by way of damages in consequence of a collision with any other ship.

A collision took place between the insured ship and a French pilotage boat off the harbour of Dunkirk. The collision was not due to any negligence on the part of the insured ship, nor to any gross negligence on the part of the pilot boat. By French law damage caused to a pilot boat in the course of pilotage operations may be recovered from the ship, unless it is due to gross negligence by the pilot boat.

Relying on that provision, the Pilotage Administration of Dunkirk took proceedings in the French courts to recover the cost of repairing the pilot boat, which proceedings were ultimately settled by a payment by the shipowners. In the present action they sought to recover three-fourths of that amount under the policy.

Held, that a liability to indemnify imposed by foreign law and not founded on any tort or breach of contract was not liability to pay a sum of money "by way of damages" and was not covered by the policy.

Furness, Withy, and Co. Limited *v.* Duder (18 *Asp. Mar. Law Cas.* 623; 154 *L. T. Rep.* 663; (1936) 2 *K. B.* 461) *applied.*

ACTION on a policy of marine insurance which contained the following clause: "If the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay, and shall pay, to any other person or persons any sum of money by way of damages in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured."

On a voyage from South America to Dunkirk in August, 1929, the insured ship stopped off Dunkirk to take up the pilot. As the pilot boat approached the ship something went wrong with her steering gear, and a collision occurred in which both vessels were damaged. There was no gross negligence on the part of the pilot boat, and the insured ship was not in any way to blame. By French law, damages sustained by a pilot boat during pilotage operations must be paid for by the ship unless there has been gross negligence by the

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

pilot boat. In reliance on that provision, the Pilotage Administration of Dunkirk brought an action in the French courts against the owners of the insured ship, which action was ultimately settled on the terms that the owners should pay a sum in francs equal to £432. The owners now claimed to recover three-fourths of that sum under the policy, alleging that they had become liable to pay it "by way of damages." The defendant, who was sued as the representative of all those who had underwritten the policy, contended that the word "damages" only applied to a sum recoverable for a breach of contract or a tort.

W. L. McNair for the plaintiffs.

Cyril Miller for the defendant.

Goddard, J.—In this case the plaintiffs sue the defendant, a Lloyd's underwriter, for a loss under a policy of marine insurance, and the case raises a neat point under the collision clause, which, in the policy in question, is in what is reasonably common form. I should say that the case has been tried on an agreed statement of facts, with the addition of evidence from two French lawyers upon a point of French law.

The facts with regard to the alleged loss are that the *Trident*, the ship in question, arrived off Dunkirk on a voyage on which she was engaged on the 24th August, 1929, and a French pilot boat, the *Veteran*, owned by the Pilotage Administration of Dunkirk, put out to her. At that time there was a strong breeze from the south-west, a moderate sea and clear visibility. The statement of facts then sets out: "The *Veteran* approached the *Trident's* port side, and, as she was manœuvring to come alongside, a nut came loose in her steering gear, so that it failed to operate when the helmsman put his helm over, with the result that the *Veteran's* starboard bow struck the *Trident* in way of No. 2 hatch, both vessels receiving physical damage. The *Trident*, which was at the time of the collision lying stopped in the water, was in no way to blame for the collision, and there was no gross negligence on the part of the pilot within the meaning of the French law hereinafter referred to."

Proceedings were then taken in the French courts, the Pilotage Administration of Dunkirk claiming a sum of money which they alleged was due to them for doing repairs to the French pilot boat. They did not claim a specific sum, but asked for an inquiry into the cost of doing the repairs to the pilot boat, and they did not claim for demurrage or loss incurred while the pilot boat was laid up. They confined their claim to the amount that it cost to do the repairs. They brought their claim under a provision of the French law which is contained in a decree of the 28th March, 1928, under which it is provided that except in a case of *faute lourde*—which the parties agree means gross or serious negligence—on the part of the pilot, damage suffered by the pilot vessel during the pilotage, and during manœuvres necessary for embarking and disembarking the pilot, shall be borne by the ship. The *Trident* counterclaimed in the action, or filed a cross claim in the action, for damages which she had sustained. The case went as high as the Court of Cassation, the supreme appellate tribunal in France, and the Court of Cassation held that under this decree the French pilot boat was entitled to recover the cost of repairs, and dismissed the claim of the *Trident*.

The owners of the *Trident* sue the underwriter, alleging that it is a loss within the collision clause, which runs in this way: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned shall pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured."

Then there are certain provisions with regard to the payment of costs if the defence is undertaken with the consent of the underwriters. "Provided . . . in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay."

Then there are provisions as to how the loss is to be calculated if both ships are held to blame. Then there comes this: "Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures consequent on such collision; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

For the plaintiffs, it is contended that the sum which the shipowners have to pay in respect of repairs to the pilot vessel is a sum which is recoverable under that clause, inasmuch as the ships did come into collision. On the other hand, for the underwriters, it is contended that the insurance here is an insurance only against a liability in tort. The contemplation of the policy is that the underwriter is to indemnify the shipowner, where the shipowner is held to blame or partly to blame, and that the words "by way of damages" must be strictly construed, and they show that the insurance is limited to sums which have to be paid by way of damages, which indicates a liability in tort.

Both parties have called lawyers from France, in each case gentlemen distinguished in their profession, to explain the provision of the French law, which, if I may humbly say so, seems to be reasonably clear in itself. There is some difference of opinion, I think, between the French lawyers, but not much, as to whether, in the action which is brought by the pilotage authority against the ship, there is any element or conception of what in English law we should call a tort, which, in French law, I think is called a *quasi-delict*. It seems to me that certainly so far as it is a matter of coming to a decision upon the evidence of the French lawyers, there is no conception of delict or tort in the cause of action which is given by the French decree to the pilot boat. It seems to me that the theory which probably underlies the legislation—though it does not matter, when it is a matter of policy of law, which theory underlies the legislation—is that the pilot boat is rendering a service for the benefit of the ship which requires pilotage, and, therefore, any damage which the pilot boat may receive in the course of rendering that service is to be regarded as an expense of the pilotage, and is to be paid by the ship, in just the same way as she would have to pay the pilotage due, or whatever is the correct expression used in France, as remuneration for the service which the pilot renders. It is not unlike the liability which is cast upon a shipowner by English law, or, rather by an English statute—the Harbours, Docks, and

Piers Clauses Act, 1847, s. 74—under which it is provided that the owner of a vessel which damages a harbour, dock or pier is responsible to the harbour authority for the amount of that damage, even though the damage may be caused by no default or negligence on the part of the owner, or the master or the seamen on the ship. The statute gives a right to recover the money.

If it were a mere matter of having to decide whether the action lay in contract or in tort, I should be inclined to the view that it would be regarded as lying in contract. It is in effect a statutory cause of action. It is a cause of action which is given by a statute to recover a sum of money on the happening of a certain event. I am speaking now both of the French statute and of the English statute to which I have referred. The statute, as it seems to me, expressly confers this right, although there be no fault on the part of the ship-master or the owners, although, in the case of the French law, it gives a defence to the ship if it can be shown that the damage was caused, not by some mere act of negligence, but by something which the court regards as gross or serious negligence on the part of the pilot. I think that one exception may be regarded as a term added to the contract. I do not think that the French lawyers quite take that view. The opinion which I prefer, and which I have come to the conclusion I ought to say is proved, is that at any rate it is not a liability in tort or in quasi-delict or in delict, and I think that in England we might very well consider, when considering the case of the Harbours Act, that the true result is that a ship is allowed into a harbour on certain terms. One term is that she shall pay harbour dues. Another term is that she shall pay for any damage which she may cause to the harbour works, even though that damage is accidental or caused by circumstances over which the ship has no control. There is no difficulty in visualising a contract made between parties to that effect. However, whether the obligation is regarded as contractual or as quasi-contractual, I am quite certain that the obligation which is imposed upon the ship by French law is not a delictual or a quasi-delictual obligation.

Then I have to consider the words "by way of damages." Mr. McNair's contention is that, in a business document between business men, that ought to include such a sum as the one in question, and he calls attention to the case of *The Mostyn* (17 Asp. Mar. Law Cas. 637; 138 L. T. Rep. 403; (1928) A. C. 57) in the House of Lords, where it certainly was not decided whether the claim was one for damages in the strict sense, but where the claim was put forward at any time in the action for damages. Mr. McNair argues that business men, who have been accustomed to use expressions which may have technical meanings but to which they would not necessarily attach technical meanings, must have intended that a sum of money which is to be paid as a direct consequence of a collision ought to be held covered by the terms of the collision clause. On the other hand, my duty in construing a document, whether a commercial document or any other sort of document, is to give a meaning to all the words in the document, if I can do so, and I have to give a meaning to the words "by way of damages." Mr. Miller argues that the real result of the French legislation is to give an indemnity to the pilot boat, and that damages should be confined strictly to damages which are recoverable either for breach of contract or for a tortious act. It is admitted here, I think, or must be admitted, that, if the proper view is that the obligation to pay arises *ex contractu* (I mean on implied terms, in the sense I have endeavoured to explain—that it is one of the terms of the contract between the pilot and the ship to pay for any fortuitous damage which may be suffered), that is not within the terms of the policy, because the policy is not considering a contractual, but only a tortious, liability.

One case to which Mr. Miller referred is of considerable assistance in this case, I think. That is *Birmingham and District Land Company* v. *London and North-Western Railway Company* (55 L. T. Rep. 699; 34 Ch. Div. 261), where the actual question which fell for decision before the court was whether third-party proceedings could be taken, which, in those days, could be taken only in a case where the claim was strictly for contribution or indemnity, and not where one person who was held liable for damages might have a corresponding claim for damages over against some third party. Bowen, L.J. said, at pp. 702 and 274: "In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given, upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of a contract express or implied."

There Bowen, L.J. laid down a doctrine which is, I think, familiar to most lawyers—that "indemnity," in its proper sense, is always the result of a contract; but he does say that there may possibly be a case in which indemnity may be given by statute, and "indemnity" for that purpose, I suppose, means a reimbursement by one person to another of something which the latter has had to pay, but without taking into account any damage which that person may have suffered. He is to be indemnified against payments or against expenses, but he does not get anything more than the mere sum which he has had to pay which is exactly the case here. The French pilot boat is not asking for any damages for loss of hire while she is laid up. She is only asking the reimbursement of the money which she will have to pay for the repairs which it is necessary to execute in consequence of this collision, which took place without any fault of the *Trident*, and without, as I was told, any gross negligence on the part of the pilot, and that is all to which, by the French court, she is held entitled. Mr. Miller has put forward what I think is a formidable argument here, when he says that the English underwriters insuring this ship may well agree to indemnify the owners against the negligence and errors of navigation of their own servants, but why should the court hold that the underwriter is indemnifying the owners against damage which is caused, not by the fault of their servants, but by the fault of somebody else, because if there was fault here at all (and it would be exceedingly difficult—at any rate, according to English ideas—to say that there

was no fault here) on the part of the French pilot, although it may not have been gross fault, why should I construe this fault as giving protection, where the fault, if any, was not the fault of the master or crew of the English ship, but of the foreign ship, and yet it is the foreign ship which, under the provision of foreign law, gets the sum of money? I think that that is a very formidable argument. It is an argument which goes some way to destroy the contrary view submitted by Mr. McNair—that the business men (the underwriter and the shipowners in this case) must have contemplated that the damages, when they used the expression "by way of damages," must cover any sum of money which the owner has to pay as the result of his ship coming into collision with another ship. I think that I ought to construe this expression "by way of damages" as meaning by way of damages which have to be paid in consequence of a tortious act, a tortious act committed by the ship. I think that in that view I have the support of Branson, J. in the case of *Furness, Withy, and Co. Limited* v. *Duder* (18 Asp. Mar. Law Cas. 623; 154 L. T. Rep. 663; (1936) 2 K. B. 461), where he was considering a collision clause in exactly the same terms as those of the one I am considering. Branson, J. said, at pp. 664 and 468: "The expression 'become liable to pay . . . by way of damages' indicates, to my mind, a liability which arises as a matter of tort, and not as a matter of contract."

It is true that Branson, J. was not considering the same sort of case as that which has arisen here. He was considering a case in which there had been a bargain made between the ship and the owner of the tug. The headnote is as follows: "Where, pursuant to the terms of a towage contract, between the owners of a steamship and the owner of the only tugs available at port, the former pay to the latter a sum in respect of damage to a tug resulting in the collision during towage between the steamship and the tug caused solely by the negligent navigation of the tug, the owners of the steamship cannot recover the amount of that sum from the underwriters of a policy of marine insurance on the steamship containing a running-down clause in the usual form, inasmuch as that clause applies only to liabilities arising from tort and not to liabilities arising from contract."

I think that that is a good workable rule to apply to this clause, and that these liabilities which may be imposed on a ship by foreign law, although the ship is in no way to blame, are not to be held covered by the common form of collision clause, as this one is, under which the underwriter agrees to indemnify the shipowner against sums which he should become liable to pay by way of damages. I think that that points, and is intended to point, only to cases in which the ship is held liable for damage which has been caused by her fault.

It is perfectly true that there is a proviso contained in the second branch of the running-down clause which excludes sums "which the assured may become liable to pay, or shall pay for removal of obstruction under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury." Mr. McNair's argument is that that excepts the liability which the ship will incur under the Harbours, Docks, and Piers Clauses Act, 1847. If the ship sinks in midstream, or in a harbour, the harbour commissioners can recover from the owners the cost of raising her. He says also that that shows that it was not intended to apply to workmen's compensation. I do not take that view of the proviso. I think that it means that, if there is a collision between two ships, it is obvious that certain consequences may happen which may involve the owners in further damages. Their ship, or the other ship in the collision, may be sunk, and then the cost of raising the ship has to be taken into account. One ship or the other, as a consequence of a collision, may be thrown against the pier, if the collision takes place in the harbour, and be damaged. The cargo may be damaged. There may be loss of life, upon which very heavy claims may arise. That class of damage is not to be included in the sum which is recoverable from the underwriters. I do not think that that is by any means inconsistent with the construction which I have placed on the clause. I think that, if my construction is right, it simply means that, though the ship may be negligently navigated, so that you become liable for damages on account of a collision in which it has been involved, the underwriter indemnifies you against the sum which you have to pay, unless it is a sum in respect of these enumerated excepted risks.

For these reasons—not without some doubt, because I think it is not an altogether easy point, and it is a point of first instance except in so far as it is covered by the judgment of Branson, J. and he was considering a different state of circumstances—I have come to the conclusion that my judgment should be for the defendant. Accordingly, I give judgment for the defendant with costs.

Solicitors for the plaintiffs, *Lightbounds, Jones, and Co.*, agents for *Ingledew and Co.*, Newcastle-upon-Tyne.

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 25 and 26, June 2, 1938.

(Before HODSON, J., assisted by one Elder Brother of Trinity House.)

The St. Angus: (a)

Collision in Long Reach, River Thames, between vessel moored at buoy and vessel going down river—Sudden faint of master at wheel at a time when no other member of crew on deck—Inevitable accident—Onus of proof—Duty on vessel under way in a fairway which cannot be said to be clear to have look-out man on deck in addition to navigating officer on bridge.

This was an action instituted by the owners of the steamship H., *of Liverpool* (407 *tons gross,* 144*ft. in length, and* 24*ft. in beam*), *against the owners of the motor vessel* St. A., *of Glasgow* (392 *tons gross,* 145*ft. in length, and* 24*ft. in beam*), *in respect of damage sustained by the* H. *as a result of a collision between that vessel and the* St. A. *which occurred at about*

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

5.30 a.m. on the 10th July, 1937, off Greenhithe, River Thames. The weather at the time was fine and clear, the wind about S.W., a very light breeze, and the tide about two hours ebb of about three to four knots force. The H. *was lying moored head to tide outside a pontoon and three other craft at a buoy about abreast of Globe Pier, and although it was then daylight she was still exhibiting an anchor light and her stern light. Her crew, consisting of nine hands all told, were turned in. The* St. A. *was proceeding down river to the southward of mid-channel, on a voyage from London to Leith. She was laden with a general cargo, and her draft was 8ft. forward and 11ft. 6in. aft. Her crew consisted of seven hands all told, the master and the mate taking four hours in turn in navigating the vessel, and two A.B.s taking alternate watches of four hours at the wheel. The remainder of the crew consisted of two engineers and one ordinary seaman. Shortly before the collision the A.B. whose watch at the wheel it was went below, with the master's permission, to stoke the galley fire, and the master who had taken over the wheel had remained the only man on deck. Immediately after the A.B. went below the master was overcome by a fit of fainting, due, as it was alleged by the defendants and accepted by the court, to food poisoning, and as he fell to the deck of the bridge, he turned the wheel sharply to starboard, causing the* St. A.s' *head to fall suddenly to starboard and in so doing to strike with her port bow and anchor the starboard bow of the* H., *doing serious damage. The defendants, whilst admitting that no blame attached to those on board the* H., *pleaded inevitable accident, contending that the collision was not caused by any negligence on the part of those in charge of the* St. A., *and that it could not have been avoided by the exercise of ordinary care and maritime skill on their part.*

Held, that, whilst no hard and fast rule should be laid down that in a vessel of the class of the St. A. *there must at all times be a helmsman at the wheel as well as a navigating officer on the bridge, yet in dangerous waters such as a fairway which, owing to vessels being moored along the side cannot be said to be clear, there should be a look-out man on deck in addition to the navigating officer on the bridge and that, the defendants having failed in their duty in this respect, the plaintiffs were entitled to succeed.*

DAMAGE BY COLLISION.

The plaintiffs were Messrs. F. Bowles and Sons, of Liverpool, owners of the steamship *Hartford*. The defendants were J. and A. Gardner and Co. Limited, of Glasgow, owners of the steel screw motor vessel *St. Angus*. The circumstances of the collision, which occurred at about 5.30 a.m. on the 10th July, 1937, about abreast of Johnson's Wharf, Greenhithe, River Thames, are sufficiently set out in the headnote. In the course of his judgment the learned judge referred to the cases of *The Merchant Prince* (7 Asp. Mar. Law Cas. 208 ; 67 L. T. Rep. 251 ; (1892) P. 179) (onus of proof where the defence is inevitable accident) and *The Marpesia* (1 Asp. Mar. Law Cas. 261 ; 26 L. T. Rep. 333 ; (1872) L. Rep. 4 P. C. 212) (as to the test to be applied when that defence is set up).

G. St. C. Pilcher, K.C. and *H. L. Holman* for the plaintiffs.

R. F. Hayward, K.C. and *Peter Bucknill* for the defendants.

Hodson, J.—In this case the plaintiffs are the owners of the steamship *Hartford*, and are claiming from the owners of the motor vessel *St. Angus*, having suffered damage by reason of a collision between the two vessels.

The following facts were admitted. The *Hartford* was lying moored in the River Thames off Greenhithe, shortly before 5.30 a.m. on the 10th July, 1937. The weather was fine and clear, the wind about S.W., a very light breeze, and the tide about two hours ebb of the force of about three to three-and-a-half knots.

The *Hartford* was lying head to tide outside a pontoon and three other craft at a buoy about abreast of Globe Pier. The *St. Angus*, under way down river, struck the *Hartford* and caused damage. No negligence was alleged on the part of the plaintiffs. On these admitted facts, the plaintiffs having established a *primâ facie* case, it lay upon the defendants to show that they were not at fault.

Their defence was that the accident could not be avoided ; that the *St. Angus*, a motor vessel of 392 tons gross, 145ft. in length, 24ft. in beam, was in Long Reach of the River Thames in the course of a voyage from London to Leith ; that she was on a down-river course to the southward of mid-channel, making eight to nine knots through the water ; and that in these circumstances the master, who was at the wheel, suddenly fainted owing to the effect of food poisoning, and, falling to the deck, caused the wheel of the *St. Angus* to be turned hard-a-starboard so that the collision followed.

The *St. Angus* left her berth at 4 a.m. with a crew of seven hands. The master was on the bridge in charge of the navigation, and an A.B., David Young, at the wheel.

The river at the southern end of Long Reach is four to five cables from bank to bank, with about three-and-a-half cables of navigable water. At the time when the ship went off her course her exact position, by reference to midstream, is difficult to ascertain, but she may very well have been as much as 900ft. from the buoys on the south side of the channel. Nothing else was under way at the time.

The master had had tinned salmon for supper, about 7–8 p.m. the night before, but felt, as he said, perfectly fit. Shortly before the collision the helmsman, Young, with the master's permission, handed over the wheel to the master, left the bridge to go to the urinal, and subsequently went to the galley in the after end of the ship, where he remained until the collision occurred, occupied, as I was told, in stoking the galley fire.

Almost immediately after Young left the bridge the master fainted and remembered nothing more until he was brought to by the shock of the collision, when he found his ship scraping along the side of the *Hartford* and heading more or less upstream.

The defendants contended that the accident, having been caused in this way, could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill. The law applicable is laid down in *The Merchant Prince* (*sup.*), where Fry, L.J. said : " The burden rests on the

defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

The plaintiffs say that the defendants have set out to establish the cause of the collision and have not succeeded. As to this, they say that the story is incredible, that there is no proof of food poisoning, and that if the master had fainted as a result of food poisoning he would have had premonitory symptoms giving him ample warning. They also said that a complete and immediate recovery following the faint is also impossible. I have heard medical evidence on both sides directed to the probable effects of food poisoning, and the likelihood of a sudden faint occurring without premonitory symptoms, and followed by a complete and immediate recovery. It may be surprising that the master felt perfectly well until he was overcome by a sudden faint, and recovered so completely as to be able to navigate his ship after the collision until he reached Barrow Deep; but I regarded him as an honest witness, and I believe that he gave a truthful account to the best of his recollection. He was a sober and healthy man of forty-seven years of age, and no doubt not predisposed to admit that he felt ill or to advertise the fact. It is suggested that, even if I find that the master fainted, the story breaks down, as the usual symptoms of toxic food poisoning were not present, and moreover, no other member of the crew, with the possible exception of the chief engineer, felt any ill-effects. I doubt whether it matters very much whether I find that the master's faintness was due to food poisoning or not, but in any event I am satisfied with the explanation given—namely, that the faint was consistent with the after-effects of food poisoning.

It was contended by Mr. Pilcher for the plaintiffs that, even if I was satisfied that the fainting attack occurred in the way in which the master described it, yet even so the defendants have not established the cause of the accident. It was argued that, if the master, standing on the starboard side of the wheel, gave it a sharp pull as he fell, the wheel would not turn more than half a turn before he let it go, and that the rudder would not then have an angle of more than 10 degrees upon it. I am advised that the electric steering engine would cut out when the wheel stopped, and that there is no reason to expect that it would carry the rudder over to a hard-a-starboard position, that is, to an angle of about 35 degrees. There was nothing wrong with the steering engine, which worked efficiently after the collision. In these circumstances it is contended that the *St. Angus* would, on the facts proved, have hit the bank at an angle of not more than about four points and beyond the place of the collision.

I do not accept the contention that it is necessary for the defendants to work out and give every detail of the sequence of events with mathematical precision. It is true that the master said he found the wheel hard-a-starboard and his vessel heading nearly upstream when he came to, and this is not fully explained; but I think that on the evidence the cause of the collision is reasonably plain. The *St. Angus* may have been, as I have said, nearly 900ft. out from the buoys when the master fainted. The diameter of her normal turning circle at full-speed would be about six times her own length with wheel hard-a-starboard. When the master fell, the wheel need not in the ordinary course of navigation have been exactly amidships, and in pulling the wheel over in his fall the master can have given the rudder an angle of as much as 15 degrees. The *St. Angus* was over 3ft. by the stern, drawing 11ft. 6in. aft and 8ft. forward. This would, I am advised, quicken her turn with the assistance of the ebb tide as she swung in towards the shore, and enable her to brush across the stem of the *Hartford* at an angle of about eight points. When she came in contact with the *Hartford* her stern would go rapidly down-river so that she would be rubbing along the starboard side of the *Hartford* when the master came to. I think that the master was mistaken in thinking that the wheel was hard-a-starboard when he came to. He was not any too sure about how many turns of the wheel were required to bring the wheel into that position from amidships. He thought two-and-a-half to three turns. The helmsman said three or four turns would be needed. The surveyor's report of the injuries to the stem of the *Hartford* lends support to the view which I have formed as to the angle at which contact was first made between the two ships. I am not deciding the case, therefore, on the ground that the defendants have not proved the cause of the collision.

I now come to the part of the case which has caused me the greatest difficulty. The collision occurred because, when the master fainted, there was no one in a position to avoid the consequences of his faint. The question to be determined is whether, using the language of Sir James Colvile in *The Marpesia* (*sup.*), "something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

The crew of seven were distributed as follows: The master and mate took four hours on and four hours off in navigating the vessel, and two A.B.s, Young and another, took similar watches at the wheel. The rest of the crew consisted of two engineers and a spare man, who was an ordinary seaman. The mate's cabin was under the bridge, and the practice was to summon him in an emergency by giving three sharp taps with the heel on the bridge. It was not disputed by the master that it was proper to have more than one man on the bridge of the vessel. It has been forcibly argued before me by Mr. Hayward for the defendants that one must not lay down too high a standard in this vessel with a small crew such as this. Having been advised by the Elder Brother on the matter, however, while I am not prepared to lay down that at all times it is necessary to maintain the position of the helmsman at the wheel and the navigating officer on the bridge in a vessel of this class, yet in the circumstances of the case I think that the position should have been maintained to the extent that there should have been a man on deck in addition to the navigating officer on the bridge.

The waters were dangerous waters. Although there were no other vessels under way in the river at the time, the ship was not in the open sea, and a fairway cannot be said to be clear when there are vessels, as in this case, moored along the side. The time from the master's fall to the time of the collision would be probably not more than a minute-and-a-half. Young had left the bridge, and had gone first to the urinal and then to the galley, where he was when he felt the shock of the

collision. Neither the mate nor anyone else was on deck. I am not satisfied that, if Young or someone else had been on deck and keeping a good look-out he could not, as soon as he saw that the ship was falling off two or three points, have got to the bridge in time to avoid the collision.

The defendants have not established, therefore, that they could not have avoided the accident by the exercise of ordinary caution and maritime skill. There will be judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, *Holman, Fenwick,* and *Willan.*

Solicitors for the defendants, *Stocken, May, Sykes,* and *Dearman.*

May 23 *and* 24 *and June* 17, 1938.

(Before BUCKNILL, J.)

The Arantzazu Mendi. (*a*)

[This decision was affirmed in the Court of Appeal on the 1st November, 1938 (*post*, p. 237) and by the House of Lords on 23rd Feb., 1939.—ED.]

Motion to set aside—Writ in rem *for possession and warrant of arrest—Plaintiffs, the Republican Government of Spain, relying on decree of requisition—Intervention by Nationalist Government of Spain, as a party interested in the* res, *by virtue of rival decree of requisition issued by it as the* de facto *Government of part of Spain, including ship's port of registry—Whether* de facto *Government entitled to legal immunity accorded to foreign sovereign State.*

This was a motion on behalf of the Nationalist Government of Spain to set aside a writ in rem *and the subsequent arrest of the Spanish steamship* A. M. *registered at the port of Bilbao. The writ, in which the plaintiffs, the Republican Government of Spain, claimed to have possession of the* A. M. *adjudged to them by virtue of a decree of requisition of the 28th June,* 1937, *was issued on the 13th April,* 1938, *when the* A. M. *was lying in London, and was directed against the ship (which was described as "of the port of Bilbao, now lying in the Surrey Commercial Docks"), the then master of the* A. M. *being joined as a defendant. This was done because the Nationalist Government of Spain, through the master of the vessel, were in possession of her, her owners having previously consented to the* A. M. *being requisitioned at the free disposal of the Nationalist Government of Spain under a decree and law issued by General Franco, the 2nd March,* 1938, *and in order to enable the plaintiffs to contend that the Nationalist Government of Spain could not be heard to say that it was directly impleaded by the writ, as it might if the writ had been in usual form prescribed by the Rules of the Supreme Court and directed, as prescribed by Order II., r.* 7, *"to the owners and parties interested in the ship." The Nationalist Government of Spain entered a conditional appearance on the 20th April,* 1938, *and on the 7th May filed notice of the present motion on the ground, amongst others, that the action impleaded a foreign sovereign State, namely, the Nationalist Government of Spain, and that that foreign sovereign State was unwilling to submit to the jurisdiction of this court. The plaintiffs opposed the motion on the ground that General Franco's Government was not such a Government as could claim the immunity accorded in this country, by virtue of the comity of nations, to a foreign sovereign State.*

Held, (1) *that upon the authority of the reported cases, the proper procedure for the court to adopt when an issue is raised as to whether a party is a foreign sovereign State is to make inquiry upon the subject from His Majesty's Secretary of State for Foreign Affairs.* (2) *That such an inquiry having been made and a reply received from His Majesty's Secretary of State for Foreign Affairs to the effect,* inter alia, (a) *that His Majesty's Government recognise the Nationalist Government as a Government which at present exercises* de facto *administrative control over the larger portion of Spain and effective administrative control over all the Basque Provinces of Spain;* (b) *that the Nationalist Government is not a Government subordinate to any other Government in Spain;* and (c) *that the question whether the Nationalist Government is to be regarded as that of a foreign sovereign State is a question of law to be answered in the light of the information furnished by His Majesty's Secretary of State in his reply and having regard to the particular issue with respect to which the question is raised, the court must follow the decision given by the Court of Appeal in* Banco de Bilbao *v.* Rey (159 *L. T. Rep.* 369; (1938) 2 *K. B.* 176), *where the court had addressed a similar inquiry to and received a similar reply from His Majesty's Secretary of State for Foreign Affairs, and, on the authority of the case of* Luther *v.* Sagor (125 *L. T. Rep.* 705; (1921) 3 *K. B.* 532 (*C. A.*)), *had treated the Nationalist Government of Spain, being a Government* de facto, *as a foreign sovereign State.* (3) *That, accordingly, in the present case the Nationalist Government of Spain were entitled to the immunity from process which they claimed, the criterion of a sovereign State for the purpose of such legal immunity being its absolute independence in law of any superior authority, and that the writ and warrant of arrest of the ship must be set aside.*

MOTION to set aside writ *in rem* and warrant of arrest.

The applicants were the Nationalist Government of Spain intervening as parties interested in the *res*, namely, the Spanish steamship *Arantzazu Mendi*, owned by the Compania Naviera Sota y Aznar, of

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

Bilbao, a port which, at the time of the arrest of the vessel, was within territory under General Franco's control. The respondents were the plaintiffs in the action, namely, the Republican Government of Spain. The material facts are set out in the headnote, and the history of the vessel, in so far as the action is concerned, appears from the judgment. In the concluding part of his remarks the learned judge dealt with the interesting question of international law as to what is the criterion of a foreign sovereign State for the purpose of legal immunity and the following cases were referred to and considered: *The Cristina* (19 Asp. Mar. Law Cas. 159; 159 L. T. Rep. 394; (1938) A. C. 485); *The Gagara* (14 Asp. Mar. Law Cas. 547; 122 L. T. Rep. 498; (1919) P. 95); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor and Co.* (125 L. T. Rep. 705; (1921) 3 K. B. 532 (C. A.)); and *Banco de Bilbao* v. *Rey* (159 L. T. Rep. 369; (1938) 2 K. B. 176).

Sir *Robert Aske*, K.C. and *J. V. Naisby* and *Rafael Valls*, for the applicants on the motion (interveners in the action, as parties interested in the *res*).

G. St. Clair Pilcher, K.C. and *Owen L. Bateson*, for the respondents (plaintiffs in the action).

Bucknill, J.—This is a motion on behalf of the Nationalist Government of Spain to set aside a writ *in rem* and the subsequent arrest of the Spanish steamship *Arantzazu Mendi*. On the 13th April, 1938, the Government of the Republic of Spain issued the writ against the ship, which is described therein as of the port of Bilbao, now lying in the Surrey Commercial Docks. The indorsement on the writ is as follows:

The plaintiffs claim to have possession of the said steamship *Arantzazu Mendi* adjudged to them.

The writ also joins Eugenio Renteria, the late master of the said steamship, as a defendant. The writ was framed in this unusual way to enable the plaintiffs to take the point that the Nationalist Government of Spain could not be heard to say that it was directly impleaded by the writ. The proper form of a writ of summons in an Admiralty action *in rem* is prescribed by Order II., r. 7, of the Rules of the Supreme Court, and is directed to the owners and parties interested in the ship. The writ in this action is therefore not in proper form. Order XII., r. 24, however, prescribes that in an Admiralty action *in rem* any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the *res* and Mr. Pilcher, on behalf of the plaintiffs, agreed that the case should proceed on the assumption that the Nationalist Government of Spain had filed their affidavits and had intervened. I have dealt with the case on the footing that the defendants, the Nationalist Government of Spain, have entered an appearance as interveners and are parties interested in the *res*.

The history of the ship, so far as this present action is concerned, is as follows: On the 1st May, 1937, the ship sailed from Barry in command of Captain Eugenio Renteria, her present master, who was duly appointed by her owners, the Compania Naviera Sota y Aznar. On the 19th June Bilbao was captured by the forces of General Franco, and on the 28th June the ship was requisitioned by the Government of the Republic of Spain in pursuance of a decree of that date. On the 11th August the ship arrived in London, and on the 24th August the owners of the ship issued a writ *in rem* for possession of the ship, and in pursuance thereof the ship was arrested in the Surrey Commercial Docks. A conditional appearance was entered on behalf of the Bay of Biscay Company Limited, and also by the Government of the Republic of Spain. On the 8th September, 1937, an application by the defendants that the action be dismissed was adjourned and an order was made that all proceedings be stayed pending the trial of another action in which the owners were parties and which was proceeding in the Chancery Division. The action *in rem* was eventually discontinued on the 12th April, but the arrest has not been raised. An official of the Admiralty Registry informs me that the ship was not released from arrest upon the discontinuance of the action, owing to the failure of the parties to make proper provision for the payment of the charges arising out of the detention of the ship. On the 2nd March, 1938, General Franco issued a decree and law the purport of which was (to use the words of the translation) to "requisition the *Arantzazu Mendi* on behalf of the Government of the Nation for public services connected with national defence, or the requirements of maritime trade in its different aspects."

On the 23rd March, the Assistant Spanish Consul in London on behalf of the Republican Government of Spain served the owners of the ship with a formal notice of requisition under the decree of that Government dated the 28th June, 1937.

On the 5th April the accredited sub-agent of the Nationalist Government of Spain served a notice of requisition under the decree and law of the 2nd March, 1938, upon the master of the ship. On the same day the agent indorsed a note of the requisition on the ship's papers and notified the owners thereof. On the 13th April the then managing director of the owners of the ship made a notarial declaration in London that he freely submitted to the provisions of the decree of the Nationalist Government, and in the name of the owners gave his consent to the vessel being requisitioned at the free disposal of the Nationalist Government of Spain to the intent that it may make use of such vessel in the manner laid down in the said decrees and as it may consider most expedient.

On the same date, the 13th April, the Government of the Republic of Spain issued the writ *in rem* which the defendants are now seeking to set aside, and a further warrant of arrest was served on the ship.

On the 21st April the owners of the ship and the master entered an appearance to the writ. On the preceding day the Nationalist Government of Spain entered a conditional appearance to the writ, and on the 7th May filed this notice of motion to set aside the writ and arrest. The first ground stated in the notice of motion for setting aside these proceedings is:

"That the action impleads a foreign sovereign State, namely, the Nationalist Government of Spain, which is unwilling to submit to the jurisdiction of this court."

It is clear from the reported cases that the proper procedure for this court to adopt when an issue is raised as to whether a party is a foreign sovereign State, is to make inquiry upon the subject from His Majesty's Secretary of State for Foreign Affairs. The court therefore directed the following letter to be sent to the Secretary of State for Foreign Affairs:

"SIR,

"1. The *Arantzazu Mendi* is a steamship registered at the port of Bilbao.

"2. On the 13th April, 1938, the Government of the Republic of Spain issued a writ and caused the vessel to be arrested in an action for possession,

brought by them against the vessel *Arantzazu Mendi* and Eugenio Renteria the late master of the said steamship *Arantzazu Mendi*.

" 3. On the 20th April the Nationalist Government of Spain entered an appearance in the action under protest and signified their intention of moving the court to set aside the writ.

" 4. On the 7th May, 1938, a notice of motion was filed by the Nationalist Government of Spain, asking that the writ and all subsequent proceedings in the action and the arrest should be set aside upon the grounds, *inter alia*, that the dispute in this action impleads a foreign sovereign State, namely, the Nationalist Government of Spain.

" 5. I have been asked by the Honourable Mr. Justice Bucknill to ascertain from the Secretary of State for Foreign Affairs, whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign State.

" 6. I have to inform you that the above case is part heard and judgment cannot be given in it until the information asked for has been obtained. It would, therefore, greatly assist the court if a reply to this letter could be sent at the earliest possible moment."

The reply, dated three days later, on the 28th May, is as follows. It is from the Foreign Office, and is signed by Mr. Walter Roberts :

" SIR,

" With reference to your letter of the 25th May, regarding the case of the steamship *Arantzazu Mendi*, I am directed by Viscount Halifax to return the following answer to the question asked in par. (5) (that is—the question whether the Nationalist Government was recognised by His Majesty's Government as a foreign sovereign State).

" 1. His Majesty's Government recognise Spain as a foreign sovereign State.

" 2. His Majesty's Government recognise the Government of the Spanish Republic now having its seat in Barcelona as the *de jure* Government of Spain.

" 3. No Government other than that referred to in the preceding sub-paragraph is recognised by His Majesty's Government as the *de jure* Government of Spain or any part thereof.

" 4. The Nationalist Government of Spain is a Government in conflict with the Government of the Spanish Republic established at Barcelona. It claims to be the Government of Spain and is seeking to overthrow the Government of the Spanish Republic, and to establish its authority over the whole of Spain.

" 5. His Majesty's Government recognise the Nationalist Government as a Government which at present exercises *de facto* administrative control over the larger portion of Spain.

" 6. His Majesty's Government recognise that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain.

" 7. His Majesty's Government have not accorded any other recognition to the Nationalist Government.

" 8. The Nationalist Government is not a Government subordinate to any other Government in Spain.

" 9. The question whether the Nationalist Government is to be regarded as that of a foreign sovereign State appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised."

A letter in very similar terms from the Foreign Office dated the 18th March, 1938, was before the Court of Appeal in the case of *Banco de Bilbao* v. *Rey* (159 L. T. Rep. 369 ; (1938) 2 K. B. 176). The question which I have to decide is the question of law whether these facts as proved by the letter from the Foreign Office dated the 28th May, constitute according to English law the Nationalist Government as a foreign sovereign State.

Sir Robert Aske, on behalf of the Nationalist Government, argued that the essential ingredients of a sovereign State are that it administers and governs the territory over which it has control, and that it is not subordinate to any other Government. In support of this proposition, Sir Robert Aske relied mainly upon the cases of *The Gagara* (14 Asp. Mar. Law Cas. 547 ; (1919), P. 95) and *Banco de Bilbao* v. *Rey* (*sup.*).

In *The Gagara*, the ship was arrested in this court in an action for possession in January, 1919, by a corporate body who had been the owners of the ship before its confiscation by the Bolshevist Government in 1918. Subsequently the ship proceeded to Reval, where it was captured by the Esthonian Government, condemned as a prize of war by a decree of the Government and registered as under the ownership of the Esthonian Republic. The Esthonian Government appeared under protest to the action *in rem* in this court and took the same point which is taken here by the Nationalist Government of Spain, that the ship was the property of a foreign sovereign State.

In the course of the proceedings before Mr. Justice Hill, the Foreign Office and the Law Officers informed the court that His Majesty's Government had for the time being provisionally recognised the Esthonian National Council as a *de facto* independent body, and that it was the view of His Majesty's Government that the Esthonian Government was such a Government as could, if it thought fit, set up a prize court. Upon this information, Hill, J. set aside the writ and arrest. Hill, J. said in the course of his judgment, that if for the time being the Esthonian National Council was recognised as a *de facto* independent body, and the Esthonian Provisional Government was recognised as its executive, the courts of this country must for the time being recognise it also. And if it was recognised as an independent body, by which he understood a political body for the time being independent of every superior authority, he must recognise it as a sovereign body capable of exercising sovereign rights, including the rights of making capture *jure belli*, and entitled to have its sovereignty respected by the courts of this country. The case was taken to the Court of Appeal, who affirmed the judgment of Hill, J. I have to consider whether the decision in *The Gagara* is an authority in favour of the Nationalist Government of Spain in this case.

Mr. Pilcher, on behalf of the Republican Government of Spain, argued that there were several important differences between *The Gagara* and the present case, in that in *The Gagara* (1) there was no rival Government in Esthonia ; (2) the Esthonian Government had an informal diplomatic representative in England ; and (3) the Esthonian Government had captured the *Gagara* and condemned her as prize, a proceeding which, if done by a prize court in Esthonia, this Government would have apparently considered as valid. Moreover, in *The Gagara*, the Government recognised the Esthonian Government as a *de facto* independent body, in other words, a body independent of every superior authority. In this case, the Government merely recognises the Nationalist Government of Spain as a Government which exercises *de facto*

administrative control over the larger part of Spain, and as a body which is not subordinate to any other Government, but is in conflict with the Government of the Spanish Republic. In *The Gagara*, the facts were more in favour of the recognition of the Esthonian Government as a sovereign body than they are in this case. The question which I have to decide is whether the facts placed before me constitute the Nationalist Government as an independent sovereign State in law.

It may well be that a neutral sovereign power cannot in terms recognise the independence of any Government seeking to overthrow by force the *de jure* Government without in some measure departing from its own neutrality. The armed struggle mainly concerns that very question of independence, and a neutral power, by recognising the independence of the *de facto* Government while the struggle continues, would anticipate that which must be finally established, if at all, by agreement or by force. It may seem a contradiction in terms that there should be two sovereign Governments in Spain, where formerly there was only one such State; but I think that there may be, in the eyes of the law, two sovereigns, one *de facto* and one *de jure* in the same country. It seems to me that the law, based on the reality of facts material to the particular case, must regard as having the essentials of sovereignty a Government in effective administrative control over the territory in question and not subordinate to any other Government, because their decrees are the only legal authority which governs the area to which the subject-matter of the dispute belongs.

This is the result, in my view, of the decision of the Court of Appeal in *Banco de Bilbao* v. *Rey*. That case, so far as it is relevant to the present case, had as its cardinal issue the question as to the validity of certain decrees made by the Republican Government of Spain with reference to the constitution of the Bank of Bilbao, a corporate body having its corporate domicile in Bilbao. These decrees were made after the Nationalist Government had acquired sole administrative control over the province in which Bilbao is situate. As I have already stated, the Court of Appeal had before it a letter from the Foreign Office in similar terms, so far as the status of the Nationalist Government is concerned, to the letter which I have already read from the Foreign Office to the registrar of this court. It is important to notice the interpretation which the Court of Appeal placed upon this information from the Foreign Office. Lord Justice Clauson on this point said (at p. 607): "The only question open to argument arises from the fact that His Majesty's Government recognise the Spanish Republican Government, with its seat in Valencia or Barcelona, as the *de jure* Government of the whole of Spain, but at the same time recognise the Insurgent Government of General Franco as the Government *de facto* of the area in which Bilbao is situate."

Lord Justice Clauson went on to say that "this court is bound to treat the acts of the Government which his Majesty's Government recognise as the *de facto* Government of the area in question as acts which cannot be impugned as the acts of a usurping government and conversely the court must be bound to treat the acts of a rival Government claiming jurisdiction over the same area, even if the latter Government be recognised by His Majesty's Government as the *de jure* Government of the area, as a mere nullity, and as matters which cannot be taken into account in any way in any of His Majesty's courts. Thus in the courts of this country no regard can be paid for the present purpose to the legislation enacted by the Republican Government which during the material period cannot be treated in this court as the Government of the area in which Bilbao is situated."

It may be argued that although this decision of the Court of Appeal may be vital to the decision in this case, if and when this court decides the question as to which of the two rival decrees of requisition of the *Arantzazu Mendi* should be recognised by this court as valid, yet the decision does not in terms decide the question at present before the court, namely, the question whether this court ought to refuse to exercise jurisdiction at all in this case on the ground that the Nationalist Government is a foreign sovereign Government.

In my view, the question of law which I have to decide also underlay the decision of the Court of Appeal. It is clear from the judgment of the Court of Appeal that the Court of Appeal considered that the question as to what is the Government whose laws govern the constitution of the Banco de Bilbao had been settled by the principles laid down by the Court of Appeal in *Luther* v. *Sagor* ((1921) 3 K. B. 532). In that case, the information from the Foreign Office which was before the Court of Appeal was that His Majesty's Government recognised the Soviet Government as the *de facto* Government of Russia, and the Court of Appeal held that this amounted to a recognition by this Government of a sovereign State the validity of whose acts the court could not inquire into. Warrington, L.J. in that case said, at p. 551, that in his opinion "there is no difference for the present purpose between a Government recognised as such *de jure* and one recognised *de facto*. In the latter case, as well as in the former, the Government in question acquires the right to be treated by the recognising State as an independent sovereign State, and none the less that our Government does not pretend to express any opinion on the legality or otherwise of the means by which its power has been obtained."

On this ground the Court of Appeal refused to inquire into the validity of certain acts of the *de facto* Government relating to the acquisition by that Government of certain property which was claimed by the plaintiffs in the action before the court. The Court of Appeal in the case of *Banco de Bilbao* v. *Rey* treated the letter from the Foreign Office as a recognition of the Nationalist Government as the Government *de facto* of the area in which Bilbao is situate, and the Court of Appeal in the case of *Luther* v. *Sagor* treated a Government *de facto* as a foreign sovereign State. It seems to me, therefore, that the decision of the Court of Appeal in *Banco de Bilbao* v. *Rey* supports the argument that the Nationalist Government of Spain is for the purposes of this case a foreign sovereign State.

When considering what are the essential qualities of a foreign sovereign State for the purpose of this motion, one must consider the reason why the court refuses to exercise jurisdiction in a case where an admittedly foreign sovereign State is impleaded or where the action is against certain property in the possession or control of such State. The principles underlying this immunity from legal process have been recently considered in the House of Lords in *The Cristina* (159 L. T. Rep. 394; (1938) A. C. 485). The decision indicates that the act of the Crown in declining through its courts to exercise the sovereign power of jurisdiction over property within its territorial limits, when that property belongs to a foreign sovereign, is based on the theory of an international comity which

induces a sovereign State to respect the independence of another sovereign State, and in pursuance thereof to decline to exercise by means of its courts any of its territorial jurisdiction over the public property of such other State when in the ordinary course of things it would become amenable to such jurisdiction. To make such a thing workable it seems that the criterion of a sovereign State for the purpose of such legal immunity must be its absolute independence in law of any superior authority. I think that such independence arises if no judgment against that State in this court can be enforced by any process of law in any court in its own territory, and if, on the other hand, such foreign State, having sole administrative and judicial control in its own territory, is able to extend reciprocal immunity from legal process in its courts to the property of another sovereign State.

The point raised on this motion appears to me to be novel and difficult. My view is that a Government which has acquired the position and power ascribed to the Nationalist Government of Spain in the letter from the Foreign Office to the court is in a position to grant to a sovereign State such immunity from legal process and such reciprocity in that respect as is the backbone of the principle of legal immunity granted to the foreign sovereign State by the law of this country.

For this reason, and for the reason that in my judgment the decision of the Court of Appeal in the case of *Banco de Bilbao* v. *Rey*, which I have already discussed, supports the argument of the defendants on this motion, my judgment is that the Nationalist Government of Spain in law is for the purposes of this case a foreign sovereign State.

A point was also taken by Mr. Pilcher, who opposed the motion on behalf of the plaintiffs, the Republican Government of Spain, that the Nationalist Government had not got possession of the ship and that therefore the rule laid down by the House of Lords in *The Cristina* (*sup.*) did not apply. I do not see any substantial difference between this case and *The Cristina* on that point. In my view, the Nationalist Government has done all that it can legally do to obtain possession of the ship consistently with the fact that the ship was already under arrest by warrant of this court. The Nationalist Government has in fact got a limited possession through the ship's master, who, according to his affidavit, is on board the ship and has undertaken to hold the possession of the ship for the Nationalist Government of Spain and recognises the sole authority of the Nationalist Government. Moreover, the Nationalist Government is impleaded by this action as a party interested in the *res*, and is properly before the court under protest as a foreign sovereign State. For these reasons I must set aside this writ and the warrant of arrest of the ship, which was based upon the writ.

Leave to appeal was granted.

Solicitors for the applicants on the motion (interveners in the action as parties interested in the *res*), *H. A. Crowe* and *Co.*

Solicitors for the respondents (plaintiffs in the action), *Petch* and *Co.*

June 20 *and* 21, *and July* 12, 1938.

(Before LANGTON, J.)

The Aizkarai Mendi. (*a*)

Collision—Reference to registrar and merchants—Life claims—Awards under Fatal Accidents Act, 1846, *and Law Reform* (*Miscellaneous Provisions*) *Act*, 1934—*Method of computing loss of expectation of life—When reviewing tribunal entitled to interfere with original award of damages—Rate of interest—Up to when interest should run.*

These were cross-motions in objection to the registrar's report, in so far as it related to the damages to be paid (a) *under the Fatal Accidents Act*, 1846 (*Lord Campbell's Act*), *and* (b) *under the Law Reform* (*Miscellaneous Provisions*) *Act*, 1934, *to the dependants and respective estates of nine members of the crew of the French steamship* B., *who had died as the result of a collision. The dependants of the deceased men who had put forward claims numbered twenty-two in all. It was submitted generally, on behalf of the owners of the* A. M., *that the awards made by the registrar and merchants in respect of shortened expectation of life under Lord Campbell's Act were too high, and that they should be substantially reduced. Such matters as the status of the claimants, the pensions which they received, the wages which they earned and their degree of dependency on the deceased ought to be taken into account. On behalf of the plaintiffs it was contended that the awards were not too high, and that no erroneous basis had been suggested for the assessments made by the registrar and merchants; that the registrar was wrong in law in awarding, as he had done under the Law Reform* (*Miscellaneous Provisions*) *Act*, 1934, *over and above the sums he had awarded under Lord Campbell's Act, the same sum, namely*, 150*l.*, *in the case of the estate of each of the deceased men, without having regard to the differing circumstances, age, and prospective length of life of each of the men respectively, and that that sum was, moreover, in every case inadequate; and, finally, that interest on the damages ought to be allowed at the rate of* 5 *per cent. per annum from the date of the accident up to the final judgment of the court.*

Held, that the registrar was right in awarding separate and individual amounts to each of the dependants in such a way as to show clearly what was awarded to every family and every member of each family; that although he (*his Lordship*) *would have been inclined to give to the widow of the second engineer* (*to whom had been awarded, under Lord Campbell's Act, the sum of* 4060*l.*), *to the widow of the cook, and to the widows of two sailors* 20 *per cent. or* 25 *per cent. less than the registrar had awarded, though it might be possible to say that the registrar was wrong,*

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

he was precluded from interfering with the awards which he was reviewing unless he was convinced, and in the present case, in so far as the awards under Lord Campbell's Act were concerned he was not so convinced, either that the registrar had acted upon some wrong principle of law or that the amounts awarded were so extremely high or so very small as to make them in his (his Lordship's) opinion an entirely erroneous estimate of the damages to which the various claimants were entitled; that in respect, however, of the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, the registrar was wrong in that, in awarding the same sum to the estate of each of the deceased men, he had taken into account two elements of damage only, namely, (a) *suffering and pain, and* (b) *the pleasure of existence (both of which he assessed as being substantially the same in each case), but had left out the age, or time, factor; that where all the deceased were in the same state of health and following the same calling with the same kind of risk, the expectation of the younger men must exceed that of the elder; that the awards in the case of the nine members of the crew of the* B. *should be graded according to their ages as follows: 400l. in the case of the men aged between twenty-three and thirty; 350l. each in the case of one man of thirty-five and another of thirty-seven; and 300l. in respect of men over forty, deductions being made from those amounts in the case of four men whose dependants his Lordship considered to have been over-compensated under the Fatal Accidents Act; that, finally, on all the items which were the subject of the objections, interest should be at the rate of 4 per cent. per annum from the date of the report, this being the usual practice. The plaintiffs' cross-objections accordingly succeeded to the extent indicated and the defendants' objections would be dismissed with costs.*

CROSS-MOTIONS in objection to registrar's report.

The applicants on the motion and respondents on the cross-motion (defendants in the action) were the Compania Naviera Sota y Aznar, of Bilbao, owners of the Spanish steamship *Aizkarai Mendi* (2309 tons gross). The respondents on the motion and applicants on the cross-motion (the plaintiffs in the action) were the owners of the steamship *Borée* (1882 tons gross). The collision in respect of which the life and personal injury claims arose occurred in the North Sea on the 26th March, 1936. The collision action was heard in the Admiralty Court on the 11th March, 1937, before Sir Boyd Merriman, P. who found the *Aizkarai Mendi* four-fifths to blame and the *Borée* one-fifth. The facts of the collision are not material for the purpose of the present report, but the arguments of counsel in objection to the registrar's report in regard to the damages to be paid under the Fatal Accidents Act, 1846 (Lord Campbell's Act), and under the Law Reform (Miscellaneous Provisions) Act, 1934, to the dependants and respective estates of nine members of the crew of the *Borée* are sufficiently set out in the judgment.

In the course of the hearing the following cases were referred to: *The Amerika* (116 L. T. Rep. 34; (1914) P. 167), *Flint* v. *Lovell* (152 L. T. Rep. 231; (1935) 1 K. B. 354 (C.A.)), *Rose* v. *Ford* (157 L. T. Rep. 174; (1937) A. C. 826), and *May* v. *Sir Robert McAlpine and Sons (London) Ltd.* (1938, 3 All Eng. L. R. 85).

H. C. Willmer for the applicants on the motion and respondents on the cross-motion (defendants in the action).

Owen L. Bateson for the respondents on the motion and applicants on the cross-motion (plaintiffs in the action).

Langton, J.—The collision out of which this matter arises took place upon the 26th March, 1936. As a result of the collision the plaintiffs' vessel *Borée* was lost and nine members of her crew were drowned. By a decree of this court, dated the 11th March, 1937, the *Borée* was held liable as to one-fifth of the damages and the defendants' vessel *Aizkarai Mendi* was held liable for the remaining four-fifths of the damage caused by the collision. The case went to the Court of Appeal, but the finding of the Admiralty Court was not disturbed, and the appeal was dismissed on the 2nd December, 1937. The plaintiffs then proceeded to present their claim to the Admiralty Registrar, who delivered his report thereon on the 30th March, 1938.

The matter comes before me in the form of objections and cross-objections to the registrar's report. The items of objection and cross-objection are all concerned with the awards made by the registrar in respect of claims arising out of the deaths of the nine members of the crew who were drowned.

The defendants object to all the allowances made by the registrar in respect of items 16 to 24 inclusive, which are in fact awards by way of damages to dependants of the deceased men under Lord Campbell's Act. The plaintiffs object to items 16A, 17A, &c., to 24A, and to the registrar's refusal to allow anything in respect of item 26 (agency), and also to his refusal to award any sum by way of interest upon the claims contained in Sched. III.

So far as the plaintiffs' objection in respect of item 26 is concerned, I can dispose of it immediately. The shipowners' portion of the claim, which has been dealt with by the registrar without objection, contained a claim for 105*l.* under the heading of "agency." The registrar allowed 52*l.* 10*s.* in respect of that claim. The amount claimed under item 26 is also 105*l.*, and it was explained to me that this sum represented a fair estimate of work and out-of-pocket expenses incurred by the owners of the *Borée* in notifying the crews' dependants of the accident and in collecting information which would enable their several claims to be properly presented. The latter part of the work was said to be the principal and indeed an overwhelmingly large portion of the total labour and expense. The registrar has dealt with the matter by lumping the two claims together and giving 52*l.* 10*s.* in respect of the first claim under Sched. I. and nothing in respect of item 26 under Sched. III. In the circumstances it seemed to me that any labour done or expense incurred in collecting information for the presentation of these life claims must really be matters of costs. In argument, Mr. Bateson, for the defendants, agreed with this view, and upon that understanding Mr. Willmer, for the plaintiffs, elected not to press his objection any further. This means, of course, that the defendants are perfectly free to take objection to any and every item which may be presented under this head in a bill of costs. I could not, if I wished to, fetter the discretion of the taxing master in any degree upon this subject. Mr. Bateson's admission, therefore, is limited to

this, that his clients will not hereafter, upon a taxation of costs, take the point either that the items which may be objected to ought to have been presented under the heading of "agency," or that the registrar has already dealt with them under this head.

The objections raised by the defendants to the amounts awarded under the Fatal Accidents Acts have put me in a situation of very great difficulty. Under each of the principal items, 16 to 24, the registrar has awarded separate and individual amounts to each of the relatives. This is, of course, the best and only proper way of dealing with such a body of claims. The method has this additional advantage, that it gives a clear and ready conspectus not only of what any individual will receive, but also of the total compensation which any family has been awarded.

To take item 16 as an illustration, it will be seen that the widow of the second engineer, Madame Chourot, has been awarded 4060*l.* for herself, that her son of two years of age is to receive 700*l.*, and her mother-in-law of sixty, 440*l.* The whole family of three will thus receive a total of 5200*l.* under the Fatal Accidents Acts alone, irrespective of any amount awarded to the second engineer's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. I have dwelt especially upon the family aspect of the matter because it seems to me to be material in considering the compensation awarded to the widow that while she has been awarded more than twelve times the full value of the highest wage that her husband has ever earned, she will neither have to provide for or keep a home for her husband in the future nor have her son or her mother-in-law fully dependent upon her.

Mr. Willmer, on behalf of the plaintiffs, argued that I was not entitled to make any use of such knowledge as I might myself possess of economic conditions or of earnings and chances of earnings in France. Further, in presenting a very reasonable argument that one must move with the times, he pushed it so far as to say that judges in this Division must move with the juries in the King's Bench Division, and that the standard of damages set up in that Division afforded the real criterion upon which this Division should proceed. I mention these arguments only in order to record that I do not assent to them, but it would serve no good purpose to state the reasons for my disagreement, since in view of another consideration which Mr. Willmer has put before me, it is a matter of only academic importance whether I agree or dissent.

Upon a careful review of all the evidence in the case I arrived at the conclusion that Madame Chourot, widow of the second engineer (item 16), and Madame Le Cavorzin, the widow of the vessel's cook (item 17), Madame Hery, widow of Ange Hery, a sailor (item 18), and Madame Rouget, widow of Jean Rouget, a seaman (item 22), have all been awarded amounts which appear to me to be excessive to the extent of about 20 or 25 per cent. I would accept immediately that where a difference between the original award and that which a tribunal of review would be inclined to give is no more than 10 per cent. of the total, it is difficult if not impossible to say that one is wrong and the other is right. Where, on the other hand, the difference between the two figures is so considerable as to amount to a fifth or even a quarter of the whole, there does not seem to be much difficulty in saying that one must be right and the other wrong. I cannot, however, read the various pronouncements of the Court of Appeal of recent times upon this topic of review of *quantum* as allowing me to interfere with the awards of the registrar in this case. In the case of *The Amerika* (116 L. T. Rep. 34; (1914) P. 167) this subject came to the notice of the Court of Appeal, upon the finding of the registrar and merchants with regard to the value of a lost submarine. The President, Sir Samuel Evans, reduced the amount of 26,500*l.* awarded by the registrar to 23,850*l.*, but a very strong Court of Appeal, consisting of Buckley and Kennedy, L.JJ. and Scrutton, J. (as he then was), held that the President was wrong to interfere with the award and restored the original figure arrived at by the registrar and merchants. Lord Wrenbury (then Buckley, L.J.), at p. 182, uses this language: "The court refuses to interfere with *quantum* except in exceptional circumstances. More than one instance may be put. The first which occurs to my mind is in respect of salvage. The court does not interfere unless the case is so strong that the court thinks a wrong sum has been arrived at as a matter of principle, or the award is so unfair, either to the salvor or the salved, that the conscience of the court is shocked.

"A second case is the taxation of costs, when there arises a question as to the proper sum to be allowed. The court never interferes there in the absence of some question of principle. The present case is another instance."

Kennedy, L.J. attempted to summarise all the cases in which a tribunal of review might interfere, and at p. 184 presents the summary as follows:

"I apprehend that in a general way the assessment of damages takes place before a specially constructed tribunal, and, I may add, a tribunal so constituted as to include both skilled and legal elements—the element of skill in business and mercantile affairs, as well as a trained lawyer with special Admiralty knowledge. The court above ought not, therefore, except in very exceptional circumstances, to interfere with the decision of the assessing tribunal unless some error in principle is pointed out or there is an obvious error in the calculations regarding figures, or a plain misunderstanding of some material portion of the evidence before the assessing tribunal. I can think of no other reason upon which the court above ought to interfere with the assessment, and it is not suggested here that there is any error in principle, or error in calculation, or plain misunderstanding of evidence, which lay at the root of the assessment to which the learned assistant registrar and his assessors came."

It is true that the matter then before the court was not a question of life claims and that Kennedy, L.J. does not specially mention that class of case in his summary. As Mr. Bateson pointed out, the registrar and merchants would hardly claim any special skill in business and mercantile affairs which puts them upon a higher plane or in a better position in dealing with such claims than a jury or even a judge. But I cannot perceive that there is any real difference in principle between awards of salvage and awards of damages either for loss of property or loss of life or assessments of costs. As lately as the year 1934, Greer, L.J., in dealing with the case of *Flint* v. *Lovell* (152 L. T. Rep. 231; (1935) 1 K. B. 354, at p. 360) said this:

"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

I take this statement from one who has sat for

very many years in the Court of Appeal as being completely authoritative, and, taking it together with the language used by the Lords Justices in *The Amerika* (*sup.*), I cannot think that a difference of opinion even amounting to 25 per cent. could justify an interference upon *quantum* only. There is no suggestion here of an error in principle, and it would be straining language out of all ordinary meaning to say that the assessments here were either extreme or absurd. Neither could it, by any stretch of imagination, be said that any of the registrar's figures are so " unfair that the conscience of the court is shocked." It is, indeed, only fair to the registrar to add that in respect of the items here objected to by the defendants, he was not invited to state his reasons, and I have not, therefore, had the opportunity which I might otherwise have been afforded of understanding fully the lines upon which his assessments were based.

Passing now to the plaintiffs' objections, the point here arising under items 16A, 17A, &c., to 24A, rests in the first instance upon a consideration of the thorny topic of loss of expectation of life. The registrar has dealt with the claims under this head by awarding the sum of 150*l.* to each personal representative, irrespective of station, earnings, or age of the deceased man. The objection of the plaintiffs to this assessment proceeds upon two lines. In the first place, they object on the ground that all the assessments are too low; and, secondly, they say that under no correct principle of assessment could all have worked out at the same figure. Accordingly, they present their objections in the form of saying that there is an error in principle in the method of assessment and that all the awards should be increased, though in varying amounts. Happily, in this instance we are not without guidance in the shape of the reasons of the learned registrar. In a very clear and careful statement, the registrar has pointed out how he has attempted to apply the law laid down by the House of Lords in *Rose* v. *Ford* (157 L. T. Rep. 174; (1937) A. C. 826).

The learned registrar will, I know, forgive me for saying (indeed, I rather suspect that he will cordially endorse the view) that this is a most unfortunate subject to be dealt with by the vehicle of registrar's reasons. If I have read the opinions of the Law Lords in *Rose* v. *Ford* rightly, especially the outspoken view of Lord Roche at pp. 860–2, they are inclined to think that the greater part of the difficulty which has lately come to surround this subject arises from the fact that an undue prominence has been assigned in recent cases—notably *Flint* v. *Lovell*—to a head of damage which had hitherto always existed as an element, though not a very prominent one, in the assessment of general damages. The fault lies, therefore, in over-analysis, and it is much to be deplored that the registrar should be placed in a position in which he is forced to analyse with particularity the various elements that have gone to the composition of his awards. At any rate, no complaint can be made on the score that he has shirked a difficult and ungrateful task.

Taking first the factor of pain and suffering endured respectively by the deceased men between the occurrence of the negligent act causing their deaths and the respective deaths, he gives convincing reasons why in the present case it is not possible to make any distinction between them.

Taking next the point as to the individuals who may be expected to profit under this head of damage, he points out that since there is no evidence in this case concerning the law of France he has presumed that it is identical in this matter with the law of this country. He arrives accordingly at the conclusion, which is not challenged by either side, that the widows, in each instance where such exist, will be the first and, perhaps, the only individuals to profit under the Act of 1934.

He then records the fact that the eldest of these men was forty-four years of age, while the youngest was twenty-three. It is clear, therefore, that the question of disparity in age was present to his mind when making these awards. But having noted this somewhat wide disparity, he then proceeds to attempt to measure the respective loss in value to each man by the single standard of the amount of enjoyment which they might be expected to have derived from their calling and circumstances. So far as the standard itself is concerned, I see no reason at all to quarrel with the very sensible conclusion at which he arrives upon this topic, and which he sums up succinctly in a single sentence: " They are all still in active life, and the joy they get out of it is much the same whether they find it in what they have done or in the hope of what they may do." This topic of the enjoyment of human life seems to me to be the most difficult and most controversial of all the elements of damage which may fall to be considered under this Act of Parliament, but in the present instance I do not see how the registrar upon the evidence before him could have done better than he has done. Having arrived, however, at the conclusion that there are no differences to be made on the score of pain and suffering on the one hand or pleasure in existence on the other, the question arises as to whether he has exhausted all the elements of damage which here fall to be considered.

To my thinking, there exists a further question raised by the idea of expectation. I am very loath to seem to disregard the advice of Lord Roche in *Rose* v. *Ford*, for which I have nothing but admiration, and to stray still further than the registrar has been forced to do along the dangerous path of analysis and segregation. But I cannot bring myself to believe that in any question of expectation of life the factor of age can be entirely negligible. I appreciate fully that this age or time factor is not to be handled arithmetically. The chances and, therefore, the expectation of life of a very young child may not, for obvious reasons, be so good as those of a healthy adult who has survived the many dangers of childish ailments without physical impairment. But the very notion of expectation seems to me to connote time, and if the good which forms the subject of expectation is rated equal over a given number of cases the time factor seems to me necessarily to assume importance. To apply this reasoning to the present case, if one assumes that the pleasure in existence derived by two men of different ages is equal, it appears to me to follow that if both are in the same state of health and are following the same calling with the same kind of risk, the expectation of life of the younger man must exceed that of his elder. It is upon this question of the time factor, which he seems to have had in mind but to have ignored deliberately, that the registrar's reasons appear to me to be illogical. It seems perhaps a trifle grandiloquent to describe this very minor illogicality as an error in principle, but since it is not a mere question of *quantum*, it is no doubt in the language of legal argument properly so described. Upon the question of *quantum*, too, I think that the registrar has erred, so far as these claims are concerned, and erred upon the side of illiberality.

The fact that he is to my way of thinking wrong in the principle of assessment would, I suppose,

in any event entitle me to alter his assessments, if I thought it right to do so, even though the alterations which I thought fit to make were of comparatively minor degree. Nor have I been insensible to the temptation to let the evil, if evil there be, remedy itself by not interfering with the awards under this head, which seem to me to be too low, and leaving their inadequacy to be compensated by the assessments under the Fatal Accidents Acts, which have seemed to me to be uniformly too high. Without, however, entering into the controversial ethical point as to whether it can ever be permissible to remedy one acknowledged wrong by perpetuating or allowing another, there are further difficulties in the way of pursuing this tempting course. To state only one of them, it would do nothing to remedy the illogicality of having ignored the time factor. I have accordingly felt obliged to face the distasteful task with which the registrar was confronted of dealing with these claims under the Act of 1934 in conjunction with the claims under the Fatal Accidents Acts.

Again, in order to explain my method of assessment, I have to depart from Lord Roche's wise advice and descend to wearisome and possibly erroneous depths of analysis. Starting from the passage in Lord Wright's speech in *Rose* v. *Ford* (*sup.*), at pp. 852–3, in which he lays down how the matter should be put in direction to a jury in order to avoid duplication, I have followed the application of this direction which was employed by Branson, J. in *May* v. *Sir Robert McAlpine and Sons* (*London*) *Limited* (1938, 3 All Eng. L. R. 85). I have first taken a sum of 1000*l.*, such as was awarded in the case of *Rose* v. *Ford* by the Court of Appeal (and not disturbed in the House of Lords) to an adult young woman of twenty-three years of age.

Next, without usurping the right to correct the registrar's awards under the Fatal Accidents Acts, which the practice laid down by the Court of Appeal forbids me to do, I have thought it right to bear in mind that in my view all the participants under those Acts have been generously compensated and that in the four specific instances which I have mentioned (all of them widows who will probably receive the whole of the money assessed under this Act) they have been largely over-compensated.

Finally, I have endeavoured to classify the nine claims with due regard to what I have called the age or time factor. Clearly, no one could pretend to quantify claims of this character with such exactitude as to measure them exactly year by year. In this case the nine claims seem to me to fall easily into three distinct classes. There are four men whose ages rank between forty-one and forty-four. Two are in their thirties, being aged thirty-five and thirty-seven respectively, and three are younger men, aged from twenty-three to twenty-six. I have greatly reduced the figure of 1000*l.* upon the view that all the men in question were engaged upon a dangerous trade in comparison with the deceased girl in *Rose* v. *Ford*, and still further reduced it on the score that all likely participants of which we have any knowledge have been liberally compensated already under the Fatal Accidents Acts. This has left me with a standard figure of 400*l.* for the highest class, namely, the men of under thirty.

I have graded the three classes as deserving 300*l.*, 350*l.* and 400*l.* respectively, and I have given effect to my view as to the over-compensation of the widows, Chourot, Le Cavorzin, Hery and Rouget by a very substantial diminution of their standard shares. I am conscious that this last line of assessment will have to be justified upon broader grounds than those of strict logic. I have preferred to do a little violence to the logic which would compel me to accept the registrar's awards under the Fatal Accidents Acts as being right, since I cannot disturb them, rather than to perpetrate a paradox of injustice by which I should largely increase the compensation awarded to individuals who are already, in my view, too highly recompensed.

The awards upon these items will therefore be :

CLASS I.

17A.	Le Cavorzin (41)	150*l.*
21A.	E. J. M. Clement (41)	300*l.*
18A.	Ange Hery (44)	150*l.*
19A.	Joseph Durand (44)	300*l.*

CLASS II.

23A.	P. L. M. Le Roy (35)	350*l.*
20A.	Georges Le Guerannic (37) ..	350*l.*

CLASS III.

24A.	Fernand Auvray (23)	400*l.*
16A.	Roland Chourot (25)	200*l.*
22A.	Jean Rouget (26)	200*l.*

There remains the question which has been argued before me as to the proper rate of interest to be allowed upon all these life claims under either head. The registrar has not dealt with it in his reasons, and has, as I understand the matter, omitted to make any allowance for interest at all. Having weighed very carefully the reasons put before me by Mr. Willmer for changing the practice which has hitherto existed, I do not think that any case has been made out for a change. In so much, however, as the registrar has in this case departed from the usual practice by not giving interest from the date of the report, I think his report should be varied to bring it in accordance with the established practice. There will therefore be interest at the rate of 4 per cent. from the date of the report upon all the items which are the subject of these objections.

Willmer.—Your Lordship's order will be "defendants' objections disallowed with costs; plaintiffs' objections, in the particulars your Lordship has mentioned, allowed with costs"?

Langton, J.—I am afraid that that must be so.

Bateson.—Will your Lordship give me leave to appeal?

Langton, J.—Certainly.

Solicitors for the applicants on the motion and respondents on the cross-motion (defendants in the action), *Bentleys, Stokes,* and *Lawless.*

Solicitors for the respondents on the motion and applicants on the cross-motion (the plaintiffs in the action), *William A. Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 22, 1938.

(Before GREER, SLESSER, and MACKINNON, L.JJ.)

Kawasaki Kisen Kabushi Kaisha v. Bantham Steamship Company Limited. (No. 1.) (*a*)

Charter-party—Construction—Payment of hire—Payment to be made monthly in advance—Hire at rate per ton deadweight—Charterers not informed of deadweight—Loading begun—Payment not made—Owners' omission to fulfil implied obligation—Owners' claim to withdraw vessel.

A charter-party provided that the charterers should pay for the use and hire of a ship at a rate per ton on deadweight, that the payments should be made monthly in advance, and that if the payments were not punctually made the owners might withdraw the vessel from the service of the charterers.

When the first month's hire became due, information as to the deadweight had not been communicated by the owners to the charterers. The charterers failed to pay the hire in advance, and the owners thereupon re-took possession of the ship.

Held, that, as it was impossible for the charterers to know how much they had to pay until the owners informed them what the deadweight was, there must be implied in the charter-party a term that the owners must give the charterers that information before the hire became payable, and, therefore, that the charterers were not in default, although loading had begun before they tendered the hire. The general principle involved, which was not confined to cases of landlord and tenant such as Makin *v.* Wilkinson (23 *L. T. Rep.* 592; (1870) *L. R.* 6 *Ex.* 25), *was that where one of the parties to a contract had the means of knowing a fact not available to the other, who without that knowledge could not fulfil his obligation, forfeiture would not be ordered against that other if that fact had not been communicated to him. A term must be implied in the contract that he should be afforded the information before he was called on to fulfil such obligation.*

Decision of Branson, J. (*ante*, p. 180; 158 *L. T. Rep.* 349; (1938) 1 *K. B.* 805) *affirmed.*

APPEAL from a decision of Branson, J. on a case stated by arbitrators.

The steamship company, the respondents, let out on hire their ship, the *Nailsea Meadow*, to the charterers, the claimants, a Japanese shipping company trading in Kobe, which had agents in London. The charter-party was dated the 2nd June, 1936, at which time the ship was still in the shipyard and before it had been delivered by the builders. It was a term of the charter-party that the ship was to sail in ballast to Houston, Texas, the agreed port of delivery, and that the hire was to run "from the time of delivery for twelve calendar months." Clause 4 of the charter provided: "Charterers shall pay for the hire of the vessel 3*s.* 9*d.* per ton on deadweight as ascertained on delivery from the builders' yard, British sterling per calendar month commencing on and from the day of her delivery, and after at the same rate for any part of a month, hire to continue until the hour of the day of her re-delivery." Clause 5 provided: "Payment of said hire to be made in London in cash monthly, in advance, and for the last half-month or part of same the approximate amount of hire, and should same not cover the actual time hire is to be paid for the balance day by day as it becomes due, if so required by the owners, unless bank guarantees or deposit is made by the charterers; otherwise, failing the punctual and regular payment of hire or bank guarantees . . . the owners shall be at liberty to withdraw the vessel from the service of the charterers. . . . Delivery to count from 7 a.m. on the working day following that on which written notice has been given before 4 p.m., but if required by charterers loading to commence at once, such time to count as hire."

The ship arrived at Houston on the morning of the 13th April, 1937. The agents of the charterers issued certificates that the ship was fit to load and that she had so much fuel, oil, and water and they accepted her. The captain was asked by them to begin loading at once. It was agreed between the agents and the captain that a written certificate of delivery should be drawn up showing that the ship should be considered as having been delivered on the 13th April, 1937, at 3 p.m. This certificate was dated the 13th April, but it was not signed by either party until the 15th April. The captain made out a notice in writing dated the 13th April, and timed 1.30 p.m., which stated that the ship was ready to load, but he did not present it to the agents till 3.55 p.m., the 15th April (when he presented it at the agents' request), because he thought a notice of readiness to load was not necessary in the circumstances. No statements had been delivered to the charterers up to 3 p.m. on the 13th April, or at any later material time, as to the deadweight capacity upon which the cost of the hire was to be calculated.

On the 14th April, 1937, the shipowners asked the charterers' agents in London to pay the first month's hire, but the agents had not then been put in funds by the charterers. Another request for payment was made on the 15th April, when the London agents said that, though they were not then able to pay, they had received a cable advising them that funds were being remitted. The shipowners thereupon gave notice withdrawing the ship from hire on account of non-payment. At 7 p.m. on the same day, the 15th April, the shipowners received a cheque for 1289*l.* 13*s.* in payment of the first month's hire and other outstanding accounts. That cheque was at once returned by the shipowners. Acting on cabled orders the master stopped loading at 5 p.m. on the 15th April. Next day, the 16th April, the London agents of the charterers said that as the captain only handed in the notice of readiness to load at 3.55 p.m. on the 15th April (although it was admitted loading had begun earlier), the hire only began to run after that time, and they accordingly enclosed a banker's draft, submitting that hire would only begin to run at 7 a.m. on the 16th April, which was equivalent to 2 p.m. London time on that day. The draft was returned by the shipowners and the dispute was referred to arbitration.

The charterers, claimants in the arbitration,

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

contended: (1) That on a true construction of clause 5 of the charter-party, the respondents had no right to withdraw the ship from the claimants' service on non-payment of the first month's hire. (2) That no hire became due until the respondents claimed it and notified the claimants of the actual deadweight as ascertained from the builders of the vessel. (3) That in fact payment of the first month's hire was made in strict accordance with the terms of the charter-party. (4) That payment was made promptly within a reasonable interpretation of the obligations of the parties.

The shipowners, the respondents, contended: (1) That on the facts and on a true construction of the charter-party they were entitled to withdraw the ship from the service of the claimants. (2) That the charter-party called for the punctual and regular payment of the hire and that such punctual and regular payment was not made or tendered.

Subject to the opinion of the court on a special case the arbitrators awarded that the owners were not entitled to withdraw the ship from the service of the charterers, and they made an award with regard to costs accordingly. The question for the opinion of the court was whether, on the facts found and on a true construction of the charter-party, the owners were entitled to withdraw the ship from the service of the charterers.

Branson, J. held (158 L. T. Rep. 349; (1938) 1 K. B. 805) that there was an implied obligation upon the shipowners to give the charterers information as to the deadweight capacity of the ship, and that the failure to do this made it impossible for the charterers to fulfil their contract to pay for the hire in advance. Consequently, the shipowners were not entitled in law to withdraw the ship and the award must be upheld. The shipowners appealed.

A. T. Miller, K.C. and *C. T. Miller* for the appellants.

Sir *Robert Aske*, K.C. and *W. L. McNair* for the respondents.

Greer, L.J.—This is a case arising out of the obligations with regard to a charter-party between charterers and shipowners. The learned judge has held that the principle contended for by the charterers, which has been mainly applied in cases between landlord and tenant, is not confined to those cases, and may be used for the purpose of determining the issues which arose in this case. I regard the decision of the arbitrators as meaning this: inasmuch as they decided against the point raised by the shipowners, they must have come to the conclusion—and it is involved in their award—that in fact the charterers did not know what was the deadweight of the vessel and, as I believe to be the fact, that they had had no opportunity of ascertaining that fact. The charter was not a demise of the ship. The undertaking of the charterers was fulfilled by loading the ship at the port of loading. They had no right to board the ship to search her or to send a surveyor on board to make the calculations as to what was her deadweight at the time when she was delivered by the shipbuilders to the shipowners. The material clauses in the charter-party are clauses 4 and 5. By clause 4: "Charterers shall pay for the hire of the vessel 3*s.* 9*d.* per ton on deadweight as ascertained on delivery from builders' yard, British sterling per calendar month commencing on and from the day of her delivery, and after at the same rate for any part of a month, hire to continue until the hour of the day of her redelivery."

By clause 5: "Payment of said hire to be made in cash monthly in advance, and for the last half-month or part of same the approximate amount of hire, and should same not cover the actual time hire is to be paid for the balance day by day, as it becomes due, if so required by the owners, unless bank guarantees or deposit is made by the charterers; otherwise, failing the punctual and regular payment of hire or bank guarantees . . . the owners shall be at liberty to withdraw the vessel from the service of the charterers. . . . Delivery to count from 7 a.m. on the working day following that on which written notice has been given before 4 p.m., but, if required by charterers loading to commence at once, such time to count as hire."

There has been no evidence that the charterers were present at the time when the ship was delivered from the builders' yard, and there has been no evidence that they ever had any other opportunity of ascertaining the deadweight, as for instance by reading any publication in regard to ships. They had no opportunity of ascertaining what the actual deadweight was, but on the other hand, the shipowners, being throughout in possession of their ship, they were liable to know that the loading began as upon a certain date which turned out to be, I think, the 13th April. The learned judge was entitled to come to the conclusion that he did that the shipowners, being in sole possession of the ship, being alone responsible for what information they received from the shipbuilders at the time when the ship was delivered to them by the shipbuilders, which was more than six months before the delivery of the ship at Houston, were under an obligation—similar to that of a landlord—before they enforced their rights to forfeit the charter-party to give this information, which it was within their power to possess, as to the deadweight on which the hire was to be based, to the charterers. They did not do so, and, not having done so, the shipowners failed to fulfil that which they had to perform before the charter-party came into existence.

We have not thought it necessary to hear Sir Robert Aske in regard to the other points with which the learned judge dealt, and we are not deciding any point except the one which has been raised by counsel for the appellants. It may possibly be that the respondents could have defended the decision of the learned judge on grounds other than those which were given by the learned judge, but we do not deal with them and they are open, if the case goes beyond this court, to whoever then argues the case on behalf of the respondents.

There can be no doubt from the cases which have been referred to, the cases of *Tyrer and Co.* v. *Hessler and Co.*, *Arbitration, In re* (9 Asp. Mar. Law Cas. 292; 1902, 7 Com. Cas. 166) and of *Murphy* v. *Hurly* (127 L. T. Rep. 49; (1922) 1 A. C. 369), and the case of *Makin* v. *Wilkinson* (23 L. T. Rep. 592; (1870) L. R. 6 Ex. 25), which was referred to by several of the judges in the case of *Murphy* v. *Hurly*, that the principle contended for by the charterers is not confined to cases between landlord and tenant. It depends upon the principle that there is an implied term in every contract where one of the parties has a means of knowledge and the other party has not that means of knowledge, without which he cannot fulfil his obligation, that there should be, before forfeiture is insisted upon, information by the party who knows to the party who does not know. For these reasons I think this appeal must be dismissed with costs.

Slesser, L.J.—I agree. The case of *Tredway* v. *Machin* (91 L. T. Rep. 310) is a case of landlord and tenant, but the general observations of Collins, M.R. in that case seem to be in point here. He said (91 L. T. Rep. at p. 311): "The law upon the subject has been repeatedly laid down and stated. The landlord is not liable unless there is a contract by him to keep the premises in repair, and he is not liable even in that case unless he has had express notice of the want of repair. That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has best means of knowing of any want of repair." Lord Atkinson in the case of *Murphy* v. *Hurly* spoke in the same way. He said (127 L. T. Rep. at p. 54; (1922) A. C. at p. 383): "These authorities, I think, establish that the duty of the tenant to give notice springs from the special knowledge of the need of repairs which his occupancy of the demised premises is presumed to give him, coupled with the state of ignorance of that need in which the absence of such occupancy is presumed to leave the landlord."

Applying those principles to this case, it seems to me that on the facts as stated in the case, there is to be presumed a knowledge of the deadweight in the hands of the owners of the vessel, but that there is no reason to presume anything but ignorance of the amount of the deadweight, the scale upon which the hire is to be fixed, in the minds of the charterers, who have not, at the time of the delivery of the vessel, any right or any opportunity, unless they specifically happen by accident, so to speak, to have the knowledge presented to them or come by it, to know that which it is essential for them to know in order that they may discharge their obligations of paying hire under the charter-party. It seems to me that the principle invoked by the charterers from the cases of landlord and tenant which, as my Lord has said, has been applied to many other cases than those of landlord and tenant, must result here in a conclusion which has found favour both with the arbitrators and with the learned judge that this is one of those cases where the special knowledge must be presumed to be with the owners and not with the charterers. I agree, therefore, that this appeal fails.

MacKinnon, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellants: *Ince, Roscoe, Wilson*, and *Glover*, agents for *Allen Pratt* and *Geldard*, Cardiff.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, October 18, 1938.

(Before BRANSON, J.)

Reardon Smith Line Limited v. East Asiatic Company Limited. (*a*)

Charter-party—Construction—Duty of charterers—Exception for obstructions—Berths requisitioned by Government.

A charter-party provided for the payment of demurrage if the lay-days were exceeded, and that time lost by reason of obstructions beyond the control of the charterers should not be counted.

On arrival at the loading port, the chartered ship was unable to berth for some days owing to the Government having requisitioned all available berths for military purposes.

Held, that the time so lost was due to an obstruction beyond the control of the charterers and must be omitted in calculating whether the lay-days had been exceeded.

Leonis Steamship Company Limited *v.* Rank (Joseph) Limited (No. 2) (11 *Asp. Mar. Law Cas.* 142; 99 *L. T. Rep.* 513; (1908) 1 *K. B.* 499) *applied.*

CASE stated by an umpire in an arbitration arising out of the construction of a charter-party.

The charter-party, which was dated the 18th September, 1937, provided that the vessel should proceed to Dairen and there load a cargo and carry it to European ports. The relevant clauses were as follows: "7. Charterers to be allowed one lay-day (Sundays and gazetted holidays excepted) for every 600 tons for loading the steamer at port of loading. Lay-days at port of loading to be weather working days, and to commence twenty-four hours after the steamer is dunnaged, matted, and all hatches are ready for cargo, whether in berth or not, and of the captain having given written notice (within business hours 10 a.m. to 5 p.m., Saturdays 10 a.m. to 2 p.m.) to that effect to charterers or their agents." "11. Any time lost at port or ports of loading and discharging through riots, detention by ice, time occupied shifting ports or berths and time lost by inability of steamer to load and discharge as above not to count as lay-days. If the cargo cannot be loaded by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the loading of the cargo . . . or by reason of obstructions or stoppages beyond the control of the charterers on the railways feeding the port or ports of loading or in transit or in the docks or other loading places, or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the discharge, the time for loading or discharging as the case may be shall not count during the continuance of such causes. . . ." "15. The lay-days at port of loading not to commence before the 20th October next ensuing unless charterers wish

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

to begin sooner, and if steamer be not arrived at her loading berth at port of loading (charterers undertaking to provide an available berth as soon as required) or although arrived be not in every way fitted for cargo and (or) ready for same (as per clause 7) on or before noon of the 10th November next ensuing . . . charterers to have the option of cancelling or maintaining this charter. . . "

The question in dispute was whether the obligation to load, whether in berth or not, imposed by clause 7, and the charterers' undertaking to provide a berth, contained in clause 15, were absolute obligations, or whether they were modified by the exception contained in clause 7 with regard to obstructions. The vessel arrived at Dairen on the 27th October, and gave notice of readiness to load on the next day. Owing to the Government having requisitioned berths in the port for the landing of troops, no berth was vacant until the 10th November. The vessel berthed on that day, but was sent away from the berth for the same reason on the 11th November, and did not obtain another till the 15th November. In the result the total loading time was exceeded, and the owners claimed demurrage. If the periods during which no berth was available were excluded, the lay-days had not been exceeded. The umpire held that those periods ought to be excluded, and made an award in favour of the charterers.

A. A. Mocatta for the appellants.

W. L. McNair for the respondents.

Branson, J.—The claimants' ship, the *Santa Clara Valley*, was chartered to the respondents by a charter-party dated the 18th September, 1937, to proceed to Dairen or Rashin, as ordered by the charterers, and there to load a cargo of soya beans. She went to the port of Dairen, and, when she arrived there, she found that, owing to certain Government requisitioning of ships, and of quay space, there was no berth where she could go to load her cargo. First of all, she was kept waiting for a day or two before she could go alongside, and, having got alongside, at a subsequent period she was ordered away from the berth by the Government authorities, and was unable to return for another period of days. In the circumstances, the claimants claimed demurrage, which the respondents declined to pay. Since the charter-party contained an arbitration clause, the matter was arbitrated, and I am now dealing with the special case stated by the umpire raising a question of construction upon the charter-party.

The point lies in a very small compass. Clause 7 of the charter-party reads as follows: "Charterers to be allowed one lay-day (Sundays and gazetted holidays excepted) for every 600 tons for loading the steamer at port of loading. Lay-days at port of loading to be weather working days and to commence twenty-four hours after the steamer is dunnaged, matted, and all hatches are ready for cargo, whether in berth or not, and of the captain having given written notice (within business hours 10 a.m. to 5 p.m.; Saturdays 10 a.m. to 2 p.m.) to that effect to charterers or their agents."

Then clause 11, which is the one relied upon by the charterers, reads as follows: "Any time lost at port or ports of loading and discharging through riots, detention by ice, time occupied shifting ports or berths and time lost by inability of steamer to load and discharge as above not to count as lay-days. If the cargo cannot be loaded by reason of riots, civil commotions . . . or by reason of obstructions or stoppages beyond the control of the charterers on the railways feeding the port or ports of loading or in transit or in the docks or other loading places . . . the time for loading . . . shall not count during the continuance of such causes. . . . In the case of any delay by reason of the before-mentioned causes no claim for damages or demurrage shall be made by the charterers, receivers of the cargo, or owners of the steamer. For the purpose, however, of settling dispatch money accounts any time lost by the steamer at loading and (or) discharging port or ports through any of the above causes shall be counted as time used in loading and (or) discharging."

What is said by the charterers is that the state of affairs found by the umpire to have existed within the port amounted to "obstructions in the docks or other loading places," and that it consequently prevented the time from running against them. The case finds that the delay in the commencement of the loading arose as a consequence of the charterers not being able to obtain a berth, because until the 10th November all the berths available for vessels not employed by the Government were occupied by other mercantile vessels, which were entitled to be loaded or discharged before the *Santa Clara Valley*. The reason for this congestion of vessels was that the authorities had requisitioned for the discharge of ships carrying troops and military stores a number of berths normally available for mercantile vessels, thus reducing the number of berths available for mercantile vessels, which were therefore obliged to wait longer for a berth than they otherwise would have been, and the charterers say that that amounted to an obstruction within the meaning of clause 11.

In upholding that contention, the umpire referred to *Leonis Steamship Company Limited* v. *Rank* (*Joseph*) *Limited* (*No.* 2) (11 Asp. Mar. Law Cas. 142; 99 L. T. Rep. 513; (1908) 1 K. B. 499). That case related to a similar question arising upon a clause in a charter-party which, though not verbatim the same as the one with which I have to deal, seems to me to be so essentially similar in all its material parts that the construction placed by the court upon the charter-party in that case ought, in my view, to bind me in deciding the construction to be put upon the charter-party in this case. Clause 39 in the charter-party in that case provided as follows: "If the cargo cannot be loaded by reason of riots . . . or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay-days." It was decided by Bigham, J., as he then was, that that clause relieved the charterers from liability in that case, the delay having arisen owing to the fact that the berths which might otherwise have been available to the *Leonis* were occupied by other ships, so that the charterers were therefore unable to put their goods on board. I do not think that it is necessary for me to refer in detail to the judgment of Bigham, J., nor to the judgments of the Court of Appeal. Vaughan Williams and Buckley, L.JJ. both agreed with the construction put upon clause 39 by Bigham, J., and Fletcher-Moulton, L.J., without dissenting from that construction, based his decision upon another point which was taken.

The situation then is that, unless there be some material difference between the language of this charter-party and the language of the charter-party in that case, I am bound to put upon the

words in this charter-party, which are the same, the same construction as that which the courts put upon the words in the charter-party in the *Leonis* case (*sup.*).

Mr. Mocatta attempts to differentiate the two cases by reference to two other clauses in this charter-party. He relies, first of all, upon the fact that in clause 7 there are the words "whether in berth or not," and he says that that shows that the finding of a berth is made a matter entirely for the charterer. To my mind, that clause can have no effect upon the construction to be put upon the exceptions in clause 11. All that that clause is doing is to indicate the time at which a notice of readiness shall be given in order to fix when the lay-days shall commence to run, and what it is saying is that that notice may be given whether the ship is in berth or not. The existence of that clause cannot, to my mind, have any effect in enabling me to put upon the exceptions clause any construction different from that which was adopted in *Leonis Steamship Company Limited* v. *Rank* (*Joseph*) *Limited* (*No.* 2) (*sup.*).

The other point which Mr. Mocatta urges is on clause 15 of the charter-party, which provides that the lay-days at the port of loading are not to commence before the 20th October unless the charterers wish to begin sooner. Clause 15 continues: ". . . and if the steamer be not arrived at her loading berth at port of loading (charterers undertaking to provide an available berth as soon as required), or although arrived be not in every way fitted for cargo (as per clause 1) and (or) ready for same (as per clause 7) on or before noon of the 10th November [then the charterers are to have an option for cancelling]." Mr. Mocatta seeks to use the expression in that clause, "charterers undertaking to provide an available berth as soon as required," as though it applied to the charter-party generally. In my view, those words are apt in the context in which they occur, and they fit into clause 15, where the question which is being dealt with is the time at which a right to cancel shall arise in the charterers. Also, of course, the charter-party very reasonably provides that, before a right to cancellation can arise in the charterers, the charterers must have provided an available berth into which the ship could go. I think that it would be giving very undue effect to those words to take them out of the context in which they appear and to treat them as importing a general obligation upon the charterers at all events to provide a berth. This is clearly not what the charter-party means, and would, as it seems to me, wipe out all the exceptions in clause 11, whatever construction is put upon them, if it were a correct interpretation of the charter-party. For these reasons, I think that the award should be affirmed, and the charterers are to have the costs of the argument.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

October 31 *and November* 1, 1938.

(Before SLESSER, FINLAY and GODDARD, L.JJ.)

The Arantzazu Mendi. (*a*)

[This decision was affirmed by the House of Lords on 23rd February, 1939.—ED.]

Appeal by the Republican Government of Spain from the judgment of Bucknill, J. (*ante, p.* 224) *delivered in the Probate, Divorce and Admiralty Division on the* 17*th June,* 1938, *on a motion on behalf of the Nationalist Government of Spain to set aside the writ* in rem *issued by the Republican Government of Spain on the* 13*th April,* 1938, *to have the possession of the steamship* Arantzazu Mendi *adjudged to them and also to set aside the subsequent arrest of that vessel.*

By the unanimous decision of the Court of Appeal, the appeal was dismissed, but leave was given to appeal to the House of Lords. The judgments of Slesser, Finlay and Goddard, L.JJ. appear hereunder. In the course of Goddard, L.J.'s judgment, reference was made to the decision of the Court of Appeal in Haile Selassie *v.* Cable and Wireless Limited (159 *L. T. Rep.* 385; (1938) *Ch.* 182 (*C.A.*)).

G. St. C. Pilcher, K.C., *Owen L. Bateson,* and *John G. Foster* for the appellants, the Republican Government of Spain.

Sir *Robert Aske,* K.C., *J. V. Naisby,* and *R. Valls* for the respondents, the Nationalist Government of Spain.

Slesser, L.J.—This is an appeal from a decision of Bucknill, J., arising out of a motion, which in itself is consequent upon a claim made by the plaintiffs, the Government of the Republic of Spain, to have possession of a certain steamship called the *Arantzazu Mendi* adjudged to them.

As frequently is the case, and ought to be the case according to the practice, in appropriate circumstances, the writ should be directed to persons interested in the ship. As the learned judge said, the writ in this action is not in proper form according to Order XII., rule 24, which provides that any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the *res.* But it is said here that the defendants, the Nationalist Government of Spain, as they are called, have entered an appearance conditionally and are parties interested in the *res,* and the learned judge tells us that he has dealt with the case on the footing that the defendants, the Nationalist Government of Spain, have entered an appearance as interveners and are parties interested in the *res.*

The Nationalist Government of Spain having so entered a conditional appearance, moved the court for an order that the writ and all subsequent proceedings in this action and the arrest of the steamship *Arantzazu Mendi* be set aside on the following grounds: Firstly, "This action impleads

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

a foreign sovereign State, namely, the Nationalist Government of Spain. The said Government is unwilling to submit to the jurisdiction of this honourable court." Secondly, "The said steamship is in the possession of the said Government by its duly authorised agents." Thirdly, "The said Government is, and at all material times was, entitled to possession of the said steamship." Fourthly, "The dispute in this action is between two sovereign States and the court has no jurisdiction, or, alternatively, will not exercise its jurisdiction, to decide the same." Fifthly, "A claim to the said steamship is being made by a foreign sovereign State and the court has no jurisdiction, or, alternatively, will not exercise its jurisdiction, to decide the validity of the said claim."

The learned judge acceded to the argument raised by the Nationalist Government of Spain, and in the result he made an order, as they prayed, to say that the arrest of the ship was continued until this appeal was determined. The question is whether in so doing the learned judge was right.

The first question which arises in this case is whether the Nationalist Government of Spain is or is not a foreign sovereign State; because it is only if they establish that they are a government of a foreign sovereign State that the claim which they make in their motion can be founded at all. In that matter, the learned judge had occasion, according to the proper practice, to consult the appropriate Government authority, namely the Foreign Office, to ascertain what was the view of His Majesty with regard to this particular State, and for that purpose a question was addressed, by direction of the learned judge, to the Foreign Office—or, more strictly, the Secretary of State for Foreign Affairs—to ascertain the will of His Majesty. In certain of the cases which have been cited to us, and in the argument, the phrase has loosely been used that the Government, or the Foreign Office, or the Secretary of State for Foreign Affairs, recognises or does not recognise what is alleged to be a foreign government, but it is, of course, clear that the recognition rests with His Majesty and His Majesty alone, and the Government is merely an instrument, a proper instrument, of the will and the intention of His Majesty the King.

In this case the question was raised whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign State. The more correct constitutional question would have been: Whether the Nationalist Government of Spain is recognised by His Majesty as a foreign sovereign State. However, that does not impeach the validity of the answer which was received by the Foreign Office—which I regret fell into the same evil practice—and which is: "(1) His Majesty's Government recognises Spain as a foreign sovereign State. (2) His Majesty's Government recognises the Government of the Spanish Republic now having its seat in Barcelona as the *de jure* Government of Spain. (3) No Government other than that referred to in the preceding sub-paragraph is recognised by His Majesty's Government as the *de jure* Government of Spain or any part thereof. (4) The Nationalist Government of Spain is a Government in conflict with the Government of the Spanish Republic established at Barcelona. It claims to be the Government of Spain and is seeking to overthrow the Government of the Spanish Republic and to establish its authority over the whole of Spain. (5) His Majesty's Government recognises the Nationalist Government as a Government which at present exercises *de facto* administrative control over the larger portion of Spain. (6) His Majesty's Government recognises that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain. (7) His Majesty's Government has not accorded any other recognition to the Nationalist Government. (8) The Nationalist Government is not a Government subordinate to any other Government in Spain."

Now, from these answers it is clear, first, that His Majesty recognises the Republican Government of Spain as the *de jure* government of the whole state. Yet it is equally clear that His Majesty's Government recognises, first, that the Nationalist administration—if I may use a neutral word—is a government. Secondly, they recognise that it is a government not subordinate to any other government in Spain; and, thirdly, they recognise that it now exercises effective administrative control over all the Basque Provinces of Spain; an answer which is important in the present case, in that the ship which is here to be considered was registered in the port of Bilbao, which is within the Basque Provinces of Spain.

In my opinion, having regard to those answers, it is clear on the authorities that the answers require this court to say that His Majesty has recognised the Nationalist Government of Spain as the Government of a foreign sovereign State. Whatever doubts might formerly have existed on this head were determined so far as this court is concerned by the case of *Luther* v. *Sagor* (125 L. T. Rep. 705; (1921) 3 K. B. 532). There it was held that where a foreign government has only been recognised *de jure* or *de facto* the court will not inquire into the validity of its acts.

It is true, as Mr. Pilcher said, that the actual question under consideration was different from the one in the present case, but there are passages in the judgment which make it quite clear to my mind that this court, on the principles there laid down, would, on the answers here given and there given, have regarded a government *de facto* as a foreign sovereign State. Thus, at p. 543, Bankes, L.J. says: "Wheaton quoting from Mountague Bernard states the distinction between a *de jure* and a *de facto* government thus: 'A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious.'" Warrington, L.J., at p. 551, says this: "In fact I rather think a *de jure* government in international law means 'one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them;'" —quoting a similar passage to that mentioned by Lord Bankes—"while a *de facto* government is one which is 'really in possession of them, although the possession may be wrongful or precarious.'" And Scrutton, L.J. says, at p. 557: "It may well be a question when first the struggling body attained such power that it was a government *de facto*, and over what area, and that you cannot answer that question by knowing that some years later the Sovereign recognised it as the government *de facto* over a particular area. When that question is to be answered, the courts must ask the Sovereign for information."

I do not understand Mr. Pilcher in general to dispute that decision, that a government held by His Majesty to be a government *de facto* should be regarded as a sovereign State for the purposes of

international law which here appear to be considered. His argument, as I understand it, is rather this: That Spain being treated both in the question and in the answer as one unit, and in the present case there being a statement from the competent authority that *de jure* Spain is one unit, there is no complementary statement that the whole of Spain as such is *de facto* in the possession of the Nationalist Government; and he is quite right in saying that no such point arises in the case of *Luther* v. *Sagor*, because there it was conceded that the whole of Russia—which was the country there to be considered—was *de facto* in the effective administration of the Soviet Republic. But there has been a case in this court, if authority be needed to deal with this matter, the case of the *Banco de Bilbao* v. *Sancha* (159 L. T. Rep. 369; (1938) 2 K. B. Div. at p. 176), where the court had to consider the *de facto* government of Nationalist Spain, which at that time as now, though the boundaries may have been different in extent, was yet a *de facto* administration over only a portion of the whole of Spain; and there, as I read their Lordships' judgments, albeit they are considering a different matter, they did in terms apply the principles of the case of *Luther* v. *Sagor*. That is to be found in the report of the case of the *Banco de Bilbao* v. *Sancha* (1938; 2 K. B. Div. at p. 195), where Clauson, L.J., stating the opinion of the whole court, said: "So far, at all events, as this court is concerned, this question"—namely, whether His Majesty's Government recognise the Spanish Republican Government with its seat in Valencia or Barcelona as the *de jure* government of the whole of Spain, but at the same time recognise the insurgent government of General Franco as the government *de facto* of the area in which Bilbao is situate—"seems to be settled by the principles laid down in decisions of this court in *Luther* v. *Sagor*." Even if there was no authority to that effect, I should myself unhesitatingly take the view that once it is found as a fact within certain boundaries, whatever they may be—and here we are told they at least include the whole of the Basque Provinces—there was a *de facto* government, the mere fact that there was another government, claiming to be the *de jure* government, in that area, in the unit which is called Spain, if it be a unit, would not deprive the court of the duty of finding, on that statement, that that *de facto* government—which points to some orderly and organised institution—are so organised in that area, although fluctuating, as to possess the powers of a State.

In those circumstances I think that it is a proper conclusion that the Spanish Nationalist Government has been recognised by His Majesty *de facto*, and must be regarded by the court as a sovereign State.

It has been said by Mr. Pilcher, who has argued this case with great vigour and lucidity, that there may be some relation between the according of belligerent rights and the recognition of a sovereign State. I am unable to see the necessary connection between the two matters. It is quite true, as Oppenheim says—no doubt other authorities are to the same effect—that the mere fact that insurgents are recognised as a belligerent power will not necessarily of itself compel the court to recognise those insurgents as a sovereign foreign State. As he says: "Between the recognition of a belligerent power and the recognition of a part of a country as a new State there is a broad gulf."

But in this case whether there is such a gulf or not is beside the point. We have no information whether there be or there not be belligerent rights accorded to General Franco's Government. I will assume for the purpose of this case, though I am doubtful about it, that we can take judicial notice of that fact. That is not a question we are here to consider. It may be that the mere fact of according belligerent rights does not constitute a government exercising sovereign rights a State. Here we are informed, without any reference to belligerent rights, that His Majesty does recognise the Government—again I call attention to the word "government"—of Nationalist Spain as an independent body exercising effective administrative control within its own area.

In those circumstances, Mr. Pilcher is driven to his second argument, which, I will admit, has afforded me considerably more difficulty than his first one. Assuming that the Nationalist Government is the Government of a sovereign State, has it been shown here that this action is calculated so to implead them that they can object to the jurisdiction of the court? On that matter it is necessary to enter to some extent into the history of this case. The ship, the *Arantzazu Mendi*, was a ship, the property of a private company registered at the port of Bilbao, and on the 28th June, 1937, she then not being in Spanish waters, was requisitioned by the Republican Government, and the effect of that requisition was normally to require that the owner should so far as the control and destination and disposition of the affair of the ship are concerned—I am speaking generally—hold the ship under the disposition of that Government. It was not a confiscation of the ship, but it was, as I say, a decree of requisition. That was the position there.

On the 24th August, 1937, the ship having arrived within English territorial waters, the owners issued a writ for possession and the ship was accordingly arrested in London. That action in which a conditional appearance was entered by the Government of Spain, and by the Republic of Spain and by the shipping company, was adjourned, and the proceedings were stayed while another action was being heard in the Chancery Division, in which various claims persons exercising or claiming proprietary rights in the company were being considered. That Chancery action was settled in March, 1938; I do not think the terms of the settlement concern us here, and on the 12th April, accordingly, the action *in rem* for possession was discontinued. Now before the ship was released from arrest the Republican Government issued their writ in the present action. It appears that one reason why the ship was not released from arrest was that certain moneys were owing to the Marshal in connection with the custody of the ship. On the 2nd March, 1938, the Nationalist Government had issued decrees—one in general terms requisitioning various ships, and a specific decree affecting this particular ship. The second article of that decree says: "The Government, by means of the appropriate decrees and in fulfilment of the function which is defined in the first article"—which includes all vessels of any class and nature engaged in maritime navigation and fishing, and are entered on the register of vessels of Spanish ports, and the like—"will assume and put into practice such possessory and managerial powers as may be expedient for the proper employment and service of the vessels requisitioned and for the attainment of the purposes for which they were intended; all this without prejudice to rights of ownership and to fair and legal compensation to the lawful owners or managers, who will recover the whole of their powers and the full exercise of the rights which pertain to them so soon as the extraordinary circumstances which give rise to the

limitation thereof shall disappear." I think on that Mr. Pilcher was right when he said that the requisition of the Nationalist Government on the 2nd March did not purport to be a complete extinction of the ownership of the owners of the ship, but only gave such necessary and managerial powers in the proper employment of the ship being requisitioned as was stated in the second article.

In those circumstances, on the 23rd March, the decree of the Republican Government, which had been dated, as I have said, on the 28th June, 1937, was formally applied to the steamship in this case ; and on the 5th April, the ship then being in the custody of the Marshal, the Nationalist Government served notice upon the master of the ship of their requisition. It appears, therefore, that both Governments have sought to utilise their powers to obtain control of the ship. I would add that by an affidavit which is dated the 6th May, 1938, the captain of the ship says : " On the 5th April, 1938, I was serving on the steamship *Arantzazu Mendi* as her master in the service of the Compania Naviera Sota y Aznar, the owners of the said steamship. On the said date, I was served by the sub-agent of the Nationalist Government of Spain with a notice of requisition by the said Government of the said steamship *Arantzazu Mendi*, and I undertook to hold the possession of the said vessel for and on behalf of the said Nationalist Government of Spain. Since the said date I have continued on board the said vessel, and have held and still hold the same solely on behalf of and at the order and disposition of the said Nationalist Government, and have not recognised and do not recognise any other authority than the said Government. At no time since the 5th April, 1938, have I received any instructions or communications from the plaintiffs in this action or their representative, neither do I recognise nor acknowledge their right to give me any instructions." And to that must be added another statement, which is in the form of an affidavit by an agent of the Nationalist Government, the Marques Luis Martinez de Yrujo. It is a translation. It is an exhibit from the Spanish of a Protocol Book of Public Instruments kept at the sub-agency and contains this matter. After reciting that he is the sub-agent in charge of the Consulate-General, he says that the managing director of the company which owned the ship, the Naviera Sota y Aznar, declares as follows. Then follows the declaration of the managing director : " That on the fifth day of April one thousand nine hundred and thirty-eight he received a notification from His Excellency the Duke of Alba, agent of the Spanish State in Great Britain, to the effect that, in pursuance of the Decree-Law dated the second day of March one thousand nine hundred and thirty-eight and the decree of the same date, both published in the Official Bulletin." Then follows the decree, to which I have already referred. I have already referred to certain ships which had been requisitioned, including the ships referred to in this case. " He declares that he freely submits to what is provided in the said decrees and, in the name of the Compania Naviera Sota y Aznar, gives his consent to the said vessels being requisitioned at the free disposal of the Nationalist Government of Spain to the intent that it may make use of such vessels in the manner laid down in the said decrees." Now, as I have already pointed out, in the said decree the Nationalist Government of Spain had stated that subject to the rights of control and disposition which I have mentioned ownership should remain in the owners, and that they might seek compensation.

On that it is said by Mr. Pilcher that really in this case it is not right to take the view that the Nationalist Government are impleaded. He points out, first of all, that at all material times they are unable to say that they are in possession of this ship. He points out that at all material times the Marshal of the Admiralty Department of the High Court was actually in possession of this ship, and that therefore it is wrong to say that at any time they can claim any right as being in possession.

Having considered the necessary rules and the authorities which have discussed the position of the Marshal, it appears to me that it is right to say that the legal possession of the ship during this period was in the Marshal. It is not necessary, for this purpose, to cite many authorities, but I will mention the case of *The Petrel*, which is reported in 3 Haggard, at p. 301, where Sir John Nicholl, speaking of the case of a ship which was arrested by the Marshal, speaks of it as " This vessel, while in the legal possession of this court." I am prepared, at any rate, to assume for the purposes of this case that at all material times it is right to say that the Nationalist Government were never able to say that they were in possession of this ship.

But having come to that conclusion, I do not think that that by any means disposes of the matters which we have here to consider. The Republican Government of Spain by their writ claim without qualification to be entitled to have possession of the ship adjudged to them, and that, as has been pointed out in the action *in rem*, if they succeeded, would necessarily have the effect of destroying any other interests which might properly be claimed by any other adverse party in this ship.

Now, the evidence before the court is to this effect, that both the master and the owner agree that so much interest in this ship, as is included in the powers of requisition, has by them been accorded to the Nationalist Government. Those are, I agree, not powers of ownership but powers of the disposition and control of the ship. For this purpose, it seems to me not material to inquire whether that requisition was or was not of legal effect in Spain. It is enough to say that the powers mentioned in that requisition, namely, the powers short of ownership, of disposition and control, are conceded by the owner and the master now to be held by them as agents for the Nationalist Government. The question then arises on that whether, in order to resist the claim of the Republican Government—which, if it succeeded, would exclude even these powers—it is necessary for the Nationalist Government to intervene, to appear as defendants and be impleaded ; that is to say, to sacrifice their independence in order to maintain their proprietary interest in these rights.

The matter is not free from authority, and, in particular, I would refer to the speech of Lord Wright in the case of *The Cristina* (19 Asp. Mar. Law Cas. 159 ; (1938) A. C. 485 at p. 507), where he says this : " The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the *Cristina*,"—there, as here, the Spanish Government had claimed (that is, the Republican Government) by requisition to control and deal with the ship—" whereas in *The Parlement Belge* (4 Asp. Mar. Law Cas. 234 (C. A.) ; 42 L. T. Rep. 273 ; 5 P. D. 197) the Belgian Government was the owner of the mail packet. But the

rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest which may be not merely not proprietary but not even possessory. Thus it has been applied to vessels requisitioned by a Government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under its orders. That was a separate ground in *The Porto Alexandre*, apart from the question whether, or fact that, the vessel had actually become the property of the Portuguese Government, which was possessing and employing her." The learned Lord also quotes to the like effect *The Broadmayne* (13 Asp. Mar. Law Cas. 356 ; (1916) P. 64). I can find in the speeches of the learned Lords in the House of Lords in *The Cristina* (*sup.*), no statement which throws any doubt on that proposition.

True it is that both in that case and the case heard in this court, the case of *Haile Selassie* v. *Cable and Wireless Limited* (159 L. T. Rep. 385 ; (1938) 1 Ch. 839), there are observations that a mere claim of itself will not necessarily justify the intervention, either on the record or before the court, of a sovereign any more than of any other person. But here we have, on the face of it, the claim made by the master and by the owner that they do hold these limited interests arising from the requisition, for the Nationalist Government in Spain.

I therefore am of opinion, firstly, that the Nationalist Government have not shown that they are in possession of this ship ; secondly, that they have failed to show that they have any ownership in this ship. Nevertheless, I think, following Lord Wright, that they have shown that they have a lesser interest imposed by the requisition, which interest, on the uncontradicted evidence, is held for their benefit by the master and the owner, who have both said that they would act according to the desires of the Nationalist Government as expressed in the requisition ; and that they have shown a sufficient interest for the Nationalist Government to be compelled, unless they wish to see that interest destroyed, to come before the court and defend that interest. They are therefore put to the election of sacrificing, as it has been said, either their independence or their property, for this interest is a proprietary interest, albeit it does not go to the fullest extent of ownership.

For these reasons I think that they may say they are impleaded in this action, that their rights in these interests are at stake, and being the Government of a sovereign State they will rely upon the general principle which has been laid down for so many years in the case of *The Parlement Belge* (*sup.*) and *The Jupiter* of classical expression ; and I think that the learned judge was right in his decision, in which he acceded to the motion and made an order accordingly.

The question as to whether, and in what circumstances, the arrest may or may not be continued, must remain over for consideration until my Brethren have given their judgments.

In my opinion this appeal fails and must be dismissed with costs.

Finlay, L.J.—I am of the same opinion, and I desire only to add a very few words because, for myself, I am perfectly content with the manner in which the case has been put by my Lord, and, I may add, with the way it was put by Bucknill, J. in the court below.

On the first point I do not want to add anything at all. On the second point, namely, whether the Nationalist Government is here impleaded, I do just desire to add this. The law is, I think, clearly got in two passages in the case of *The Cristina* (*sup.*) : one is the passage in the speech of Lord Wright, which has just been read by my Lord, and which I do not need to read again ; the other is a passage in the speech of Lord Atkin, which I think is important, where it says this : " In these days it is unusual to name defendants : when the defendants are described as 'the owners of a vessel,' they can be at once identified. When persons are not entitled the defendants but in the body of the writ are cited to appear as persons claiming an interest, there is said to be some uncertainty whether they appear under leave to intervene or without such leave. In any case, when they do appear they appear as defendants, and as such I conceive that they are impleaded. And, when they cannot be heard to protect their interest unless they appear as defendants, I incline to hold that, if they are persons claiming an interest, they are by the very terms of the writ impleaded." Now here, it appears to me, for the reasons which have just been given by my Lord, quite clear that there was an interest in the Spanish Nationalist Government. The owner and the officer had agreed to hold the ship on the terms that it should be subject to requisition by the Nationalist Government. What the rights of a Government to requisition a ship are has been defined in a good many cases, for example, *The Broadmayne* (*sup.*), and I find it impossible to see how it can be said here that the Spanish Nationalist Government have not, and cannot, have an interest in the matter now being decided. A claim has been put forward, and they will, therefore, inevitably lose rights which they claim if judgment is given in accordance with the prayer of the writ.

The ground, as I understand it, on which Mr. Pilcher rested this part of his case appeared to me throughout to be a technicality, though, of course, a technicality which had to be dealt with. He said : " But the Marshal here is in possession." Assuming that the sole possession is in the Marshal—which is a matter which might require some further discussion—but assuming that, I do not think that it carries Mr. Pilcher's point, and for this reason : the rights to be considered are not rights of possession, they are proprietary rights, as was pointed out by Lord Wright in the passage just read by my Lord. And, assuming that the true view is that possession is so exhaustively in the Marshal that there can be no other possession than that, I find it to be quite impossible to see why, by taking that view, it should be said that a right—a very important right—is not here being claimed by the Nationalist Government ; nor why, if the ship was adjudged as claimed in the writ, the Nationalist Government would not be deprived of that right.

For these reasons, purely supplementary to those given by Bucknill, J. below, and by my Lord, I agree.

Goddard, L.J.—I am of the same opinion. I think the strength of Mr. Pilcher's argument on the first point was as to the true construction, if I may so put it, of the letter which the Secretary of State wrote in answer to the questions propounded by Bucknill, J. I have always understood, and I believe it to be the law, that where a question is raised as to the status of a body of persons who claim to be a Government of a sovereign State, where a question is raised as to whether there is sovereignty in that body or not, it is not for the court to decide it. The court cannot take evidence on that point, and it is not for the court to express a finding on that point. The proper course is, and

the only course is, to inquire of the Secretary of State what His Majesty's attitude is pleased to be; and it seems to me that it is most desirable in these cases that where a court propounds a question of this sort to the Secretary of State, that a clear answer should be given if it is possible to give one. If, of course, His Majesty is not pleased to come to any determination on the facts, then the court should be so informed.

In this case the question propounded by Bucknill, J. was whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign State, and the answer was given in nine paragraphs. The facts which are set out by the Secretary of State seem to me to amount beyond any question of doubt to this, that the Nationalist Government of Spain is a *de facto* sovereign State, and I say that particularly for this reason: that the fifth paragraph of the answer is: "His Majesty's Government recognises the Nationalist Government as a government which at present exercises *de facto* administrative control over the larger portion of Spain." The sixth paragraph of the answer is: "His Majesty's Government recognise that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain." I do not know whether that is in any way meant to be different from *de facto* administrative control, but I should think it is the same thing. The seventh paragraph: "His Majesty's Government have not accorded any other recognition to the Nationalist Government." Now, more particularly, par. 8: "The Nationalist Government is not a Government subordinate to any other Government in Spain." I take it, *ex hypothesi*, that it was not subordinate to any other Government. In *The Parlement Belge* the test of sovereignty for the purpose of immunity was laid down by Lord Esher. Therefore, if the Nationalist Government informs the court that the Nationalist Government had absolute independence of any superior authority, it informs the court that the Government is *de facto* the sovereign State over that part of Spain.

Nor do I think I can accede to Mr. Pilcher's contention that because the Secretary of State informs the court that His Majesty's Government recognises Spain as a foreign sovereign State, that necessarily excludes the Nationalist Government as a sovereign State because it does not exercise jurisdiction over the whole of Spain. It is just because you get these competing Governments that the question of *de facto* and *de jure* Governments arises, and if there can be a *de facto* and a *de jure* Government over the whole of the country, I cannot see why there cannot be over part of the country. It seems to me, therefore, that we are informed by the Secretary of State with sufficient clearness, though I could wish with a little more directness, that there is a *de facto* Government in the Nationalist Government of Spain, and, accordingly, we are bound by authority to hold that for all purposes the consequences are the same as they would be if the Government were a *de jure* Government.

On the second point I also agree with my Lords. The speeches of the noble and learned Lords who decided *The Cristina* and the recent case in this court, *Haile Selassie* v. *Cable and Wireless Limited*, I think show this: that where a claim for immunity is made by a foreign sovereign, it is not enough that his claim should be a bare assertion of right, as Lord Wright called it, or a mere claim, as Lord Maugham called it, but if the court can see that the question that arises is a question of competing rights, as in this case here, when we have got the fact that the owner of the ship admittedly has purported to give to the foreign sovereign, who is claiming immunity, rights over the ship—it may be that those rights are good or it may be they are bad; that is just what we cannot try—but if he purports to give rights over his ship and therefore there is more than a mere claim, and evidence before the court on which it can be shown that the question which is to be decided in the case is competing rights, then it appears to me the principle of immunity applies, and that this court has no option but to say that the decision of Bucknill, J. is right, and the appeal is dismissed with costs.

Robert Aske.—The appeal will be dismissed with costs?

Slesser, L.J.—Yes.

Pilcher.—I am instructed to ask your Lordships to be good enough to give me leave to go to the House of Lords.

Slesser, L.J.—I suppose your desire to have leave to go to the House of Lords includes your desire that the ship shall remain under arrest, otherwise you will say, as no doubt you said below, that leave to have that point disposed of after the bird had flown would not be of much value. There must be some time limit. You will have to undertake, if leave is given, to give in your notice within a very short time.

Pilcher.—Certainly.

Slesser, L.J.—Otherwise there might be ultimately an abuse of rights.

Pilcher.—I think my clients would be quite prepared to hand in their notice of appeal within a week.

Slesser, L.J.—Sir Robert, you cannot object to giving leave, apart from the question of arrest.

Robert Aske.—No, my Lord.

Slesser, L.J. — How long do you want, Mr. Pilcher?

Pilcher.—I think a week might be sufficient.

Slesser, L.J. — After that, Sir Robert Aske might apply to the House of Lords to have the case expedited. You cannot ask for less than a week.

Robert Aske.—No, my Lord. It is really a matter of the arrest.

Slesser, L.J. — You understand what would happen would be this: the arrest would be continued, as I understand it, subject to their giving notice within a week. If they did not, the order for the arrest would be released. After that, you could apply to the House of Lords to have the case expedited.

Robert Aske. — I am told that what the Court of Appeal did in the case of *The Cristina* was to refuse leave to appeal, so that the appellants could apply to the House of Lords for leave, and at the same time ask that the appeal should be expedited.

Slesser, L.J.—That is one way of dealing with it.

Robert Aske.—And the House of Lords did, on that petition, expedite the appeal.

Goddard, L.J.—As a matter of practice, does that have to go before the Appeals Committee? The Appeals Committee may not sit for some time. I do not know.

Robert Aske. — Yes, my Lord, that is the position.

Slesser, L.J.—I was a member of the court in *The Cristina* case, and I felt some reluctance, because I do not like refusing leave when I feel it ought to be given, and I felt it ought to be given in that case. I think it would be better than giving leave to appeal to say that, with regard to the arrest, on your undertaking to give notice of appeal within one week there would be no release. Then Sir Robert can go to the House of Lords and point out the position in which he finds himself and ask for the case to be expedited. The appeal will be dismissed. There will be no release. You say you will give notice of appeal within a week, Mr. Pilcher?

Pilcher.—Yes, my Lord.

Slesser, L.J.—Then I think you ought to be under terms for putting in your case.

Pilcher.—I am quite prepared to submit to any reasonable terms.

Slesser, L.J.—You would rather not have it in the order?

Pilcher.—I would rather not have it in the order.

Slesser, L.J.—Sir Robert, we must leave you to apply to the House of Lords. We cannot interfere. I do not know whether it would assist you at all if we intimated, as we did in *The Cristina*, that, in our opinion, this is a case which their Lordships might consider favourably.

Robert Aske.—Yes, my Lord.

Slesser, L.J.—You need not take our advice.

Goddard, L.J.—I do not know that the House of Lords like to be advised.

Slesser, L.J. — They are not advised. Sir Robert, with his great experience, will know whether it is likely to help him or not. It may do him more harm than good. We all think it ought to be expedited, but whether you tell them so or not is a matter for your discretion. There is another case in the list, *The Alec Mendi*. What about that?

Pilcher.—Will your Lordship be good enough to make the same order in that case by consent?

Slesser, L.J. — By consent, the same order. Very well.

Solicitors for the appellants, *Petch* and *Co.*

Solicitors for the respondents, *H. A. Crowe* and *Co.*

Judicial Committee of the Privy Council.

October 17, 18; *December* 2, 1938.

(Present: Lords ATKIN, THANKERTON, PORTER, Sir LANCELOT SANDERSON and Sir GEORGE RANKIN.)

Chung Chi Cheung v. The King. (*a*)

APPEAL FROM THE FULL COURT OF HONG KONG.

Hong Kong—International law—Foreign armed vessel—Murder of captain by member of crew—Vessel in British territorial waters—Arrest of accused—Failure of extradition proceedings by foreign Government—Jurisdiction of local court to try accused—Public ship in foreign waters is not treated as territory of her own nation.

The appellant, a British national who was cabin boy on board a Chinese maritime customs cruiser, killed by shooting the captain of the cruiser, who was also a British national, while the cruiser was in Hong Kong territorial waters. Both the captain and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser.

Immediately after the shooting, the acting chief officer directed the cruiser to proceed to Hong Kong, and on arrival there the accused man was taken by the Hong Kong water police to the hospital. Extradition proceedings which had been commenced against the appellant on the requisition of the Chinese authorities having failed on the ground that he was a British national, he was at once rearrested and charged with murder "in the waters of the colony." At the trial he was convicted and sentenced to death.

Held, that a public ship in foreign waters is not and cannot be treated as territory of her own nation. The domestic courts in accordance with principles of international law will accord to the ship and its crew and its contents certain immunities which do not depend upon an objective exterritoriality, but on implication of the domestic law. Applying these considerations to the facts of the present case it was plain that the Chinese Government once the extradition proceedings were out of the way, consented to the British court exercising jurisdiction.

It therefore followed that there was no valid objection to the jurisdiction, and the appeal failed.

Judgment of the Full Court of Hong Kong affirmed.

APPEAL by special leave *in forma pauperis* from a judgment of the Full Court of Hong Kong, dismissing an appeal by the appellant against conviction and sentence of death passed on him at a trial in the Supreme Court of Hong Kong.

The facts are fully set out in their Lordships' judgment.

H. J. Wallington, K.C. and *Eric V. E. White* for the appellant.

Sir *Donald H. Somervell*, K.C. (A.-G.) and *Kenelm Preedy* for the Crown.

The judgment of their Lordships was delivered by

Lord Atkin.—This is an appeal from the Full Court of Hong Kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before the Chief Justice, MacGregor, C.J. and a jury. The appellant was convicted of the murder of Douglas Lorne Campbell and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser *Cheung Keng* while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain; the appellant was cabin boy. Both were British nationals. At the trial

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

the point was taken that as the murder took place on an armed public vessel of the foreign Government, the British court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and on appeal his decision was upheld by the Full Court over which he presided.

In order to elucidate the legal position it will be necessary to make a short statement of the material facts. On the 11th January, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge and shot at and wounded the acting chief officer, and then went below and shot and wounded himself. The acting chief officer as soon as he was wounded directed the boatswain to proceed to Hong Kong at full speed and hail the police launch. He wanted, he said, help to arrest the accused from the Hong Kong police. Within a couple of hours the launch of the Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the accused had armed himself, of the spent revolver bullets and expended shells, and of some unexpended cartridges. On the 25th February extradition proceedings were commenced against the accused on the requisition of the chairman of the Provincial Government of Kwangtung alleging murder and attempted murder on board the Chinese Customs cruiser "within the jurisdiction of China while the said cruiser was approximately one mile off Futaumun (British waters)." This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many adjournments the magistrate decided, on evidence called for the defence, that the accused was a British national and that the proceedings therefore failed. The accused was at once rearrested and charged with murder "in the waters of this colony" and duly committed. At the hearing before the magistrate and at the trial the acting chief officer and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced and gave evidence as to the revolvers, cartridge cases and bullets. As has already been stated the accused was convicted and sentenced to death.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is or is to be treated by other nations as part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any court where jurisdiction depends upon the act in question or the party to the proceedings being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not and is not treated as territory of her own nation. The domestic courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law; and alone is consistent with the paramount necessity expressed in general terms for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that so far at any rate as the courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our courts and on what principle are they based?

The principle was expounded by that great jurist, Marshall, C.J., in *The Exchange*, 7 Cranch 116 (1812), a judgment which has illumined the jurisprudence of the world: "The jurisdiction of the courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions therefore to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction: but if understood not less obligatory. The world being composed of distinct sovereignties possessing equal rights and equal independence whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates, and its wants require, all sovereigns have consented to a relaxation in practice in cases under certain peculiar circumstances of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . . . This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse and an interchange of good offices with each other have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation."

The Chief Justice then proceeds to illustrate the class of cases to which he has referred. He takes first "the exemption of the person of the sovereign from arrest or detention within a foreign territory." Second, "standing on the same principles as the first is the immunity which all civilised States allow to foreign ministers": "Whatever may be the principle on which this immunity is established whether we consider him as in the place of the sovereign he represents or by a political fiction suppose him to be extra-territorial and therefore in point of law not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it." The judgment then proceeds to

the third case " in which a sovereign is understood to cede a portion of his territorial jurisdiction," namely, " where he allows the troops of a foreign power to pass through his dominions." The Chief Justice lays down that " the grant of a free passage implies a waiver of all jurisdiction over the troops during this passage and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require." He points out that differing from the case of armed troops where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction: " But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign: is employed by him in national objects. He has many and powerful motives for preventing these objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port may reasonably be construed and it seems to the court ought to be construed as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality. It seems then to the court to be a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction." This conclusion is based on the principles expounded in the extracts from which the Chief Justice summarised at p. 143 of the report: " The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory: that this consent may be express or implied; and that when implied its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act." The judgment then proceeded to apply the principles stated to the case before the court and held that the former owners of the *Exchange* which had been captured by the French and entered the port of Philadelphia under stress of weather could not have a decree to recover the vessel which must be treated as an armed public vessel of the Emperor of the French whose title could not be controverted in the American court.

The extreme doctrine of exterritoriality was not in issue in the *Exchange*: and neither the principles enunciated by Marshall, C.J. nor his application of them appears to support it. In this country the question arose in acute form in 1875 over instructions issued by the Admiralty to commanders of Her Majesty's ships in respect of the treatment of fugitive slaves. They were attacked by Sir William Vernon Harcourt, then Whewell Professor of International Law at Cambridge and Liberal M.P. for Oxford, in two letters to *The Times* under the title " Historicus." He there stated, the 4th November, 1875, that " he had seen with much surprise that the doctrine of the absolute immunity of a public ship and all persons and things on board of it from local jurisdiction and the operation of local law where lying in the territorial waters . . . has been treated as a doubtful proposition. I had certainly supposed that in the whole range of public law there was no position more firmly established by authority, more universally admitted by Governments, or one which had been more completely accepted in the intercourse of States as unquestioned and unquestionable."

The Government appointed a Royal Commission to report on the whole question as to the reception of fugitive slaves, which included such eminent lawyers as Sir Alexander Cockburn, C.J., Sir Robert Phillimore, Mr. Montague Bernard, Mr. Justice Archibald, Mr. Alfred Thesiger, K.C., Sir Henry Maine, Mr. James Fitzjames Stephen, K.C., and Mr. Henry C. Rothery, the Registrar in Admiralty. The lawyers were not agreed as to the doctrine of international law, and the Commission were able to report without expressing any decided opinion about it. The lawyers, however, wrote memoranda which were annexed to the report. Sir Robert Phillimore, Mr. Bernard and Sir Henry Maine appeared to favour the more extreme doctrine but admitted it must have qualifications. Sir Alexander Cockburn, in a memorandum which is worthy to be compared with the judgment of Marshall, C.J., discussed the whole question of exterritoriality of a public ship of war, quoting the authorities from 1740 onwards and referring to cases of Government action. He quotes Casaregis (1740), " Discursus de Commercio," Hubner (1759), " De la Saisie des Batiment Neutres," Lampredi, Pinheiro Ferreira, Azueri, Lord Stowell's advice to the British Government in 1820 in *Brown's* case, Wheaton, Hautefeuille, " Des Droits et des Devoirs des Nations Neutres," Ortolan, " Diplomatie de la Mer," Bluntschli Heffter and Calvo. Of these Hubner, Hautefeuille, Ortolan and Calvo support in his view the high doctrine of exterritoriality, Casaregis and Wheaton are non-committal, the others are against the doctrine. After controverting the views which favour complete exterritoriality, and pointing out the difficulties and indeed absurdities to which the doctrine leads, he says: " The rule which reason and good sense would as it strikes me prescribe would be that as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another matters should be left entirely to the law of the ship, and that should the offender escape to the shore he should if taken be given up to the commander of the ship on demand and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject or if a crime having been committed on shore the criminal gets on board a foreign ship, he should be given up to the local authorities. In which way the rule should be settled so important a principle of international law ought not to be permitted to remain in its present unsettled state."

In this passage, which was cited with approval by the Full Court of Hong Kong in the present case, it should be observed that the Lord Chief Justice assumes that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial court would have jurisdiction. Their Lordships doubt whether when he is dealing with the case of a crime committed on board on a local subject he has present to his mind the possibility of the local subject being a member of the crew. And while he says that in the cases put the offender should be given up to the local authorities, he does not say whether, if surrender were refused, judicial process could be directed to the captain of the foreign vessel to secure the custody of the offender by the local authority.

In the memorandum of Sir Alexander Cockburn, Archibald, J. concurred. Mr. Stephen wrote a memorandum to the same effect in the trenchant Stephen style. Mr. Rothery treated the dogmatic assertion of "Historicus" and his authorities to a merciless dissection to which the conclusions of a Whewell Professor can seldom have been subjected. In addition to the authorities already mentioned, reference should be made to the passages cited in the judgment of the Supreme Court in this case from Hall, 8th edit., 1924, edited by Professor Pearce Higgins, par. 55. There the author states that a public vessel is exempt from the territorial jurisdiction; but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship and taking no effect externally to her in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively concerned. The author appends a note: "The case which however would be extremely rare on board a ship of war of a crime committed by a subject of the State within which the vessel is lying against a fellow subject would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal."

The other passage is from "Oppenheim," 5th edit., 1937, edited by Professor Lauterpacht, vol. 1, par. 450. The author adopts the full exterritorial view: "The position of men-of-war in foreign waters is characterised by the fact that they are called 'floating portions of the flag State.' For at the present time there is a customary rule of international law universally recognised that the State owning the waters into which foreign men-of-war enter must treat them in every point as though they were floating portions of their flag State." When, however, he is dealing with the analogous immunities of diplomatic envoys, par. 389, he says, "exterritoriality in this as in every other case is a fiction only, for diplomatic envoys are in reality not without but within the territories of the receiving States." There is a note that "The modern tendency among writers is towards rejecting the fiction of exterritoriality," a note which is not in the second edition, the last prepared by the author, and appears for the first time in the fourth edition edited by Professor McNair.

Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim which regards the public ship "as a floating portion of the flag State." However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it unless indeed they were invited to exercise it by competent authority of the flag nation. But if a resident in the receiving State visited the public ship and committed theft and returned to shore, is it conceivable that when he was arrested on shore and shore witnesses were necessary to prove dealings with the stolen goods and to identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local court then has no jurisdiction, and this fiction dismisses the offender untried and untriable. For it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. Similarly in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy and having completed his crime is arrested in his own country cannot be tried in the courts of the country? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local courts. Even so objective exterritoriality would for the reason given above deprive our courts, at any rate, of any jurisdiction in such a case. The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign but to lower them by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic their Lordships agree with the remarks made by Professor Brierly in "The Law of Nations (1928)," p. 110:

"The term 'exterritoriality' is commonly used to describe the status of a person or thing physically present in a State's territory, but wholly or partly withdrawn from that State's jurisdiction by a rule of international law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is in fact within, and not outside, the territory; it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only metaphor and to deduce untrue legal consequences from it as though it were a literal truth. At most it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends."

The true view is that in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys and public ships and the naval forces carried by such ships certain immunities. Some are well settled; others are uncertain. When the local court is faced with a case where such immunities come into question it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property including his public armed ships are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service by local jurisdiction. What are the precise limits of the immunities it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these. In

the present case the question arises as to the murder of one officer and the attempted murder of another by a member of the crew. If nothing more arose the Chinese Government could clearly have had jurisdiction over the offence ; and though the offender had for reasons of humanity been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim or the offender or both are local nationals should make a difference if both are members of the crew. But this request was never made. The only request was for extradition, which is based upon treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local courts recognise flow from a waiver by the local sovereign of his full territorial jurisdiction and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign court over his rights of property. Here is no question of saying you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sovereign may say you have waived your jurisdiction in certain cases ; but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British court exercising jurisdiction. It is not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British court in aid of the prosecution. That they had originally called in the police might not be material if on consideration they decided to claim jurisdiction themselves. But the circumstances stated together with the fact that the material instruments of conviction, the revolver bullets, &c., were left without demur in the hands of the Hong Kong police make it plain that the British court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tientsin in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favour of the Crown on this point also, but in view of the opinion already expressed on the main point it is unnecessary to decide this, and no opinion is expressed upon it. For the above reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Reid, Sharman,* and *Co.*

Solicitors for the respondent, *Birchalls.*

Supreme Court of Judicature.

COURT OF APPEAL.

December 2 *and* 12, 1938.

(Before SCOTT, MACKINNON, and DU PARCQ, L.JJ.)

The Nordborg. (*a*)

Carriage of goods by sea—Short delivery of timber under some bills of lading and over-delivery of other timber under some other bills of lading—Shipowners' claim for balance of freight—Counterclaim of consignees for short delivery—Reply by shipowners claiming to be credited with the value of timber over-delivered which the consignees had accepted, which value was admittedly in excess of the value of the timber short delivered.

Appeal by defendants (consignees) from a decision of the county court judge sitting at Kingston-upon-Hull in an action by plaintiffs (owners of the steamship N.) *claiming from the defendants* 19*l.* 12*s.* 9*d. balance of freight on a cargo of redwood shipped at Leningrad in August* 1933 *under twelve bills of lading dated the* 14*th to the* 17*th August,* 1933. *The defendants had accepted delivery of part of this cargo which was carried on board the steamship* N., *but by their defence, though admitting that* 19*l. odd was due for freight they counterclaimed in respect of the short delivery of* 286 *pieces of redwood under four of the bills of lading. In their reply the plaintiffs admitted their failure to deliver certain pieces of redwood, but alleged that the defendants had received* 362 *pieces of wood not covered by any of the bills of lading and had accepted them "in satisfaction or on account" of the timber which the plaintiffs were under an obligation to deliver to them under the respective bills of lading. Alternatively, the plaintiffs said that they were entitled to credit for the value of the* 362 *pieces of timber over-delivered to the defendants as a set-off against the latter's counterclaim in respect of short delivery. It was further alleged by the plaintiffs that they had received all the pieces loaded on board the* N. *as carriers and bailees, and were entitled to possession thereof, and that the defendants were not entitled to possession of any goods not covered by the bills of lading. They alleged that the defendants' refusal to deliver the goods as over-delivered to the plaintiffs and their detention by the defendants was wrongful and amounted to conversion, and they claimed that they were entitled either to have the over-delivered pieces of timber returned to them or to be credited with their value as a set-off against the defendants' counterclaim in respect of short delivery. The county court judge gave judgment for the plaintiffs for* 19*l.* 12*s.* 9*d.*,

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

balance of freight, judgment for the defendants upon their counterclaim for the value of the goods short-delivered, and further directed that the plaintiffs were to be at liberty to set-off the timber over-delivered or its value against the defendants' counterclaim for short delivery.

Held (reversing the learned county court judge), that the shipowners did not derive a right to anything more than the payment of additional freight merely from the fact that the consignees had accepted the over-delivered goods, and that if there was such a right, it would depend not on an implication of law but on an inference to be drawn from the particular facts. In the present case there were no facts before the court to support a finding that the defendants were bound by contract to pay the plaintiffs the value of the goods over-delivered. Appeal allowed.

Romer, L.J.'s dictum in Mediterranean and New York Steamship Company *v.* A. F. and D. Mackay ((1903) 1 *K. B.* 297, *at p.* 305) *as to the obligation to give credit to a shipowner in case of over-delivery disapproved.*

THIS was an appeal from a decision of His Honour Judge Sir Reginald Mitchell Banks sitting in the Kingston-upon-Hull County Court in an action brought by the owners of the steamship *Nordborg* against Messrs. C. P. Sherwood and Co., timber merchants, of Jameson Street, Hull. The dispute between the parties is sufficiently set out in the headnote. In the course of his judgment, du Parcq, L.J. who read the judgment of the court, referred to a dictum of Romer, L.J. in *Mediterranean and New York Steamship Company* v. *A. F. and D. Mackay* ((1903) 1 K. B. 297) and cited a passage from that judgment at p. 305, which passage, however, would appear from the report of the same case in 72 L. J. (K. B.) at p. 150 to be somewhat different, and to read as follows: "I can find nothing in the circumstances of this case which says that because they took the over-delivery of the scantlings and boards they must be taken to have elected to treat the over-delivery as making up, so far as it went, for the shortage of 1253 pieces of deal. On the contrary, as I have said, the inference of fact is that they took the surplus as an over-delivery of scantlings and boards alone. That being so, the result would be as follows: the consignees would be entitled to compensation for the deficiency of the deal; they ought to give credit, and they have given credit, for the over-delivery of scantlings and boards. The result is they are entitled to what they have lost by the shortage through the default of the shipowners in not complying with the bill of lading. The amount awarded in the court below is the difference between the loss to them of the shortage on the deals after giving credit for the over-delivery of scantlings and boards. That appears to be perfectly right in every respect."

It will be seen from the judgment that the above dictum was disapproved by the Court of Appeal in the present case.

Amongst the cases relied on by the respondents (plaintiffs) in addition to *Mediterranean and New York Steamship Company* v. *A. F. and D. Mackay* were the following: *Van Oppen and Co Limited* v. *Tredegars Limited* ((1921) 37 Times L. Rep. 504), and *Lancashire and Yorkshire Railway Company* v. *MacNicoll* (118 L. T. Rep. 596).

F. A. Sellers, K.C. and *A. A. Mocatta* for the appellants (defendants).

Sir *Robert Aske*, K.C. and *Owen L. Bateson* for the respondents (plaintiffs).

du Parcq, L.J. read the judgment of the court: This is the defendants' appeal from a judgment of the Kingston-upon-Hull County Court. The defendants were the holders of twelve bills of lading bearing various dates in August, 1933, under which they took delivery of a part cargo of sawn timber borne in the plaintiffs' vessel from Leningrad to Hull. To a claim for freight amounting to 19*l.* 12*s.* 9*d.* the defendants, while admitting the claim, counterclaimed damages on the ground of short delivery on four of the bills of lading. It was provided in each of the bills of lading that all the terms, conditions, clauses and exceptions contained in the charter-party were deemed to be incorporated therein, and by clause 10 of the charter-party the owner was to be responsible for the number of pieces signed for by the master or his duly authorised agents. Possibly because of the operation of this clause the plaintiffs were constrained to admit in their reply that "they failed to deliver certain pieces of wood to the defendants as claimed in the counterclaim." By way of defence to the counterclaim, however, they sought to rely on the fact that a quantity of timber amounting to 362 pieces had been received from them by the defendants which was not covered by any of the twelve bills of lading. By their pleading they made alternative and inconsistent allegations, as, of course, they were entitled to do. First, they said that the defendants had accepted the quantity over-delivered "in satisfaction or on account of" the plaintiffs' "obligation to deliver the number of pieces set out in the respective bills of lading." Alternatively, they said that this timber had been delivered to the defendants "by mistake," and that the defendants had refused to deliver it up to the plaintiffs and wrongfully detained it. They claimed to be entitled to be credited with the value of the 362 pieces, or to have the 362 pieces returned or their value paid to them.

At the trial the bills of lading were put in evidence. There was no other evidence, written or oral. Each party relied on the admissions in the other party's pleadings. The plaintiffs for their part further relied on certain admissions obtained from the defendants in response to a notice to admit facts. These admissions, so far as it is necessary to set them out, were as follows: (1) that 362 pieces of wood over and above the number shown in seven specified bills of lading were discharged to and received by the defendants from the vessel on the said bills of lading and that they were of the quality described in such bills of lading; (2) that the value of the said 362 pieces calculated on the average of the respective bills of lading exceeded the value of the admitted shortage of 286 pieces of wood calculated on the same basis.

The question which we have to decide is whether, on the admitted facts, the learned judge was justified in holding that the defendants must give credit to the plaintiffs for the value of the 362 pieces described as "over-delivered."

It was conceded by counsel for the plaintiffs that upon these facts he could not ask the court to find that the defendants had accepted the 362 pieces "in satisfaction or on account of" the plaintiffs' obligation to deliver the number of pieces set out in the bills of lading. He contended, however, that the proper inference from the facts was that the plaintiffs had established their alternative allegation and that the defendants were liable to them as tortfeasors in detinue or conversion.

In support of this contention counsel referred us to the decision of a Divisional Court in *Lancashire and Yorkshire Railway Company and others* v. *MacNicholl* (118 L. T. 596). In that case it was not in dispute that the consignees had received from the carriers goods which were the property of another and to the possession of which they had no right. In the present case, as was pointed out by counsel for the defendants, it is consistent with the facts admitted that, as between themselves and their vendors, the defendants were contractually bound (or at least entitled) to accept and to pay the vendors for the 362 pieces, and that they were, in truth, themselves the owners of the timber described as "over-delivered." The figures in the bills of lading, though conclusive evidence against the shipowners, may be erroneous, and it may be that in fact the 362 pieces were shipped by the consignor under those bills of lading. Not only is there no admission of the allegations that the 362 pieces were delivered "by mistake" and that the defendants have "refused to deliver" them to the plaintiffs, but it was admitted at the Bar that these allegations were first made by the plaintiffs in a pleading delivered on the 4th January, 1937, and they were then pleaded as an alternative to the allegation that the defendants had accepted this quantity of timber in satisfaction of the plaintiffs' obligation to deliver other timber. It was indeed common ground that from 1933 to 1937 no request had been made by the plaintiffs that the 362 pieces should be redelivered to them. It may well be thought that the true inference from the known facts is that the plaintiffs were well aware that the defendants were entitled to retain the 362 pieces. On the materials before the learned county court judge it would have been impossible for him to hold, and indeed he has not held, that the defendants were liable to the plaintiffs in tort.

The remaining question is whether the mere fact that a consignee has received from the shipowner a quantity of goods in excess of that specified in the bill of lading renders him liable to pay to the shipowner or credit him with the value of the over-plus. The learned county court judge has answered this question in the affirmative. In so doing he followed a previous decision of his own in which he had founded his judgment upon a dictum of Lord Justice Romer in *Mediterranean and New York Steamship Company* v. *A. F. and D. Mackay* ((1903) 1 K. B. 297, at p. 305). In that case there was a short delivery of goods of one sort, but an over-delivery, which was accepted by the consignees, of goods of another sort. The decision of the court was that the consignees had a claim for shortage and for an allowance in respect, first, of the freight attributable to the portion not delivered, and, secondly, of the value of the quantity which was not delivered. It appears that the consignees had in fact given credit to the shipowners for the value of the goods over-delivered (see the report of the same case in 72 L. J. (K. B.) 147), and in the course of his judgment Lord Justice Romer said ((1903) 1 K. B. at p. 305):

"I can find nothing in the circumstances of the case to show that because they [the consignees] took the over-delivery of the scantlings and boards they must be taken to have elected to treat the over-delivery as making up, so far as it covered it, the shortage of deals. That being so, the result would be that they would be entitled to compensation for the deficiency of the deals, and ought to give credit for the over-delivery in scantlings and boards. The amount awarded in the court below is the difference between the loss by shortage of deals and the value of the over-delivery of scantlings and boards, and appears to be right in every respect."

The report in the *Law Journal* attributed to the Lord Justice the further statement that the consignees had in fact given credit for the over-delivery. It may be doubted whether Lord Justice Romer, in the passage quoted, intended to enunciate a principle of general application. Assuming that he did so intend, it is, we think, plain that his dictum was not necessary to the decision of the case, and nothing to the same effect is to be found in the judgments of the other members of the court.

We were referred to a recent decision of Mr. Justice Goddard (as he then was) in which doubt was expressed as to the correctness of the dictum and the accuracy of the reports (*Lauro* v. *L. Dreyfus and Co.*, 59 Ll. L. Rep. 110, at pp. 116, 117).

In the absence of any binding authority, it is necessary for this court to decide the question according to general principles. It was argued that, just as the buyer who accepts a quantity of goods larger than he contracted to buy must pay for them at the contract rate (see sect. 30, sub-sect. (2), of the Sale of Goods Act, 1893), so, by analogy, the consignee who takes delivery from the shipowner of a larger quantity of goods than the bill of lading specifies must pay their value to the shipowner.

In our view, the two cases are in no way analogous. As between seller and buyer, the delivery of a quantity larger than that specified in the contract was regarded at common law as a proposal for a new contract of sale which the buyer might accept by retaining the goods (see *Hart* v. *Mills*, 15 M. & W. 85, and *Cunliffe* v. *Harrison*, 1851, 6 Ex. 903, per Baron Parke, at p. 906). As between shipowner and consignee we can find no reason for holding that, whether (as was suggested) by implication of law, or by way of inference from the facts, the acceptance by the latter of the overplus of itself gives the shipowner a right to anything more than the payment of additional freight. *Primâ facie* the shipowner is entitled to be paid for carrying the surplus goods, but not to be paid their value or their price. Even the right to additional freight, where goods are not mentioned in the bill of lading, and are thus it would seem, not covered by sect. 1 of the Bills of Lading Act, 1855, would appear to depend not on an implication of law, but on an inference which may properly be drawn from the facts (see *Sanders* v. *Vanzeller*, 1843, 4 Q. B. 260, at p. 295; *White and Co.* v. *Furness, Withy, and Co.*, 7 Asp. Mar. Law Cas. 574; 72 L. T. Rep. 157; (1895) A. C. 40, per Lord Herschell, at p. 43).

In the present case there were no facts before the learned county court judge to support a finding that the defendants were bound by contract to pay to the shipowners the value of goods the price of which, for all that appears from the admitted facts, either may have been paid long ago by the defendants to their vendors or may be a debt due from the defendants to their vendors which would not be satisfied by payment to the shipowners.

Counsel for the plaintiffs sought to rely upon a passage in the speech of Lord Moulton in *Sandeman and Sons* v. *Tyzack and Branfoot Steamship Company Limited* (109 L. T. Rep. 580; (1913) A. C. 680, at pp. 696 and 697), which deals with the position of a consignee whose goods have become "inseparably and indistinguishably mixed" with those of another consignee, "without loss and without deterioration." Lord Moulton there says that if the consignee chooses to exercise his right to claim as tenant in common the mixture of his goods with those of another, "the shipowners

are entitled to the benefit of what he received in reduction of damages for their breach of contract." In the case supposed, the consignee elects to exercise a right which he has acquired solely by reason of the shipowners' breach of contract. He thus becomes co-owner of a mixture in which the goods which should have been delivered to him as a separate entity have been merged. It seems almost self-evident that any profit which this co-ownership brings him should be set off against the loss occasioned by the breach of contract.

In the present case, the consignee is not shown to have received any countervailing advantage whatever which may be set against his loss, nor is there anything to show any *commixtio* of his goods with those which are the property of another person. Here again the answer to the respondents' contention is that the appellants may well have had a right to receive not only the goods which the respondents failed to deliver, but also the 362 pieces which, according to the bill of lading, were over-delivered.

In the result, the appeal succeeds. The judgment of the county court must be varied (1) by omitting that part of it which adjudges that the plaintiffs are to be given credit for a sum to be assessed as the value of overage of delivery, and (2) by giving the costs of the issue raised by the reply to the defendants instead of to the plaintiffs. The defendants are to have the costs of this appeal.

Leave to appeal granted.

Solicitors for the appellants (defendants), *Pritchard, Sons, Partington*, and *Holland*, agents for *Andrew M. Jackson* and *Co.*, of Hull.

Solicitors for the respondents (plaintiffs), *Botterell* and *Roche*, agents for *Sanderson* and *Co.*, of Hull.

House of Lords.

November 15, 17, 18; *December* 15, 1938.

Before Lords ATKIN, THANKERTON, RUSSELL, WRIGHT and PORTER.)

The Owners of Motor Vessel Heranger v. The Owners of Steamship Diamond; The Heranger. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision near Stone Ness Point, River Thames, between approaching vessels — Rules of good seamanship—Duty of vessel navigating on proper side to reverse engines—Both vessels held to blame—Proportion of damage—Port of London River By-laws, 1914, *by-law* 33.

The H., *a twin-screw motor vessel of* 4877 *tons gross register and* 398*ft. long, was bound down the River Thames to Antwerp partly laden in charge of a Trinity House pilot. The* D., *a small steamship of* 628 *tons gross register and* 170*ft. long, was in ballast. The* H. *was abreast of Stone Court Wharf when she first sighted the* D. *The* D. *was showing her green light and was two points on the port bow of the* H. *The pilot of that vessel expected the* D. *to open her red light so as to comply with rule* 33 *of the Port of London By-laws, which required vessels passing up and down the river to pass port to port, but the* D. *continued to show her green light. The* H. *was then proceeding with the tide at about eleven knots, and the* D. *at six knots, and the two vessels were thus approaching at not less than* 1000*ft. a minute. The engines of the* H. *were stopped at* 6.10 *p.m., when the vessels were about four cables apart. At* 6.11 *the engines of the* H. *were put full speed astern, when the distance between the two vessels was about two cables, or* 1200*ft., and the stopping of the* H.'s *engines produced no appreciable effect on the* H.'s *speed. The collision occurred about a minute later; the* D. *was struck forward and sank immediately. It was not in question that the* D. *was the more seriously to blame, as she ported when she ought to have starboarded in order to pass the* H. *port to port. She gave no port signal until the vessels were about* 1200*ft. apart. The trial judge found that the* H. *was also to blame for the collision in the proportion of one-third. That decision was affirmed by the Court of Appeal (Scott, L.J. dissenting).*

Held, that the continuance of the D. *on her wrong course had reached a point at which the* H. *was bound to take effective action, and had reached this point before she actually reversed her engines. That breach of duty contributed to the collision, or at least to the extent of damage consequent upon it. It would have been good and prudent seamanship for the* H. *to have reversed her engines at a time substantially before she actually did.*

The Aeneas (18 *Asp. Mar. Law Cas.* 571; 154 *L. T. Rep.* 246; (1935) *P.* 128) *overruled.*

Decision of the Court of Appeal affirmed.

APPEAL from the decision of the Court of Appeal (Greer and Slesser, L.JJ., Scott, L.J. dissenting), dated the 15th December, affirming the decision of Bucknill, J. dated the 30th July, 1937.

The action arose out of a collision between the British steamship *Diamond* and the Norwegian motor ship *Heranger* which took place on the evening of the 30th December, 1936, in the river Thames. Bucknill, J. held that both vessels were to blame for the collision, and he apportioned the blame as to one-third to the *Heranger* and as to two-thirds to the *Diamond*. His decision was affirmed by the Court of Appeal by a majority. The owners of the *Heranger* appealed.

The facts, which are sufficiently summarised in the headnote, are fully set out in the opinion of Lord Wright.

The Port of London River By-laws, 1914, by-law 33, provides: "Every steam vessel proceeding up or down the river shall, when it is safe and practicable, keep to that side of mid-channel which lies on the starboard side of such vessel and when two steam vessels proceeding in opposite directions, the one up and the other down the river, are approaching each other so as to involve risk of collision they shall pass port side to port side, unless the special circumstances of the case make departure from this by-law necessary."

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

Hayward, K.C. and *Gordon Williams*, for the appellants.

Carpmael, K.C. and *Owen L. Bateman*, for the respondents.

The House took time for consideration.

Lord Atkin.—I have had an opportunity in this case of reading the opinion which is about to be delivered by my noble and learned friend Lord Wright. I agree with it, and I will only add that as the result of the decision in this case, it is clear that the decision in the case of *The Aeneas* (18 Asp. Mar. Law Cas. 571; 154 L. T. Rep. 246; (1935) P. 128) must be taken to be overruled.

Lord Thankerton.—I am of the same opinion.

Lord Russell.—I also concur.

Lord Wright.—The appellants have been held by Bucknill, J. and the Court of Appeal, Scott, L.J. dissenting, liable in the proportion of one-third for the damages resulting from a collision between their vessel the *Heranger* and the respondents vessel the *Diamond*, who have been held liable for two-thirds of the damage. They are appealing in order to secure a judgment that the *Diamond* was solely to blame.

The collision took place at about 6.12 p.m. on the 30th December, 1936, in the River Thames, nearly opposite Stone Ness Point. The night was dark, but fine and clear, there was a slight southerly breeze, the tide was ebb, and of about two knots in force. The *Heranger* is a twin-screw motor vessel of 4877 tons gross register and 398ft. long. She was bound down the river from Victoria Dock to Antwerp, partly laden and in charge of a Trinity House pilot named Dean. The *Diamond* was a small steamship of 628 tons gross register and 170ft. long. She was in ballast and was drawing 8ft. 6in. forward and 11ft. 3in. aft. She was at the time proceeding to the Kent Portland Cement Company's wharf, which is on the south side of the river west of Greenhithe from the Bell Wharf, which is also on the south side of the river and is in St. Clement's Reach. The collision took place about opposite Johnson's Wharf, which is between Greenhithe and the Kent Company's wharf, at a point in the stream about 500ft. from the south shore and just on the edge of the dredged channel. The river at that point is about half a mile wide. Unfortunately, the master and one of the men were drowned. Thus the master, who had been both steering and navigating the *Diamond*, could not give his side of the story. The facts, however, have been very clearly found by the learned judge, whose findings have been accepted by both parties. Indeed, there was practically no dispute about what happened, except as to the whistle signals given respectively by the two vessels. The displacement of the *Heranger* is calculated at 10,000 tons and of the *Diamond* at 800 tons.

The *Heranger* was about abreast of Stone Court Wharf when she first sighted the *Diamond*. The *Diamond* was then coming up St. Clement's Reach. The judge found she was sighted at 6.6. p.m. She was showing her green light and a single masthead light, she was distant about one mile and was two-and-a-half points on the port bow of the *Heranger*. The pilot of that vessel expected the *Diamond* to open her red when she began to round Stone Ness, so as to comply with rule 33 of the Thames By-laws, which requires vessels proceeding up and down the river to pass port to port. But the *Diamond* continued to show her green in about the same or a finer bearing on the port bow of the *Heranger*. The *Heranger* was then proceeding with the tide at about 11 knots, the engines having been put full speed ahead at 6.6. p.m. This speed was not excessive. The *Diamond* is said to have had a speed of 6 knots through the water or about 4 knots over the land. The vessels were thus approaching each other at not less than 1,000ft. a minute. It appears from her engine log that the engines of the *Heranger* were stopped at 6.10 according to the pilot's order. The pilot explained in evidence that he gave this order because he thought there was danger of collision. The vessels were then about four cables apart. The *Diamond* had not altered her course or opened her red on rounding Stone Ness as the pilot, thinking the *Diamond* was bound up river in the ordinary course, had expected her to do. A minute later at 6.11, the engines of the *Heranger* were put full astern. The distance between the vessels was then about two cables, or 1200ft., stopping the engines having in the minute produced no appreciable effect on the *Heranger's* speed. The judge has precisely found the time when the engines were reversed and the relative positions of the two vessels at that time. He took the time 6.11 p.m. from the engine log. He fixed the position of the *Diamond* on the independent evidence of a tug master, who passed the *Diamond* just before she signalled and placed her about 100ft. off Stone Ness Point, and a little to the southward of mid-channel. He found that the *Heranger* was heading straight down Long Reach with wheel amidships, which would tend to take her nearer to the south bank. He found, after conflicting evidence, that the *Diamond* was first to sound a signal, and that the signal was two short blasts. The *Heranger* sounded a signal of three short blasts in reply.

What had happened was that the *Diamond* had gone full ahead and hard aport, in order to make the Kent Wharf, at a time when, as the judge found, she must have been on a course which was at an angle of only two or three points from the opposite course of the *Heranger*. The inevitable collision occurred about one minute later, about opposite Johnson's Wharf and about 500ft. from the shore. The *Diamond* was struck forward at an angle leading about five points aft just abaft the collision bulkhead. She sank immediately. The *Heranger* anchored.

It is not in question that the *Diamond* was the more seriously to blame of the two vessels. If she was to be deemed to be proceeding up the river she broke by-law 33, because she ported, when she ought to have starboarded in order to pass the *Heranger* port to port. She gave no port wheel signal till the vessels were about 1200ft. apart. If she was to be regarded as crossing from one side of the river to the other, she broke by-law 34, because she was not navigated so as not to cause obstruction, injury or damage to any other vessel. But apart from any particular by-laws, her action in porting when she did and putting herself in the way of the *Heranger* was so ill-advised, and such a breach of good seamanship, as almost to deserve the epithet "suicidal" which has been applied to it. The respondents have not contended that the *Diamond* was not to blame.

The question in the appeal is whether the judge was right in finding that the *Heranger* was also to blame, and holding the appellants liable in the proportion of one-third.

Certain minor grounds of complaint put forward by the respondents against the *Heranger* may be rejected as the judge and the Court of Appeal have done. These complaints are that her speed was excessive, that she was keeping too close to the

south bank, that she was taking too wide a sweep when rounding the bend, that she should have sounded a starboard wheel signal. I do not think it necessary to discuss these matters further. There remains the question which the judge said had perplexed him, and which is certainly difficult, whether the *Heranger* should have taken action earlier to reduce her speed, that is, whether she left it too late to reverse her engines? She did indeed stop at four cables, but merely to stop her engines would produce no appreciable effect up to the time when the engines were reversed, whereas reversing reduced her speed, in the minute which elapsed before the collision, from about eleven to about four or five knots. Ought the pilot of the *Heranger* to have reversed her engines at a time substantially sooner than he did, say, at the time when he stopped his engines, which was when the vessels were at about four cables distance, or at least substantially before the distance had narrowed to two cables when he did reverse? The judge has found that the pilot ought to have done so. The Elder Brethren who were with him advised him to the same effect. It is clear that the judge came to his conclusion on a survey of all the circumstances. He pointed out that the *Heranger* took no effective action to reduce her speed until the vessels were about 1200ft. apart, because he disregarded the stopping of the engines as not capable of producing any material effect in the two minutes between stopping and reversing. When the *Heranger* reversed, she was closing on the *Diamond* at a rate of at least 1000ft. a minute, quite apart from the *Diamond's* speed of approach. If the *Diamond* had starboarded, she would have been retarded in doing so by the tide on her starboard bow. The precise bearing of the *Diamond* was difficult to ascertain because she had only one masthead light. She had been angling to the south side of the channel for some minutes in full view of the *Heranger* and had shown no intention to starboard. She was gradually getting finer on the port bow of the *Heranger*, although the latter was gradually drawing closer to the southern edge of the channel, and could not herself go to starboard to any extent. These considerations taken together, which are fully justified by the evidence, warrant the conclusion that there was risk of collision even at four cables. This view was confirmed by the evidence of the pilot of the *Heranger*. He had been watching the *Diamond* for some time, since he had sighted her about a mile away, expecting her all the time to open her red. He did not think she was going to the south shore. When the ships were about four cables away, he did think there was danger of collision and then he stopped the engines. It is clear that what impressed him was the delay of the *Diamond* in straightening up. He did not know what she was going to do. At this stage the *Diamond* had not ported nor had she signalled. The question depends on whether the continuance of the *Diamond* on her wrong course reached a point at which the *Heranger* was bound to take effective action and had reached this point before she actually reversed. I agree with the judge and the Court of Appeal that it had. In my opinion that breach of duty contributed to the collision, or at least to the extent of damage consequent on it.

The question in this case depends on the rules of good seamanship, or what a prudent seaman ought to do, not on the breach of any specific rule or regulation. The nautical assessors who have been advising your Lordships agree that it would have been good and prudent seamanship for the *Heranger* to reverse at a time substantially before she actually did. The question is one of fact to be decided on a consideration of all the relevant circumstances. This, I think, is the footing on which the judge and the majority of the Court of Appeal have proceeded. In argument, however, the matter has been complicated by reference to what Scott, L.J. in his dissenting judgment called "a rule of law in the sense that it is a statement of what is the meaning of the rules." It is said that the rule has been laid down in several cases, and in particular the words of Hill, J. in *The Wheatear* (3 Ll. L. Rep. 229), are quoted as a statement of the rule. Hill, J. said that "it would lead to great confusion if at an early stage ships which are navigating in a narrow channel were under this obligation, that because one is not immediately seen to be acting properly the other must be called on to take drastic action. I think that each is for a time entitled to assume that the other will act correctly and to go upon that assumption, and it is only at the last when it is quite clear that the other is not going to act correctly that the one which has hitherto been doing what is right is called upon to do something more—that is, to take immediate action to avoid the collision which the other is bringing about, namely, by reversing engines." The same distinguished Admiralty judge in *The Haliartus* (31 Ll. L. Rep. 189), in a similar connection described the question to be determined as a question of law and said it was whether the vessel was in the circumstances justified in maintaining speed or whether she could not rely on expecting that the other vessel would correct her mistake and incur the risk of defeating that vessel's repentance.

I do not think that a question of this character can properly be treated as a question of law. The Court of Appeal recently held in *Tidy* v. *Battman* (150 L. T. Rep. 90; (1934) 1 K. B. 319), a common law action for negligence in a motor-car collision, that it was not proper to set aside the finding of a jury by reference to a rule of conduct which it was said was a rule generally binding and a rule of law. I may venture to quote what I said in that case in the Court of Appeal: "It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of fact." In all these cases of negligence, whether on sea or on land, the decision must be arrived at as a question of fact on all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case. Indeed I think this is obvious from the actual language of Hill, J. in *The Wheatear* (*sup.*), where he speaks of "an early stage," "each is for a time entitled to assume," "one is not immediately seen to be acting properly." These are, I think, questions of fact. But the sting of the passage is in the words, "when it is quite clear that the other is not going to act correctly." If this were put as a question of law, I should not accept it as correct. Bucknill, J. does not, I think, accept it. He begins by using the phrase "when it should have become clear to the pilot of the *Heranger* that the *Diamond* was not going to take appropriate action to pass port to port." In the next sentence he put the matter thus: "When . . . the *Diamond*, not having given any signal to indicate her intentions, has got so close to the *Heranger* that it should appear doubtful to the pilot of the *Heranger* whether the *Diamond* can get port to port by her own action alone if the *Heranger* continued on at her comparatively high speed." This puts a concrete

question of fact based on the facts of the case, and is, as I read it, a way of stating the question whether there was such an apparent risk of collision if no steps were taken to change the situation that a prudent pilot would reverse. This is different in substance from Hill, J.'s criterion, "it is only at the last when it is quite clear that the other is not going to act correctly." Hill, J. is disposed to support his rule by reference to the analogy of reg. 21 of the Sea Rules. But that is not a true analogy. It is vitiated by a fundamental distinction. Rule 21 is specific and imperative, the "keep on" ship is to keep her course and speed, subject to the qualification contained in the note that if that vessel finds herself so close that collision cannot be avoided by the giving way vessel alone, she shall take such action as will best aid to avert collision, in addition to which reg. 27 provides for a departure from the rules in order to avoid immediate danger. But in the present case there are no rules which apply to the particular facts. The decision what action should be taken depends and can only depend on the requirements of good seamanship and the application of the ordinary principles of the law of negligence. Whether or not there is a breach of duty depends on the special facts of the case. But even in regard to reg. 21, the facts of the case must be considered to determine whether the note to reg. 21 or reg. 27 applies so that a vessel is not merely justified but bound to depart from the rule. Thus in *The Otranto* (18 Asp. Mar. Law Cas. 193, at p. 195; 144 L. T. Rep. 251, at p. 254; (1931) A. C. 194, at p. 201) Lord Buckmaster quotes with approval what was said by Lord Herschell in *The Tasmania* (6 Asp. Mar. Law Cas. at p. 518; 63 L. T. Rep. at p. 2; 15 App. Cas. at p. 226): "As soon, then, as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd (now the 21st) rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened." Lord Buckmaster adds: "The rule was designed to secure that the stand on vessel shall maintain her course until the last safe moment." It is not necessary further to discuss the cases under rule 21 because the rule is no true analogy. But in any event even the rule would not give so rigid a criterion as Hill, J. seems to suggest. The duty in a case like the present may be described as a duty to avoid risk of collision. The position may become so uncertain that "the last safe moment" has arrived.

In my opinion, Bucknill, J. did not misdirect himself but stated the true question and answered it correctly in the circumstances of the case. This really meets the reasoning on which Scott, L.J. dissented, and was of opinion that the judge was wrong. It is true, as he emphasises, that to reverse is a very drastic step, especially with a heavy vessel like the *Heranger*, borne on a tide and not far from the shore. Nor does anyone doubt that it should not lightly be assumed that a wrong-doing ship might not correct her error in time, and that it is not desirable to prejudice her repentance so long as action can properly be deferred. But the time may come when the drastic action of reversing must be taken. It is not questioned by the appellants that the time had certainly come when the vessels were two cables apart. But I think, in agreement with the judges and the majority of the Court of Appeal, that the time had come substantially earlier and that the *Heranger* left it too late to reverse her engines.

Mr. Hayward has, however, contended that even if the *Heranger* was negligent, still that negligence is immaterial unless it is established by the respondents that it actually contributed to the collision. He contended that the statement of law contained in the judgment of the President in *The Aeneas* (18 Asp. Mar. Law Cas. at p. 575; 154 L. T. Rep. at p. 251; (1935) P. at p. 131) was erroneous. The President said: "I think the principle to be applied when there is a breach of a rule which is definitely asserted to have contributed to a collision is that it is for those who have been guilty of the breach of the rule to exonerate themselves and to show affirmatively that their default did not contribute in any degree to the collision actively or to the resulting damage." This, in my opinion, is contrary to the principle stated by Lord Finlay 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" (*The Karamea*, 126 L. T. Rep. 417, at p. 418; (1922) 1 A. C. 68, at p. 71). It is also contrary to the general principle of the law of negligence, according to which it is necessary for the plaintiff to show both breach of duty and consequent damage. Damage is, it is said, the gist of the action. This is too well established at common law to call for any citation of authority. But it is, as Lord Finlay points out, also the rule in Admiralty. Whatever the Admiralty law on this matter was before the Maritime Conventions Act, 1911, it is now, I think, clear that the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases, is equally the rule in Admiralty. The party alleging negligence or contributory negligence must establish both the relevant elements. I thus find myself, with all respect, unable to agree with the view as to the onus of proof stated by the learned President in *The Aeneas* (*sup.*). But though the burden is on the respondents to prove that the fault of the *Heranger* contributed to the accident and resulting damage, I think it is clear that they have discharged this burden. It is, I think, clear that if the *Heranger* had reversed at a time substantially earlier than she did, either there would have been no collision (which is very doubtful) or at least (which is perhaps more probable) a different and much less serious collision. No doubt the disastrous effect of the collision on the *Diamond* was due to her desperately improper action in hard-aporting when she did. Scott, L.J. thinks that no prudent pilot could possibly have foreseen such an action and hence the pilot of the *Heranger* should be held to be in no fault at all. It is impossible not to feel that the *Heranger's* pilot was confronted in the end by very extraordinary conduct on the part of the *Diamond*. But that is really irrelevant on the question of fault, though it is relevant in so far as it goes to proportion of damage. The judge has held the *Heranger* liable in the proportion of one-third. There is no appeal against that apportionment. Indeed, this is not of the exceptional cases in which an appellate court would be likely to consider altering the proportions found by the judge.

The result is that, in my opinion, the appeal should be dismissed with costs.

Lord Porter.—I also concur.

Appeal dismissed.

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

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

November 14, 15; *December* 15, 1938.

(Before Lords ATKIN, THANKERTON, RUSSELL, WRIGHT, and PORTER.)

The Umtali. (*a*)

ON APPEAL FROM THE COURT OF APPEAL.

Collision in St. Clement's Reach, River Thames, just below Stone Ness Point—Down-going vessel and up-coming vessel approaching each other at high speed on the south side of mid-channel—Porting by down-going vessel, starboarding by up-coming vessel—Failure by both vessels to pass port-to-port—Failure of up-coming vessel, navigating against the ebb-tide, to "ease her speed or stop on approaching . . . bend . . ."—Port of London River By-laws, 1914–1934, *by-laws* 4 (*a*) *and* 33.

This was a claim by the Donaldson South American Line Limited, of Glasgow, owners of the steamship C. (6863 *tons gross*) *against Messrs. Bullard, King, and Co. Limited, of London, owners of the steamship* U. (8158 *tons gross*) *for damages in respect of a collision between the* C. *and the* U., *which occurred on the morning of the* 16*th May*, 1937, *in St. Clement's Reach, River Thames, off Greenhithe, about two cables below Stone Ness Point and to the north of mid-channel. The stem of the* U. *came into contact with the port side of the* C. *in the way of the* C.'s *engine-room and both vessels were so severely damaged that they had to be beached. The damage sustained by the* C. *and her cargo were in the neighbourhood of* 100,000*l. The facts found by Bucknill, J., as far as the navigation of the vessels was concerned, were as follows: The* C. *was proceeding up-river to the south of mid-channel and against the tide, which was a quarter ebb and of about one knot's force. The* U. *was proceeding down-river from the north, in her own water. Each vessel was in charge of a duly licensed Trinity House pilot, and up to within half a mile of the collision, which occurred to the north of mid-channel and about two cables below the bend at Stone Ness Point, was doing about ten knots over the ground. At half a mile apart the* U. *sounded two short blasts, ported her wheel, and put her engines to half-speed ahead, the* C. *being then fine on the* U.'s *port bow. The* C. *replied with one short blast and repeated that signal ten seconds later, indicating that she was directing her course to starboard, but the* U. *continued to go to port. The* C. *subsequently put her wheel hard a-starboard and again sounded one short blast. When the vessels were* 1000*ft. apart the* U. *put her engines full speed astern, but at collision her speed was still five knots, whilst the* C., *although approaching a bend in the river, never reduced her speed at all from the time the* U. *was first rounding the point up to the actual impact.*

Held, that both vessels were seriously to blame and there was no satisfactory reason for saying tha one was more to blame than the other.

Decision of the Court of Appeal (19 *Asp. Mar. Law Cas.* 176; 159 *L. T. Rep.* 350) *reversed.*

Judgment of Bucknill, J. (19 *Asp. Mar. Law Cas.* 133; 158 *L. T. Rep.* 72) *restored.*

APPEAL from the decision of the Court of Appeal (reported 19 Asp. Mar. Law Cas. 176; 159 L. T. Rep. 350) (Greer, Slesser, and Scott, L.JJ., sitting with nautical assessors), on appeal from the decision of Bucknill, J. assisted by Elder Brethren of the Trinity House, reported 19 Asp. Mar. Law Cas. 133; 158 L. T. Rep. 72. The facts are fully set out in the headnote.

Bucknill, J. had held both vessels to blame in equal degrees. The Court of Appeal held the *Umtali* alone to blame.

The owners of the *Umtali* appealed.

G. St. C. Pilcher, K.C. and *Gordon Williams* for the appellants.

R. F. Hayward, K.C. and *Owen L. Bateson* for the respondents.

The House took time for consideration.

Lord Atkin.—In this case I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Wright. I entirely agree with it and have nothing to add.

Lord Thankerton.—I concur also in the opinion of my noble and learned friend Lord Wright.

Lord Russell.—I also agree.

Lord Wright.—At 6.55 a.m. summer time on the 16th May, 1937, in broad daylight on a fine clear morning with no wind except light northerly airs, the *Umtali* and *Corrientes* came into collision on the River Thames a little below Stone Ness Point, which is on the north bank of the river. About that point the river makes a sharp bend from St. Clement's Reach which runs roughly south-west with Long Reach which runs roughly north-east. The river at that place is about half a mile wide. The dredged channel is about two cables in width, while on either side of the dredged channel there was sufficient water for these vessels, which were drawing about 26ft., to navigate. No other vessels were about. Each vessel was in charge of a duly licensed Trinity House pilot. The tide was on the first quarter of the ebb and of a force of about one knot. Both vessels were seriously damaged, and were beached not far below Stone Ness Point.

Bucknill, J. held both vessels seriously to blame and apportioned the damage equally. The Court of Appeal differed from the judge and held the *Umtali* alone to blame. The owners of the *Umtali* do not appeal against the decision that the *Umtali* was to blame jointly with the *Corrientes*, but appeal against the decision of the Court of Appeal that the *Umtali* was alone to blame, and alternatively question the apportionment of liability.

The *Umtali* is a steel screw steamship belonging to the Port of London, of 8158 tons gross, 5084 tons net, 468ft. in length, 61ft. in beam, fitted with triple expansion engines and a Bauer Wach turbine giving a total horse-power of 1118 nominal. At the time of the collision she was outward bound in the course of a voyage from London to South

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

Africa carrying passengers and general cargo and manned by a crew of 135 hands all told.

The *Corrientes* is a steel screw steamship belonging to the Port of Glasgow, of 6863 tons gross, 4233 tons net, 419ft. in length, 54.8ft. in beam, and fitted with steam turbine engines of 756 nominal horse-power. At the time of the collision the *Corrientes* was inward bound in the course of a voyage from British Columbia to London laden with a cargo of about 6200 tons of general merchandise.

There was at the trial considerable conflict of evidence between the witnesses on the respective sides, but the judge has very clearly and precisely stated his findings of fact. These were accepted by both sides before this House and were also accepted (except for one or two particular points of degree) in the Court of Appeal. It will thus be sufficient to state the effect of these findings, without referring in detail to the evidence. As the judge observed, there was a wide discrepancy as to the position of the *Corrientes* coming up the river, as to the whistle signals given or heard by each vessel, as to the place of collision, as to the heading of the vessels at collision and as to the speed of the *Umtali* at the time of collision. As to the speed of the *Corrientes* there was no question. She was proceeding at full speed, about 11 knots, and continued to do so right up to the collision.

The story may roughly be divided into two periods, one before the *Umtali* sounded her first signal, the other from then to the collision.

At the time the *Umtali* sounded her signal, which was of two blasts, the *Corrientes* was about half a mile away. She was coming up St. Clement's Reach, steering a course south-west by west, and was a little to the southward of mid-river and a little below Lower Swanscombe Buoy. The *Umtali* seems to have had her in view then for about a mile, but the *Corrientes* had made no sign of going to her proper side of the river. At the time when the *Umtali* sounded her signal, the *Corrientes* was fine on the port bow of the *Umtali* and the *Umtali* was fine on the starboard bow of the *Corrientes*. The course of the *Umtali* was east by north, that of the *Corrientes* was south-west by west. On these headings the courses if continued would cut each other at an angle of about two points. Both vessels were doing about the same speed, that is, ten knots over the ground, allowing for the tide of one knot, the speed of the *Umtali* being about nine knots, the speed of the *Corrientes* being about eleven knots. When the *Umtali* gave her signal she ported and put her engines at half speed. Thereupon the *Corrientes* sounded one short blast, and ten seconds later sounded another short blast, and starboarded her helm. The pilot of the *Umtali* then ordered the helm amidships. Then seeing the *Corrientes* was turning to starboard the *Umtali* again altered course to port. Almost immediately afterwards the wheel of the *Corrientes* was put hard a-starboard and she again sounded one blast. There was by then imminent risk of collision, the ships being about 1000ft. apart. The *Umtali* stopped both engines and almost immediately afterwards reversed and sounded three blasts. The collision occurred to northward of mid-river, about two cables below the Stone Ness Light. The *Umtali's* speed, though reduced by reversing, was at the time of collision about five knots, while the speed of the *Corrientes* was still about eleven knots.

Before considering what conclusion follows from these findings it is necessary to refer to two of the Port of London River by-laws, No. 33 and 4A, which are as follows:

"33. Every steam vessel proceeding up or down the river shall when it is safe and practicable keep to that side of mid-channel which lies on the starboard side of such vessel and when two steam vessels proceeding in opposite directions the one up and the other down the river are approaching each other so as to involve risk of collision they shall pass port side to port side unless the special circumstances of the case make departure from this by-law necessary."

"4 (A).—Every steam vessel navigating against the tidal stream shall if necessary in order to avoid risk of collision ease her speed or stop on approaching or when rounding a point or sharp bend so as to allow any vessel navigating with the tidal stream to pass clear of her."

It was contended on behalf of the *Corrientes* that she had broken neither by-law. Being on her wrong side she had no doubt, they said, the duty to get into her proper water as quickly as possible when within a reasonable distance of the *Umtali*, and this she did in the best and quickest way by keeping her speed and starboarding her wheel. But this contention does not give effect to the by-law. It ignores that the *Corrientes* was not only on the wrong side without any reason to justify it, but continued to be on the wrong side in a way which involved risk of collision, the *Corrientes* being fine on the port bow of the *Umtali*, and the *Umtali* fine on the starboard bow of the *Corrientes*. This position led the *Umtali* herself to break the by-law, by porting, as I shall discuss later. The vessels were at that stage approaching so as to involve risk of collision, which was due to the continuing breach of the by-law by the *Corrientes*. Not only was the *Corrientes* continuing to proceed at eleven knots on her wrong side, but she kept her full speed right up to the moment of collision, though she was within the terms of by-law 4A, because she was navigating against the tidal stream, approaching a point in the river, and it was necessary to take steps to avoid risk of collision. Under the by-law she was thus bound to ease her speed or stop. It was her duty to do so in order to allow the *Umtali*, which was navigating with the tidal stream, to pass clear of her. The respondents have contended that by-law 4A only applies in cases where two vessels meet or are likely to meet on a sharp bend at what has been called the apex, and not to a case like this where the vessels were approaching some distance away from the point. I can find no warrant for this contention in the words of the by-law, which are perfectly clear, and refer specifically to a vessel approaching the bend, as well as to a vessel rounding it. The rule is precautionary and meant to prevent the vessel proceeding against the tide getting into the way of the vessel proceeding with the tide. This is also clear from the words "to avoid risk of collision" which again are quite plain. The contention advanced by the respondents that the duty only arises in order to avoid bringing into existence a risk of collision is contrary to the actual language, to say nothing of the spirit of the rule. No doubt there are cases in which the rule has been expressed as intended to deal with the danger of the vessels meeting at a point. Such are, for example, *The Homefire* (57 Lloyd's List Reports, p. 110), *The Backworth* (17 Asp. Mar. Law Cas. 289; 137 L. T. Rep. 653; 1927, Prob. p. 256), and *The Hontestroom* (17 Asp. Mar. Law Cas. 123; 136 L. T. Rep. 33; 1927, App. Cas. p. 37, at p. 55, per Lord Phillimore, in a dissenting judgment). But these expressions were used in reference to the facts of the particular cases and were not intended to lay down any general rule or principle limiting the meaning which the words of the rule plainly bear. I think the rule applied to the

Corrientes, and was broken. I also agree with our assessors that, apart from the by-laws, there was a breach of the rules of good seamanship.

But the judge has stated the position and his conclusions in language so clear and to my mind so convincing that I cannot forbear quoting it in full: "On my findings the *Corrientes* was not coming up on her starboard side of mid-channel although it was quite safe and practicable for her to do so. When the *Corrientes* saw the *Umtali* coming down she should at once have taken steps to get over to her proper side. Being on her wrong side, there was a risk of collision with the *Umtali* which was coming down on her proper side, at any rate so long as the *Corrientes* stayed where she was and approached the Point at her full speed, and it was, therefore, the duty of the *Corrientes* to ease her speed on approaching Stone Ness until she had got into her proper water and the vessels were in a position to pass port to port with a safe margin in accordance with by-law 33. Quite apart from by-law 4A, the Elder Brethren advise me that in the circumstances of this case, as found by me, the *Corrientes* should have eased her speed as I have said.

"The *Corrientes* continued on at her full speed right up to the moment of collision although there was risk of collision from the time when the *Umtali* first started to round the bend and much more serious risk of collision when the *Umtali* sounded two short blasts and showed her desire to pass starboard to starboard by porting her wheel. The *Corrientes*, as soon as she saw this action by the *Umtali*, should at once have taken prompt steps to get into her proper water by decisive starboarding and sounding one short blast, and she should at once have stopped her engines. I am unable to find any reason why those in charge of the *Corrientes* did not hear this signal of two short blasts as they say. Instead of decisive starboarding and stopping her engines the *Corrientes* starboarded and sounded one short blast, and after a short interval sounded another short blast, and after a further interval put her wheel hard-a-starboard and sounded a third signal of one short blast, and continued on at full speed of eleven knots up to the moment of impact. The *Corrientes* is therefore seriously to blame."

As the *Umtali* also is confessed to be seriously to blame, I do not develop that matter at any length. She clearly committed a gross breach of by-law 33 by porting her helm when there was no necessity to do so, instead of continuing on the course on which she was, by following which she would have passed port to port as the rule requires. This action of porting and sounding two blasts started what the judge calls "the immediate series of events which led up to" the collision. Up to that time the navigation of the *Umtali* had been correct and the *Corrientes* alone had been the wrongdoer. Furthermore, the *Umtali* made matters worse by further action with helm and perhaps engines to alter course to port after the *Corrientes* had starboarded and sounded the starboard signal, which those on the *Umtali* either heard or ought to have heard. She should have starboarded and she was also to blame because she did not reverse till the vessels were within 1000 feet of each other. The judge found her also seriously to blame.

In the Court of Appeal, Scott, L.J. delivered the judgment of the court, Greer, L.J. adding an observation that he concurred with hesitation and doubt. The court appears to have been under a misapprehension as to the position of the *Umtali* when she ported. They put it opposite Stone Court Wharf, which was considerably further up the river than the position found by the judge. This is a matter not without importance, but what is more serious is that the court seems to give no effect to the initial error of the *Corrientes* in coming up the river at full speed on her wrong side. They do, indeed, put her less on her wrong side than the judge did, but they seem to have attached no importance to the fact that she had been observed by the *Umtali* to be keeping on her wrong side for a mile or so and showed no sign of changing course or reducing speed. When the *Umtali* ported the vessels were at a distance of half a mile apart as the judge found, not at a distance of considerably more, as the Court of Appeal seem to have thought. The combined speed of the two vessels was 20 knots, or half a mile in little more than a minute. No doubt the *Umtali* did very wrong in porting, but the continued breach by the *Corrientes* of by-law 33 cannot be said not to have contributed to the collision, quite apart from her wrong actions when the immediate crisis arose. The Court of Appeal said that the *Corrientes* was only slightly on the wrong side of mid-channel and that all the *Umtali* had to do was to give a touch of starboard helm and that she ought to have expected or assumed that the *Corrientes* would at once starboard and get across to her proper side. But it must not be overlooked that the *Corrientes* had not, since she was sighted, shown any disposition to starboard and get to her proper side and was still coming on at full speed on a course involving risk of collision. I cannot accept the view that the conduct of the *Corrientes* up to the moment when the *Umtali* sounded and ported was not subject to the blame which the judge expressed, and equally her conduct afterwards was subject to the blame which the judge attributed to her. It should be observed that the judge was careful to say that he based his decision on a consideration of all the circumstances of the case.

The judge states that the Elder Brethren of the Trinity House who sat as his assessors concurred in his views. So also do the assessors who have helped your Lordships on this appeal. It is difficult to be sure what was the view of the assessors in the Court of Appeal. They were asked two questions directed to the necessity or advisability of the *Corrientes* reversing, but the assumptions of fact on which these questions were based are open to question.

I am of opinion that both vessels were seriously to blame. It was contended by the appellants that in that event this House should vary the apportionment of liability which the judge has found, because it was said the misconduct of the *Umtali* in porting was very gross and that of the *Corrientes* was slight in comparison. But I agree with the judge's apportionment. I think with him that both vessels were seriously to blame and that there is no satisfactory resason for saying that one is to blame more than the other. The assessors sitting with your Lordships also take that view, as did those sitting with the judge. I ought to add that it would require a very strong and exceptional case to induce an Appellate Court to vary the apportionment of the different degrees of blame which the judge has made, when the Appellate Court accepts the findings of the judge. I doubt that there ever could be a case where the Appellate Court would take that course, but certainly this is not such a case.

In the result the appeal, in my judgment, should be allowed, the judgment of the Court of Appeal should be set aside, the judgment of Bucknill, J. should be restored and the respondents should pay the costs of this appeal and of the appeal to the Court of Appeal.

Lord Porter.—Having had an opportunity of reading, and having heard, the opinion expressed by my noble and learned friend Lord Wright, I concur both with the result and in the reasoning upon which it is based.

Appeal allowed.

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

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

Judicial Committee of the Privy Council.

November 24, 25, 28, 29, 1938; *January* 30, 1939.

(Present: Lords ATKIN, RUSSELL, MACMILLAN, WRIGHT and PORTER.)

Vita Food Products Incorporated v. Unus Shipping Company Limited (in liquidation). (*a*)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, *en banc.*

Nova Scotia—Carriage of goods from Newfoundland to New York in a Nova Scotian vessel—Delivery of goods damaged—Negligent navigation—Bills of lading expressed to be governed by English law—Failure to comply with Newfoundland statute—Conflict of laws—Whether contract enforceable in Nova Scotia—Newfoundland Carriage of Goods by Sea Act, 1932 (22 *Geo.* 5, *c.* 18), *ss.* 1, 3.

By sect. 1 *of the Newfoundland Carriage of Goods by Sea Act*, 1932: "*Subject to the provisions of this Act, the (Hague) rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.*" *By sect.* 3: "*Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect, subject to the provisions of the said rules as expressed in this Act.*"

The appellants, who carried on business at New York, made a claim as purchasers against the respondents, a body corporate incorporated under the law of Nova Scotia in respect of three consignments of herrings which were being carried from a port in Newfoundland in a ship belonging to the respondents to New York, and were delivered in a damaged condition. The bills of lading contained a general exemption of loss or damage due to negligence of the shipowners' servants, but did not incorporate the Hague Rules which had been adopted by the Carriage of Goods by Sea Act enacted in Newfoundland in 1932. *By clause* 7 *it was provided that "this contract shall be governed by English law." On her voyage to New York with the herrings on board the ship encountered bad weather and ran ashore. The ship was eventually got off and taken to Guysboro, where the herrings were unloaded, re-conditioned, and forwarded by another ship to New York. The appellants took delivery of the herrings in their damaged condition, and paid freight. It was admitted that the loss was due to the captain's negligence in navigation. For the respondents it was contended that the provisions either of the bills of lading or of the Carriage of Goods by Sea Act*, 1932, *exempted them from liability for a loss due to negligence. For the appellants it was contended that as the Act had not been complied with, the bills of lading were illegal, and the respondents were subject to the liabilities of a common carrier.*

Held, (1) *that sect.* 3 *of the Act was directory and not obligatory. The omission of that section did not make the bills of lading illegal documents in whole or in part either within Newfoundland or outside it. The bills of lading were, therefore, binding according to their terms, and the respondents were entitled to succeed; and* (2) *there was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract should be English law.*

The Torni (18 *Asp. Mar. Law Cas.* 315; 147 *L. T. Rep.* 208; (1932) *P.* 78) *not followed.*

Judgment of the Supreme Court of Nova Scotia en Banc affirmed.

APPEAL from a judgment of the Supreme Court of Nova Scotia en Banc dismissing an appeal from a judgment of the Chief Justice of Nova Scotia.

The facts, which are sufficiently summarised in the headnote, are fully set out in their Lordships' judgment.

G. McL. Daley, K.C. (of the Nova Scotian Bar), *W. L. McNair*, and *E. W. Roskill* for the appellants.

L. B. Smith, K.C. (of the Nova Scotian Bar) and *Cyril Miller* for the respondents.

The considered judgment of their Lordships was delivered by

Lord Wright.—This appeal arises out of a claim made against the respondent, a body corporate incorporated under the law of Nova Scotia, now in liquidation, as owner of the motor vessel *Hurry On*, registered at the port of Halifax, Nova Scotia. The claim was made by the appellant, a body corporate carrying on business at New York, in the United States, for damage and loss suffered in respect of consignments of herrings which were being carried in the *Hurry On* from Middle Arm, Newfoundland, to New York, and were delivered in a damaged condition.

In January, 1935, the *Hurry On* was put up as a general ship for the carriage of cargo, including herrings, from Newfoundland ports to New York. Middle Arm was one of these ports. At that port there were loaded in the *Hurry On* three lots of herrings in barrels for carriage to New York. The appellant purchased the herrings from M. G. Basha, whose name appears on the bills of lading. It is not clear when the property passed, but so far

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

as concerns this case the appellant may be treated as owner of the herrings at all material times. Bills of lading were issued on behalf of the ship. They were dated Middle Arm, the 15th January, 1935, and acknowledged receipt on board of the goods in apparent good order and condition from M. G. Basha, and provided for delivery in the like apparent good order and condition at New York, "unto order Commercial National Bank and Trust Company, notify Vita Food Products, New York, or his or their assigns." W. A. Shaw acted for the ship as broker or agent in Newfoundland to secure the cargo, and J. Poole acted as a sort of super cargo, and signed the bills of lading for the ship. By some error or inadvertence the bills of lading so signed by Poole were old ones used outside Newfoundland by Shaw at other ports for other vessels, and did not incorporate the Hague Rules which had been adopted by the Carriage of Goods by Sea Act enacted in Newfoundland in 1932. It is this fact or accident which has led to the questions agitated in this case.

The *Hurry On* sailed from Middle Arm on the 16th January, 1935, bound for New York with the herrings on board. On the 18th January, 1935, she ran into bad weather and ice off the coast of Nova Scotia. The captain decided to make for a port of refuge, but in the attempt to do so ran ashore at Grady Point in Nova Scotia in a gale of wind. The ship was eventually got off and taken to Guysboro, where the herrings were unloaded, reconditioned and forwarded by another ship to New York. At New York the appellant took delivery of the herrings in their damaged condition under the bills of lading and paid freight, and then claimed for the damage to the herrings and for salvage and other expenses. The allegation in the action that the ship was unseaworthy was rejected by the courts in Canada, and need not now be considered; it is, however admitted that the loss was due to the captain's negligence in navigation. The provisions either of the bills of lading or of the Carriage of Goods by Sea Act would exempt the respondent from liability for a loss due to negligence, but it was contended on various grounds to be discussed later that, as the Act had not been complied with, the exceptions did not avail the respondent, and that it was subject to the liabilities of a common carrier. This contention was rejected by the Chief Justice of Nova Scotia, where the action was brought, and also by the Supreme Court of the Province. In addition the Supreme Court held that if the bills of lading were illegal, the parties were *in pari delicto* and on that ground also the action must fail.

The bills of lading are in identical terms except as to the description of the goods included in each parcel, and it will be convenient to begin by stating briefly the substance of them and of the Act. The bills of lading contained, as already stated, an acknowledgment that the goods had been received on board for carriage to New York, with a proviso that they should be at shipper's risk while at the dock pending loading. There was a later clause by which in accepting the bill of lading the shipper, consignee and holder of the bill of lading agreed to be bound by all its stipulations as fully as if the shipper, consignee or holder had signed it. The bill of lading set out in detail the "Terms and Conditions of this Contract Bill of Lading which are hereby mutually agreed upon as follows." These terms and conditions, so far as material, may be briefly summarised. There were the usual exceptions of sea and other perils, and the usual exemptions of specified classes of damage such as leakage, breakage and so forth. Of these latter clause 7 is specially material in this case. It contains a general exemption in respect of the goods carried from liability for all damage capable of being covered by insurance, and from liability above a certain value per package unless a special declaration is made. There follows a wide general exemption of loss or damage due to negligence of the shipowners' servants at or after the commencement of the voyage, or to unseaworthiness provided all reasonable means had been taken to provide against it. General average was to be settled according to York Antwerp Rules, 1924, and adjusted in the country selected by the owners. The same clause also provided that: "This contract shall be governed by English law." By clause 8 the liability of the goods to contribute to general average and similar charges was not to be affected though the necessity for that contribution was due to negligence or unseaworthiness, provided, however, that due diligence was exercised to make the ship seaworthy and properly manned, equipped or supplied. By clause 22 no claim was to be admitted unless made in writing within fifteen days after delivery or failure to deliver the goods. Provision was also made that in the case of shipments from the United States the Harter Act of 1893 was to apply. It was also stipulated that save as so provided, the bill of lading was subject to the terms and provisions of and exemptions from liability contained in the then unrepealed Canadian Water Carriage of Goods Act, 1910, and the clause of that Act which declared illegal, null and void any clauses exempting the shipowners from liability save in accordance with the provisions of that Act was specifically incorporated. The Canadian Act only applies to shipments of goods from any port in Canada, whether to ports in Canada or ports outside Canada, and accordingly *primâ facie* would not apply to a shipment from Newfoundland. In any event the incorporation of the Canadian Act, like the incorporation of the Harter Act, would only have effect as matter of contract on the principles laid down in *Dobell* v. *Steamship Rossmore Company* (8 Asp. Mar. Law Cas. 83; 73 L. T. Rep. 74; (1895) 2 Q. B. 408).

The Newfoundland Act, passed in 1932, recited that it is expedient that the rules agreed to as a draft convention for the unification of certain rules relating to bills of lading by the delegates of a number of States, including the delegates representing His Majesty at the International Conference on Maritime Law held at Brussels in October, 1922, and afterwards amended at a further conference at Brussels in October, 1923, should, subject to the provisions of the Act, "be given the force of law with a view to establishing the responsibilities, liabilities, rights, and immunities attaching to carriers under bills of lading."

Of the sections of the Act, it is necessary to set out sects. 1 and 3 in full. They are as follows:

Sect. 1: "Subject to the provisions of this Act, the rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.

Sect. 3: "Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as expressed in this Act."

Sects. 4, 5, and 6, sub-sect. (3), contain certain provisions to which the rules are subject. Sect. 7 gives any court in Newfoundland having jurisdiction

to the amount claimed power to try any action for loss or damage to goods carried by sea to or from the Dominion of Newfoundland, notwithstanding any stipulation in the bill of lading or similar document.

The rules which are thus given the force of law are set out in full in the schedule to the Act. These rules, often called the Hague Rules, are identical with those scheduled to the British Sea Carriage of Goods Act, 1924, and have now been adopted with or without modifications by certain foreign States, including recently the United States, and also by the Crown Colonies, by Australia, by Canada, and by New Zealand. They confer rights and immunities and also impose liabilities upon the shipowner, liabilities which he cannot escape since art. III (8) avoids any clause or agreement relieving the carrier from the liability for negligence imposed by the rules or lessening that liability. But the Act and rules only apply where a bill of lading is issued and there is no provision making it imperative for the carrier to issue a bill of lading save on demand of the shipper.

If the rules are compared with the provisions of the bills of lading in suit, they agree in substance in respect of the relevant matters, namely, liability in respect of negligence and unseaworthiness. In some respects the rules go beyond the bills of lading, as for instance where they provide that the carrier is to be released from liability if suit is not brought within one year after delivery has been or should have been made. In other respects the bills of lading contain provisions which are outside the scope of the Act and rules. The bills of lading are furthermore documents of title which define the contractual voyage and provide for general average and for the obligation to deliver the goods which are received at the dock and actually loaded. Moreover they expressly stipulate that the proper law of the contract is to be English law. It is necessary to bear such matters in mind when the central questions in the case are being considered, that is, the questions whether the failure to obey sect. 3 of the Act is illegal under the law of Newfoundland the place where the contract was made, and whether that failure renders the contract void in the courts of Nova Scotia, and in either event what is the resultant legal position. The learned Chief Justice held that notwithstanding the non-inclusion of the clause paramount (by which is meant the clause specified in sect. 3) the bills of lading were effective documents but are subject to the exemptions, not of the bills themselves, but to those prescribed in the rules, and that in the circumstances the latter exemptions give a good defence to the shipowner so that the action failed. The Supreme Court also held that the action failed but reached that conclusion by a different route. The reasoning of the learned judges did not in all respects agree, but in substance they held that disobedience to sect. 3 constituted an illegality in which both parties were equally concerned, and accordingly the action failed whether laid in contract or in tort. They held that the appellant's arguments involved it in a dilemma, either the bills of lading were good or they were illegal. In either event the suit failed.

Their Lordships are of opinion that the bills of lading were not illegal, and must be accepted as valid documents by the courts of Nova Scotia. The precise meaning of this statement, however, and the reasoning on which it is based require elucidation.

The first question to determine is the true construction of sects. 1 and 3 of the Act. Sect. 1 provides for the application of the rules to every bill of lading for the carriage of goods by sea in ships from any port in Newfoundland to any other port, whether in or outside that Dominion. The appellant contended that since sect. 1 only provided that the rules should have effect "subject to the provisions of this Act," the rules could not apply to a bill of lading unless the terms of sect. 3 were complied with. Their Lordships do not so construe the section. In their opinion the words "subject to the provisions of this Act" merely mean in this connection that the rules are to apply but subject to the modifications contained in sects. 2, 4, 5, and 6, sub-sect. (3), of the Act. To read these words as meaning that the rules are only to have effect if the requirements of sect. 3 are complied with, would be to put an unnecessarily wide interpretation upon them instead of the narrower meaning, which is more natural and obvious. In their Lordships' judgment sect. 1 is the dominant section. Sect. 3 merely requires the bill of lading to contain an express statement of the effect of sect. 1. This view of the relative effect of the sections raises the question whether the mandatory provision of sect. 3, which cannot change the effect of sect. 1, is under Newfoundland law, directory or imperative, and if imperative whether a failure to comply with it renders the contract void, either in Newfoundland, or in courts outside that Dominion.

It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect, with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply." That intention is objectively ascertained and if not expressed will be presumed from the terms of the contract and the relevant surrounding circumstances. But as Lord Atkin, dealing with cases where the intention of the parties is expressed, said in *Rex* v. *International Bondholders Trustee for Protection of Bondholders Aktiengesellschaft* (156 L. T. Rep. 352, at p. 353; (1937) A. C. 500, at p. 520) (a case which contains the latest enunciation of this principle), "their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive." It is objected that this is too broadly stated and that some qualifications are necessary. It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms, but rather as *primâ facie* presumptions. But where the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case, however, it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential. The provision in a contract (*e.g.*, of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English

and the transactions are carried on completely outside England. Moreover, in the present case the *Hurry On*, though on a Canadian register, is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case, parties may reasonably desire that the familiar principles of English commercial law should apply. The other ground urged is that the choice of English law is inconsistent with the provisions of the bill of lading, that in respect of certain goods the Harter Act or the Canadian Water Carriage of Goods Act of 1910 (now repealed, but in force at the date of the bill of lading) was to apply. It has been explained that the incorporation of these Acts may have only contractual effect, but in any case though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract. The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms. But that part of the English law which is commonly called the conflict of laws requires, where proper, the application of foreign law, *e.g.*, English law will not enforce a performance contrary to the law of the place of performance in circumstances like those existing in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (123 L. T. Rep. 375; 15 Asp. Mar. Law Cas. 33; (1920) 2 K. B. 287), and the law of the place of performance, though it will not be effective to affect the construction of the contract in regard to its substance (which must be ascertained according to the rule of the proper law, as was held in *Jacobs, Marcus and Co.* v. *The Crédit Lyonnais London Agency* (50 L. T. Rep. 194; 12 Q. B. Div. 589), will still regulate what were called in that case the incidents and mode of performance in that place. English law will in these and sometimes in other respects import a foreign law, but the contract is still governed by its proper law. The reference to the United States and the Canadian Acts does not on any view supersede English law which is to govern the contract, nor does Newfoundland law, though Newfoundland was the place where the contract was made, apply to oust English law from being the law of the contract, and as such from being the law which defines its nature, obligation and interpretation, though Newfoundland law might apply to the incidents of performance to be done in Newfoundland. There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with sect. 3 of the Act.

If however by reason of this failure to obey the Act the bills of lading were illegal in Newfoundland, it would not follow as a necessary consequence that a Nova Scotian court, applying the proper law of the contract, would in its own forum treat them as illegal, though the position of a court in Newfoundland might be different, if it held them illegal by Newfoundland law. A court in Newfoundland would be bound to apply the law enacted by its own Legislature, if it applied, and thus might treat the bills as illegal, just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship (*Liverpool and Great Western Steam Company* v. *Phenix Insurance Company* (*The Montana*), 129 U. S. 397). Such a clause, it was held, was against public policy and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *Re Missouri Steamship Company* (61 L. T. Rep. 316; 6 Asp. Mar. Law Cas. 264; 42 Ch. Div. 321), where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy though the shipment took place in America and the bill of lading was issued there, and that the clause being valid in English law must receive effect.

With these considerations in mind it is necessary first to consider if the bills of lading are illegal by Newfoundland law. If they are not, the question of illegality cannot arise in the courts of another jurisdiction, *e.g.*, those of Nova Scotia. Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinise the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibitions in *Liverpool Borough Bank* v. *Turner* (3 L. T. Rep. 494; 2 De G. F. and J. 502): "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only, or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed."

In that case the court by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. On the other hand cases can be cited where the contract was not avoided by some particular illegality, *e.g.*, *Kearney* v. *Whitehaven Colliery Company* (68 L. T. Rep. 690; (1893) 1 Q. B. 700), where an illegality in a certain respect in an agreement of employment was held not to vitiate the whole contract. Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void, are in proper cases nullified for disobedience to a statute is a rule of public policy only and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

Are there such grounds for holding that the Newfoundland law does in Newfoundland nullify bills of lading such as those in question? In their Lordships' opinion there are not. The matter can be tested by asking what would be the position if a bill of lading set out *in extenso* the exact provisions of the rules, but failed to contain an express statement in compliance with sect. 3, that the provisions of the rules applied to it. Surely such a bill of lading could not be regarded as illegal. Or again, what is the position where not only is a shipment made in a Newfoundland port but the port of delivery also is in Newfoundland? In such a case sect. 1,

by its own force, imports the rules and sect. 3 is merely an intimation of what, if the parties concerned are all residents or natives of Newfoundland and bound by that law, they must be taken to be aware. At least this is the position if Newfoundland law governs the contract. It seems impossible to hold that in such cases the bills of lading would be illegal and void. If that is so of a transaction beginning and ending in Newfoundland, and if such a transaction is not illegal, their Lordships do not think that such a transaction is to be treated as illegal because the place of delivery is outside Newfoundland and the parties or some of them are outside that Dominion and are not bound by its laws. It is said that the rules are not made part of the contract save when there is an express clause in the contract stating that they are to apply as provided in sect. 3 and that to hold the bills of lading legal and effective documents without such a clause would frustrate the purpose of The Hague Rules and of the International Conference, which aims at an obligatory unification of bills of lading all over the world, at least so far as particular nations adopt them. The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes sect. 3, nor does it impose penalties for failure to comply with sect. 3, nor does it in terms expressly prohibit the failure. Indeed there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all (see *Harland and Wolff Limited* v. *The Burns and Laird Lines Limited* (1931) S. C. 722). The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious. A foreign merchant or banker could not be assumed to know or to inquire what the Newfoundland law is, at any rate when the bill of lading is not expressed to be governed by Newfoundland law and still less when it provides that it is governed by English law, and it would seriously impair business dealings with bills of lading if they could not be taken at their face value, and as expressing all the relevant conditions of the contract. It was partly for that reason that in *Dobell* v. *Steamship Rossmore Company* (73 L. T. Rep. 74 ; 8 Asp. Mar. Law Cas. 83 ; (1895) 2 Q. B. 408), the Court of Appeal refused to treat the Harter Act as having any effect as a foreign law affecting the validity of the contract but treated it only as part of the English contractual document which expressly embodied it. A bill of lading fulfils other functions than merely that of setting out the conditions of carriage. It is a document of title which if endorsed passes the property, and which if money is advanced upon it, as is done in ordinary course of business, passes a special property by way of pledge to the banker or other lender. It would be a grave matter if business men when dealing with a bill of lading had in a case like the present to inquire into the foreign law ruling at the port of shipment.

All these reasons seem to justify the conclusion that the omission of what is called the clause paramount does not make the bills of lading illegal documents, in whole or in part, either within Newfoundland or outside it. Sect. 3 is in their Lordships' judgment directory. It is not obligatory nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion. If that is so the bills of lading are binding according to their terms and consequently the respondent is entitled to succeed in its defence.

But on the basis that the bills of lading were illegal in Newfoundland in that their issue without the clause paramount was prohibited by the law of that country it was argued that no court in any country would enforce their terms and exemptions and the carriage would therefore be upon the terms implied where goods are taken for carriage by a common carrier, *i.e.*, subject only to the exception of the Act of God and the King's enemies. No further terms, it was said, could be implied nor could any reliance be put upon the provisions of The Hague Rules since they had not been incorporated in the bills of lading by the insertion of the clause paramount. The appellant contended that unless the clause was inserted, no contract between carrier and shipper which included the provisions of The Hague Rules was entered into. Nor could the Act be said to have incorporated them even in Newfoundland itself since sect. 1 only provided that the rules should have effect " subject to the provisions of this Act," a phrase which the appellants maintained meant, *inter alia*, that the rules were not incorporated unless the provisions of sect. 3 were complied with. For reasons already explained their Lordships do not so construe the section.

But whatever view a Newfoundland Court might take, whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated The Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case where the action was brought not in a Newfoundland, but in a Nova Scotian court. It may be that if suit were brought on these bills of lading in a Newfoundland court and the court held they were illegal, they would refuse to give effect to them, on the basis that a court is bound to obey the laws of its own Legislature or its own common law, as indeed the United States Supreme Court did in *Liverpool and Great Western Steam Company* v. *Phenix Insurance Company* (*The Montana*) (*sup.*). But it does not follow that any other court could properly act in the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law. This was done in *Re Missouri Steamship Company Limited ; Monroe's Claim* (*sup.*), both by Chitty, J. and by the Court of Appeal. Lord Halsbury, L.C. having stated that the contrary view would mean that no country would enforce a contract made in another country unless their laws were the same, said (61 L. T. Rep. at p. 318 ; 42 Ch. Div. at p. 336) :

" That there may be stipulations which one country may enforce and which another country may not enforce, and that in order to determine whether they are enforceable or not, you must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract."

Having held that the law of the contract was English, he went on to hold that the exception of negligence even if of no validity in the place where made, must receive effect in English law, although the exception of negligence was invalid in the United States as being against the public policy of that country and although to do an act contrary to public policy is one type of illegal action. The same attitude is illustrated in *Dobell* v. *Steamship Rossmore Company* (*sup.*), where the Harter Act, which declares certain stipulations to be unlawful and imposes penalties on shipowners inserting them in bills of lading, was not considered as affecting the

English contract as a part of the contract where its provisions were infringed, save so far as it was expressly incorporated. Foreign law was also disregarded in *Trinidad Shipping and Trading Company* v. *G. R. Alston and Co.* (15 Asp. Mar. Law Cas. 31; 123 L. T. Rep. 476; (1920) A. C. 888), where the contract was an English contract and payment of certain rebates on freight were rendered illegal by the law of the United States where the freight was payable. From the rule which he states Lord Halsbury, L.C. in the *Missouri* case (*sup.*) puts aside:

"Questions in which the positive law of the country [*sc.*, the foreign country] forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it."

In this passage Lord Halsbury would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English court to give effect to the transaction just as an English court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which by the foreign law of the place where a contract was entered into, are essential to its formation, though even in that case the validity of the contract may depend on its proper law. But whatever the precise ambit of that saving expression, it is clear that it does not apply to such a statutory enactment as sect. 3, even if disobedience to it were regarded as rendering the bill of lading in some sense illegal.

It is, however, necessary, before parting with this aspect of the case, to consider whether *The Torni* (147 L. T. Rep. 208; (1932) P. 78) (in which the Court of Appeal affirmed the judgment of Langton, J.) should be applied, as the respondent's counsel contend it should, in the respondent's favour. The bills of lading in that case had been issued in Palestine, a territory over which His Majesty held a mandate. Two bills of lading, the only bills material in the case, had been endorsed to Hull merchants. The shipment was to Hull. The question was whether these bills of lading were to be construed according to their actual terms, or whether those terms were supplemented or supplanted by The Hague Rules, there being a Sea Carriage of Goods Ordinance in Palestine corresponding to the Newfoundland Act. There were certain differences between that case and the present. One was that the bills of lading had a clause providing that they were "to be construed in accordance with English law" not as in the present case "shall be governed by English law." In their Lordships' judgment that distinction is merely verbal and is too narrow to make a substantial difference. The construction of a contract by English law involves the applications to its terms of the relevant English statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense the construing of the contract has the effect that the contract is to be governed by English law. In addition, even apart from that term (and *a fortiori* with it) the form of the bill of lading would point to it being an English contract (*The Industrie*, 7 Asp. Mar. Law Cas. 457; 70 L. T. Rep. 791; (1894) P. 58). The law of the flag was Esthonian, which was not likely to be taken as the proper law of the contract. The other distinction was in sect. 4 of the Palestine Ordinance which corresponded to sect. 3 of the Newfoundland Act. The former section, which was otherwise identical with sect. 3, contained the additional words "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." In view of the effect of sect. 1 as construed by their Lordships, the additional words seem to them to add nothing in substance. The indorsees were claiming in the action for damage and short delivery, and the question was set down for trial as a preliminary issue whether the bills of lading were subject to the provisiont of the Ordinance. The Court of Appeal held thas they were. The grounds of this decision were that the bills would have been illegal because they did not contain the stipulated express clause had it not been for the fact that its omission was immaterial because by the law of Palestine the clause was incorporated whether expressly inserted or not, and the bills of lading were therefore legal. It was also held that the stipulation that the contract should be construed by English law did not mean that English law should be the proper law of the contract but merely that English rules of construction as contrasted with English substantive law should apply. The law of Palestine was the substantive law to be applied and governed the contract.

As already indicated, their Lordships do not agree with this view. With the greatest respect to the Court of Appeal their Lordships are of opinion that the decision is contrary to the principles on which they have proceeded in the previous part of this judgment and that it cannot be supported. The Palestine Ordinance, so far as appears, did not any more than the Newfoundland Act make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is the law by which it was to be enforced and governed, should be English law. To do so is to contravene the fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply. The effect of the judgment seems to be to read the bill of lading as if it expressly provided that it was to be governed by the law of Palestine. Nor does the Court of Appeal seem to have had its attention directed to the *primâ facie* rule that an English court dealing with a contract made in a foreign jurisdiction, as Palestine was, must first ascertain what was the bargain of the parties and give effect to that bargain unless debarred by some provision of the foreign law which binds the court. In general, for reasons already explained, legislative provisions such as those in question do not have extra-territorial effect, and do not debar the court from giving effect to the bargain of the parties. The exceptions to this general rule do not apply here. It may be that a court in Palestine, bound to give effect to the laws under which it exercises jurisdiction, might arrive at a different conclusion. No opinion can here be expressed on that matter, nor would it be material in considering the effect which a court outside Palestine should give to the contract. Nor is it necessary to consider what the position would have been if the bills of lading had expressed that they were governed by the law of Palestine. Their Lordships do not think that they should follow or apply the reasoning in *The Torni* (*sup.*).

A further question strenuously argued on the

assumption that the bills of lading were illegal and void was that the appellant was entitled to recover in tort against the respondent as a bailee, which had no contractual protection but was simply liable for its admitted negligence whether as common carrier or bare bailee. As the assumption in their Lordships' judgment fails, the question does not arise. It may, however, be pointed out that if there were illegality in respect of the bills of lading, both parties would be *in pari delicto*. In a case like this, the bills of lading contain the contract. On that footing they are issued by the shipowner and accepted by the shipper, as indeed the bills expressly state. The question of illegality would not depend on pleading or procedure or who first might or should produce the documents. It would be a question of substance, of which, if necessary, the court would of its own motion take cognisance and to which the court would give effect. Furthermore, though there may be cases in which an action may be brought indifferently either in contract or in tort, this is not such a case. The actual transaction between the parties cannot be ignored even in an action in tort. The transaction includes as an essential part the bills of lading whether regarded from the point of view of the contractual exceptions or of illegality. To apply the language of Lord Sumner in *Elder Dempster and Co. Limited and others* v. *Paterson Zochonis and Co. Limited* (131 L. T. Rep. at p. 464 ; (1924) A. C. 522, at p. 564), there is not here a bald bailment with unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact. Hence even on that footing the respondent would fail, either because it was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored.

Their Lordships are of opinion that the appeal should be dismissed with costs and will humbly so advise His Majesty.

Appeal dismissed.

Solicitors for the appellant, *Ince, Roscoe, Wilson,* and *Glover.*

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

House of Lords.

January 24, 26, 27, 30, *and February* 2, 23, 1939.

(Before Lords ATKIN, THANKERTON, RUSSELL, MACMILLAN and WRIGHT.)

The Arantzazu Mendi. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Motion to set aside writ for possession and warrant of arrest—Plaintiffs, the Republican Government of Spain, relying on decree of requisition—Intervention by Nationalist Government of Spain—Interest in res *by virtue of rival decree of requisition—Nationalist Government the* de facto *Government of part of Spain, including ship's port of registry—Whether entitled to immunity accorded to foreign sovereign State.*

(*a*) Reported by H. A. PALMER, Esq., Barrister-at-Law.

The Republican Government of Spain issued a writ in rem *claiming to have possession of the steamship* A. M. *adjudged to them by virtue of a decree of requisition, and a warrant of arrest was issued. The* A. M., *which was registered at the port of Bilbao, was at the time of the writ lying in the port of London, and was, through her master, in the possession of the Nationalist Government of Spain, who had requisitioned her with the owners' consent under a decree issued by General Franco on the 2nd March,* 1938. *The ship had previously been arrested in a possession action by the owners, which was terminated by a consent order dated the 28th March,* 1938 ; *but she remained in the custody of the Marshal under a claim for the daily expenses. The writ was directed against the ship, the then master being joined as defendant. This was done in order to prevent the Nationalist Government from contending that it was directly impleaded by the writ. The Nationalist Government entered a conditional appearance to the writ on the 20th April,* 1938, *and on the 7th May filed notice of a motion to set aside the writ and the subsequent arrest of the ship, on the ground,* inter alia, *that the action impleaded a foreign sovereign State. The Republican Government contended that the Nationalist Government was not entitled to immunity as a foreign sovereign State. On an inquiry made by the court from His Majesty's Secretary of State for Foreign Affairs the reply stated in effect* (a) *that His Majesty's Government recognised the Nationalist Government as a Government which at that time exercised* de facto *administrative control over the larger portion of Spain and effective administrative control over all the Basque Provinces of Spain ;* (b) *that the Nationalist Government was not a Government subordinate to any other Government in Spain ; and* (c) *that the question whether the Nationalist Government was to be regarded as that of a foreign sovereign State was a question of law to be answered in the light of the preceding statements.*

Held, that the reply of the Secretary of State for Foreign Affairs conclusively established that the Nationalist Government of Spain was a foreign sovereign State ; that that Government, being in possession of the ship, was impleaded by the writ ; and that the writ and arrest must be set aside.

Decision of the Court of Appeal (19 *Asp. Mar. Law Cas.* 237 ; 159 *L. T. Rep.* 499 ; (1939) 1 *K. B.* 37) *affirmed.*

Held, also, that the right of the Marshal in the ship was a right of custody and not possession, and did not affect the possession of the Nationalist Government at the time of the issue of the writ.

Per Lord Atkin : The writ was wholly irregular as purporting to make a chattel a defendant and to order it to enter an appearance, and might have been set aside on that ground alone.

APPEAL from a decision of the Court of Appeal, reported 19 Asp. Mar. Law Cas. 237 ; 159 L. T. Rep. 499 ; (1939) 1 K. B. 37.

The appellants, the Republican Government of Spain, issued a writ claiming to have possession of the steamship *Arantzazu Mendi* adjudged to them. The respondents, the Nationalist Government of Spain, entered a conditional appearance to the writ, and on the 7th May filed notice of a motion to set it aside on the ground, *inter alia*, that the action impleaded a foreign sovereign State.

Bucknill, J. ordered that the writ and all further proceedings in the action and the arrest of the ship be set aside, and his decision was upheld by the Court of Appeal.

The appellants appealed to the House of Lords.

The facts are sufficiently stated in the headnote.

G. St. C. Pilcher, K.C., *Owen L. Bateson*, and *John G. Foster* for the appellants.

Sir *Robert Aske*, K.C., *J. V. Naisby*, and *R. Valls* for the respondents.

On the 2nd February, 1939, the House dismissed the appeal and intimated that they would give their reasons at a later date.

On the 23rd February the following opinions were read:

Lord Atkin.—This was an appeal from an order of the Court of Appeal dismissing an appeal from an order of Bucknill, J. in the Admiralty Division by which he ordered that the writ and all further proceedings in this action and the arrest of the steamship *Arantzazu Mendi* be set aside. The writ issued on the 13th April, 1938, was expressed to be between the Government of the Republic of Spain, plaintiff, and the steamship or vessel *Arantzazu Mendi* and Eugenio Renteria, the late master of the said steamship, defendants, and commanded the defendants to cause an appearance to be entered for them in the Admiralty Division. The plaintiffs' claim was to have possession of the said steamship adjudged to them.

The writ appears to me to have been wholly irregular. It purported to make a chattel (the ship) a defendant and to order the chattel to enter an appearance. I think that it might have been set aside, unless amended, on that ground alone, and that no warrant of arrest should have been issued on it. It makes it no better that the form was obviously adopted to seek to evade the difficulty that might have been caused if the plaintiffs had described the proposed defendants in terms that would have included the Nationalist Government of Spain, subject to whose directions the master and crew were holding the vessel. However, this point does not arise. The Nationalist Government of Spain entered a conditional appearance and then moved to set aside the writ and the arrest on the ground that the action impleaded a foreign sovereign State and that the ship was in their possession. Bucknill, J. made the order applied for; he was affirmed by the Court of Appeal, and on the 2nd February this House dismissed the appeal from this order. We then stated that we would give our reasons for the decision at a later date and this I proceed to do.

My Lords, in the events that have happened it does not seem necessary to discuss this case at much length. The question is whether the Nationalist Government of Spain represent a foreign sovereign State in the sense that entitles them to immunity from being impleaded in these courts, and if so whether they are impleaded in the action by reason of being in possession of the ship in question. I state the question in that form as being sufficient to dispose of the present case. As, in my opinion, there is no doubt that the Nationalist Government was in fact in possession of the ship, the question does not arise that was discussed in *Compania Naviera Vascongada* v. *Steamship Cristina* (19 Asp. Mar. Law Cas. 159; 159 L. T. Rep. 394; (1938) A. C. 485), whether, on a writ framed in the ordinary form of a writ *in rem* and not having specified defendants, the mere fact that a foreign sovereign State was claiming to be in possession or to be entitled to possession was sufficient to show that the State was impleaded without proof that the claim was rightly or reasonably made. On the question whether the Nationalist Government of Spain was a foreign sovereign State, Bucknill, J. took the correct course of directing a letter, dated the 25th May, 1938, to be written by the Admiralty Registrar to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign State. I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the judgments in this House in *Duff Development Company* v. *Kelantan Government* (131 L. T. Rep. 676; (1924) A. C. 797). With great respect I do not accept the opinion implied in the speech of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognise as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.

The answer of the Foreign Secretary was given in a letter dated the 28th May, 1938. After stating that His Majesty's Government recognises Spain as a foreign sovereign State, and recognises the Government of the Spanish Republic as the only *de jure* Government of Spain or any part of it, the letter proceeds:

"5. His Majesty's Government recognises the Nationalist Government as a Government which at present exercises *de facto* administrative control over the larger portion of Spain.

"6. His Majesty's Government recognises that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain.

"8. The Nationalist Government is not a Government subordinate to any other Government in Spain."

My Lords, this letter appears to me to dispose of the controversy. By "exercising *de facto* administrative control" or "exercising effective administrative control," I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognise it as sovereign, and for the purposes

of international law as a foreign State. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished. In the present case we appear to be dealing with a claim based upon a legislative decree affecting merchant shipping registered at Bilbao in the Basque Provinces, the territory specially designated in the sixth paragraph of the Foreign Office letter. That the decree therefore emanated from the sovereign in that territory there can be no doubt. There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a State *de facto* as opposed to *de jure*. All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law exist. There is the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if Government property is seized or injured. The non-belligerent State which recognises two Governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal courts.

For these reasons I think that it was established by the Foreign Office letter that the Nationalist Government of Spain at the date of the writ was a foreign sovereign State and could not be impleaded.

On the question whether that Government was in possession of the ship, so that the claim of the writ was to take possession from it and transfer it to the plaintiffs, there seems to me little difficulty. Following a decree for requisition made by the Nationalist Government it is proved that on the 13th April, 1938, the owners agreed to the vessel being requisitioned at the free disposal of the Nationalist Government, while on the 5th April the master had undertaken to retain possession at the disposal of the Nationalist Government. The vessel had in fact been arrested on the 24th April, 1937, in a possession action by the owners, the Compania Sota y Aznar against the Bay of Biscay Company Limited, Don Ramo de la Sota Aburto and others, which was terminated by a consent order dated the 28th March, 1938. During this period the ship had been lying in the Surrey Commercial Dock, with a master and crew on board, and the marshal's representative, "the ship keeper," maintaining the arrest. After the consent order the ship keeper remained on board under a claim for the daily expenses "while the ship is in the custody of the marshal," as expressed in the Supreme Court Jurisdiction Order, 1930, S. IV., B. 93. As a result the arrest was not withdrawn at the time of the arrest in the present action. Founding on this the plaintiffs say that the ship was in the possession of the marshal and could not therefore be in the possession of the Nationalist Government. This seems to me based upon a misapprehension of the position created by the arrest. The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the court which ordered arrest, but subject to his complete control of the custody all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. There may be some doubt even whether the sheriff's officer, who has levied under a *fieri facias*, is in fact in possession. But his case is quite different, for he acts under a direction of the court to make of the goods of the defendant so much money: he has the right to sell and therefore to hand over possession to the purchaser. His case, therefore, need not be discussed here. But a bare arrest appears to me clearly to give custody and not possession. The argument on this footing fails, and the simple fact emerges that the Nationalist Government was in possession of this ship at the material date by the master and crew acting with the consent of the owners. For these reasons, my Lords, the appeal was, in my opinion, rightly dismissed.

Lord Thankerton.—My Lords, I agree.

Lord Russell.—My Lords, I agree. The letter addressed to the Secretary of State was one which invited an answer to a question of fact, namely, whether or not the Nationalist Government of Spain was recognised by His Majesty's Government as the Government of a foreign sovereign State; but the answer of the 28th May (in the last paragraph) poses another, and a quite different, question, namely, whether the Nationalist Government should be so regarded.

The earlier portion of the letter, however, contains statements which can lead to only one conclusion of fact, namely, that His Majesty's Government does recognise the Nationalist Govern, ment as the Government of a sovereign State which has the larger portion of Spain (including in particular the Basque Provinces) under its exclusive authority and control.

In these circumstances, and for the reasons stated by my noble and learned friend, Lord Atkin, the unavoidable result was that this appeal was dismissed.

Lord Macmillan.—My Lords, I agree with the reasons which have been stated by my noble and learned friend on the Woolsack for dismissing this appeal.

Lord Wright.—My Lords, I agree, and merely add a few words because of what might appear to be a difficulty in respect of the final paragraph of the letter of the 28th May, 1938, from His Majesty's Secretary of State for Foreign Affairs. The court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose, in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the court on grounds of law. But I do not think that in this case the Foreign Office meant that they should be so open. The Foreign Office stated the precise facts as then existing in regard to recognition by His Majesty's Government, by the decision of which recognition is given or withheld. The question of law left to the court was what was the effect of these facts on the issues before the court.

For the purposes of this case, the letter of the Foreign Office appears to me to have stated sufficiently and in substance that the Nationalist Government of Spain had been recognised by His Majesty's Government as a *de facto* Government, not subordinate to any other Government in Spain, and ruling over the larger portion of Spain, within which is included Bilbao, the vessel's port of registry. That statement is, in my opinion, sufficient, when taken together with the other facts of the case, to bring into operation the principles of law expounded by this House in *The Cristina* (*sup.*), with the result that the appeal was rightly dismissed.

Appeal dismissed.

Solicitors for the appellants, *Petch* and *Co.*

Solicitors for the respondents, *H. A. Crowe* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, February 28, 1939.

(Before HALLETT, J.)

Jenkins v. Shelley and another. (*a*)

Navy—Captain's jurisdiction to punish summarily by detention—Petty officer charged with wilful disobedience — Power of punishing summarily given for offence of "highly insubordinate conduct"—Whether summary detention of petty officer lawful—Naval Discipline Act, 1870 (29 *&* 30 *Vict. c.* 109), *s.* 17.

By sect. 17 *of the Naval Discipline Act,* 1866, *which is grouped with sect.* 18 *under the heading "Insubordination," "Every person subject to this Act who shall wilfully disobey any lawful command of his superior officer . . . shall . . . suffer . . . punishment." Chap. XII. of the King's Regulations and Admiralty Instructions deals with "Discipline," and sect. V. of that chapter deals with "Summary Punishments," comprising arts.* 535 *to* 586. *Table I. of art.* 540 *is headed "Index of Offences suggesting the normal maximum summary punishment that may be awarded for each." Sect.* (d) *of Table I. prescribes detention as the punishment for "*1. *Wilful disobedience of orders." Sect.* (j) *of the Table is headed "Insubordination and Disrespect," and the second offence specified under that section is "Insubordination." Art.* 552 *provides that chief petty officers who cannot be disrated (a category which included the plaintiff) may be sentenced summarily to detention only for certain offences, which include "highly insubordinate conduct." Wilfully disobeying a lawful command of a superior officer may amount to "highly insubordinate conduct," and it is for the officer in command of a ship to decide whether the quality of the wilful disobedience charged in a given case is sufficiently serious to bring it within the description "highly insubordinate conduct."*

The effect of Table I. in art. 540 *is neither to create offences nor to subdivide existing ones except with regard to the suggested normal maximum punishment in respect of each; it is intended to deal only with limitation of punishment and not with jurisdiction to try offences.*

A chief petty officer who could not be disrated was charged with wilfully disobeying the lawful command of a superior officer. On a punishment warrant signed by the captain of his ship and by the commander-in-chief of the port where the ship was stationed, which specified the offence in the same terms, he was sentenced to a period of detention, which he duly served with certain remission for good conduct. In an action for false imprisonment by the petty officer against the captain and the commander-in-chief.

Held, that there was jurisdiction to impose the sentence of six weeks' detention for the offence which was charged.

ACTION tried by Hallett, J. without a jury.

The plaintiff was an engine-room artificer, with rating as a chief petty officer, serving in the Royal Navy on board H.M.S. *Curacoa*. On a day in January, 1938, the plaintiff's superior officer gave the usual order to begin work, using some such words as, "Come along, lads, turn to." A few minutes later he found that every one had left the mess except a stoker and the plaintiff. He said to the plaintiff, "Turn to, Jenkins," whereupon the plaintiff said in the presence of the stoker some such words as, "Well, it has got to come at last, chief. I am not going to do any more work for the Admiralty. Will you tell the senior engineer when you go along?" As a result of that occurrence a charge was made against the plaintiff, alleging that he "did wilfully disobey the lawful command of . . . his superior officer when ordered to turn to at 8.15," and he was ordered by the first defendant, Captain Shelley, the captain of the ship, to be kept in detention for forty-two days, the punishment warrant also being signed by the second defendant, the Earl of Cork and Orrery, as commander-in-chief. The plaintiff in fact served thirty-six days in detention, having received a remission of six days for good conduct. He then brought this action, claiming damages for false imprisonment, contending that the defendants had no jurisdiction to sentence him summarily to detention for wilful disobedience. The defendants pleaded that the plaintiff had been sentenced to detention because he had been guilty of highly insubordinate conduct in disobeying the lawful command of his superior officer. They denied that in so detaining the plaintiff they acted without lawful justification, and they relied on the provisions of the Naval Discipline Act, 1870, and the King's Regulations and Admiralty Instructions.

Sir *Stafford Cripps*, K.C., *Peter Pain*, and *Anthony Cripps* for the plaintiff.

The Attorney-General (Sir *Donald Somervell*, K.C.) and the Hon. *H. L. Parker* for the defendants.

Cur. adv. vult.

February 28.—**Hallett, J.** read the following judgment: The plaintiff, Eric John Arnold Jenkins, was in the month of January, 1938, an engine-room artificer, 4th class, in His Majesty's Navy serving aboard H.M.S. *Curacoa* in Portsmouth Harbour. By a letter dated the 12th December, 1938, it was admitted on behalf of the defendants, although originally traversed in their defence, that the plaintiff had a rating as a chief petty officer, but on the other hand at the trial it was admitted on behalf of the plaintiff that he was a chief petty officer who could not be disrated. The relevance of these two admissions will appear when I come to deal with art. 552 of the King's Regulations and Admiralty Instructions for the Government of His Majesty's Naval Service, upon which this case mainly turns. The first defendant was at all material times a captain in His Majesty's Navy, commanding H.M.S. *Curacoa*, and the second defendant was at all material times the commander-in-chief of His Majesty's ships and vessels at Portsmouth. One, Reginald Lewis Mauger, chief engine-room artificer, 2nd class, was at all material

(*a*) Reported by R. C. CALBURN, Esq., Barrister-at-Law.

times, having regard to the definition contained in sect. 86 of the Naval Discipline Act, 1870, the superior officer of the plaintiff.

On the 19th January, 1938, an incident is alleged by the defendants to have occurred aboard H.M.S. *Curacoa*, particulars of which are set out in a letter from their solicitors of the 12th December, 1938, and counsel for the plaintiff conceded that those particulars might be accepted by me as sufficiently accurate for the purposes of this action.

By reason of that incident the plaintiff was charged on the 20th January, 1938, before the first defendant, as the officer in command of the ship to which the plaintiff belonged, with an offence which was specified on a form S241 (hereinafter called the charge sheet) as follows: "Did wilfully disobey the lawful command of Reginald Lewis Mauger, chief engine-room artificer, second class, O.No. P/M 22013, his superior officer, when ordered to 'turn to' at 0815." Thereupon the first defendant, having investigated the matter, transmitted to the second defendant a form S271 (hereinafter called the punishment warrant), which recited on p. 1 that the plaintiff had been charged with an offence specified in exactly the same terms as on the charge sheet, and submitted on p. 4 that the offence might be dealt with summarily, and that a sentence of forty-two days detention in addition to deprivation of one good conduct badge was considered suitable. On the same day this recommendation was approved in writing by the second defendant on the appropriate part of the form, and on the 22nd January, 1938, the first defendant made further entries on the form adjudging that the plaintiff should be kept in detention in Portsmouth Naval Detention Quarters for forty-two days and be deprived of one good conduct badge, and certifying that before awarding the foregoing punishment he had duly investigated the matter and that he considered the charge to be substantiated against the plaintiff.

Counsel for the defendants intimated to the court that he was prepared to call the first defendant to give evidence that, before arriving at the decision recorded on the punishment warrant, he had addressed his mind to the question whether the plaintiff was guilty of highly insubordinate conduct, and had come to the conclusion that the plaintiff was guilty of such conduct; but counsel for the plaintiff, whilst submitting that that evidence could be of no possible relevance, intimated to me that without the first defendant's being actually called he was prepared to treat that evidence as having been given and not challenged. I attach no importance to the conduct sheet, which was also put in evidence, but, in order to complete this survey of the documentary evidence it may be mentioned that the offence in question was specified on it in the same terms as on forms 241 and 271. No oral evidence was adduced on either side. As a result of the respective actions of the defendants which appear from the punishment warrant, the plaintiff was in fact kept in detention in Portsmouth Naval Detention Quarters for thirty-six days, six days of his sentence being remitted.

For the plaintiff it was contended that the first defendant had no jurisdiction in the circumstances of this case to sentence him summarily on the punishment warrant to detention, as had admittedly been done, and that, therefore, the detention of the plaintiff amounted to a false imprisonment in point of law for which both defendants were responsible and in respect of which both were liable to pay to the plaintiff such damages as I might think fit to award.

For the defendants it was contended in their defence that the plaintiff's claim did not fall within the jurisdiction of this court, but during the course of the hearing it was admitted by their counsel that, having regard to *Heddon* v. *Evans* (35 Times L. Rep. 642), it was not open to this court to decide this point in their favour; and accordingly, whilst keeping the point open for argument in a higher court, he did not address any argument to me on it.

The sole questions for this court, and which, in my opinion, necessary to consider, are, first, whether the first defendant had the necessary jurisdiction in point of law to sentence the plaintiff summarily to detention as he did, and secondly, what damages ought to be awarded if the first defendant had not that jurisdiction.

By sect. 56, sub-sect. (2) of the Naval Discipline Act: "Any offence not capital which is triable under this Act, and (except in the cases by this Act expressly provided for) is not committed by an officer, may, under such regulations as the Admiralty from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time either of the commission or of the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude or to award imprisonment for more than three months." The general power of summary trial and punishment in respect of offences triable under the Act which is thus conferred on the officer in command of the ship to which the offender belongs is, therefore, expressly limited by the section only in three particulars, namely, as regards the nature of the offence—it must not be capital; as regards the nature of the offender—he must, except in certain cases, not be an officer, which expression includes by sect. 86 a subordinate officer; and as regards the nature of the punishment awarded—it must not be penal servitude or imprisonment or detention for more than three months. None of those limitations is applicable in the present case. The words "under such regulations as the Admiralty may from time to time issue," in my opinion, merely regulate procedure, and do not further limit the jurisdiction. It was conceded, however, on behalf of the defendants that, since the King's Regulations and Admiralty Instructions are, to quote the Order enjoining their observance, "established by His Majesty's Order in Council," any further limitation of the jurisdiction of the first defendant which appears from them can be relied upon by the plaintiff, and does not merely expose the defendants to disciplinary action for disregarding that limitation.

Art. 551 of the King's Regulations lays down a general power of summary trial and punishment in respect of offences triable under the Naval Discipline Act, which power is by the article limited in the same three particulars as the power conferred by sect. 56, sub-sect. (2) of the Act, but is also limited by reference to the exceptions specified in art. 552.

Art. 552 lays down that (amongst others) chief petty officers, of whom the plaintiff was one, are not to be sentenced summarily to imprisonment or detention except for desertion; but that those, of whom the plaintiff was one, who cannot be disrated, as shown in Appendix XVII, Part I., may be sentenced summarily to imprisonment or detention for the offences thereinafter specified only. There follows a list of offences under letters (*a*) to (*i*), of which (*a*) is "Mutiny or highly insubordinate conduct." It results that art. 551

clearly conferred no jurisdiction to sentence the plaintiff summarily to detention, and that according to art. 552 he was not to be sentenced summarily to detention except for one of the offences specified under letters (*a*) to (*i*). It is not suggested that the plaintiff was in fact sentenced for mutiny or for any of the offences specified under letters (*b*) to (*i*) inclusive, and the short point for decision therefore becomes whether he was sentenced for "highly insubordinate conduct."

His counsel points to the terms in which his offence was specified on both the charge sheet and the punishment warrant, and contends that it appears from those terms that the plaintiff was neither charged with, nor adjudged guilty of, nor sentenced for "highly insubordinate conduct." Counsel contends, and I agree with him, that whether the plaintiff could have been so charged, adjudged and sentenced, having regard to the admitted particulars of his conduct, is wholly immaterial if he was not in fact so charged, adjudged, and, more particularly, sentenced. He further contends that whether the first defendant considered the plaintiff to be guilty of highly insubordinate conduct is equally irrelevant, and I agree that this is so if, but only if, the defendants are precluded by the documents from establishing that this was the offence for which the plaintiff was in fact sentenced.

The first difficulty in the case is that, while art. 552, when read in conjunction with art. 551, which refers to it, clearly contemplates that highly insubordinate conduct is an offence triable under the Naval Discipline Act, the Act itself does not refer in terms to any such offence. I may add that the inclusion of "insubordination" as the second offence in sect. (j) of Table I. under art. 540, to which I shall have further to refer, also seems to contemplate that insubordination is an offence triable under the Act. In those circumstances counsel for the plaintiff does not dispute that highly insubordinate conduct is an offence triable under the Act, and concedes that it is an offence covered by sect. 17, since it is common ground that there is no other section which can cover it. That section creates three offences, namely: (i.) wilfully disobeying any lawful command of his superior officer, (ii.) using threatening or insulting language to his superior officer, and (iii.) behaving with contempt to his superior officer. For each of those offences a punishment of detention is clearly authorised by the section having regard to its terms coupled with sect. 55. The first of those offences was the offence charged in the present case according to the charge sheet and punishment warrant, and not only would a charge of highly insubordinate conduct in those terms have been a charge of an offence not mentioned in the Act, but the insertion of such a charge on the punishment warrant would have failed to comply with the requirements of art. 538, which prescribes that when punishments are ordered by warrant, as in the present case, the charge as shown under the heading "Particulars of Offence" on p. 1, should follow as closely as possible the wording of the appropriate section of the Naval Discipline Act.

Accordingly counsel for the defendants contends that conduct rendering the offender guilty of any one of the three offences created by sect. 17 may amount to highly insubordinate conduct, and that the question whether it has been of the gravity described by those words is a question for determination by the officer trying the offender, and not by this court. He points to the fact that the word "insubordination" appears as a heading to both sects. 17 and 18, and it may be added that in sect. 46 there is a reference to this heading. As to the effect that such a heading may have, counsel refers me to Maxwell on the Interpretation of Statutes (8th edit., at p. 46), where it is stated that such headings are regarded in the same light as preambles, and he concedes that assistance can only be derived from them in case of ambiguity; but he contends, as I understand, and, notwithstanding the contention of the plaintiff's counsel to the contrary, I agree, that this is a case where the court can legitimately derive some assistance from the heading.

The plaintiff's counsel contends, on the other hand, that wilfully disobeying a lawful command of a superior officer does not, and cannot, amount to highly insubordinate conduct, and in reply to my question what is the difference, according to the ordinary use of language, between such disobedience and insubordination, he submits that wilful disobedience is something merely passive, whereas insubordination is something in the nature of active defiance. He concedes, apparently, that the second or third offences created by sect. 17 might amount to highly insubordinate conduct, but denies that the first offence so created can amount to it.

After careful consideration, I am unable to take that view. In my opinion, wilful disobedience to a lawful command of a superior officer would commonly and correctly be described as a kind of insubordination, although not the only kind, and the heading to which I have referred tends to support the view, which I have formed independently of the heading, that such disobedience is to be so regarded for the purposes of the Act. Counsel for the plaintiff suggests that highly insubordinate conduct is the equivalent of gross insubordination, and I agree; but the adjective seems to me to relate merely to the quality of the insubordination, and not to render highly insubordinate conduct a different offence from insubordinate conduct or a different offence from wilful disobedience, if insubordinate conduct is not a different offence from wilful disobedience. I do not understand it to be disputed that the quality, as distinct from the nature, of the offence committed is a matter for consideration by, and only by, the person or persons entrusted with the duty of deciding how far the offender ought to suffer or escape the maximum punishment which can lawfully be imposed for that offence.

Counsel for the plaintiff has further urged that the officer in command of the ship cannot be the judge of his own jurisdiction, but it is, in my opinion, clearly for that officer to decide whether the person charged with wilful disobedience is guilty of that offence, and if so whether the quality of his offence is, in all the circumstances, sufficiently serious to bring it within the description "highly insubordinate conduct." It has been strongly contended, however, on behalf of the plaintiff that the contents of Table I. under art. 540 conclusively prevent wilful disobedience from being regarded as a kind of insubordination which may amount to highly insubordinate conduct, and I agree that considerable difficulty is occasioned by the subdivisions of offences which are to be found in that table.

The expression "highly insubordinate conduct" does not appear in the table at all, but it is pointed out that "Disobedience" is the heading to sect. (*d*) of that table, and that "wilful disobedience of orders" appears as the first offence mentioned in that section, whereas "Insubordination and Disrespect" is the heading of sect. (*j*) of the table and

"insubordination" is the second offence mentioned in that section. It is therefore contended that the table shows that wilful disobedience is to be regarded as a different offence from insubordination, and not merely as a possible kind of insubordination. That argument is reinforced by pointing out that in sect. (*j*) mutiny and insubordination appear as the first and second offences and are thus in a sense coupled, just as they are in (*a*) under art. 552, and it is sought to deduce from that circumstance that, for the purposes of art. 552, wilful disobedience should be regarded as falling within a less serious category of offences than highly insubordinate conduct, and therefore within a different category. It was conceded that that argument would have been stronger if a more severe maximum punishment, for example, punishment No. 3 (imprisonment), were suggested for insubordination, but I agree that the fact that the same maximum punishment is suggested for insubordination and wilful disobedience of orders may be a mere coincidence and does not carry the matter any further. I have also come to the conclusion that the note in Table II. of art. 540 to the second offence in sect. (*d*) does not throw any real light upon the question whether any one of the offences specified under art. 552 can or cannot come under more than one of the descriptions contained in Table I. For the defendants it is pointed out that Table I. merely contains suggestions as to normal maximum summary punishments and that it is expressed not to be exhaustive as regards offences. In my opinion, that table can neither create fresh offences, nor subdivide, save as regards the suggested normal maximum summary punishments, existing offences, nor affect by such creation or subdivision the permissible mode of trying offences. The only effect which it can in my opinion have upon the application of art. 552 is that whereas, for example, by virtue of the combined effect of sect. 56, subsect. (2), of the Act and art. 552, if they had stood alone, the plaintiff could have been sentenced for highly insubordinate conduct to a summary punishment as severe as six weeks' imprisonment, that is, punishment No. 3, by virtue of Table I. and the first part of the second sentence in note (*i.*) at the head of that table, the normal maximum summary punishment to which he exposed himself by committing that offence was further limited to three months' detention, that is, punishment No. 4 for three months. In my opinion, art. 540 deals, and is intended to deal, only with limitation of punishments, and does not deal, and is not intended to deal, and ought not to be utilised so as to have the effect of dealing, with jurisdiction to try offences summarily.

For these reasons I have come to the conclusion that when the plaintiff was sentenced summarily to detention by the first defendant on the charge specified on the charge sheet and the punishment warrant he was not so sentenced without jurisdiction, having regard to the authority enjoyed by that defendant under the relevant provisions of the Naval Discipline Act and the King's Regulations, and that the plaintiff's claim fails accordingly. In those circumstances the question what amount of damages ought to be awarded to him does not arise.

Where the assessment of damages involves an investigation which the trial judge has already conducted, it is often desirable for him, although giving judgment against the plaintiff on the question of liability, to state the amount of damages which he would have awarded if he had decided differently on that question, and thus to save unnecessary trouble, delay and expense in the event of the plaintiff's succeeding upon the issue of liability in a higher court.

In the present case, however, I am in no better position to assess damages than a higher court would be, and I therefore content myself with saying that no suggestion was made before me on behalf of the plaintiff that the defendants were guilty of anything more than a *bona fide* misapprehension as to the extent of the powers conferred on the first defendant by provisions which, as sufficiently appears from this judgment, are in my opinion not very easy to construe and apply. For these reasons there will be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiff, *Gower, Pollard, Thorowgood,* and *Tabor.*

Solicitor for the defendants, *The Treasury Solicitor.*

COURT OF APPEAL.

February 27, 28 ; *March* 1, 1939.

(Before Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.)

Hall Brothers Steamship Company Limited v. Young ; Steamship Trident. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Common form of running down clause—"By way of damages" —French statutory liability imposed on ship in any event on damage happening to pilot boat—Sum payable under that special liability when the ship in no way to blame not a liability to pay "by way of damages"—Sum payable "by way of damages" means sum payable in consequence of some tortious act of ship.

This appeal raised the question whether the words "by way of damages" used in the proviso to the common form running down clause in a policy of marine insurance covered a certain payment for which the ship became liable under a French law with respect to the pilot boat. The policy provided that if the ship insured came into collision with any other ship or vessel, and the assured should in consequence thereof become liable to pay and should pay to any other person or persons any sum by way of damages in respect of such collision, the undersigned would pay to the assured such proportion of three-fourths of such sum so paid as their respective subscriptions thereto bore to the value of the ship insured. Then there was a proviso that that clause should in no case extend to any sum which the assured might become liable to pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers,

(*a*) Reported by Geoffrey P. Langworthy, Esq., Barrister-at-Law.

stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel or for loss of life or personal injury.

By art. VII. of a French law of the 28th March, 1928, *dealing with pilotage, it was provided, as translated into English, that in the absence of gross negligence of the pilot, damage* (les avires) *happening to the pilot boat in the course of pilotage operations and in the course of manœuvring for the embarkation or the disembarkation of the pilot was for the charge of the ship.*

The steamship company were the owners of a steamer which in August, 1929, *was carrying a cargo of cereals to Dunkirk from the River Plate. About eight miles from Dunkirk the steamer was stopped to take a pilot aboard. As the pilot boat owned by the pilotage administration of Dunkirk drew alongside, her steering gear broke down, and she came into collision with the steamer and in consequence both vessels sustained damage. It was admitted that there was no gross negligence on the part of the pilot boat, as also that the steamer was in no way to blame. The appellants, the steamship company, brought an action to recover* 13s. 1d. *from the respondent as one of the underwriters of the policy of marine insurance of the steamer, the other underwriters agreeing to regard him as their representative. Goddard, J. held that the words "by way of damage" meant a sum which was payable in consequence of some tortious act of the ship, and that a liability imposed by a foreign law, such as art. VII. of the* 1928 *French law, although the steamer was in no way to blame for the collision, was not covered by the policy of the appellants, who could not, therefore, recover. The plaintiffs appealed.*

Held, that the liability was not for payment in respect of the collision, but to pay "by way of damages," and therefore the liability did not extend to every pecuniary liability. The contract fell to be construed by English law, and damages imported that the sums payable were due by reason of some breach of duty or obligation, whether imposed by contract, the general law, or legislation. Liabilities to make payments which would fall outside the word "damages" were such as compensation under the Lands Clauses Act, or under the Workmen's Compensation Act. The phrase in the clause "but when both vessels are to blame" imported the idea that the clause was dealing with where the vessel insured was to blame. Because the proviso extended to cover cases of statutory liability, that did not mean that the word "damages" in the main part of the clause must be given a very wide and loose meaning. The North Britain (70 *L. T. Rep.* 210 ; (1894) *P.* 77) *and* Tatham, Bromage and Co. *v.* Burr ; The Engineer (8 *Asp. Mar. Law Cas.* 401 ; 78 *L. T. Rep.* 473 ; (1898) *A. C.* 382) *distinguished. The conclusion was that payments "by way of damages" to be made under the clause were payments the obligation to make which arose from a fault of some kind on the part of the ship insured. Decision of Branson, J. in* Furness Withy and Co. Limited *v.* Duder (18 *Asp. Mar. Law Cas.* 623 ; 154 *L. T. Rep.* 663 ; (1936) 2 *K. B.* 461) *approved. The liability on the ship under the French law fell without any regard to the question whether it had or had not been guilty of any fault or breach of duty. Therefore the special liability imposed by art. VII. of the French law did not fall under the head of a sum which the assured became liable to pay by way of damages in respect of the collision.*

Decision of Goddard, J. (19 *Asp. Mar. Law Cas.* 218 ; 159 *L. T. Rep.* 89) *affirmed.*

Leave to appeal to the House of Lords.

APPEAL from the judgment of Goddard, J.

The material facts are stated in the headnote.

The arguments were before the Court of Appeal on the 27th and 28th February and sufficiently appear in the judgment of the Master of the Rolls.

Sir *Robert Aske*, K.C. and *W. L. McNair* for the appellants.

H. U. Willink, K.C. and *Cyril Miller* for the respondent.

Sir Wilfrid Greene, M.R.—We need not trouble you, Mr. Willink.

The question raised by this appeal turns upon the construction of the common form running down clause in a policy of marine insurance, as applied to the particular circumstances of the case. It therefore becomes necessary to consider, first of all, the actual language used in the clause and then to consider the nature of the subject-matter to which it is said the clause applies. The obligation undertaken by the underwriters is this : "If the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision "—that is, the event upon which the underwriters' liability springs up. It is to be noticed that it is not a liability to make any payment to any other persons in respect of the collision, but a liability to pay "by way of damages." Accordingly the clause does not extend to every pecuniary liability arising in respect of the collision but only to such liabilities as arise by way of damages. The word "damages" is one which to an English lawyer conveys a sufficiently precise meaning. This document is an English contract which falls to be construed according to English law. That does not, of course, mean that in its application to liabilities arising under foreign law (an application which the parties of course clearly contemplated as possible) the operation of the clause is to be excluded merely because some liability arising under foreign law as a result of a collision does not precisely coincide with the liability which is recognised in the courts of this country. Nevertheless, it is necessary, in my opinion, in construing a document of this kind, to give to the word "damages" its ordinary meaning in English law. "Damages" to an English lawyer imports this idea, that the sums payable by way of damages are sums which fall to

be paid by reason of some breach of duty or obligation whether that duty or obligation is imposed by contract, by the general law, or legislation.

The measure of the duty, of course, will depend upon the particular law. A statute may impose an absolute obligation not to do certain things, and, as the result of that, the person injured by the doing of such a thing may have a right to damages. That is a question of the measure of the duty. An example which was referred to in the course of the discussion is to be found in the Air Navigation Act, 1920, s. 9, sub-s. (1), under which damages are recoverable from the owner of aircraft who causes damages irrespective of negligence or intention ; it is a standard of duty not to do certain things imposed by that statute. Looking at it from another point of view, there are certain classes of liability to make pecuniary payments which clearly fall outside the word " damages." For instance, compensation paid under the Lands Clauses Act or a matter of that kind is certainly not damages. Workmen's compensation payments are certainly not damages in the ordinary sense of the word, and, in spite of Mr. McNair's argument to the contrary, I find it quite impossible to suppose that workmen's compensation payments are included in the word " damages " in this clause. The foundation of that class of liability is something entirely different from the foundation of the liability which gives rise to a claim for damages.

Proceeding with the clause, it is to be noticed that in the last branch of the clause there occurs the phrase " but when both vessels are to blame." That phrase seems to me to throw light upon the construction of the earlier part of the clause and to confirm what I have been saying about it. The phrase, " but when both vessels are to blame," imports the idea that what the clause is dealing with is a case where the vessel insured is to blame, that is to say, has been guilty of some breach of duty (normally, the duty to take care), and the last part of the clause makes special provision for the case where the other vessel also is to blame.

Then comes the proviso, and an argument was based upon it to this effect. It was said that the proviso, upon its true construction, covers matters which would not fall within the word " damages " in its ordinary meaning—matters such as liability under sect. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, to pay for removal of obstructions under statutory powers or to pay for injury to wharves, piers, and so forth. The argument is of this nature : It is said that because the proviso extends to cover cases of statutory liability, imposed without reference to any breach of duty at all, therefore the word " damages " in the main part of the clause must be given a very wide and loose meaning. I cannot give that force to the proviso. The two cases that were relied upon on this part of the argument were *The North Britain* (70 L. T. Rep. 210 ; (1894) P. 77), and a later case in the House of Lords, that of *Tatham, Bromage, and Co. v. Burr ; The Engineer* (8 Asp. Mar. Law Cas. 401 ; 78 L. T. Rep. 473 ; (1898) A. C. 382), a case in which the same point arose. In the case of *The North Britain* the claim against the underwriters was truly a claim for damages, because it was a claim by the owners of the *North Britain*, the vessel insured, to be re-imbursed by the underwriters the sum which they had been compelled to pay to the owners of the other vessel who had incurred the statutory liability to pay for the removal of their vessel as an obstruction. The liability of the *North Britain* was a liability to pay to the owners of the other vessel its share of that particular head of damage suffered by them in consequence of the negligence of the *North Britain*. It was argued in that case that the proviso only extends to cases where the liability to make a payment for removal of obstructions under statutory powers arises apart altogether from a liability to pay damages, and that as in that case the liability was a liability to pay damages the measure of which was the amount which the other vessel had to pay for removal of the obstruction, the proviso did not cover it and it fell to be governed by the main clause. It will be seen, therefore, that the point in that case is very far removed from anything which we have to consider here ; but it is argued that in that case it was said that the clause extends not merely to payments for removal of obstructions which are payments by way of damages, but also to payments for removal where no question of damages arises. It seems to me that the observations in that case are, if anything, against the contention of the appellants. Lindley, L.J., for instance (70 L. T. Rep. at p. 213 ; (1894) P. at p. 84), agrees with the view expressed by Gorell Barnes, J. in the Court of Appeal that the proviso is not an exception and that it is put in by way of precaution. Lindley, L.J. says that he regards the proviso as a warning that you are not to read the clause so as to include the consequences mentioned in the proviso, and then he says (70 L. T. Rep. at p. 213 ; (1894) P. at p. 84) : " The true meaning of the proviso is that ' this clause shall in no case extend to any sum which the assured shall have to pay for removal of obstruction consequent on such collision.' I know the clause itself says in terms ' shall pay by way of damages ' ; but I do not think the construction which I am adopting involves the insertion of any words at all. It is ' in no case shall extend to any sum the assured shall become liable to pay '—that is, pay in respect of any ship by way of damages or otherwise." Lindley, L.J., therefore, is reading the proviso as extending not merely to cases where the payment falls to be made by way of damages, but to cases where it falls to be made not by way of damages. That is in agreement with what he has just said, that he is regarding the proviso, in so far as it goes beyond the subject-matter of the main clause, as something put in *ex abundanti cautela*. Davey, L.J., in his judgment, also appears to take the same view, that the proviso is to that extent put in *ex abundanti cautela ;* and indeed to find a proviso inserted in such a context for such a purpose is a thing of common occurrence.

The case of *The Engineer* is one to which I do not think I need refer except to say that the House there approved the observations of Davey, L.J. I find myself quite unable to find in this proviso any words sufficient to give to the word " damages " the extended and inaccurate signification which the appellants would have us give to it. The difficulties into which the appellants get in trying to construe the word on some such basis as that is illustrated by the fact that they feel constrained to include within the word workmen's compensation payments, which are not damages at all, but to exclude such things as penalties. On what principle that distinction can be drawn I am quite unable to appreciate.

Therefore, taking the matter of the construction of this clause, the conclusion to which I have come to is this, that the payments " by way of damages " to which it refers are payments the obligation to make which arises from a fault of some kind on the part of the ship insured. That is in accordance with a decision of Branson, J. in the case of *Furness Withy and Co. Limited* v. *Duder* (18 Asp. Mar. Law Cas. 623 ; 154 L. T. Rep. 663 ;

(1936) 2 K. B. 461). That was a case where the obligation to make a payment arose, not by reason of a local law but by reason of a special contract into which the owners of the vessel had entered with the Admiralty, who provided the only tugs which were available at the spot. It was under that contract that the payments fell to be made. Branson, J. had in that case to deal, therefore, with a point which is on all fours with the present point, save for the fact that the obligation arose not by legislation but by contract. He construed the clause in this way. He said (18 Asp. Mar. Law Cas. at p. 624): " I think the sentence means that where in consequence of a collision there arises a legal liability upon the shipowners to pay a sum which can properly be described as damages for a tort, then the underwriters will indemnify them. The expression ' becoming liable to pay . . . by way of damages ' indicates, to my mind, a liability which arises as a matter of tort, and not as a matter of contract." As I said earlier in this judgment the word " tort " in regard to a document intended to apply to foreign countries under foreign jurisdiction must not necessarily be read in the precise technical sense of English law. It would not be necessary to find that the act should necessarily be tortious by English law, but it must be, at any rate, of that character.

I come to examine the nature of the payment in this case. The first thing to be observed about it is that the liability to make the payment falls upon the vessel without any regard to the question whether it has or has not been guilty of any fault or breach of duty. The obligation which arises is an obligation to make good the damage suffered by the pilot vessel in the circumstances stated, whether or not there is a collision, whether or not the vessel insured is to blame, whether or not the pilot himself is negligent, provided that his negligence is not the type of negligence described as *faute lourde*. It has nothing in the world to do with any duty on the vessel itself, but it is a provision under which the vessel is compelled to bear a particular charge irrespective of any question of duty imposed upon it. In the present case the liability would have arisen equally if the pilot vessel, without touching the *Trident*, had been swamped by a sea owing to the failure of its steering gear. But the liability would have been precisely the same in either case. Looking at the terms of the French law—without doing what the learned judge found it unnecessary to do and I find it unnecessary to do, namely, to express any concluded opinion as to the true category into which this class of payment ought to be put—one thing which is to my mind quite clear is this, that it cannot be put into the category of " damages " within the meaning of this particular clause. It is based on an entirely different conception, and the liability which arises under it is not a liability to avoid collision, it is not an obligation to navigate carefully or to do acts of that kind, it is merely a liability to make a payment of that particular character ; it has no reference whatsoever to any act or default on the part of the vessel insured.

That is the conclusion to which I should have come upon an examination of the language of the French law itself ; but evidence was called before the learned judge, given by two distinguished French lawyers, one of whom, the lawyer called by the respondents, had very special experience in maritime law, and there again, without considering whether or not the evidence of the respondent's expert is evidence which we are bound to accept or ought to accept, I am quite clearly of opinion that the evidence of the appellants' expert is evidence which cannot be accepted. What he said was this, that liability under the French decree was based upon negligence ; he said that " *faute* " is at the bottom of it, and that it raises a presumption of " *faute*." That seems to me to be a thing which it is quite impossible to extract from this provision. There is no conception in it at all of fault on the part of the vessel.

The result in my opinion is, in a sentence, that the very special liability imposed by art. 7 of the French law of the 28th March, 1928, is not one which, upon the true construction of the running down clause, falls under the head of a sum which the assured became liable to pay by way of damages in respect of the collision. Whatever else it may be, it is in its nature outside the word " damages " as used in that clause. In my opinion the learned judge was perfectly right in his conclusion, and the appeal must be dismissed with costs.

MacKinnon, L.J.—I agree. The plaintiffs seek to recover three-quarters of the amount of a certain sum which they have become liable to pay. I entirely agree with the Master of the Rolls that they fail under this clause to establish any right to recover that sum, because they fail to establish that that liability was a liability to pay " by way of damages." That result arises from a consideration of those four words, " by way of damages." I think that the same result is arrived at by a consideration of three other words in a neighbouring but different part of the clause. Those three other words are the words " in consequence thereof." It has been a well settled rule for over seventy years, in regard to the construction of marine insurance policies, that where, in an added clause in a policy, there are words like " in consequence thereof," in dealing with causation you have to look at the proximate and not the remote cause. I say that was settled over seventy years ago ; it was so in the case of *Ionides* v. *Universal Marine Insurance Company* (8 L. T. Rep. 705 ; 14 C. B. (N.S.) 259), where the words were " in consequence of hostilities." So here, where you have the words " in consequence thereof," it means, " and the assured shall in a result proximately caused by the collision be liable to pay." This liability, in my view, was not proximately caused by the collision, and it was not caused by the collision at all. This liability was caused by the French law, which created a liability on the ship to pay for any damage caused to the pilot boat by any cause, and of course " any cause " included collision. I think the liability for this expense was not a liability in consequence of the collision, but in consequence of the French law, even though by the operation of that law the damage to the pilot boat did arise by reason of this collision.

The same sort of conclusion was arrived at in a case which at first sight is not very parallel, but which I think does afford a real parallel, and that is the case to which I referred of *Inman Steamship Company* v. *Bischoff* (5 Asp. Mar. Law Cas. 6 ; 47 L. T. Rep, 581 ; 7 App. Cas. 673). There there was a claim for loss of freight under an insurance policy against the loss of freight by perils of the sea. It was held that the freight that was lost could not be recovered because the loss was not caused by perils of the sea, but was caused by the operation of the contractual right of the charterers to stop the payment of freight, even though the exercise of that right by the charterers was made possible by the insured ship having been damaged by perils of the sea.

In the result, for these reasons, in addition to those given by the Master of the Rolls, I think the appellants fail to establish that the respondent is liable to pay them the sum of 13*s.* 1*d.*

Finlay, L.J.—I agree both with the judgments which have just been delivered and with the judgment which was delivered by my brother Goddard. There is only one passage in his judgment to which I should like to call attention, because I think it accurately deals with the question of what the position was by French law. My brother Goddard of course had the advantage of hearing and seeing the experts who were called, and what he says is this : " It seems to me that, certainly so far as it is a matter of coming to a decision upon the evidence of the French lawyers, there is no conception of delict or tort in the cause of action which is given by the French decree to the pilot boat. It seems to me that the probable theory which underlies the legislation, though it does not matter when it is a matter of policy of law what theory underlies the legislation, is that the pilot boat is rendering a service for the benefit of the ship which requires pilotage and, therefore, any damage which the pilot boat may receive in the course of rendering that service is to be regarded as an expense of the pilotage, and is to be paid by the ship in just the same way as she would have to pay the pilotage dues, or whatever is the correct expression used in France, as remuneration for the service which the pilot renders." Applying that passage, it seems to me, for the reasons which have been given by my brethren, clear here that in the first place this was not a payment by way of damages in any possible sense in which that word could be used in an English clause of this character, and in the second place it appears to me to result, as my brother MacKinnon has pointed out, that the payment, whatever it was, was not made in consequence of the collision, but was made because the French law has imposed a liability—nothing to do with collision, though collision is one of the matters which may arise—to make a payment in case of damage suffered by the pilot vessel during the pilotage, during the manœuvres necessary for embarking and disembarking the pilot.

On all the grounds which have been assigned by the Master of the Rolls and by my brother MacKinnon, as well as for the reasons which were assigned by my brother Goddard, I entirely agree in the result.

Willink.—The appeal will be dismissed with costs, my Lord ?

The Master of the Rolls.—Appeal dismissed with costs.

Sir *Robert Aske.*—My Lord, this point is regarded as one of substantial importance, and I am instructed to ask your Lordship for leave to appeal.

MacKinnon, L.J.—It is very rarely that this sort of thing will arise.

Sir *Robert Aske.*—It may be a very serious matter. The damage here is very small, but it might be very great.

The Master of the Rolls.—Have you anything to say as to that application, Mr. Willink ?

Willink.—Of course, it is a matter for your Lordship. I would say that this particular type of case must arise very rarely indeed, and in my submission it is a very clear case. Your Lordships might think fit to impose terms. It has been admitted that this is not an individual shipowner who is suffering great hardship ; this is a fight between a club and underwriters. The underwriters have won in two courts.

MacKinnon, L.J.—That applies to every case in the Commercial Court.

Willink.—Very frequently.

MacKinnon, L.J.—To the great profit of the gentlemen who practise there !

Willink.—If a protection club desires to have a simple point (because I submit it is a simple point) taken through three courts, your Lordships might think it proper that they should pay for that luxury in any event. We have won in two courts. Ought underwriters to be taken further on a case of this sort ?

MacKinnon, L.J.—If leave is to be given you do not want an undertaking that they shall pay the costs in any event ?

Willink.—No, my Lord.

MacKinnon, L.J.—You are so confident that you are going to win !

Willink.—An extra safeguard is always desirable.

The Master of the Rolls.—This is not a case where an unsuccessful party here is interested in establishing a principle against somebody who is only concerned with his own individual case. Both these parties are interested in this as a matter of principle.

Willink.—Yes.

The Master of the Rolls.—Of course, in the other class of case where you have on the one side a mere individual and on the other side a person who is concerned to establish a principle, terms are very frequently imposed ; but this is not that class of case. It is rather a case where one would have expected, if the decision of this court had been the other way, the underwriters would have been very anxious to obtain the opinion of the final tribunal on what is a common form clause.

Willink.—Certainly, my Lord. If there was that difficulty it would be reasonable for it to go to the House of Lords. I submit it is unreasonable that this case should go to the House of Lords : that is really the substance of it.

The Master of the Rolls.—Yes, Sir Robert, you may take leave.

Appeal dismissed.

Solicitors for the appellants, *Lightbounds, Jones,* and *Co.*, agents for *Ingledew* and *Co.*, Newcastle-on-Tyne.

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

March 1 *and* 2, 1939.

(Before Sir WILFRID GREENE, M.R., MACKINNON and FINLAY, L.JJ.)

Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Company Limited (No. 2) (*a*)

Charter-party — Power to cancel "if war breaks out involving Japan"—Cancelled Japanese charterers claim damages for breach —Popular sense of meaning of "war"— Diplomatic relations not broken off—Question whether war existed was solely one for Executive and not for court.

On the 2nd June, 1936, a Japanese firm at Kobe chartered from an English firm of shipowners the steamship N. M. *on time charter, and clause 31 of the charter-party provided that "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." On the 18th September, 1937, the owners cancelled the charter-party on the ground that war had broken out involving Japan. The charterers brought this action claiming damages for breach of contract, and the matter went to arbitration. The umpire, after describing the operations and battles fought between China and Japan and the position on the 18th September, 1937, found as a fact that, though diplomatic relations had not at that date been broken off between China and Japan, war had broken out in which Japan was engaged. The charterers, before the hearing, had applied to the Foreign Office in England and asked whether on the 18th September war was in progress. The answer was that the current situation in China was indeterminate and anomalous and that at present His Majesty's Government were not prepared to say that in their view a state of war existed, and suggested that the question of the meaning of "war" as used in a charter-party might simply be one of determining the relevant clause, and that their attitude on the question might not necessarily be conclusive as to the meaning of the term "war" as used in particular documents. Goddard, J. held that the Executive, the English Foreign Office, had in their letter shown that at that time they suspended their judgment on the question, and on the facts Japan was involved in war, in the common use of that term.* Bolivia (Republic) *v.* Indemnity Mutual Marine Insurance Limited (100 *L. T. Rep.* 503; (1909) K. B. 785) *applied.*

Held, that on the true construction of the charter-party the owners were entitled to cancel it on the facts found to exist by the umpire. Janson *v.* Driefontein Consolidated Gold Mines Limited (87 *L. T. Rep.* 372; (1902) A. C. 484) *and* Thelluson *v.* Cosling (1803) 4 *Esp.* 266) *distinguished.*

Decision of Goddard, J. (infra) *affirmed.*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

APPEAL from the judgment of Goddard, J.

The material facts are set out in the headnote.

Sir *Stafford Cripps*, K.C., *P. Devlin*, and *A. L. Macmillan*, for the appellants.

H. U. Willink, K.C. and *Cyril Miller*, for the respondents.

The argument for the appellants appears in the judgment of the Master of the Rolls.

Goddard, J.—On the 2nd June, 1936, a Japanese firm at Kobe chartered from an English firm of shipowners the steamship *Nailsea Meadow* on time charter, and clause 31 of the charter-party provided that: "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan." On the 18th September, 1937, the owners, contending that war had broken out involving Japan, cancelled the charter-party, and a claim was made by the charterers, which was referred to arbitration, claiming damages for breach of contract in so determining the charter, as I have mentioned. The matter went to arbitration, the arbitrators appointed an umpire, Sir Robert Aske, and the learned umpire has awarded that on the 18th September, 1937, war had broken out involving Japan, and he has stated his award in the form of a special case asking whether, on the true construction of the charter-party, he was so entitled to award.

If this case goes higher, as the Court of Appeal will have before it the whole of the facts found in the case, it is unnecessary for me to read them out at length, but I think to make my judgment clear it is desirable that I should read two or three paragraphs of the case. The umpire finds: "On the 18th September, 1937, the position in the Shanghai area was as follows: 50,000 men, supported by the guns of the Japanese fleet and a strong air arm, were engaged in battle with Chinese forces of over 150,000 men on a thirty-miles front. Fighting had lasted over three weeks, in the course of which the Japanese had made good their landing from troopships and had pushed the Chinese Army back to their prepared lines of defence. Casualties had been heavy, and many thousands of Japanese and Chinese were killed or wounded. The position on the 18th September, 1937, in North China was as follows: One Japanese army had struck west, carried the Nankou Pass after eleven days of intensive bombing and mass attack, and captured Kalgan. This secured the right flank of the Japanese forces operating in North China. From there, the army was striking rapidly south-west into the Shansi Province, and had advanced 100 miles, and so cut road connections with Russia and Mongolia. A second Japanese army was striking south along the Peking-Hankow railway on a fifty-mile front. A third Japanese army was advancing south from Tientsin astride the Tientsin-Nanking railway, and had driven the Chinese back forty miles. These three armies numbered over 100,000 men, fully equipped with aeroplanes, tanks, and heavy artillery. The Japanese advance was effected in the teeth of opposition of Chinese armies numbering 300,000, and while the latter offered all the resistance they could, they were ill-supplied with artillery, and were driven back. Over fifty battles were fought between the 20th August and the 16th September. The Chinese losses were estimated by the Japanese at 60,000, while the latter also lost heavily. In addition to these major objectives, air operations on an extensive scale had been conducted. The Japanese had

gained command of the air and had destroyed a great number of Chinese aeroplanes in the air and in aerodromes. They had not only attacked the Chinese lines of communication but had frequently bombed Chinese cities, including Nanking, Hangchow, Seechow, Kwangteh and Shanghai, and cities as far south as Canton and Amoy, and the seaports between Hong Kong and Swatow," and the learned umpire also refers to the fact that "a naval blockade had been maintained over 1,000 miles' stretch of coastline and that the Japanese Foreign Minister had given notice 'that foreign ships carrying munitions to China would not pass safely through the blockaded zone.' On the 5th September the blockade was extended to all coastal waters from Chinwangtao, on the borders of Manchukuo, to Pakhoi, near the borders of French Indo-China." It is perhaps necessary also to say that one of the curious facts which emerged in this matter is that diplomatic relations had not, at any rate at this time, been broken off between China and Japan in the sense that the ambassadors of either country were present at the capital of the other, and that there had been no declaration of war. The learned umpire on these facts has found, and one is not surprised so to find, that war has broken out in which Japan was engaged. All the factors seem to be present which were dealt with in the one case in which, so far as I know, any definition in English law has been given to the word "war," if one needs to give a definition of that. That case is *Driefontein Consolidated Gold Mines Limited* v. *Janson* (83 L. T. Rep. 79; (1900) 2 Q. B. Div. 33). Mathew, J., quoting with approval from Hall on International Law, said: "What is a state of war is well described in Hall on International Law, 4th edit., p. 63: 'When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.'"

As I understand the argument for the charterers here, it is said that in spite of the acts of force and the acts of violence which Japan has offered towards China, China had not chosen to look upon it as a breach of the peace, but as the umpire finds, that they killed many thousands of Chinese and the Chinese troops were operating, not in hundreds or thousands, but hundreds of thousands, it would seem perfectly clear that China at this time was looking upon it as a breach of the peace. It is difficult indeed to understand how any ordinary person could regard this state of affairs as other than involving war.

The main point which Sir Stafford Cripps has argued, and supported with a wealth of authority, is this: He says it is my duty as a judge to exercise judicial cognisance on the question as to whether or not the two foreign countries were at war, and that, if my own knowledge does not enable me to answer that question, I must apply to the Crown through the appropriate Minister and obtain information from him, and that that was what was done in this case is that one of the parties—I understand the charterers—applied to the Foreign Office and asked whether, on the 18th September, war was in progress. The answer received from the Foreign Office was this: "With reference to your communication of the 8th September inquiring whether His Majesty's Government recognise that there was an outbreak of war in which Japan is involved, either on or before the 25th August, or at the date of this reply, I am directed by Mr. Neville Chamberlain to inform you that the current situation in China is indeterminate and anomalous, and His Majesty's Government are not at present prepared to say that in their view a state of war exists. At the same time, I am to suggest that the question of the meaning to be attached to the term 'war' as used in a charter-party may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term 'war' as used in particular documents or statutes." I have only to say this: As, in my view, the question of judicial cognisance of this matter does not arise, I refrain from expressing any opinion, tempting as it may be, on the main question which Sir Stafford Cripps has argued. I think it is much better that I should not express any view, although I have formed one, as to whether or not, the question being whether a state of war existed between two foreign countries, that has to be proved by evidence in the ordinary way, or, if the court is precluded from taking evidence, it must apply to the Secretary of State to enable the judge to take judicial cognisance of that fact. I do not think it is necessary to say more about the letter, as I take that view, than this, that I am far from being of opinion that this letter could be regarded as conclusive one way or the other. The words are that "His Majesty's Government are not at present prepared to say that in their view a state of war exists." It seems to me also to follow from that that His Majesty's Government were not, at the time of the letter, prepared to say a state of war did not exist. I think it merely says, "at the present moment His Majesty's Government suspend judgment on the fact."

Sir Stafford called attention to passages in many cases which show how inconvenient it would be if courts took one view on such matters as this and the Executive took another view, though I do not think it has gone further than the question of boundaries of States, or whether a State is an independent sovereign State or not. With regard to the suggestion of how inconvenient it would be if the courts took one view and the Executive took another on the subject, one is relieved to find in the second passage of this letter that His Majesty's Principal Secretary of State for Foreign Affairs seems to be of opinion that the word "war" in the charter-party may very likely be given a different interpretation in construing that document than it might be in some public document or statute.

It seems to me what I have to determine is what the parties meant by this clause. I think they were using the word "war" in this clause, and must be taken as intending it to be construed as war in the sense in which an ordinary commercial man would use it, if one may put it, as the captain of a tramp steamer would interpret it. I have not a doubt that a captain of a tramp steamer arriving at Shanghai and finding the state of things described by the umpire would have had no difficulty in recognising that a state of war existed. I do not think the parties in a case of this sort are going into the niceties of international law. There is always a temptation in these cases to turn to the words of great international jurists, such as Grotius and Hall, and others, who wrote some centuries ago, when modern conditions did not prevail, though whether the state of civilisation which then prevailed was the same as the state of civilisation which prevails now with regard to the methods of warfare is not for me to enter into. At any rate, things were done in those times more formally.

In these days there were declarations which now one knows from recent examples in this century are often omitted. In my opinion, the parties meant in this charter-party that if there was a state of conflict going on—not a revolution or a civil conflict—if a state of affairs broke out in which there was armed conflict between competing nations of which Japan was one, that would justify the breaking-off of the contract. It is not to be expected that business men can concern themselves with the extraordinary nice distinctions which are drawn by great international lawyers between reprisals, armed intervention, peaceful penetration and war—definitions which have probably far less importance nowadays than they may have had years ago. No such things as armed intervention, without producing a state of war and also a pacific blockade, which we know has been much discussed by the text writers, can ever take place except between two States, one of which is far too inferior and weak to resist.

I desire to say that I decide this case exactly on the same grounds, and applying the same rules of construction as Pickford, J. (as he then was) did in the Court of Appeal in the case of *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Company Limited* (100 L. T. Rep. 503; (1909) 1 K. B. 785). In that case the court had to construe what the word "piracy" meant, or "pirates." The court said you are not to go into niceties or refinements of writers on international law, you are to look at it in the broad sense or the coarser sense, which is one expression used, and find whether commercial men, using that expression in a commercial document, would mean or would visualise a state of affairs which was there found to exist—I apply, if I may so put it, the coarser meaning to the word "war." If I had to give a complete definition of the word "war" I do not think it would be necessary to go further than Professor Hall did in the passage which I read at the beginning of my judgment.

On the facts found by the umpire, I am quite satisfied that he was well justified in coming to the conclusion that, for the purpose of construing this document between the parties, a war had broken out in which Japan was involved. Therefore I uphold the award of the umpire and the respondents will have the costs of this argument.

Willink.—I believe sometimes the formal order is the costs of the setting-down shall be paid.

Goddard, J.—Yes. There are two special cases before me. I take it the second case will follow the first?

C. T. Miller.—If your Lordship pleases. Your Lordship will make the same order in the next case?

Goddard, J.—Yes. *Award affirmed.*

Sir Wilfrid Greene, M.R.—We need not trouble you, Mr. Willink. In my opinion, this is a clear case, and the judgment of the learned judge was manifestly right. The main argument addressed to us by Sir Stafford Cripps, on behalf of the appellants, was, if I rightly appreciated it, of this nature. He said that in all matters of State it is a rule of law in this country that the decision, or statement, of the Executive Government as to a particular state of facts is not merely conclusive, but essential, and as the basis of that rule he asserted that it was undesirable that the courts should come to a decision with regard to matters of State in which this country is, or might be, concerned which might embarrass the Executive. I do not myself find the fear of the embarrassment of the Executive a very attractive basis upon which to build a rule of English law, and in the present case the argument presents a certain air of unreality: For we find that the Executive, when appealed to for a statement with regard to the position at the relevant date as between China and Japan, informed the inquirer "that the current situation in China is indeterminate and anomalous and His Majesty's Government are not at present prepared to say that in their view a state of war exists." But the Foreign Office letter went on to suggest "that the question of the meaning to be attached to the term 'war' as used in a charter-party may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Govern nent may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term 'war' as used in particular documents or statutes." The writer of that letter, written with the authority of the Prime Minister as appears upon its face, does not appear to have realised the supposed unfortunate results, embarrassing to the Executive, which might occur if the determination of such a question as the present were to be undertaken by the courts; and if Sir Stafford Cripps's argument be right, it would appear that the Executive is in need of being protected against itself. However, the proposition which Sir Stafford Cripps contended for is one which on principle I find quite unacceptable, and for which I can find no sort of authority. He referred to a large number of cases, quite properly, in which the question of judicial notice by the courts of this country of certain matters of State, whether municipal or foreign, is considered. It is perfectly manifest, to take a simple case, that if in any particular litigation a question arises whether or not this country is at war with another country, that is a matter of which the courts of this country will take judicial notice, and if the courts find themselves unable from their own knowledge to take that notice, the source of information to which they must address themselves is one, and one only, namely, the Executive Government whose function it is to make war, or not to make war, and whose decision as to whether a state of war exists or not concludes the matter. That is one example, and that was what took place in *Janson* v. *Driefontein Consolidated Gold Mines Limited* (87 L. T. Rep. 372; (1902) A. C. 484) upon which Sir Stafford Cripps relied. That authority seems to me to have nothing at all to do with the present case, nor does it come anywhere near laying down a proposition of the kind asserted by Sir Stafford. Other cases to which he referred, which I do not propose to discuss in detail, were familiar cases, such as those where the question is as to the status of a foreign sovereign depending upon his recognition as such by the Government of this country. If a litigant in these courts claims that he is not subject to the jurisdiction of these courts because he is a foreign sovereign, the answer to the question whether he is a foreign sovereign or not depends upon his recognition as such by the Government of this country. It is a matter of which the courts take judicial notice, assisted in case of necessity by the answer of the Government itself, which is the one way of bringing that matter to the mind of the court. Cases of that kind appear to me to have nothing to do with the present case at all. We are not concerned here with the question whether His Majesty's Government recognises a state of war as existing between China and Japan. If that were the question which had to be decided, the courts would be bound to take judicial notice of the fact of such recognition, and if the courts were

unable to answer that question, they would ascertain from the appropriate department of Government whether or not His Majesty's Government had recognised the existence of that state of war. That is not the question with which we are concerned. We are concerned, and concerned only, with the question whether, upon the true construction of a particular private document, the owners were entitled to cancel the charter-party, which they are only entitled to do if war breaks out involving Japan. It is, in my judgment, impossible to assert that, within the meaning of that clause, the words "if war breaks out" mean "if war is recognised to have broken out by His Majesty's Government." War may break out without His Majesty's Government recognising it. If His Majesty's Government had recognised that war had broken out, it may be—and I say no more—that a statement to that effect by His Majesty's Government would be a matter which, even when dealing with a document of this kind, the court would be bound to accept. It is not necessary to decide that question one way or the other, because that is not the question with which we have to deal. There is one case which Sir Stafford Cripps relied upon which I think perhaps I should just mention. It is a case in 1803 reported in vol. 4 Espinasse, p. 266, and I will assume for the present purposes that the report is an accurate one. It is the case of *Thelluson* v. *Cosling*. There the question that arose was whether or not war had been declared by Spain against France on a particular date. The evidence on that matter consisted of a document. The document was a declaration by the Spanish Government to the effect that war was declared by Spain against France on the 23rd March. That document had been transmitted by the British Ambassador in Madrid to the Secretary of State in this country, and it was produced in court. Sir Stafford Cripps says that this shows that the proper method of proving a declaration of war is by the production of a statement by the Secretary of State, and that that is the only method of doing it. As I say, I assume that the case is accurately and sufficiently reported, and it seems to me to prove the exact opposite. First of all the document produced was not a declaration by His Majesty's Government—it was a declaration by the Spanish Government relating to the state of affairs between itself and France. The custody from which it was produced was the British Foreign Office, for the very simple reason that it had been communicated to the Foreign Office by the British Ambassador in Madrid. That does not make it a statement by the British Government, nor was it tendered as such. It was produced as being exactly what it was, a statement by the Spanish Government as to the existence, or non-existence, of a state of war between Spain and France. It was accepted by Lord Ellenborough as evidence, not on the ground that it was the only evidence, but on the ground that it was proper evidence to prove that particular matter of fact as to the date when war was declared between Spain and France. So understood, the case is a perfectly simple one, and it is as far as any case could be, with respect to the argument of Sir Stafford Cripps, from establishing the proposition in support of which he cited it. For these reasons, in addition to those given by the learned judge, I am of the opinion that the first point put forward by Sir Stafford Cripps is one which has no justification.

His second point was this. He said, with regard to the phrase "if war breaks out involving Japan," that the word "war" has not a loose or popular meaning but a technical meaning, and that technical meaning, he said, is to be found in the principles of international law. Where those principles of international law for this purpose are to be found, I must confess that I remain in complete doubt, since the only source of those principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that those writers do not speak with one voice, and it is possible to extract from their pages definitions of "war" which not only differ from one another, but which are inconsistent with one another in important respects. I asked for any authority in which, for the purpose of the municipal law of this country, "war" is in any way defined. No such authority could be suggested. The nearest authority for that purpose which has been furnished is the observation of Mathew, J. in which he cites, with approval, the passage from Hall referred to in the judgment of the learned judge. But to say that English law recognises some technical and ascertainable description of what is meant by "war" appears to me to be a quite impossible proposition. If the English courts had endeavoured in ancient days to lay down such a definition, no doubt one of the things which in those days they would have regarded as essential to "war" was a declaration of war. Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war. Similarly, the recent events in the world have introduced new methods and a new technique with regard to which I conceive that writers on international law will dispute for many years to come. I do not propose to be the first to lay down a definition of "war" in a so-called technical sense.

Sir Stafford Cripps said that whatever else "war" may mean, an essential element in it is *animus belligerendi* on the part of both, or at least one, of the combatants. What precisely "*animus belligerendi*" means is again a matter of great obscurity. In fact, to define "war" as a thing for which it is requisite to have *animus belligerendi* is coming very near defining the thing by itself. I must confess that at the end of the argument, and with the very skilled assistance that we have had, I am still as doubtful as to the meaning of "*animus belligerendi*" as I was before the argument began.

There is one matter upon which Sir Stafford Cripps was quite precise, and that was this, that there cannot be an *animus belligerendi* where diplomatic relations between two countries are still preserved, and he pointed out in the present case that the diplomatic relations between China and Japan had not, at the relevant date, been severed, and he says that it is impossible, as a matter of English municipal law, for war to exist between two countries who have not severed diplomatic relations with one another. Therefore, he said, the finding of the arbitrator could not stand, because, having found that diplomatic relations had not been severed, he was bound, as a matter of law, as a result of that finding, to find that war had not broken out. There again I can find no justification for so extreme a view. There may be very good reasons, and no doubt there are very good reasons, why the parties engaged in these present operations have not recalled their respective ambassadors. But that circumstance appears to me to amount to nothing more than one element to be taken into consideration in answering the question. I cannot find that it is a conclusive element at all. It is one element, and no doubt an important element—in some cases even a decisive element—but in the present case it appears to me that it was an element of no particular importance. If my view is right, that the fact that diplomatic

relations had not been severed did not compel the arbitrator to find that no war had broken out, then the matter becomes a question of fact, and the arbitrator has found as a fact, in so far as it is a matter of fact, that the *animus belligerendi* existed. Sir Stafford Cripps called our attention to various statements, various findings, in the very clear statement made by the arbitrator, which he suggested showed that, viewing this question as a matter of fact, there was really no evidence upon which the arbitrator could find that an *animus belligerendi* existed. The matters upon which he particularly relied were statements, in some cases by the Japanese, and in some cases by the Chinese, commanders in the field in various places in China, and in some cases by members of the Executive Government of one country or the other. No doubt the authoritative statements of a Government concerned in such a matter as this are matters of importance to which attention must be paid; but acts very often speak more truly than words, and it was perfectly open to the arbitrator on the facts as found by him as to the state of affairs which preceded the relevant date and was then in existence, to find that war had broken out, notwithstanding that on certain occasions certain individuals had apparently repudiated the idea that there was a war. Speaking for myself, I find myself happy to be able to avoid coming to a conclusion on this matter which would violate all one's feelings of common sense. To say that the finding of fact of the arbitrator is one upon which there was no evidence, seems to me to fly in the face of the manifest realities of the position.

I am unable to accept the suggestion that there is any technical meaning of the word "war" for the purpose of the construction of this clause. I repeat that if there is such a technical meaning, I do not know where it is to be found, and, as I have said, I do not propose to attempt to define it. But even if there be some such technical meaning, it seems to me that, for the reasons which I have given, the finding of fact of the arbitrator is unassailable, and I can find no trace on the face of his award that he has misdirected himself in law. That, I think, really concludes the matter. But I must not be taken as in any sense disagreeing with the further view expressed by the learned judge, that in the particular context in which the word "war" is found in this charter-party, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a common-sense way. If one had asked the owners of this vessel on the relevant date, if this charter-party had never existed, or if one had asked any shipowner what he thought about the then present position between China and Japan, as to whether or not a war existed, I cannot imagine any commercial person with any common sense answering that question in any other way than that in which the arbitrator has answered it. MacKinnon, L.J. suggests that even the most revered names in international law, such as Bynkershoek or Grotius, would have answered that question in one way, and one way only. Certainly one modern authority, Professor Westlake, answered it, because he defines "war" as "the state or condition of Governments contending by force," a definition which accords with common sense as far as it goes. It seems to me that to suggest that within the meaning of this charter-party war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of business men.

I have given these reasons in my own words out of respect to the argument put before us. I might have been content to say, as I do say, that I agree with the reasoning, and with the conclusion, of Goddard, J., as he then was, and the appeal must be dismissed with costs.

MacKinnon, L.J.—I agree. I am content to say that I agree with the reasoning of Goddard, J. and the learned Master of the Rolls.

Finlay, L.J.—I also agree.

Willink.—The appeal will be dismissed with costs, my Lord?

Sir Wilfrid Greene, M.R.—Yes.

Sir *Stafford Cripps.*—Would your Lordships grant leave to appeal to the House of Lords?

Sir Wilfrid Greene, M.R.—No.

Sir *Stafford Cripps.*—It is a very important matter to get a definition of what "war" is for this purpose.

Sir Wilfrid Greene, M.R.—This case involves the construction of a particular document. You will remember the words I used at the beginning of my judgment with which I think the whole court agrees. You must go to the House of Lords and persuade them that it is a proper case in which leave should be given. *Appeal dismissed.*

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

Solicitors for the respondents, *Allen Pratt and Geldard*, Cardiff.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, March 8, 1939.

(Before BRANSON, J.)

Kawasaki Kisen Kabushiki Kaisha v. Belships Company Limited, Skibakselskap. (*a*)

Charter-party—Construction—Implied term—Right to cancel on outbreak of war—Right to be exercised within reasonable time—Purported cancellation seven months after commencement of war.

An option to cancel a charter-party in the event of certain States therein named becoming engaged in war must be exercised within a reasonable time after the commencement of the war.

APPEAL by special case from the award of an umpire on the construction of a charter-party. The charter-party, which was a time charter made on the 23rd April, 1937, provided, by clause 30, as follows: "In case Japan, Norway, China, the U.S.A., or any of the great European Powers shall become engaged in war with any other of those countries, the owners and (or) charterers have the option of cancelling the charter-party." The umpire found as a fact that the war between Japan and China began in September, 1937, and was

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

still continuing. On the 2nd April, 1938, the charterers, acting in purported pursuance of clause 30, gave notice cancelling the charter-party. The question in dispute was whether they were entitled to do so. The umpire held that the right to cancel must be exercised within a reasonable time of the outbreak of war, and that it had not been so exercised. The charterers appealed, and contended that the right to cancel might be exercised at any time during the continuance of the war. The owners contended that it must be exercised within a reasonable time of the right arising.

Paull, K.C. and *P. Devlin* for the appellants.

Sir *Robert Aske*, K.C. and *Cyril Miller* for the respondents.

Branson, J.—The facts of this case may be quite shortly stated from the special case. There was a time charter, dated the 23rd April, 1937, under which the owners chartered the *Belpareil* to the charterers for eighteen months from the time of delivery, and the charterers had, by the terms of the charter-party, an option to extend the period, which option they exercised on the 14th July, 1937. Clause 30 of the charter-party contained a paragraph which reads as follows: "In case Japan, Norway, China, U.S.A., or any of the great European Powers should become engaged in war with any other of these countries owners and (or) charterers have the option of cancelling charter-party."

The *Belpareil* entered upon her service on the 21st July, 1937, and, after a certain amount of correspondence, the charterers' London agents, on the 2nd April, 1938, purported to cancel the charter under clause 30. The owners took up the position that the charterers' option to cancel the charter had expired because it had not been exercised within a reasonable time, and the question at issue in the arbitration was whether or not, on the 2nd April, 1938, the charterers were entitled to cancel the charter-party.

The arbitrator has found that on the 8th July, 1937, there occurred the first of a series of incidents involving fighting between Chinese and Japanese detachments. Within a short time the conflict between China and Japan developed into a campaign of a major character. So far as events up to the middle of September are concerned, the parties agreed that the statement of facts which is annexed to the arbitrator's award is accurate. As to events between September, 1937, and the 2nd April, 1938, it was further agreed between the parties that no material alteration had taken place, except that the Chinese Ambassador left Japan on the 28th January, 1938. Then the arbitrator goes on to find as follows: "On the 16th January, 1938, the Japanese Government declared that it would thenceforth cease to have any dealings with the Chinese National Government, and acted accordingly up to the 2nd April, 1938. Up to the 4th May, 1938, M. Tani, who holds the rank of a Minister, was resident in Shanghai, and was described by the Japanese Government as being in charge of the Japanese Embassy in China. Up to the 20th May, 1938, there had been no formal severance of diplomatic relationship between China and Japan."

In those circumstances the solicitors for the owners inquired of the Foreign Office as to what the position was, and the answer is set out in par. 9 of the special case: "The situation in China is indeterminate and anomalous, and His Majesty's Government are not prepared to say that in their view a state of war exists. The meaning to be attached to the term 'war' as used in a given document may simply be one of interpreting the relevant clause, and . . . the attitude of his Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term 'war' as used in particular documents or statutes."

The award states further as follows: "The charterers further relied on the fact that on the 27th January, 1938, the award of Sir Robert Aske, K.C., M.P., in a dispute between the charterers and the Bantham Steamship Company Limited, was published containing a decision (subject to the opinion of the court) that by the 18th September, 1937, there was war between China and Japan in the sense intended by a clause contained in the charter-party under discussion in that case which was similar to that quoted in par. 1." That decision was upheld by Goddard, J. sitting in this court, and has now been upheld by the Court of Appeal. I am told that there is still a possibility that leave to appeal to the House of Lords may be obtained, and that the decision of the Court of Appeal may be contested in the House of Lords, in which event the parties to this proceeding desire to reserve to themselves the opportunity of further discussion of the question whether or not a war did exist within the meaning of that word as used in the charter-party now under discussion. The arbitrator found as follows in par. 14: "In so far as it is a question of fact, I find that by the beginning of September, 1937, China and Japan had become engaged in a war and remained so engaged throughout the period up to the 2nd April, 1938." He also finds as follows in par. 15: "The military operations between China and Japan from the beginning of September, 1937, to the 2nd April, 1938, constituted a war in the ordinary and popular meaning of that word between China and Japan." Moreover, he finds that a reasonable time for the exercise of the option given by the cancellation clause elapsed before the 2nd April, 1938, and, therefore, subject to the decision of this court, he held that the charterers were not, on the 2nd April, 1938, entitled to cancel the charter-party.

The contention before me is, first of all, that, upon the true construction of the material words in clause 30, the parties have agreed that if at any time there exists a state of war between any of the countries mentioned, so long as that war continues, the option of cancelling the charter also continues in either the owners or the charterers. I am not able to agree with that construction. It seems to me that, upon the construction of the material words, the agreement is that (taking any two of the countries), should Japan and China become engaged in war with each other, an option immediately arises for exercise by either the charterer or the owners of the ship. Then it is said that, unless one is to import by implication some limitation of the time for which that option is to run, or within which that option may be exercised, the option may continue so long as the war continues, and it is said, on the one hand, that there must be implied into the contract the usual clause that an act for the doing of which no time is fixed has got to be done within a reasonable time. Then Mr. Paull says that that is all very well in an ordinary case. No doubt the law will imply a reasonable time for the performance of a contractual obligation if no time is fixed, unless it appears that there are reasons why such an implication should not be made.

The law as to implying terms in contracts has so often been stated that if it were not for the fact that one is always being pressed to imply this, that, or the other term in contracts, I should hesitate to

quote any authority upon the matter at all. However, as it always seems to me to be most important that the courts should abstain from implying terms into contracts unless it is perfectly plain that the parties really intended the contract to have that term, I fortify myself by reading again a passage out of the judgment of Scrutton, L.J. in *Reigate* v. *Union Manufacturing Company* (*Ramsbottom*) *Limited* (118 L. T. Rep. 479, at p. 483; (1918) 1 K. B. 592, at p. 605): "The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in a contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed." If I may respectfully say so, I am not only bound by that statement of the principle, but I also most heartily agree with it. Thus, the question that one has to consider here is whether or not, if the point had been raised when these owners and these charterers were writing out this clause relating to the option, and one of them had asked, "Within what period is the option to be exercised?" it would immediately have been agreed between the parties: "Of course, it must be exercised within a reasonable time." Unless one can come to the conclusion that that would have happened, then no doubt it is wrong to import the term that the option should be exercised within a reasonable time. However, having given as much weight as possible to the arguments of Mr. Paull, I have come to the conclusion that that is just what the parties would have done. Mr. Paull very ingeniously tries to argue that they would have considered all the difficulties that there might have been, first in ascertaining that war had broken out, and then in deciding whether it would be to the advantage of one or the other of them to give notice of cancellation of the charter-party. I do not think that that is the way in which they would have approached the matter at all. It seems to me that the ordinary rule that one applies in the case of a commercial contract where no time is fixed is applicable to the present case, because what the parties would have had to decide, if and when a war broke out, would have been whether or not, in view of the outbreak of war, it was their desire to go on with this contract. As Sir Robert Aske put it, no doubt what is contemplated by people who are envisaging the outbreak of war between great Powers is that there will immediately be such a dislocation of business as to make it right that both parties to a contract shall have a right of reconsidering their position and determining whether or not in the changed circumstances—that is to say, in view of the outbreak of war—they are prepared to go on implementing a contract which was made in peace time and was intended to be operative in peace time.

This contract falls within the same principle as that which is applied, as I have said, to commercial contracts in the ordinary way. The principle is stated by Farwell, L.J. in *Moel Tryvan Ship Company Limited* v. *Andrew Weir and Co.* (11 Asp. Mar. Law Cas. 469; 103 L. T. Rep. 161; (1910) 2 K. B. 844): "If the contract were silent as to the period of time within which the option must be exercised, then I think it clear that there would be an implied term that the option should be exercised within a reasonable time . . . and if so, this would be a question of fact for the jury. . . . They would be directed that the charterers were entitled to a reasonable time in which to ascertain the relevant facts necessary to enable them to make up their minds." In other words, the charterers and the shipowners would be entitled here to a reasonable time within which to ascertain that war had broken out, and within which to consider and decide the question whether or not, seeing that war had broken out, they thought it was in their interest to continue to implement the contract. The question of fact has been decided by the arbitrator against the charterers. He has found that a reasonable time had expired by the 2nd April, 1938, when the charterers purported to give notice of cancellation of the charter-party, and he has consequently decided against them. This appeal fails, and, in my view, the arbitrator's award was correct, and should be upheld.

Appeal dismissed.

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

Solicitors for the respondents, *Sinclair, Roche,* and *Temperley.*

Wednesday, March 15, 1939.

(Before BRANSON, J.)

Compagnie Primera de Navagaziona Panama v. Compania Arrendataria de Monopolio de Petroleos S.A. (*a*)

[This decision was reversed by the Court of Appeal on 13th Oct., 1939.—ED.]

Charter-party—Construction—Contract for two voyages—Deviation on first voyage—Obligation to perform second voyage.

A charter-party by which a ship was let to charterers for a specified voyage contained a clause providing that the charter-party was to remain in force for two consecutive voyages. During the first voyage the ship called at a port in circumstances which constituted a deviation and a breach of contract.

The charterers refused to give orders for the second voyage, contending that the breach entitled them to treat the charter-party as being at an end.

Held, that the deviation during the first voyage did not relieve the charterers from the performance of the second voyage. The case was analogous to a contract for the delivery of goods by instalments and the principles laid down for such cases in Maple Flock Company *v.* Universal Furniture Products (Wembley) Limited (150 *L. T. Rep.* 69; (1934) 1 *K. B.* 418) *applied. The deviation on the first voyage did not lead to the implication that the owners did not intend to fulfil the contract for the second voyage, and that part of the contract*

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

was still in existence, and the owners were entitled to damages for the charterers' failure to perform it.

SPECIAL case stated by an umpire. By a charter-party dated the 30th December, 1937, the claimants let their ship Yolanda to the respondents for a voyage from Istanbul to Constantza. Clause 32 of the charter-party provided as follows: "This charter-party is to remain in force for two consecutive voyages at the same rate of freight and on the same terms and conditions as herein provided." The ship performed the first voyage, but in the course of it called at a port in circumstances which constituted a deviation and a breach of the contract. The respondents thereupon refused to give orders for the second voyage and contended that the charter-party was altogether at an end.

A. A. Mocatta for the claimants.

Willink, K.C. and *J. Forster* for the respondents.

Branson, J.—By a charter-party dated the 30th December, 1937, the Yolanda was chartered to go to Istanbul, and from there, as ordered, to proceed to Constantza, or to a safe port in the Russian Black Sea, and there to load some oil in bulk and take it to one port in the Spanish Mediterranean between Cartagena and Barcelona, inclusive. The charter-party contained certain liberties to deviate. One of them is contained in clause 9: "The vessel has liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property."

Clause 12 says: "The vessel to have leave to tow or to be towed, and to assist vessels in all positions of distress, or to call at any port or ports for bunker supplies."

The charter-party was to remain in force for two consecutive voyages at the same rate of freight and upon the same terms and conditions as were provided in the charter-party. The Yolanda went to Constantza in accordance with the charter-party, loaded a cargo of oil, and on the 22nd January, 1938, sailed for Valencia. At the time of sailing, the vessel had on board 58 tons of bunker coal, her total bunker capacity being 876 tons of coal. Her normal consumption of bunkers was 35 tons per day for a normal distance of about 150 miles. The captain, when he left Constantza, intended to call at Zonguldak for bunkers, and set his course for that port. Zonguldak is about 125 miles eastwards of the Bosphorus, and is not a port on the ordinary route from Constantza through the Bosphorus. At some point between Constantza and Zonguldak, the exact position of which was not proved, the captain on the 23rd January altered his course to proceed to Istanbul because he considered that, owing to the weather conditions, bunkering at Zonguldak would not be safe. The ship arrived at Istanbul on the 24th January at 1 p.m., her bunkering space being then entirely empty; and at that port she took on board 308 tons of bunker coal. She then sailed for Algiers, where she had been ordered to take on board a non-intervention officer before proceeding to Valencia to discharge. She proceeded by the ordinary route towards Algiers, and between the 25th January and the 31st January she met with weather which was no worse than might have been reasonably expected for the time of the year. On the 1st February the Yolanda was off Bona, a North African port some 240 miles east of Algiers, and at the time she had on board about 75 tons or 80 tons of bunkers, which would have been sufficient to enable her to reach Algiers. She nevertheless called at Bona and took on board 220 tons of bunkers there. She left that port and was, on the 2nd February, 1938, captured by warships flying the Spanish Nationalist flag and was ordered to proceed to Palma, where she arrived on the 3rd February, and where she subsequently discharged her cargo. On the 15th February the respondents' agents were informed that the Yolanda was lying at Palma, and on the 28th February they were informed that the vessel had on the previous day left Palma and would be arriving at Algiers the same afternoon. At the same time the claimants' agents requested the respondents to give orders for the steamer's next loading port, it being indicated that the Yolanda had been forced to discharge her cargo at Palma. On the 1st March the respondents' agents were informed that the Yolanda was proceeding from Algiers to Istanbul for orders in accordance with the charter-party. They were also asked whether the irrevocable credit for freight, which clause 32 of the charter-party provided for, had been established in accordance with that clause. On the 3rd March the respondents' agents replied that clause 32 of the charter-party required credit to be established before the vessel sailed from the last discharging port on the first voyage under the charter-party. In the language used by the umpire "they also referred to deviations during the first voyage and reserved their rights in respect thereof." After some further correspondence regarding orders for the second voyage, the respondents took the view that, as the vessel had not completed her first voyage, the question of opening a credit did not arise, and as to the giving of orders these were not required until the vessel reached Istanbul. On the 12th March the claimants' agents stated that the vessel was nearing Istanbul and asked again for orders, and on the 14th March the respondents' agents definitely declined to give any orders for the second voyage. Thereupon the claimants chartered the vessel elsewhere and indicated that they would in due course claim damages.

On those statements of fact, the umpire found as a fact that, when proceeding towards Zonguldak, the Yolanda departed from her direct course in accordance with the charter-party, and it is not disputed now that the action of the master in directing the course of the ship towards Zonguldak instead of towards Istanbul amounted to a deviation under the charter-party. The umpire also found that at the time when the Yolanda altered her course for Bona she had a sufficient quantity of bunkers on board to enable her to reach Algiers, and he accordingly finds further as a fact that in proceeding to Bona the Yolanda had again departed without necessity from her direct course under the charter-party.

The first question which arises for decision before me is whether the act of the *Yolanda* in altering course for Bona when she had a sufficient quantity of bunkers on board to enable her to reach Algiers constituted an unpermitted deviation from her course. That depends upon whether the liberty given by the clauses in the charter-party, which I have already referred to, were sufficient to justify her in committing what would otherwise have been a deviation. Now it is said on the part of the ship that the liberties are sufficient to justify that deviation. Whether or not they are, I think, depends upon the true construction to be placed upon such a clause as this when it is found in the charter-party. I think the light upon that subject is to be found by going back to the old cases of *Leduc* v. *Ward* (6 Asp. Mar. Law Cas. 290; 58

L. T. Rep. 908 ; 20 Q. B. Div. 475) and of *Glynn* v. *Margetson and Co.* (7 Asp. Mar. Law Cas. 366 ; 69 L. T. Rep. 1 ; (1893) A. C. 351). I do not think it is necessary to go into either of them in any detail, but it seems to me to be sufficient to refer to a passage or two of the judgments in those cases. First, in *Leduc* v. *Ward*, Lord Esher, M.R., dealing with a clause which was in some respects wider than that in the present case, for there the liberty was given to call at any ports, in any order, said : " Here again it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course, such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that." The language was used in order to cut down the *primâ facie* meaning of the wide language used ; and similarly here if one looks simply to the language used, it is amply wide enough to cover a liberty to put into the port of Bona. The only question is whether, applying the ordinary canons of construction which the courts have applied to such cases as the present, that wide liberty is cut down sufficiently to make it a deviation for the ship to put into Bona in the circumstances. I proceed then to apply the language which Lord Esher, M.R. used to cut down the generality of the very wide words that appeared in the case before him in order to see whether Bona is excluded in the present case. It appears from the chart that Bona is a port between the terminus *a quo* and the terminus *ad quem* of the voyage. It is a port which is only a few miles, some thirty miles or so, according to a rough glance at the chart, out of the direct route between Istanbul and Algiers, which was one of the ports to which the ship had to go. I think it would be giving no force at all to the clause if I were to conclude that a call at that port for the purpose of bunkering was not within the liberty reserved under the charter-party to the ship. *Glynn* v. *Margetson and Co.* (*sup.*) really carries the matter no further, and I do not think it is necessary to cite any of the passages from the judgment in that case which have been referred to in argument before me. So the position with regard to deviation is that the deviation to Zonguldak is an unauthorised deviation, but the deviation to Bona was within the liberties of the charter-party. The next question which then arises is whether the deviation to Zonguldak has or has not been waived by the charterers. Waiver is a question of mixed law and fact, and I think, following the course taken by Wright, J. in *Valkering* v. *Winter Bros.* (34 Lloyds List Rep. 30), that, if it were necessary to do so, it would be proper to request the umpire to assist the court by finding as a fact whether there had been a waiver or not. It is contended, on the one hand, that, upon the true construction of the language used in the special case, the umpire has found that there was no waiver, because he found that the knowledge in the charterers which they must have had before they could be held to have waived a breach of the contract was not in their possession until a late stage in the arbitration proceedings. It is contended, on the other hand, that the proper construction of the special case does not lead to any such result. In my view the clause in the special case which is material upon this point is ambiguous. It reads as follows : " The respondents were not aware of the course which had been taken by the vessel in the Black Sea until a much later stage in the proceedings. The respondents were, however, aware on or about the 3rd February, 1938, that the vessel had called at Bona." Now, as a matter of construction, if one had to give a concluded opinion about it, it would appear to me that the meaning of that clause is that the respondents were not aware of the course which the vessel had taken in the Black Sea until some time after the course had been taken, because of the expression " until a much later stage in the proceedings." No other stage in the proceedings, if " the proceedings " mean arbitration, had been referred to at all by the umpire, and I think it must have meant that they did not know until some time after the event had happened. Now that is not sufficient to enable this court to come to an opinion as to whether or not there had been a waiver, and if the waiver were material, I should have felt obliged to remit the case to the arbitrator for a finding of the necessary facts ; to wit, the fact as to the date when knowledge that the ship had shaped her course for Zonguldak had come to the charterers. But in my opinion the decision at which I have arrived upon the last point which is raised in the case renders it unnecessary for me to trouble the umpire to go into this matter again.

The last point is this. It is contended on the part of the ship that this charter-party, relating as it does to two voyages, enables the two voyages to be treated as severable matters and governed by several contracts, though each contract would, of course, be in the same terms as the other. It is contended, on the other hand, by the charterers that the contract is one and indivisible, and by virtue of the fact that there was this deviation to Zonguldak the whole contract has come to an end, or did come to an end, as soon as the charterers, having discovered the deviation, chose to assert their rights and declare themselves no longer bound by that contract. It was pointed out by Mr. Willink that, first of all, in the charter-party the expression " this charter " is used, and, secondly, that there is only one cancelling date ; and, thirdly, that there is no date for the starting of the second voyage, and those things are relied upon as showing that this is an indivisible contract. But I cannot help thinking myself that when one is discussing the question, such as arises in the present case, of the determination of a contract for two voyages by reason of the deviation in the first of them, it is necessary to consider the reason why a deviation from the contracted voyage is considered such a heinous offence in relation to a contract of carriage by sea. These matters have been talked about both in *Leduc* v. *Ward* (*sup.*) and in *Glynn* v. *Margetson and Co.* (*sup.*), and it is unnecessary for me to enumerate them in any detail, but the chief of them is that if the ship deviates from the voyage which is prescribed for her, she is embarking upon an adventure to which the contract does not apply at all. Secondly, if she deviates from the voyage laid down for her, she may be invalidating all the insurances which the charterers may have effected upon her cargo. None of those considerations would apply to a case like the present case, which, so far as I am aware, is bare of authority and has to be decided upon first principles. I think one of the principles that one should apply to a case like this is that of *cessante ratione legis, cessat ipsa lex.* The reason why so much weight is put and has been put, by the merchants and by the courts upon deviations in contracts of carriage by sea does not apply where one has in one document contracts which cover more than one voyage. One could not tell

from this contract what would be the second voyage at all. It is not the same voyage. When the ship arrived at Istanbul the second time she might have had instructions to go, not to Constantza, but to some other port in the Black Sea, which would render the contract voyage a different voyage altogether. I think, therefore, that the true analogy to apply to a case of this kind is not the analogy of a charter for a single voyage, but an analogy which I was invited by counsel for the claimants to apply—namely, the analogy of a contract for the delivery of goods by instalments. The recent case of *Maple Flock Company Limited* v. *Universal Furniture Products (Wembley) Limited* (150 L. T. Rep. 69; (1934) 1 K. B. 148) lays down the principles which are applicable in a case of that kind. It appears from the judgment in that case that what one has to look at is the circumstances of the particular case. It is said, as was said in *Freeth* v. *Burr* (29 L. T. Rep. 773, at p. 775; L. Rep. 9 C. P. 208, at p. 214), that you must examine the circumstances "in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

That was cited by Lord Hewart, L.C.J. from the language used by Lord Selborne, L.C. in *Mersey Steel and Iron Company* v. *Naylor Benzon and Co.* (51 L. T. Rep. 637; 9 App. Cas. 434). The whole matter is summed up by Lord Hewart, L.C.J. (150 L. T. Rep. at p. 71; (1934) 1 K. B. at p. 157): "With the help of these authorities we deduce that the main tests to be considered in applying the sub-section"—the sub-section of the Sale of Goods Act which was based upon those old authorities—"to the present case are, first, the ratio quantitatively which the breach bears to the contract as a whole, and, secondly, the degree of probability or improbability that such a breach will be repeated."

It is said that the breach here quantitatively considered is a breach of 50 per cent. of the contract. In a sense it is, because taken by itself—if it is not waived—the deviation to Zonguldak would have been enough to put an end to a charter for a single voyage, but that particular expression does not, to my mind, apply to a case of this sort at all. What you have got to see is whether there is anything in what the ship has done to make it appear that the ship did not intend to continue to fulfil its obligations under this charter-party. In my view, the answer to that is that there is nothing; there was nothing to indicate that the ship intended to deviate in the second voyage, and there was nothing in the circumstances to render it in the least probable that the ship would deviate in the second voyage, and, therefore, applying the test which was laid down in the *Maple Flock* case (*sup.*), I come to the conclusion that what had taken place in this case was not sufficient to entitle the charterers to refuse to implement the contract with regard to the second voyage.

The result is that the deviation to Zonguldak was a deviation in law; but that did not relieve the charterers from the performance of the charter-party, or the necessity for giving orders for the second voyage.

Solicitors for the claimants, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondents, *Middleton, Lewis,* and *Clarke.*

COURT OF APPEAL.

May 1, 2, *and* 3, 1939.

(Before SCOTT, CLAUSON, and GODDARD, L.JJ.)

Court Line Limited v. Canadian Transport Company Limited. (*a*)

[This decision was affirmed by the House of Lords on 30th May, 1940.—ED.]

Time charter-party — Charterers to load, stow, and trim cargo—Under supervision of the captain—Improper stowage—Damages for, paid by shipowners to bill of lading holders —Recoupment by shipowners' indemnity club —Owners to give time-charterers the benefit of club insurances—"So far as club rules allow" —Interpretation of rules.

By clause 8 *of a time charter-party: "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally-clerks' receipts. Owners to give time-charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and, in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules which owners would have otherwise borne." The franchise, according to the club rules, was a provision that the shipowner was to bear the first* 10*l. as between himself and the club.*

By rule 2 *of the West of England Protection and Indemnity Association, of which the shipowners were members: "The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay and shall have, in fact, paid as follows . . ." There followed a number of paragraphs dealing with the head of "protection." Then the rule deals with "indemnity," and under sub-rule (i.) provides: "For other claims arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise arising through other causes than 'improper navigation,' the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents, the Association shall be entitled . . . to recover for its own account from third parties any damages that may be provable by reason of such neglect."*

By rule 17: "*No assignment or subrogation by a member of his cover with this Association to charterers or any other persons shall be deemed to bind this Association to any extent whatsoever.*"

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

At a loading port, during the currency of the charter, unseasoned timber full of sap was stowed on and subsequently caused damage to parcels of grain shipped under bills of lading, to the extent of 101*l.* 3*s.* 4*d. The holders of the bills of lading claimed this amount from the shipowners on the ground that the grain cargo had been damaged by reason of improper stowage. The shipowners' club paid the amount and the shipowners then claimed this amount from the time-charterers.*

Held by the court, that, by the first half of clause 8*, this liability fell upon the charterers. For the words "under the supervision of the captain" did not replace the liability on the shipowners. These words, at the most, entitled the captain to interfere with the stowage for the limited purpose of protecting the ship from that which would interfere with her seaworthiness. They had no operation in shifting the onus save possibly where the master's interference had been the cause of the improper stowage.*

View of Greer, J. in Brys and Gylsen Limited *v.* J. and J. Drysdale and Co. (1920, 4 *Ll. L. Rep.* 24) *followed.*

Accordingly, the ship owners could recover this amount from the time-charterers unless the words in clause 8 *of the charter-party: "Owners to give time-charterers the benefit of their protection and indemnity club insurances as far as club rules allow" prevented them.*

Held by Scott and Clauson, L.JJ.—Goddard, L.J., dissenting—that rules 2 (1) *and* 17 *did not allow the shipowner members to give the time-charterers the benefit of their club insurances. The club was, in all events, entitled by way of subrogation to enforce the shipowner member's rights of recourse against all third parties, including charterers.*

Per Goddard, L.J. dissenting: There was nothing in the rules which prevented the shipowners giving the time-charterers the benefit of their club insurances. Rule 2 (1) *was no more than a statement of an insurer's common law right of subrogation, when he had paid his assured. But before a right of subrogation could arise there must be a claim which the assured could raise against a third party; here the assured, the shipowners, had no such claim against the time-charterers, for they had contracted with the time-charterers that they were to have the benefit of their club insurances and were entitled to do so. Rule* 17 *was merely a prohibition of the member assigning his contract of insurance.*

Decision of Lewis, J. reversed.

APPEAL by the plaintiffs, shipowners, and cross-appeal by the defendants, time charterers, from a judgment of Lewis, J., affirming the award of an arbitrator on a case stated by him. The facts are fully set out in the judgment of Scott, L.J.

Mocatta for the appellants.

Sir Robert Aske, K.C., *Cyril Miller* and *Richard Hurst* for respondents and cross-appellants.

Scott, L.J.—This is an appeal from Lewis, J., who gave his decision upon a special case stated by an arbitrator, Mr. Willink. The arbitration took place pursuant to, or by agreement between the parties in connection with a time charter of a vessel called the *Ovington Court*, dated the 28th January, 1937, by which the owners of that ship agreed to let her to time charterers for a round voyage from Rotterdam to the West coast of North America and back to Europe—that is, to load cargoes outwards and homewards. The time charter was the Government form of time charter in which the ordinary provisions of a time charter are inserted, and in particular a provision, very common in time charters, requiring the master to sign bills of lading as presented.

At the loading port on the West coast of North America a grain cargo was taken on board and also timber stowed on the top of the grain cargo. The timber was unseasoned and full of sap, and the dampness of the timber caused damage to the grain. In the result, parcels of grain shipped under bills of lading were damaged to the extent of 101*l.* 3*s.* 4*d.* The holders of the bill of lading on this side on the return voyage claimed from the ship, and that claim was paid in full under circumstances which I will mention presently. Having paid that claim to the bill of lading holders, payable because the cargo had been damaged by reason of improper stowage, the shipowner then turned round and sought, under circumstances which I will detail in a moment, to enforce against the charterer the liability to indemnify the shipowner, which always arises where a shipowner incurs liability to bill of lading holders through signing a bill of lading at charterer's request, where the reason of the liability being incurred is some act done by the charterer which he is not entitled to do under the terms of the charter-party. That is the simple basis at the back of the arbitration which took place over this matter. But the form of the arbitration was not that. The form of the arbitration was complicated by another provision of the charter-party which brought in the protection and indemnity rights of the shipowner with the West of England Protection and Indemnity Association of which he was a member. Those rights were made material to the elucidation of the relations between owner and time charterer by a clause in the time charter (No. 8) which reads, so far as material, as follows: "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load, stow and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts." Then comes another sentence after a full stop: "Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules, which owners would have otherwise borne." When the owners received their claim from the bill of lading holders, they communicated with the West of England Club, and the club, to save unnecessary inconvenience, paid the claim direct to the bill of lading holders—a claim of 101*l.* 3*s.* 4*d.* In that way the owners incurred at that time no out-of-pocket expense. But the club, on making the payment, expected, as insurers, to have the benefit of subrogation to the owners' right of recourse under the charter-party against the time charterers under their obligation to indemnify the owners against the liability which

they themselves had caused to be put upon the owners by reason of the negligent stowage, which had been carried out by them, pursuant to the terms of clause 8. When, however, the owners duly made their claim against the time charterers to pay up under that obligation to indemnify, the latter's reply was that under the second part of clause 8 the owners had undertaken to give them the benefit of their club insurance; and that, that being so, and the club having paid, the effective result was to free them from any obligation, because if they were called upon to pay under their obligation to indemnify the owners they would get nothing out of the clause by which the owners undertook to give them the benefit of their club insurance. But a further aspect of the position then came up for consideration. *Primâ facie*, when an insurer, whether under a policy or as a club of mutual insurance, pays a loss under the contract of insurance, the insurer is entitled to stand in the shoes of the assured and to enforce by way of subrogation any rights of recourse that the assured may have against any third party that caused the loss and became responsible to him for that loss. So we may assume, although we have not seen the correspondence, that in the present case the club called upon the owners, its member, to enforce their right of indemnity upon the time charterers, and that that is how the arbitration arose in the present case. The arbitration took place, and the award was made in the form of a special case and the learned arbitrator, having stated the facts about the making of the time charter, quotes clause 8, or that part of it which I have read, and then proceeds to the interpretation of the second half of the clause which contains the provision that "owners are to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow." For that provision it is, of course, necessary to read into clause 8 all the rules of the club which are relevant to it.

The question in the case which was before the arbitrator and the judge below, and is now before us, is one of interpretation, and only one of interpretation, and the question turns entirely on the true construction of this one clause which, of course, has to be construed in the light of the charter-party as a whole.

The arbitrator sets out in his award parts of the club rules. The rights of membership are given to owners under two sections of the rules, one called "protection" and the other "indemnity"—two general words which are in use in mutual marine insurance and which have no very clear definitions, because there is no very clear borderline between the two; but "liability to bill of lading holders" is a claim which is usually treated as an indemnity claim. Rule 2 of the rules reads, so far as it is relevant, as follows: "The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay, and shall have in fact paid as follows . . ." Then there are a number of paragraphs dealing with the general head of "protection." The typical case of protection is the remaining quarter of the collision clause of an ordinary marine policy on hull. Then the rule passes to the section of "indemnity," and under sub-rule (i.) provides as follows: "For other claims"—that is to say, for claims other than "protection" claims—"arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise, arising through other causes than 'improper navigation,' the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents." Then the rule goes on as follows: "The Association shall be entitled"—I leave out irrelevant words—"to recover for its own account from third parties any damages that may be provable by reason of such neglect."

I think it is convenient to pause for a moment there and just think what the meaning of that one part of the rules is as applied to the circumstances of this case. Here the stowage of the cargo—the loading of the ship and the arrangement as to how the cargo should be stowed—had all been carried out by the time charterers under the provisions of clause 8, which I have already read, which says that the charterers are to load, stow, and trim the cargo at their expense; in fact, they did it negligently or improperly, whichever word one chooses to use, with the consequence that damage was unnecessarily caused to the grain and the shipowner was put under liability to the bill of lading holder because, although the charterers did the stowage, the ship was responsible for the stowage to the bills of lading holders. The first step towards construing clause 8 of the charter-party is to ascertain the true interpretation of rule 2 (i.) of the club rules: "The Association shall be entitled to recover for its own account from third parties any damages that may be provable by reason of such neglect." The meaning of that sentence, as it stands there, is, in my view, quite clear. If in an ordinary time charter the owner incurs liability to bill of lading holders by reason of the charterer calling upon the captain to sign bills of lading which put a liability on the ship brought about improperly, that is to say, in breach of the charterer's duty to the owner by the conduct of the charterers, then *quoad* the insurers of the owner against the risk of that liability it is beyond doubt that the charterer is a third party liable to the owner for damages provable by reason of the time charterer's neglect within the meaning of the second half of rule 2 (i.). In other words, that sub-rule says that the Association shall be entitled to recover for its own account from third parties in such circumstances. The sentence is, so to speak, a rider upon the first half of the rule. The first half of the rule insures the owner with the club against the risk of claims for against time charterers in such circumstances shall be preserved for the benefit of the Association when, after the owner has been paid by the Association, the Association desires to enforce its right of subrogation to stand in the shoes of the assured and gather in those rights of recourse possessed by the assured against third parties which an insurer is entitled to put in his own pocket by way of a reduction of his liability under his insurance obligations.

There is another rule, to be found towards the end of the rules, namely rule 17, which may throw light on rule 2 (i.). That rule reads: "No assignment or subrogation by a member of his cover with this Association to charterers or any other person shall be deemed to bind this Association to any extent whatsoever." In order to construe that rule, I think it is well in the first instance to omit the words "or subrogation." Omitting these words, the rule is a rule which forbids assignment by a member of his cover to charterers or anybody else. The insertion of the words "to charterers" specifically in rule 17 seems peculiarly appropriate to the solution I have suggested of rule 2 (i.). I have pointed out how the claims by bills of lading holders against the ship are very often, in fact, brought about through the negligence of charterers, by reason of the ship being called upon by charterers

to sign the bills of lading, and how normally whenever that happens there is a right of indemnity which accrues to the owner against the charterer. Rule 17 to my mind quite clearly says that no member shall be allowed to give to charterers any assignment of his rights of insurance cover by the Association in such a way that the Association will be prejudiced thereby. Those words are not expressed, but to my mind it is plain that one object of rule 17 is to prevent the club losing its right of subrogation after payment to the assured, its member. Those two rules taken together, rule 2 (i.) and rule 17, to my mind quite clearly provide, firstly, that the member-owner of the club is not entitled to give away to third parties, such as charterers, his rights to recover from the club, and, secondly, that the Association shall in all events remain entitled by way of subrogation to enforce the member's right of recourse against all third parties including charterers.

Now if that be the right meaning of those rules, what is the meaning of the second part of clause 8 of the time charter, which says: "Owners to give time charterers the benefit of their protection and indemnity club insurances, as far as club rules allow, and in case of shortage or damage to cargo charterers to bear the franchise according to the club rules, which owners would have otherwise borne"? *Ex hypothesi*, by reason of the interpretation that I have just put upon those two rules, the owner is required by the club to preserve to the club his right of recourse against the time charterer for an indemnity, and to the extent of that right of recourse the owner is prevented by the club rules from giving to the time charterer the benefit of his insurance with the club. Therefore, under this rule the time charterer cannot claim the benefit of the club insurance if a claim to that effect would in any way take from the club its effective right to recover for its own account from third parties—that is to say, from the charterers—the damages that were payable to the bill of lading holder by reason of bad stowage. Therefore, under that clause, for that reason, if the right of indemnity of the owner from the time charterer extended to the whole amount of his liability to the bill of lading holder, then the answer to the question: How far did the club rules allow the time charterers to have the benefit? is: "To no extent"—because the benefit and the right of recourse by way of the indemnity were equal. The right to recover from the time charterers was to recover the whole amount which the owners had to pay to the bill of lading holders and recovered from his club. In the same way, in my view, if the time charterer says that the effect of the clause in the charter is to give to him the benefit of the member's cover with the association, that interpretation would bring the time charterer into collision, so to speak, with rule 17, which says that the member shall not assign his cover with the association to charterers. So that for those two reasons, which support each other, I think the true view of the position is this, that there was an undertaking by the member that he would not give away any rights of recourse he might have, so as to deprive the club of its right of subrogation upon payment of a claim by way of indemnity under the indemnity section, and particularly under rule 2 (i.). But, further than that, I think that the preservation of the club's right of subrogation—a preservation of the right of recourse against the time charterers—was a condition which was introduced into the charter-party contract as between the owner and the time charterers. The result of that condition can be expressed by interpreting the clause thus: Owners will give to time charterers the benefit of their club insurances in case of shortage or damage to cargo if the rules of the club permit that to be done; but if the rules of the club do not permit that to be done, then this undertaking to give the time charterers the benefit of the insurance will have no application. The promise to give it is conditional upon the club rules allowing it, and if there is a condition in the club rules which forbids it, then, *ex hypothesi*, it cannot be done. That seems to me to be the plain meaning of the clause in the charter, and, if so, then the effect of it is that the time charterers in this particular case do not show that there was any benefit from the insurance which the club rules allowed them to have given to them by the owner.

There is one more point I want to mention before I return to the award. The last line of clause 8 of the charter-party says this: "Charterers to bear the franchise according to the club rules, which owners would have otherwise borne." Under the club rules there is a provision to this effect—a proviso attached to all the different sub-rules of protection and indemnity risks which are covered by the club—"Provided that, except in respect of claims for loss of life and personal injury, the member shall bear the first 10*l.* of any one claim attaching to either the protection or indemnity section of the rules, unless other standards are provided therein." In one or two cases it is a higher standard than £10. That means that when the owner makes a claim on the club for payment of a liability to a bill of lading holder the club will automatically say to the owner: "Yes, we will pay the claim less 10*l.*," and that deduction is spoken of in the charter-party as "the franchise according to the club rules." It was contended by the charterers here that by reason of their interpretation of the earlier part of clause 8 they had a complete answer to the owners' claim for indemnity under the ordinary principle that an owner is entitled to indemnity from his charterer if the charterer puts upon him a liability which otherwise he would not have incurred. They said: "At any rate, the benefit you are entitled to from the club is the whole amount less 10*l.*; we contend that we are not liable to you for anything, but alternatively we submit that we are only liable to you for the 10*l.* which you could not get out of your club"—and that is the relevance in these proceedings of that particular provision about the 10*l.* franchise.

Before I deal with the arguments addressed to the court below and to this court, I will just refer to the remainder of the award, so far as it is necessary to do so. The award was expressed in alternative forms: "The question for the decision of the court is whether on the facts found and the true construction of the contract the claimants are entitled to recover 101*l.* 3*s.* 4*d.* or 10*l.* or nothing." The finding of fact in the award was that the damage to the goods which gave rise to the claim was improper stowage by the time charterers, making the right of indemnity of the owners attach as against the charterers. On the award being submitted in those alternative forms to the learned judge before whom the special case was brought, Lewis, J., he held that on the true interpretation of clause 8 the benefit which the owners undertook to give was the whole benefit that they might get from the club, and that in this case as the club had paid the bill of lading claimant direct, there was no way of giving effect to that undertaking in clause 8 except to say that the owners having got complete "benefit" from the

insurance with the club the only way of giving effect to the undertaking of the owners in the charter-party was to say equally that the time charterers should have the same degree of benefit and be relieved from all liability, subject to the 10*l.* franchise.

Lewis, J. said this: "I feel I ought not to say that the clause is to be of limited application," and he held, firstly, that the only effect of rule 17 is that a person to whom the member assigns his cover is not to be able to bind the Association; that is to say, that to such a person the Association could say: "We do not recognise this, and we are not going to pay." Then he goes on: "I do not see why, in a case like the present, where the time charterer is not attempting to get money out of the club, he is not entitled to say: 'There is nothing in the club rules which disallows you from giving me the benefit of what you have got from your club, or what you may get from your club'"—and consequently he took the view that to the extent of what the owner got from the club the charterer was equally entitled by reason of the clause in the charter-party by which the owner gave him the benefit of his club protection.

The question we have to decide is whether the judgment in favour of the time charterers (except for the 10*l.* franchise) is right or wrong. In my view, that decision is wrong, for the reasons I have already stated.

The question is a pure question of interpretation, and in my view the association of the provision in the second half of clause 8 with the first half of that clause makes the position still clearer. The first half of that clause provides that the captain shall sign bills of lading as presented. The very next words are that the owners are to give the time charterers the benefit of their club insurances in case of shortage or damage to cargo. That shows that the provision is directly addressed to the case of the liability of the owner by reason of the act of the charterer, and it also makes it clear that the liability against which the time charterers desire the benefit of the club protection, is their liability to the owner under their implied obligation to indemnify him against the liability that they have put upon him. For that reason, the argument that the time charterers' liability contemplated by clause 8 must be a liability to persons other than the owners, to my mind is necessarily a wrong interpretation. That was the first argument addressed to us on behalf of the owners by their counsel, but for the reasons I have given I think that argument is wrong. The clause is, as it is framed, quite appropriately adapted to dealing with the time charterers' liability to the owners under the ordinary implied indemnity, and in my view it is not necessary to consider what other meanings the clause may have, or what other applications may be given to it, or what other circumstances may give rise to its application. It is enough to say that the particular facts of this case are, in quite clear language, covered by clause 8 and that, for the reasons I have mentioned, the club rules are such as not to allow any benefit of the club insurance being given to the time charterers.

That being so, what is the final result? The provision about giving the benefit of the club insurances to the time charterers has no application to the facts of this case at all. *Ex hypothesi*, for the reasons I have mentioned the club requires the member to preserve for its benefit his right of recourse; in other words, it is a condition of their contract of insurance with him that that should be done. Therefore, the time charterers are prevented from invoking any part of the club rules, because their right to do so is excluded by the terms of this clause of the charter and, therefore, in my view, it follows that the 10*l.* provision is just as irrelevant as the major provision under which the club give the owner the benefit of the insurance against the third party claims by bill of lading holders.

Accordingly, the judgment, in my view, should be against the time charterers for the whole amount of 101*l.* 3*s.* 4*d.*, which is the full claim for indemnity under the terms of the charter-party if the clause about the benefit of club insurance is eliminated, and for the reasons I have given that clause, in my opinion, has no application here because the club rules do not allow it to be applied and, therefore, it is wholly eliminated from the consideration of the case.

There is only one other minor matter upon which I desire to add one word, and that is this: It was contended that the clause which says that "Charterers are to load, stow and trim the cargo at their expense under the supervision of the captain" was a clause that left the obligation of stowage, as between ship and charterer, solely with the ship, and that the words, "under the supervision of the captain," imported that he had to give directions as to the whole of the stowing, and that, consequently, the charterers had no obligation in regard to it, and that, therefore, their primary liability to indemnify the owners never arose. That argument was submitted to the court by Sir Robert Aske, on behalf of the charterers, but in my opinion it is erroneous. That matter has been, as a matter of fact, considered in the courts, particularly in the case of *Brys and Gylsen Limited* v. *J. and J. Drysdale and Co.* (1920, 4 Ll. L. Rep. 24). There was a clause in the charter-party in that case which provided that the charterers or their agents were to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master. When that case came before the court, Greer, J. (as he then was) said (4 Ll. L. Rep. at p. 25): "I think the effect of such a clause is to transfer the duty and obligation, which would otherwise rest on the shipowner, to the charterer, of stowing the cargo in the way it ought to be stowed"—and a few lines further on, he said: "To my mind, the effect of this clause is the same as Lord Esher felt would be the effect of the words 'employ and pay the stevedore' in his judgment in *Harris* v. *Best*" (1892) 7 Asp. Mar. Law Cas. 272; 68 L. T. Rep. 76). In that case there was a clause in the charter-party which provided: "Stevedore to be appointed by the charterers in London only, but employed and paid for by owners"—and Lord Esher said this *obiter*: "Sometimes it is stipulated that the charterer is to employ and pay a stevedore, and if he is to employ a stevedore to stow the cargo, then he is liable for the consequences of bad stowage"—pointing out that the mere fact of his employing and paying the stevedore made the stevedore his servant or, at any rate, made him responsible for the good stowage of the cargo. Those two cases, although perhaps not absolutely in point, or perhaps not absolutely binding on this court, I think establish a true interpretation of a phrase in a charter-party, such as the phrase here: "Charterers are to load, stow and trim the cargo at their expense under the supervision of the captain"—and, further, I think that is the true interpretation of the clause.

For these reasons I think that in this case the learned judge took a wrong view of the interpretation of clause 8 and the club rules. I notice that

in his judgment he does not cite the second half of rule 2 (i.). It is possible that that second half of the rule was not brought to his Lordship's attention, as it was to our attention on the argument before us. I think that that particular half of the rule is one of vital importance here, because it is the combination of that rule with rule 17 which makes the interpretation which I have put upon the charter-party, in my opinion, clear; and it may be that that is the reason why the learned judge took the view he did as to the interpretation of this charter-party.

For these reasons, I think this appeal must be allowed and judgment entered for the owners against the charterers under the award for 101*l.* 3*s.* 4*d.*, with costs here and below.

Clauson, L.J.—Logically the first question in this case is whether, on the true construction of the charter-party, the liability for improper stowage is thrown, as between the time charterers and the owners, on the time charterers. The provisions of clause 8 of the charter-party shift this liability from the shipowners to the charterers unless the words "under the supervision of the captain" have the operation of replacing the liability as between those parties on the shipowners. The words as to "supervision" do not appear to me so to operate; they merely, at the most, entitle the master to interfere with the stowage for the limited purpose of protecting the ship from something which would interfere with her seaworthiness. They have, in my opinion, no operation as regards shifting the onus save, possibly, where the master's interference has been the cause of the improper stowage—and that, of course, is not the present case. The same view appears to have been taken by Greer, J., (as he then was), in the case of *Brys and Gylsen Limited* v. *J. and J. Drysdale and Co.* (1920, 4 Ll. L. Rep. 24).

The liability for improper stowage being thus as between the time charterer and the shipowner upon the time charterer, and the shipowner having in fact paid, or procured his club to pay for him, the 101*l.*, admittedly payable to the cargo owner in respect of the improper stowage, it follows that the shipowner has the right to recover the 101*l.* against the time charterer unless there is some provision in the charter-party which modifies this position. It is suggested that the position is modified by the last sentence in clause 8 of the charter-party. It is suggested that the charter-party provides that to the extent to which the shipowner is in a position to obtain indemnity against this liability from his club he must transfer to the time charterer the benefit of his cover, with the result that the time charterer will get protection at the expense of the shipowner's club.

In the present case under the rules of the club the shipowner has to bear the first 10*l.* as between himself and the club—and the result is, if this view be correct, that the time charterer gets protection to the extent of 91*l.* at the expense of the club and must indemnify the shipowner to the extent of 10*l.* only. Whether this contention would succeed if clause 8 of the charter-party stood as in print is a question which does not arise and about which, for myself, I do not propose to express any opinion. I am, however, of opinion that that contention is excluded by reason of the presence in the charter-party of the words "as far as club rules allow." Turning to the club rules and particularly to the part of rule 2 (i.) which must, of course, be read in conjunction with all the other rules, including rule 17, it appears to me to result as a matter of construction that it is a condition of the indemnity to which the member is to be entitled under the rules that the club is to have the right to recover for its own account any sum which the member may be entitled to recover from any third party in respect of the matter of his claim against the club. The words in the charter-party "as far as club rules allow" have the result, in my view, that no greater right in respect of the cover is to be vested by reason of this clause in the time charterer than such right as could be so vested consistently with the provisions of the club rules. So reading the clause it seems to me to follow that the time charterer cannot claim against the shipowner under this clause, in view of the rules of the club, to be freed from the very liability which it is a condition of the indemnity that the club should be entitled to enforce against him for its own account.

The consequence is that for the purposes of the present matter and in the case of a shipowner who is a member of this particular club, with these particular rules, the last sentence of clause 8 has no effective operation for the benefit of the time charterer.

Accordingly, in my judgment the appeal should be allowed and the judgment should be to the effect that the claimants are entitled to recover 101*l.* 3*s.* 4*d.*, with the result as to costs which is stated in par. 14 of the award, and the respondents, the time charterers, must be ordered to pay the costs of the appeal.

Goddard, L.J.—On the first point, namely, whether the liability for the improper stowage falls on the owners or the time charterers, I entirely agree with the view taken by the learned judge and by my Lords, and I propose to say no more upon that.

On the second point I have the misfortune to differ from my Lords. Naturally, I express my opinion with some hesitation, although perhaps with less hesitation than I should otherwise do, because I am agreeing with the learned judge below and with the view taken by a learned arbitrator, whose very wide experience in these matters is well known.

The point arises in this way. The owners, having had to pay the bill of lading holders for damage caused by reason of improper stowage, the liability for which as between themselves and the time-charterers falls on the latter, claimed in the arbitration to be re-paid that sum. They are met with this answer: "You, the owners, have agreed to give us, the time charterers, the benefit of the protection and indemnity club insurance so far as your club rules allow" and the only question that I see which arises on this part of the case is whether the club rules—the club being the West of England Steamship Owners' Protection and Indemnity Association—permit of that bargain being made between the owners and the time charterers. If they do not, the claim fails. But as between the time charterers and the owners, if I can place a construction upon the rules which does enable protection to be given as against a construction that prevents the protection being given, I think I ought to prefer the construction which allows the protection to be given because *this* clause is put in the charter-party for the benefit of the time charterers. Now this is where I differ from my Lords. I do not find anything in the rules which prevents the owners making this bargain with the time charterers. The way the case arises is that

when the owners claim against the time charterers, they say : " True, we are liable to you, but you have been paid your loss by your club, and as you have contracted to give us the benefit of that payment there is nothing you can recover from us." It would be in my judgment exactly the same if they had not actually been paid by the club, but had a right to be paid by the club—because then the answer would be : " You go to your club and get the money from your club and you have to give us the benefit of that money, so there is nothing which can be claimed from us, because you will hold the money as trustee for us."

Both before the learned arbitrator and before the learned judge it does not appear that the question as to rule 2 (i.) which has been so much discussed before us was as much as mooted ; the only point which seems to have been taken there is with regard to rule 17. It is quite clear this point was not taken before the learned arbitrator because he, who has set out his special case with extreme care, has not set out the words in rule 2 (i.) of the rules upon which so much depends. That clearly shows that nobody thought of raising that point before him. Nor was the point apparently discussed before Lewis, J., because he does not mention it at all—Mr. McNair having based his argument solely upon rule 17. For myself I confess that when a case has been before a learned arbitrator of the experience of Mr. Willink and a judge of the experience of Lewis, J., and has been argued by experienced counsel, I think I should look very carefully at an argument which does not emerge until the case comes into this court.

As I understand it, the way it is put is this. It is said that rule 2 (i.) of the club rules is in these words—omitting immaterial words : " The Association shall be entitled to . . . . recover for its own account from third parties any damages that may be provable by reason of such neglect." For myself, I do not regard that as any more than a statement of the common law, namely, that if the Association, being the insurers in the case, pay the assured they are entitled to subrogation of his rights—but before the right of subrogation can arise there must be a claim that can be made by the assured against some third person. If there is no third person against whom the claim would lie at the suit of the assured, no right of subrogation arises. If I insure my property against all risks and I myself damage that property through my own negligence I am entitled to recover from my insurers. For instance, if I have insured a motor car against damage, and I run it into a wall, I am entitled to recover in respect of that damage from my insurers. No question of subrogation arises there. I regard *these* words as though they were written into a policy of insurance, and I then ask myself, if they were, whether there is anything in those words which prohibits the assured from making any contract that he sees fit to make. I confess I do not, unless I read into the clause a great many words which are not there. Ordinarily, the assured may make such a contract as he likes provided that it is not forbidden by the policy. Take the instance of a motor car insurance again. If I insure my motor car against damage and it is damaged by the negligent act of a third party the insurer pays me, but he has his right of subrogation. Now take the common case that can arise and does arise every day. Everybody knows now, and it has been affirmed in this court, that garage proprietors say they will not take cars in except at owner's risk, which absolves them from liability for negligence. If my car is damaged while in the garage by the garage proprietor's negligence, I cannot recover against the garage proprietor. But, though I have words in my policy preserving or setting out the insurer's right of subrogation, it would be startling to hear that the insurer could refuse to pay me for the damage to my car because the garage people had only taken the car in on the terms that they should not be liable for damage caused to it by their negligence. I do not regard the words of this rule as in any way limiting the right of the assured to make what contract he pleases. I do not think the words : " The Association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect " ought to be construed as meaning : " You are never to make a contract which will deprive you of the right to recover damages against the third person "—because it is only if I have the right to recover against the third person that the insurance company can have the right to recover against that third person.

The cases which counsel for the appellants cited and relied on, as saying that if the assured did anything to deprive the insurer of his right of subrogation, he then became liable in damages to the insurance company the measure of which was the amount which had been paid to him by the insurance company, were all cases in which the assured altered the position between himself and the third party, who would otherwise have been liable, after payment by the insurance company and after the right of subrogation had become vested in the insurance company. That, of course, is an entirely different matter. If I have been paid by my insurance company for damage to my car and have got the money in my pocket, I must not then go and release the person who has caused the damage, so as to deprive my insurer, who has paid me, of the right of pursuing the wrongdoer. I think that it is difficult, and indeed I find it impossible to read into rule 2 (i.) a prohibition on the assured from making a contract of this sort in the ordinary course of his business, although it may have the effect of excluding recovery from a wrongdoer so that the insurance company would have no remedy against him. If the intention of the club is to do any such thing, I think it should be stated in clear terms. As I have said, the interpretation which I put on this rule is no more than this, that it is declaratory of the right of the insurance company to pursue its ordinary right of subrogation if there is a claim which can be enforced in those circumstances.

With regard to rule 17, which was the only rule which was relied upon before the learned arbitrator and, so far as I can see, before Lewis, J.—certainly it was the only rule relied upon before the learned arbitrator—I would say that that, in my judgment, has nothing to do with the case. That rule says : " No assignment or subrogation by a member of his cover with this Association to charterers or any other persons shall be deemed to bind this Association to any extent whatsoever." That to my mind simply means this : " You shall not assign your contract of insurance." A marine insurance policy is by sect. 50 of the Marine Insurance Act assignable unless it contains terms expressly prohibiting assignment. I read that rule as only meaning that the contract of insurance between the club and its member shall not be assigned by a member to any other person ; in other words, no other person is to be thrust on the club as one of its members or insured without its consent.

For these reasons I would be for dismissing the appeal and upholding the award as directed by Lewis, J.

Appeal allowed. Cross-appeal dismissed. Leave to appeal to the House of Lords.

Solicitors for the appellants, *Holman, Fenwick* and *Willan*.

Solicitors for the respondents, *Middleton, Lewis* and *Clarke*.

House of Lords.

March 16, 17, *and May* 8, 1939.

(Before Lords ATKIN, THANKERTON, RUSSELL, WRIGHT, and PORTER.)

Northumbrian Shipping Company Limited v. E. Timm and Son Limited. (*a*)

Contract for carriage of goods—Loss of ship and cargo by stranding—Deviation to obtain coal—Liability of shipowners—Canada Water Carriage of Goods Act, 1910 (*R. S. C.*, 1927, *c.* 207), *ss.* 6, 7.

The appellants were owners of a steamship which loaded a cargo of wheat at Vancouver for carriage to Hull. They duly issued a bill of lading relating to the wheat, of which the respondents were the endorsees. The appellants intended that the ship should proceed to St. T. and coal there, but on the way it was found that she had not sufficient coal to reach that port and a deviation was made in order to obtain coal at J. While on the way to J. the ship stranded and both ship and cargo were lost. The endorsees of the bill of lading brought an action against the shipowners claiming that the loss was due (inter alia) *to the negligence of the shipowners or their servants in allowing the ship to leave the port of departure with an inadequate supply of coal. The shipowners pleaded that they were protected by the terms of the bill of lading and by sects.* 6 *and* 7 *of the Canada Water Carriage of Goods Act*, 1910, *which was incorporated therein. The bill of lading contained a deviation clause and also a clause relieving the shipowners from liability for loss by stranding or by perils of the sea or by unseaworthiness of the vessel, provided all reasonable means had been taken by the carriers to provide against such unseaworthiness. By sect.* 6 *of the Canadian Act : " If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned equipped and supplied neither the ship nor the owner agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship . . ." By sect.* 7 *of that Act : " The ship the owner charterer agent or master shall not be held liable for loss arising from fire, dangers of the sea . . . or for loss resulting . . . from saving or attempting to save life or property at sea, or from any deviation in rendering such service or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents servants or employees." MacKinnon, L.J. found as a fact that the stranding of the ship was caused by the negligence of the master and navigating officers and that the ship had left Vancouver with insufficient coal to reach St. T., and held that the above sections did not apply and that the shipowners were liable. The Court of Appeal held, applying* The Vortigern (8 *Asp. Mar. Law Cas.* 523 ; 80 *L. T. Rep.* 382 ; (1899) *P.* 140), *that the ship having left the port of loading with insufficient coal to enable her to reach the end of the first stage of the voyage, the appellants were not protected either by the terms of the bill of lading or by the provisions of the statute incorporated therein, and were liable for the loss of the wheat.*

Held, that the appellants could not show that they exercised due diligence to make the ship seaworthy, and therefore had not fulfilled the condition imposed by sect. 6 *of the Canadian Act of* 1910, *since they were responsible for deciding that the ship should bunker at S. T. and were bound to see that she had sufficient coal to get there.* Paterson's Steamships Limited *v.* Canadian Co-operative Wheat Producers Limited (18 *Asp. Mar. Law Cas.* 524 ; 151 *L. T. Rep.* 549 ; (1934) *A. C.* 538) *applied. The contention of the appellants that, though a ship had not a sufficiency of bunkers to satisfy the normal contingencies for the bunkering stage of the ship which the owners had fixed, yet if a reasonably sufficient margin had been allowed for, the fact that there turned out to be a deficiency would not necessitate a finding that the ship was not seaworthy for the stage or that due diligence had not been used to make her so, provided that there was in the course of the stage an intermediate bunkering port at which the ship could call, was wrong. The remarks of Barnes, J., a great master of mercantile law, in* The Vortigern (ubi sup.) *could be applied with even greater force in the present case. If the owners allowed the ship to start on the first stage fixed upon for bunkering without sufficient coal for that stage the ship was not seaworthy for that stage.*

Decision of the Court of Appeal (19 *Asp. Mar. Law Cas.* 184 ; 158 *L. T. Rep.* 474) *affirmed.*

APPEAL from the judgment of the Court of Appeal, dated the 2nd March, 1938.

The facts are shortly stated in the headnote.

Willink, K.C. and *Cyril Miller* for the appellants the Northumbrian Shipping Company Limited.

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

A. T. Miller, K.C., Sir *Robert Aske*, K.C. and *A. J. Hodgson* for the respondents.

The arguments were heard on the 16th and 17th March, and appear from the judgment of Lord Wright.

Their Lordships took time for consideration.

Lord Atkin.—My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends, Lord Wright and Lord Porter. I agree with them, and have nothing to add.

Lord Thankerton.—My Lords, I also have had an opportunity of considering the opinions about to be delivered by my two noble and learned friends, and I concur in their view.

Lord Wright.—The material facts in this case were carefully and precisely found by MacKinnon, L.J., who tried the action when sitting as an additional judge of the King's Bench Division. His findings of fact were affirmed by the Court of Appeal, and have been accepted before your Lordships on this appeal. They can therefore be stated shortly.

The respondents were holders of a bill of lading for a parcel of 9520 bushels of wheat shipped in November, 1932, at Vancouver, British Columbia, on the appellants' steamship *Newbrough* for carriage to Hull. The vessel's total cargo consisted of 8389 tons of wheat and bran. In the events which ensued that whole cargo, which was worth about 40,000*l*., became a total loss. It has been agreed that the result of these proceedings will be binding as between the shipowners and the other bill of lading holders. The *Newbrough* had sailed round from Montreal to Vancouver in ballast, and the appellants had instructed the master to bunker on the way at Port Royal, Jamaica, taking in sufficient coal to sail with 1200 tons. This was done. At Vancouver the master was instructed to bunker for the ocean voyage homewards at St. Thomas, in the Virgin Islands. This, as MacKinnon, L.J. found, fixed the stage of the voyage for bunkering purposes. At the trial the Lord Justice found, after considering a great deal of conflicting evidence, that when she left Vancouver, on the 26th November, 1932, she had on board no more than 675 tons of coal, and that this quantity was not sufficient to take her from Vancouver to St. Thomas. Her voyage took her down the Pacific coast and then through the Panama Canal. There was nothing abnormal in the weather in the Pacific for a winter voyage. While passing through the canal the master asked the chief engineer what quantity of coal remained on board and was told there was about 168 tons. This appears to have been an over-estimate of about 12 tons. But it is not now contested that, as the Lord Justice found, the master should have taken more bunkers at Colon, the port at the Atlantic end of the canal, where there are bunkering facilities, before proceeding towards St. Thomas. It is not questioned that he had authority from his owners to do so if he deemed it necessary. He did not do so and left the canal on the 19th December, 1932. On the 22nd December, he decided that he had not enough bunkers to take him to St. Thomas, which was about 530 miles away and altered course to Port Royal, then about 415 miles away. There had been no unusual weather for the time of the year in the Caribbean Sea. While on this course the vessel ran on to Morant Cap, a reef off the island of Jamaica, and became, along with her cargo, a total loss. MacKinnon, L.J. found that the vessel was lost by default or errors in navigation. He also found that on starting from Vancouver the vessel had not enough coal to take her to St. Thomas, allowing a reasonable margin for the contingencies to which any such voyage must be subject, and the master had not exercised due diligence to make her seaworthy.

The bill of lading under which the respondents' wheat was carried was issued at Vancouver on the 26th November, 1932. It was to be governed by the law of the carrying ship, that is, by English law, and contained elaborate stipulations and exceptions, but these were in the main superseded by clause 35. This clause, which is generally called the clause paramount, provided that the bill of lading was subject to all the terms and provisions of, and exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1910, which was then in force, and incorporated as required by that Act, s. 4, which declared to be null and void any clause, covenant or agreement in any bill of lading relieving the shipowner, charterer, master or agent from liability for damage arising from negligence or weakening or avoiding the obligations of the owner or charterer to exercise due diligence in regard to seaworthiness or the obligations of the master, officers, servants or agents to care for and deliver the goods, unless such clause, covenant or agreement was in accordance with the Act. In this way as matter of contract the relevant exceptions contained in the Act were incorporated in the bill of lading. Of these provisions those in sect. 6 were the only ones relied on by the appellants. This section, so far as material, is to the effect that if the owners of any ship transporting merchandise from any port in Canada should exercise due diligence to make the ship in all respects seaworthy and properly supplied, the owner should not be responsible for loss resulting from faults or errors in navigation of the ship. The appellants rightly, for obvious reasons, did not seek to found a defence on sect. 7. Sect. 6 was considered by the Privy Council in *Paterson's Steamships Limited* v. *Canadian Co-operative Wheat Producers Limited* (18 Asp. Mar. Law Cas. 524, at p. 526; 151 L. T. Rep. 549, at p. 551), where it was said: "What is important to note in sect. 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law, seaworthiness of the ship in a contract of sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of (*J. and E. Kish* v. *Charles Taylor Sons and Co.* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604)), but the obligation to provide a seaworthy ship is absolute, and is not limited to due diligence to make it so. The matter which sect. 6 deals with as the condition on which the privileges may be relied on is not seaworthiness but due diligence to make the ship seaworthy: if, however, that condition is not fulfilled, the shipowner cannot, under sect. 6, excuse himself from liability for loss due to negligence in the respects specified in the section."

In the present case, as already stated at the trial, MacKinnon, L.J. held that the stranding of the *Newbrough* on the Morant Cap was caused by the negligence of the master and the navigating officers, and thus resulted from faults or errors in navigation. Whether the appellants could successfully rely on sect. 6, depended on whether they could show that they exercised due diligence to make the vessel seaworthy and thus fulfilled the condition imposed by the section. This issue

turned solely on the sufficiency of the bunkers on leaving Vancouver. As already stated, MacKinnon, L.J. held that they had not fulfilled the condition. The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents. They cannot say that there was a miscalculation merely due to the negligence of their servants. They were in this case responsible for deciding that the vessel should bunker at St. Thomas on her way from Vancouver, and were bound to see that she had sufficient coal. *Primâ facie*, the findings of fact of MacKinnon, L.J. would seem to dispose of the case. But there has been raised on behalf of the appellants a more subtle contention, involving a refinement on the doctrine of stages of the voyage as applied in regard to bunkering on a long voyage. This doctrine of stages has not been the subject of direct decision in this House, but has been laid down or recognised by the Court of Appeal in *Thin* v. *Richards and Co.* (7 Asp. Mar. Law Cas. 165; 66 L. T. Rep. 584; (1892) 2 Q. B. 141), *The Vortigern* (8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140), *McIver* v. *Tate* (9 Asp. Mar. Law Cas. 362; 88 L. T. Rep. 182; (1903) 1 K. B. 362), and also in *Greenock Steamship Company* v. *Maritime Insurance Company* (9 Asp. Mar. Law Cas. 463; 89 L. T. Rep. 200; (1903) 2 K. B. 657), where the rule was applied in the case of a voyage policy of marine insurance. It is a special application, to bunker supply, of a doctrine which has been applied in other connections, such as a stage of the voyage for loading in port, or for passages in inland waters, where different standards of fitness are required as compared with what is required in the open sea. The application of the doctrine of stages became particularly important when vessels came to depend for their propulsion on machinery, the fuel for which was necessarily consumed as the voyage went on. The rule which has been established is that a steamship or motor vessel starting from her port on a long ocean voyage need not carry enough coal (or oil or other fuel) for the whole voyage, but only sufficient to take her to a particular convenient or usual bunkering port on the way. That is treated as a section of the voyage, and is called a stage of the voyage. Thus the warranty of seaworthiness is sub-divided in respect of bunkers. Instead of a single obligation to make the vessel seaworthy in this respect, which must be satisfied once for all at the commencement of the voyage, there is substituted a recurring obligation at each bunkering port at which the owners or those who act for the owners decide she shall bunker, thereby fixing the particular stage of the voyage. The principle presupposes that the contract of affreightment permits of this course, and of deviating if necessary for this purpose. It has been said that this rule is a concession to the shipowners. But I prefer to say (with Collins, L.J. in *The Vortigern*) that it is rather an adjustment of the requirements as to this type of seaworthiness to the commercial necessities of the case. If a steamship starting, for instance, from London for Australia had to start with enough coal or fuel to carry her to Australia, the amount she would have to carry on starting would reduce her cargo-carrying capacity to such an extent as to make the adventure uneconomic. Not only would the shipowners suffer, but so would the shippers and the community generally because of the high or prohibitive freights which would have to be charged.

But, as usually understood, the doctrine of stages would not in this case help the shipowners, on the Lord Justice's finding that there was a failure of due diligence in sending the ship from Vancouver with insufficient coal for the bunkering stage which they had fixed at St. Thomas. The refinement which the appellants seek to introduce depends on a proposition of law which the Lord Justice and the Court of Appeal have rejected. This is that, though a steamer has not in fact a sufficient margin of bunkers to satisfy the normal contingencies of the stage which the owners have fixed, yet if a reasonably sufficient margin has been allowed for, the fact that there turns out to be an actual deficiency, will not necessitate a finding that the vessel was not seaworthy for the stage or that due diligence has not been used to make her so, provided that there is in the course of the stage an intermediate bunkering port at which in case of need the vessel can call. The quantity of bunkers, which apart from this qualification would be necessary for the stage is then, it is said, to be modified by taking into account this optional facility. Thus, it is argued, the vessel starts in a seaworthy condition in respect of bunkers, and if she is likely to run short on the way, because of conditions of the voyage rather worse than anticipated, though not abnormal, she can make good the defect by calling at the intermediate bunkering port. If she fails to do so, the failure is not, it is said, a breach of the warranty of seaworthiness, which has been satisfied once for all for that stage when she started upon it, but is merely a fault or error in navigation for which the owners can claim the protection of sect. 6 of the Act, or of similar exception clauses under other forms of contract. As to the facts of this particular case, the appellants point out that the *Newbrough* on a previous winter voyage from Vancouver to St. Thomas had consumed 602 tons of coal, which was substantially less than what the Lord Justice found she had when she started from Vancouver on this voyage; and also that the failure to take more coal at Colon was due to the miscalculation of the engineer who gave the master a wrong figure when the master on the passage through the canal inquired what coal was left in the bunkers; all this constituted a case of negligence, not unseaworthiness. The appellants alleged that, having regard to the possibility of bunkering at Colon, the *Newbrough* should be held as a matter of law to have been sufficiently supplied with bunkers when she left Vancouver, or at least that due diligence had been exercised to make her so. In support of this view of the law they relied on the language of Gorell Barnes, J. in the *Vortigern*. In that case the *Vortigern* was on a voyage from Cebu to Liverpool. The first stage of the voyage was to Colombo where she coaled. The next coaling port fixed by the owners was Suez. She ran short of coal in the Red Sea. In proceeding down the Red Sea she passed Perim and Aden, and might have put into either port to coal, but she did not. Barnes, J. held that she was unseaworthy on leaving Colombo because she had not sufficient coal for the stage to Suez, and held that it was immaterial to consider what happened afterwards when she passed Perim. But the judge went on to say that if it were not a breach of warranty for the vessel to start with insufficient coal to reach the next port at which she was intended to coal, provided there were another coaling port which she would pass on the way and could have in reserve to go into if necessary, then as the owners must treat the voyage as divided into two stages from Colombo to Port Said instead of one, the vessel must be made seaworthy on leaving Perim. "The vessel must be seaworthy for the whole stage, or made seaworthy for each division

of the stage, and she was not seaworthy for the portion of the voyage on which the loss occurred." Thus there is a dilemma. To apply this reasoning to the facts of the present case, either the stage was from Vancouver to St. Thomas, in which event the steamer was not seaworthy on leaving Vancouver, or the stage was from Vancouver to Colon, in which case the new stage started from Colon and was to St. Thomas from Colon, and the steamer was not seaworthy on that stage. The dilemma thus appears to be unavoidable.

Barnes, J. in the *Vortigern* (*sup.*), said that he preferred the former alternative, and added: "If the captain determines to start, as in this case, from Colombo to Suez, that is the stage that is fixed upon, and if the vessel has not enough coal for that stage I do not think the owners are relieved from the obligation thus incurred by setting up negligence in not putting into a port on the way to get coal if they are bound to fall short in the transit from Colombo to Suez."

These observations by a great master of mercantile law, meet with my complete assent, and may be applied with even greater force in the present case. It is true that under sect. 6 of the Canadian Act, the question is not whether the unseaworthiness caused the loss, as it was in the *Vortigern*. There is no question here of the absolute warranty of seaworthiness. It is a question of the more limited obligation of due diligence. But the condition of claiming the exemption depended on establishing that due diligence had been exercised to make the ship seaworthy. I do not see how due diligence can be exercised if it is uncertain what is to be the next coaling port. There may be several alternative or optional possible coaling ports on the way, and I do not see how there can be a standard of what is a sufficient bunker supply unless it is determined what is the stage of the voyage. This must be done before sailing, because it is then that the obligation, whether it is the absolute obligation or the obligation of due diligence, must be satisfied.

I can find no suggestion that the master ever contemplated that he was sailing from Vancouver on any stage of the voyage except to St. Thomas, which was the next coaling port fixed by the owners. It is true that the master had authority if coal were proving insufficient to replenish the bunkers at Colon, as he thought of doing when in the canal. But in my opinion the stage must be determined when the vessel sails. Seaworthiness is no doubt relative to the nature of the adventure and the other circumstances of the case. But unless it is determined on sailing what the stage of the voyage is, it is impossible to say whether the ship is seaworthy or not. This might have serious consequences on the insurances. There is also the special difficulty under sect. 6 that a vessel might be lost by negligent navigation soon after sailing from her first port with insufficient bunkers. Like Barnes, J., I prefer what he called the former alternative, that is, that the intention on sailing definitely fixes the stage and that the availability *en route* of what might be called an optional bunkering port cannot be taken into account. I think that this is true, not only in general but also where it may be said that it is only a question of estimating the margin for contingencies. If the stage is determined, the quantity of bunkers sufficient to make the vessel seaworthy for that stage must be determined in view of all contingencies that a prudent shipowner ought to contemplate.

The appellants' argument seems to be that the bunkers are to be deemed to be sufficient for the stage if, though in fact insufficient, they might have appeared to be reasonably sufficient having regard to reasonable contingencies; if, however, the estimate is not adequate and the margin proves in fact insufficient, the vessel is still to be held seaworthy for the stage, because she can fill up on the way. I find such a view most difficult. The way of looking at the matter in this connection most favourable to the shipowners is that there may be what may be called a conditional seaworthiness. Though the bunkers are insufficient for the stage, as MacKinnon, L.J. held that they were in this case, yet they become sufficient when the condition is fulfilled and they are replenished at the intermediate coaling station before harm can ensue. If the condition is fulfilled, seaworthiness, it is said, is actually or at least retrospectively secured. But if, in the case supposed, the vessel is lost by negligent navigation soon after leaving the first port, and the court finds that she was not sufficiently bunkered for the stage, whether because there was an insufficient margin for contingencies or for any other reason, how can it be said that the defect was immaterial simply because she might have bunkered at the intermediate port and made good the initial deficiency? It is, however, not necessary here to consider these questions because the vessel did not in fact take coal at Colon, so that if it be right to talk of a conditional seaworthiness, the condition was not fulfilled and the original unseaworthiness was unadeemed. It is not here necessary finally either to reject or accept the view that Barnes, J. mentioned but did not prefer and which the Court of Appeal in the *Vortigern* did not even mention, because on either view the appellants must fail here, as MacKinnon, L.J. and the Court of Appeal unanimously held. If they have to rely on conditional seaworthiness the condition was not fulfilled.

I merely add a few words out of respect to an argument addressed on behalf of the appellants that to reject their contention which, as at present advised, I am prepared to do, would be unduly to burden shipowners, who would be held bound to fulfil excessive requirements in the way of bunkers. Commercial law has always been ready so far as possible to sacrifice pedantic logical consistency in favour of convenience in the conduct of business. But I am not pressed by the suggested hardship or embarrassment. Owners, with the help of their masters and other agents acting for them, have full discretion to fix any reasonable stages for the voyage. It would involve grave difficulties in practice if the stage of the voyage were not definitely fixed on sailing so that the standard of what was sufficiency in respect of bunkers was rendered vague and uncertain.

In my opinion, the appeal should be dismissed with costs.

Lord Porter.—The appellants are the owners of the steamship *Newbrough*, and the respondents are the endorsees of certain bills of lading issued by the appellants in respect of a parcel of Canadian wheat, part of a cargo which she carried. The action was brought by the respondents for non-delivery of the parcel, which was totally lost through the stranding of the *Newbrough* on Morant Cap, a reef in the Caribbean Sea, south of Jamaica. She had sailed on a voyage from Swansea to Montreal, and the captain was there instructed by the appellants to proceed to Vancouver in ballast and to bunker *en route* at Port Royal, taking in sufficient coal at that port to sail with 1200 tons. After coaling as directed the *Newbrough* cleared for Vancouver and arrived there on the 24th November, 1932. At Vancouver she shipped a cargo of

Canadian wheat and set out on her return voyage to Hull, without having taken on board any further bunkers. Before sailing, however, the captain was instructed by the appellants to replenish his coal at St. Thomas in the Virgin Islands on the homeward voyage. He had, according to his own account, also received authority to call at Colon if necessary and to coal there.

The cargo was carried under bills of lading signed by the master containing a large number of provisions of which only two need be mentioned. The first is clause 2, which may be sufficiently described by saying that it gives a wide permission to deviate. The second is clause 35, which provides: "This bill of lading is subject to all the terms and provisions of and exemptions from liability contained in the Act of Parliament of Canada, 9–10 Edw. 7, c. 61, and the following section is incorporated in this bill of lading as required by the said Act: Where any bill of lading or similar document of title to goods 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 for loss or damage to goods 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 to properly man, equip, and supply the ship and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating, and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in anywise lessened, weakened or avoided; or (*c*) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in anywise lessened, weakened or avoided, such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act." Sect. 6 of the Canadian Act referred to—omitting immaterial words—runs as follows: "If the owner of any ship transporting merchandise from any port in Canada exercises due diligence to make the ship in all respects seaworthy, and properly manned, equipped and supplied, neither the ship nor the owner . . . shall become or be held responsible for loss resulting from faults or errors in the navigation . . . of the ship . . ."

It was found by the court of first instance and admitted in argument before us that the cargo was lost owing to the stranding of the ship and that that stranding was due to the negligent navigation of her master. If, then, the owners had exercised due diligence to make the ship seaworthy they would be excused for a loss suffered owing to the negligence of her officers, but in order to claim that protection they must show that the condition of seaworthiness was fulfilled (see *Paterson's Steamships Limited* v. *Canadian Corporation Wheat Producers Limited* (18 Asp. Mar. Law Cas. 524, at p. 526; 151 L. T. Rep. 549, at p. 552). The question argued in the courts below and before your Lordships was whether that condition had in fact been complied with.

Primâ facie a ship must be seaworthy on sailing from her starting-point for the whole voyage upon which she is engaged, but it has long been established that the voyage may be divided into stages and that it is sufficient if she be satisfactorily equipped for each stage at its commencement. The principle is older than the age of steam. It has been held to apply to such stages as lying in harbour. *McFadden* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697), proceeding down a river, *Bouillon* v. *Lupton* (8 L. T. Rep. 575; (1863) 33 L. J. C. P. 37), and passing from one port to another, *Biccard* v. *Shepherd* (5 L. T. Rep. 504; (1861) 14 Moo. P. C. 471).

The doctrine was, however, of less importance in the days when vessels proceeded under sail. Once steam propulsion was adopted and bunkers had to be carried, it became important for the shipowner that he should not be compelled to carry so large a quantity of bunkers as to compel him unduly to diminish his cargo or should even force him to avoid certain voyages altogether. Indeed it is true to say that the principle had also some importance for the cargo owner, since by it more cargo could be carried and freight cheapened. Whatever its origin, the doctrine of stages is now well established and it is immaterial to consider whether it is a concession granted to the shipowner or a provision for the mutual advantage of the carrier and cargo owner. But though the voyage may be divided into stages and the obligation of the shipowner confined to providing the proper equipment for each of those stages at its beginning, the force of the obligation has not been diminished. It may well be that the shipowner has the right to predetermine what those stages shall be, at any rate, provided he chooses usual and reasonable stages. Once chosen, however, they are those for which the necessary equipment must be furnished.

It was conceded on behalf of the appellants that if the voyage from Vancouver to St. Thomas were alone to be considered, and if the possibility of coaling at other ports on that stage were excluded, the *Newbrough* had insufficient coal in the sense that no sufficient margin for possible contingencies had been shipped. It is indeed possible that on the figures found by the learned judge, she was insufficiently equipped for that stage even though the possibility of coaling at an intermediate port were taken into consideration, but your Lordships have not considered the evidence on that part of the case, and for the purpose of this decision I accept the view that in the latter case a sufficient margin of coal had been shipped.

It was, however, contended on behalf of the appellants that in equipping a vessel for a stage between two ports where it is possible to call and take in bunkers at an intermediate port, the same margin of safety is not required as in a case in which a ship sails from one port to another with no possibility of coaling in between. In either case the appellant agreed that the sole question for the court to consider was whether at the beginning of the stage the ship had sufficient bunkers on board for a voyage between the two ports; but, it was said, that sufficiency must be measured by a different standard in a case where she could replenish her fuel in the course of the stage from that required where such replenishment was impossible. In argument the proposition was stated thus: "The quantity is reasonably sufficient if it consists of the quantity reasonably anticipated as the quantity that will be used plus a reasonable margin for contingencies. In fixing the margin for contingencies, however, the shipowner is bound to take into account any weather or other adverse conditions with which in the ordinary course he may meet, but is entitled also to take into account, at any rate where his contract gives him liberty to call at intermediate ports, the existence of bunker facilities *en route* which will be available in the event of adverse conditions reducing his margin to an unsatisfactory level."

In the present case, as I have indicated, there was a wide deviation clause and liberty was thereby given to call at intermediate ports, amongst which Colon would be included. The question, therefore, can be narrowed to an inquiry whether the obligation as to the amount of the bunkers required for a stage differs according to whether there are opportunities of bunkering at a usual coaling port on the route, or whether there are no such opportunities because the stage is one where no such coaling port exists.

In the present case the owners of the *Newbrough* chose as their first stage on the homeward voyage that from Vancouver to St. Thomas. It was imperative, therefore, that she should be seaworthy at Vancouver, the beginning of the stage.

But seaworthiness is a term of art and means in relation to bunkering, as indeed the wording of the Canadian Act shows, that the ship must have a sufficient supply of coal, including a proper margin for contingencies to take her over the whole of her route between the ports constituting that stage. If that be the obligation the *Newbrough* was admittedly insufficiently supplied. Indeed, to assert otherwise is merely to say that though she had not enough to cover all necessary contingencies for the stage, yet she had enough for the more usual eventualities and an opportunity of making up her deficiencies *en route* in case the less usual but still not improbable contingencies should occur. It may be that the owners in taking the lesser quantity were running no more than a reasonable risk in a case where the coal supplied might well prove sufficient and, if it did not, their master could take a further supply at an intermediate port; but the question is not whether a reasonable risk has been taken, but whether the owners have exercised due diligence to make their ship in all respects seaworthy and properly supplied. Their duty is to use due diligence to supply the ship with coal and that duty is not performed by providing what may prove to be insufficient unless the master takes an additional quantity at some intermediate port in case of need. They may have supplied sufficient bunkers if all goes well—if not, they have delegated to their master a duty which the law imposes upon them, and must trust to him to perform it. If he does not, they are answerable for the breach of an obligation which it was their duty to fulfil.

The argument involves the proposition, as indeed the appellants recognised, that a failure of the master to make good the deficiency would not make the ship unseaworthy, but would only be an instance of negligence on the part of her officers. But to accept such a contention would indeed be to decrease the liabilities of a shipowner by excusing him for a failure to perform his obligations on the ground that he had entrusted them to his servants and those servants had been negligent. If the argument were to prevail I see no reason why a shipowner should not claim that, though his ship had insufficient bunkers at the beginning of a voyage or a stage, yet he had done all that was necessary, since he had instructed his master to take an ample supply of bunkers on sailing and had supplied him with enough money to pay for them. On the other hand, to maintain that the ship was or was not seaworthy according to whether the master bunkered or failed to bunker *en route* would involve the possibility of her becoming unseaworthy at some place on the voyage, and at a time which it would be difficult to define. Would it be when the master determined to take no more coal, or when he reached and passed the intermediate port without calling, or must one regard the ship as unseaworthy from the beginning of the stage? And with this doubt in mind, how is it to be known when her insurances became ineffective, or when the protection afforded by the terms of her bills of lading ceased to operate?

If the moment when she might have coaled at the latest available intermediate port be taken, she would become unseaworthy as from a port at which she did not bunker and at which she might not even have called. Such a state of things was no doubt envisaged by Gorell Barnes, J. in *The Vortigern* (*ubi sup.*) (80 L. T. Rep. at p. 384; (1899) P. at p. 147), but he preferred to rest his decision on the ground that the vessel was unseaworthy from the beginning of the stage. Moreover even if the contention were to be adopted, it would not avail the appellants in the present case, since if Colon is to be regarded as the beginning of a stage she was conceded to be unseaworthy then. Indeed, the argument on behalf of the appellants recognised and maintained that the vessel's seaworthiness must not be judged by the amount of bunkers she had at Colon. In whatever way, however, one looks at the circumstances, the appellants seem to be placed in a dilemma. If the master elects not to avail himself of the intermediate port he but confirms the stage which the owners had previously arranged, and if at the beginning of that stage the ship was unseaworthy, she remained unseaworthy until she reached or failed to reach the appointed port. If, on the other hand, he does avail himself of the opportunity of bunkering at the intermediate port, he elects to make that part of the voyage in two stages and the vessel must be seaworthy when she leaves the intermediate port. It is not enough to say that a prudent man would proceed on the longer stage trusting to fill up with bunkers at an intermediate port if necessary. No doubt the opportunity of replenishing her bunkers exists, but a failure to perform the warranty of seaworthiness cannot be excused by trusting to the discretion of the master, and if he fails to act prudently by laying the blame on him. The fact that it was negligence in the captain or some other officer of the ship not to elect to call at the intermediate port will not make the ship seaworthy at the beginning of her voyage.

This view accords with that expressed in *Thin* v. *Richards and Co.* (7 Asp. Mar. Law Cas. 165; 66 L. T. Rep. 584; (1892) 2 Q. B. 141), *The Vortigern* (8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140), and *Greenock Steamship Company* v. *Maritime Insurance Company* (9 Asp. Mar. Law Cas. 463; 89 L. T. Rep. 200; (1903) 1 K. B. 357; (1903) 2 K. B. 657).

With these cases I agree and I do not find it necessary—as Gorell Barnes, J. did not find it necessary in *The Vortigern*—to determine whether any consideration of seaworthiness at the intermediate port was material or not. The *Newbrough* was not seaworthy when she started on that stage of her voyage which lay between Vancouver and St. Thomas, and due diligence was not exercised to make her so. I would dismiss the appeal.

Lord Atkin.—My Lords, I am asked by my noble and learned friend Lord Russell of Killowen to say that he agrees with the opinions which have been expressed.

Appeal dismissed.

Solicitors for the appellants, *Middleton, Lewis,* and *Clarke,* agents for *Middleton* and *Co.,* Sunderland.

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

March 9, 10, 13, 14, *and May* 8, 1939.

(Before Lords ATKIN, THANKERTON, RUSSELL, WRIGHT, and PORTER.)

Robertson v. Petros M. Nomikos Limited. (*a*)

Insurance (Marine)—Freight policy—Construction—Institute Time Clauses, Freight, clause 5 *—"In the event of the total loss, whether absolute or constructive of the steamer"—Constructive total loss—Notice of abandonment not condition precedent of such loss—Clause* 5 *overriding clause* 8 *that no claim on loss owing to delay—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 61, 62.

Shipowners insured the hull of a steamer by policies in which her value for constructive total loss was 28,000*l. By a Lloyd's policy they insured for* 4110*l. in respect of the vessel "freight chartered or otherwise." This policy was subject to the Institute Time Clauses, Freight, by which* (5) "*In the event of the total loss whether absolute or constructive of the steamer the amount underwritten by the policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.*" (6) "*In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value.*" (8) "*Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.*"

The owners chartered the vessel to carry a cargo of crude oil from Venezuela to the United Kingdom or the Continent during the currency of the hull policies and the policy on freight. Before proceeding to the port of loading, the steamer went to Rotterdam for repairs, where, owing to explosion followed by a fire, the after part of the steamer was burnt out. The owners accepted a tender for the repairs for 37,000*l., did not abandon the vessel to their hull underwriters, but claimed from them as for a partial loss* 28,000*l. less a deductible franchise of* 1000*l. The value of the vessel when repaired was about* 45,000*l. The freight under the charter was never earned, and the owners sued the defendant, one of the underwriters, on the freight policy under clause* 5 *of the Institute Time Clauses, Freight, for his proportion of the* 4110*l. The appellant, the underwriter, in the House of Lords, contended that* (1) *there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners, who, on the contrary, had elected to retain the vessel and claim as for partial loss, and* (2) *in any case the claim was excluded by clause* 8 *as being a claim consequent on loss of time because the repairs took so long as to make it impossible to perform the charter-party.*

Held, (1) *that there was a constructive total loss of the vessel within the meaning of clauses* (5) *and* (6), *for notice of abandonment was not a condition precedent of such a loss, though it was of a right to sue for such a loss. The words "constructive total loss" must have (apart from clause* (6) *which merely invoked the full policy in order to get a figure of value) the same meaning as if there were no hull policy in existence at all and notice of abandonment was not an essential ingredient of a constructive total loss. Clause* (5) *fixed a conventional measure of indemnity under the freight policy where the ship had become an actual or constructive total loss.* Roura and Forgas *v.* Townend and Others (14 *Asp. Mar. Law Cas.* 397; 120 *L. T. Rep.* 116; (1919) 1 *K. B.* 189) *approved as applying the correct principle for construing sects.* 60 *and* 61 *of the Marine Insurance Act*, 1906, *with regard to what constituted a constructive total loss.* (2) *The Institute Time Clause, Freight, No.* (5) *overrode the provisions of clause* 8.

Bensaude *v.* Thames and Mersey Marine Insurance Company Limited (8 *Asp. Mar. Law Cas.* 315; 77 *L. T. Rep.* 282; (1897) *A. C.* 609) *distinguished.*

Question whether the claim in this case was in any view consequent on loss of time reserved.

Decision of the Court of Appeal (19 *Asp. Mar. Law Cas.* 208; 159 *L. T. Rep.* 130) *affirmed.*

APPEAL from an order of the Court of Appeal.

The facts are stated shortly in the headnote.

The arguments which were heard on the 9th, 10th, 13th and 14th March, 1939, sufficiently appear in the judgment of Lord Wright.

Their Lordships took time for consideration.

Lord Atkin.—I have had the opportunity of reading the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I agree with their reasoning and with the motion they propose.

There was a constructive total loss of the ship, for notice of abandonment is not a condition precedent of such a loss, though it is of a right to sue for such a loss. I further agree that Institute Time Clause, Freight, No. 5 overrides the provisions of clause 8. I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view. It may prove that the words "consequent on loss of time" have received too wide a construction in some of the cases, and I only desire to register a caution that it must not be assumed from the decision in this case that the loss of freight in question was in consequence of loss of time.

Lord Thankerton.—I also have had the privilege of considering the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I agree with the reasonings and conclusions of those opinions, subject to the caution which my noble and learned friend on the Woolsack, in the opinion which he has just expressed, has made clear. I also wish to make it quite clear that I express no opinion at all—because it is quite unnecessary to do so—on the argument which was urged on behalf of the respondents that

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

clause 5 of the Freight Clauses effected some extension of the perils insured against.

Lord Wright.—This appeal raises the question of the true construction of a contract of marine insurance on a vessel named the *Petrakis Nomikos*, of which the respondents are owners. The policy, dated the 28th August, 1936, was for "4110*l.* on freight chartered or otherwise in and/or over" and was a time policy for twelve months from 6 a.m. on the 20th July, 1936, to 6 a.m. on the 20th July, 1937. It was underwritten by the appellant, along with other underwriters. It was against the usual perils, namely, of the seas, men-of-war, fire and so forth. It was expressed to be subject to the Institute Time Clauses, Freight, which were set out in a slip attached to the policy. They will be referred to as the freight clauses. It also incorporated the hull and machinery policies on the vessel in respect of certain warranties, and contained an express warranty "that 50 per cent. (fifty per cent.) of the hull and machinery valuation is uninsured for total or constructive total loss." The hull and machinery policies, also for time and dated the 28th August, 1936, fixed the insured value at 28,000*l.* and, like the freight policy, contained the warranty that 50 per cent. was uninsured for total or constructive total loss. It contained the Institute Time Clauses, Hull, of which reference may be made to clauses 17 and 18 which were in the following terms: "17. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. 18. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not."

Of the freight clauses embodied in the policy sued upon, clauses 5, 6, 7 and 8 are material in this appeal, and are as follows: "5. In the event of the total loss, whether absolute or constructive of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered. 6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. 7. In calculating the amount due under this policy in respect of any claim except under clauses 3 and 5, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein. 8. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

The material facts can be shortly stated. On the 23rd September, 1936, the vessel was chartered to a Belgian company to proceed to Venezuela, or Aruba or Curacoa and load a cargo of crude oil for ports in the United Kingdom or Continent. The cancelling date under the charter-party was the 10th November, 1936. On the 18th October, 1936, the vessel left Havre for Rotterdam for the purpose of repairs before starting in ballast on the voyage to Venezuela. While the repairs were being executed at Rotterdam, there was a violent explosion on board followed by a fire, as a result of which the after part of the vessel and the cross bunker were completely burnt out. The cost of repairs was not less than 37,400*l.*, but as the value of tonnage had risen the repaired value of the vessel was 47,000*l.* The respondents elected not to abandon the vessel and claim as for a constructive total loss, as they obviously were entitled to do, but had the ship repaired and claimed for a partial loss up to 27,000*l.*, the total amount of the insured value under the policies, less a deductible franchise of 1000*l.* The repairs were completed on the 31st May, 1937, and the vessel was thereafter used by her owners, the respondents, as a freight-earning instrument. The charter-party was never performed.

The respondents based their claim on clauses 5 and 6 of the freight clauses and averred that the case fell within the precise terms of the clauses, in that there was a constructive total loss of the vessel, while chartered, the cost of repairs being more than the insured value in the policies on ship. They accordingly claimed payment in full of 4110*l.* under clause 5. The case was in a sense the converse of *Carras* v. *London and Scottish Assurance Corporation Limited* (18 Asp. Mar. Law Cas. 581; 154 L. T. Rep. 69; (1936) 1 K. B. 291), where the cost of repairs was less than the insured valuation in the policy, but was more than the actual repaired value. The Court of Appeal there held that the clauses in question gave an additional right to the assured, but not an exclusive right superseding the common law rights under the policy, and that the assured were entitled to claim at common law. This decision was followed in that respect by the Court of Appeal in *Kulukundis* v. *Norwich Union Fire Insurance Society* (155 L. T. Rep. 114; (1937) 1 K. B. 1). In neither of these cases was it necessary to consider the precise construction of clauses 5 and 6. In the present case it is not contested that the respondents are entitled to frame their claim under the Institute clauses as being a right added or alternative to the common law rights under the policy. The principal objections raised by the appellant to the claim were (1) that there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners, who on the contrary had elected to retain the vessel and claim as for partial loss, and (2) that in any case the claim was excluded by clause 8 as being a claim consequent on loss of time because the repairs took so long as to make it impossible to perform the charter-party.

In my opinion, the appellant fails on both points. What is meant by a constructive total loss is now determined by sects. 60 and 61 of the Marine Insurance Act, 1906, which will apply to any particular contract of marine insurance unless some different meaning is imported either expressly or by implication. The question here is whether there was a constructive total loss of the vessel by insurance law. If clauses 5 and 6 are read together they cannot apply unless there are policies on ship, so as to determine what is the insured value. The appellant contends that the clauses only apply if the shipowner has elected to treat the loss under his hull policies as a constructive total loss by giving notice of abandonment of the ship. But the hull policies and the freight policy are distinct contracts and are only to be read together in so far as one incorporates the other. In the policy on freight it is only clause 6 which incorporates the hull policy so far as is relevant to this case and then only for the purpose of introducing the insured value which is to be found in the hull policies. Clause 5 cannot be construed by considering what action the shipowner took on his hull policies. The words "constructive total loss"

must have (apart from clause 6, which merely invokes the hull policy in order to get a figure of value) the same meaning as if there were no hull policy in existence at all. The test is not the shipowners' intention, or what he did under the hull insurances. In my opinion, notice of abandonment is not an essential ingredient of a constructive total loss. The appellant's argument confuses two different concepts, because it confuses constructive total loss with the right to claim for a constructive total loss. The right to claim except in certain cases depends on due notice of abandonment under sect. 62 of the Act. The distinction is explicitly stated in sect. 61 of the Marine Insurance Act, which is as follows: "Where there is a constructive total loss, the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer, and treat the loss as if it were an actual total loss." The section makes it clear that the right to abandon only arises when there is a constructive total loss in fact. That is the necessary precondition to a right to abandon. The frame of the section makes it impossible to treat the right to abandon as identical with the constructive total loss. It is a superimposed right of election where there is a constructive total loss. Nor is it even a necessary ingredient of a constructive total loss, because though there is a constructive total loss, the assured may still treat it as a partial loss. The objective definition of a constructive total loss is found in the preceding section of the Act. Some difficulty has been found in interpreting that section because it consists of two parts. Sub-sect. (2) is purely objective; it gives the two cases of constructive total loss of ship, the first being deprivation of possession, the second the cost of repairs. This is completely consistent with sect. 61. But sect. 60, sub-sect. (1) is said to be inconsistent, because it makes the constructive total loss depend on the condition that the subject-matter is reasonably abandoned for either of the reasons stated. This, I think, does not qualify the definition in sub-sect. (2). The two sub-sections contain two separate definitions, applicable to different conditions of circumstances. But I do not find any inconsistency between sect. 60, sub-sect. (1) and sect. 61. Sect. 60, sub-sect. (1) deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual abandonment of the subject-matter insured. But if there is any inconsistency between sect. 61 and sect. 60, sub-sect. (1), there is, in my opinion, no inconsistency at all between sect. 61 and sect. 60, sub-sect. (2), which latter is the definition material in the present case.

I think, therefore, that there was here a constructive total loss of the ship within clauses 5 and 6. This conclusion agrees in principle with the decision of Roche, J. (as he then was) in *Roura and Forgas* v. *Townend and others* (14 Asp. Mar. Law Cas. 397; 120 L. T. Rep. 116; (1919) 1 K. B. 189), which was a case of capture of a ship and recapture after a long lapse of time. There was no notice of abandonment of the vessel, because she was not insured at all by her owners. The plaintiffs were not owners but charterers insuring their anticipated profits on the charter, against total or constructive total loss of the steamer. Roche, J. held that there was a constructive total loss within sect. 60, sub-sect. (2) because it had been unlikely that the owners would recover her in a reasonable time. The test was external and objective and did not depend on the shipowner's election. There was no clause corresponding to clause 6 of the freight clauses here. Indeed there could not be, as there was no hull insurance at all. I agree with that conclusion, which I think applies the correct principle for construing sects. 60 and 61. If, however, the question had been whether the appellant could claim, not on his freight policy but on his hull policy, without having given notice of abandonment of the vessel the position would have been different. He would have been met by sect. 62, which states the rules as to giving notice of abandonment. These only apply when the shipowner elects to abandon to the insurers under the policy the subject-matter insured by that policy, and seeks to claim as for a constructive total loss under that policy.

One of the conditions, then, of clause 5 of the freight clauses, namely, that there should be a constructive total loss under the hull policy, has, in my opinion, been fulfilled. No one has suggested notice of abandonment in respect of the freight was necessary. There is no question that clause 6 has been correctly applied in regard to the cost of repairs as compared with the insured value. It now becomes necessary to ascertain what is the precise effect of clause 5. What, I think, the clause clearly does is to fix a conventional measure of indemnity under the freight policy where the ship has become an actual or constructive total loss. The measure of indemnity stipulated in that event is that the amount underwritten shall be paid "in full." The final words of the clause "whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered," are not, in my opinion, words of limitation, but are words inserted to provide as far as possible for every circumstance in reference to insurable interest in freight which is likely to arise. The loss of the ship to the owners must involve in fact the loss of the vessel's freight-earning capacity. The first part of the final words of the clause, "whether the steamer be fully or partly loaded," may have been introduced, as Hamilton, J. (as he then was) said in *Coker* v. *Bolton* (12 Asp. Mar. Law Cas. 231; 107 L. T. Rep. 54, at p. 56; (1912) 3 K. B. 315, at p. 320), "for the purpose of meeting the hardship that has long been felt to exist that a shipowner, who has given notice of abandonment and has consequently lost his right to freight subsequently earned, is precluded from suing on the policy on freight." This rule, which was founded on decisions of this House, is now embodied in sect. 63, sub-sect. (2) of the Marine Insurance Act. Like most other rules in the Act, it can be excluded by agreement. This hardship may also be excluded in practice, as it was done in the present case and in *Coker* v. *Bolton*, by a clause in the hull policy such as clause 18 of the hull clauses here. But these words of clause 5 may have a wider application, if required by the facts of any particular case. They do not apply to this case, in which the ship was neither fully nor partly loaded. The remaining words of the clause, "or in ballast, chartered or unchartered," seem to be intended to exclude in the most unqualified manner any other question of an assured's insurable interest in the freight. The policy is a time policy and the intention may be to secure that even if the vessel at the time of the casualty has no cargo on board (that is, is in ballast) and has no charter, there shall be no question of insurable interest, though it is not likely that any underwriter would think of raising such a question in a case of this type. The intention may be to provide that the owner's interest in the profit-earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient insurable interest for purposes of this policy. I should see

no legal obstacle why this agreement should not receive effect. Clause 5 deals with actual as well as constructive total loss. But it is not necessary to discuss this matter here, because the *Petrakis Nomikos* was actually chartered. Hence in my opinion the case comes under clauses 5 and 6 of the freight clauses, so that the respondents are entitled to succeed in their claim.

I do not think it necessary to express any final view on an argument which was strenuously urged on behalf of the respondents. This argument was to the effect that clause 5 involved some extension of the list of perils insured against which were enumerated in the policy. It was contended that all that was necessary to prove under the clause was that the loss of the vessel was due to perils insured against. Thereupon, it was said, the underwriters were liable to pay for any loss of freight, even though due to some extraneous cause, such as the bankruptcy or default of the consignee. In other words, that the condition on which payment became due was the loss, actual or constructive, of the vessel by perils insured against, as the stipulated event on which the sum due under the freight policy became payable, though it had no actual effect in causing the loss of freight. The question does not, in my opinion, as I have explained, arise in this case, and I should be content to say no more than that I reserve my opinion on it. I shall, however, out of respect to the argument advanced, add that, as at present advised, I should not be prepared to accept that construction. It would mean that the policy, *pro tanto*, was not a policy of indemnity, which appears to me to be inconsistent with the view of Hamilton, J. in *Coker* v. *Bolton* (*sup.*). It would also mean that in this particular respect it was not a policy of marine insurance. But Hamilton, J. regarded it as a contract of marine insurance, because he held that the underwriters' title to salvage and the provisions of the Marine Insurance Act applied. The contention construes the policy as a policy *pro tanto* covering other than marine risks—for instance, insolvency or default of the consignee. But clauses 5 and 6 are only parts of a contract of marine insurance, which is limited to the perils set out in the body of the policy. There are no express words adding outside risks. The loss actual or constructive of the ship is not an added peril, but a loss or casualty operating on the freight through the ship. But the question certainly does not, as I think, arise in this case. I reserve my opinion upon it in case it should ever arise for decision.

There remains to be considered the second point taken by the appellant, namely, that the claim here is excluded by clause 8 of the freight clauses. So far as authority goes, such a contention has been rejected under circumstances similar in principle to the present by Roche, J. in *Roura and Forgas* v. *Townend* (*sup.*), and by the Court of Appeal in the *Carras* case (*sup.*). For the appellant, however, reliance was placed on *Bensaude* v. *Thames and Mersey Marine Insurance Company Limited* (8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282), a decision based on words identical with those in clause 8 in the present policy, but the policy there did not contain clauses like clauses 5 and 6 of the freight clauses. The facts, moreover, in that case were quite different. There was no constructive loss of the ship. Soon after starting on her chartered voyage she was disabled by the breaking of her main shaft due to perils of the sea. She was towed back to port, where repairs could not be effected, and delay was incurred in taking her to another port where she was repaired. The charterers, as they were entitled to do by the foreign law applicable, threw up the contract. The loss of freight was caused simply by the delay in repairing the particular average damage arising from the peril of the sea, the delay being such as to frustrate the object of the adventure. Such a loss of freight would have been, apart from this special clause, recoverable under the authority of *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10, C. P. 125). The object of the clause was to protect the underwriters from this liability. Lord Watson in *Bensaude's* case, said that but for the delay occasioned by the breaking of the shaft there would have been no loss [that is, of freight] to claim. Lord Herschell said, "If the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability." The loss of freight was due to loss of time and nothing else, though arising from a peril of the sea. In my opinion it is impossible to apply this reasoning to the entirely different facts and the entirely different contract in the present case. I do not think that on the facts of this case the claim was consequent on loss of time within clause 8. Clause 8 must be read with clause 5. Under clause 5 the underwriter's liability to pay depends on the loss, actual or constructive, of the vessel. That liability accrues at once when the casualty happens, even if the exact position is not ascertained till later. If the assured has rightly given notice of abandonment of the ship the loss dates back retrospectively to the date of the casualty. The property in the vessel then passes to the hull underwriters and the shipowner is not interested whether there is a loss of time or not. He can claim on his freight policy under clauses 5 and 6 in a proper case. Equally here the loss is complete at the date of the fire. The question of loss of time after the casualty does not enter into the question of liability. The claim under clause 5 does not depend on loss of time in the prosecution of the voyage within the language used by Lord Herschell. The fact that the vessel could not be repaired in time to make her cancelling date is immaterial under clause 5. In one sense every case of a constructive total loss based on the cost of repairs or on deprivation of possession implies that it will take some time to make the repairs or recover possession, and if a claim under clause 5 were treated as a claim consequent on loss of time, the operation of clause 5 would be defeated in the vast majority of cases by clause 8, except in the case of actual total loss. But in my opinion that is not the true construction of either clause 5 or clause 8. The loss under clause 5 occurs *eo instanti* and does so none the less because the shipowner has retained and repaired the vessel. The sole condition under clause 5 is that the vessel should be an actual or constructive total loss. Clauses 5 and 8 must be read together. Clause 8 cannot control clause 5, but has its proper application in cases like *Bensaude's* case. I reject also the second contention advanced on behalf of the appellant.

In my opinion the judgment of the Court of Appeal was right and should be affirmed, and the appeal should be dismissed with costs.

Lord Atkin.—I am asked by my noble and learned friend Lord Russell of Killowen to say that he agrees with the two opinions which have been expressed.

Lord Porter.—The present appeal raises the question of the right of the respondents to recover

against the appellant under the terms of a policy on freight dated the 28th August, 1936. The respondents are the owners of the steamship *Petrakis Nomikos*. The appellant is an underwriting member of Lloyds. The policy of marine insurance, upon the true construction of the terms of which the result of the present appeal depends, was underwritten by the appellant and is expressed to be " on freight chartered or otherwise in and (or) over." The freight was that to be earned by the *Petrakis Nomikos*, the policy was stated to be subject to the Institute Freight Clauses, subject to the same warranties as on hull and machinery, and warranted that 50 per cent. of the hull and machinery valuation is uninsured for total or constructive total loss. The policy was a time policy for twelve months covering the ordinary marine risks. Attached to and forming part of it were the " Institute Time Clauses. Freight." Of these clauses three are material to the question in issue in the present appeal. They are as follows: " (5) In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered. (6) In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or breakup value of the vessel or wreck shall be taken into account. (8) Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise."

In addition to the freight policy the respondents were insured by a policy of marine insurance of the same date, which, like the freight policy, was subscribed by the appellant. The second-named policy was expressed to be on the hull and machinery of the *Petrakis Nomikos*, valued at 28,000*l.*, against the ordinary marine perils subject to a deductible franchise of 1000*l.* from the aggregate of all particular average claims on each round voyage. This policy, which will be called the " hull policy," contained in type the following clause: " In the event of the total or constructive total loss of this vessel this policy is only to pay its proportion of 14,000*l.*" To it were attached the Institute Time Clauses, Hulls, of which three also are material, namely, clauses 16, 17 and 18. Their terms are:

" 16. In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy. 17. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or breakup value of the vessel or wreck shall be taken into account. 18. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not." While these two policies were in force the respondents chartered the vessel by a charter-party dated the 23rd September, 1936, to a Belgian company to sail to Venezuela or Aruba or Curaçoa and there load a cargo of crude oil for various European ports. This charter-party contained a cancelling clause under which the charterers had the option of cancelling should the steamer not be ready to load by the 10th November, 1936. On the 18th October, 1936, the vessel left Havre for Rotterdam in order to undergo certain repairs before starting in ballast on her voyage to South America. On the 31st October, whilst repairs were being carried out at Rotterdam, an explosion, followed by a fire, occurred in the aft part of the ship, with the result that that part and the cross bunker were completely burnt out. The vessel was then surveyed and tenders for her repair were asked for. The lowest tender received was 37,400*l.*, and in fact the vessel could not have been repaired for a less sum. The value of tonnage, however, had risen since the hull policy was effected, and the respondents, ascertaining that the repaired value of the ship would be about 45,000*l.*, decided not to abandon her to the hull underwriters or to claim on them for a constructive total loss, but to claim in respect of the cost of repairs for a partial loss.

For a constructive total loss they would have received only 14,000*l.*, since the vessel was uninsured against total loss to the extent of 50 per cent. In a claim for a partial loss they were entitled to recover 27,000*l.*, *i.e.*, 28,000*l.* less the franchise of 1000*l.*, and at an expenditure of 37,400*l.* to repair a ship which would then be worth upwards of 45,000*l.* The repairs were completed on the 31st May, 1937, and the respondents have thereafter used the vessel as a freight-earning instrument. But the charter-party, though it was never cancelled, was in fact never performed, and the respondents have received no part of the freight payable thereunder. In these circumstances the respondents claimed that they were entitled to recover the sum of 4110*l.* under clause 5 of the Institute Time Clauses in the freight policy, and from the appellant his proportion of that sum.

The appellant maintained that the respondents had suffered no loss by a peril insured against, or at any rate that the claim was a claim consequent on loss of time, and he was therefore exempted from payment by clause 8 of the Institute Time Clauses, Freight. He alleged that there had never been a constructive total loss, but that even if there had been such a loss, the ship having been repaired, the freight was lost by the time taken for the reparation and not by the constructive total loss of the ship. The respondents on their part contended that there had been a constructive total loss and that there was no necessity to prove that the loss was caused thereby. The sum insured was, they said, payable in an event, *i.e.*, in the event of the total loss or constructive total loss of the ship, so long, at any rate, as that total loss or constructive total loss was caused by a peril insured against, but they contended that if it was necessary to prove that the loss was caused by the total loss or constructive total loss of the ship, it was so caused and not by loss of time.

The learned judge who tried the case in the court of first instance held that there had been no constructive total loss inasmuch as the ship has been repaired and not abandoned to underwriters and that in any case there has been no loss by a peril insured against. The Court of Appeal reversed the decision of the learned judge, holding that there was a constructive total loss of the ship by a peril insured against, and that the insurance was against the happening of that event.

In these circumstances the first question which your Lordships have to decide is whether there was a constructive total loss of the ship within the meaning of clause 5 of the Institute Time Clauses, Freight. Having regard to the facts and figures agreed upon by the parties, the repairs required would have cost more than the agreed value of the ship inserted in the hull policies. Is this enough? The appellant says, " No." In his contention there can be no constructive total loss unless the ship be abandoned to her underwriters. Constructive total loss, he says, is defined in sect. 60 of the Marine Insurance Act, 1906, and by sub-sect. (1)

of that section there is a constructive total loss "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." Sub-sect. (2), he maintains, only gives particular instances of the general definition in sub-sect. (1), and therefore when it says that in particular there is a constructive total loss, "in the case of damage to a ship, where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired," it means there is a constructive total loss where the ship is reasonably abandoned because the cost of repair would exceed her value when repaired.

That sect. 60 is intended to be a complete and not a partial definition appears to follow from the wording of sect. 56 when it says, "Any loss other than a total loss, *as hereinafter defined*, is a partial loss." But it does not follow that the first subsection lays down the general rule, whereas the second gives certain particular instances already covered by the general rule. Indeed, whatever may be the case with regard to sub-sect. (2) (i.), paras. (ii.) and (iii.) do not appear to be covered in terms by the definition in sub-sect. (1). But in any case unless there is some reason to the contrary a definition must be held to include the whole of its wording, and if particular instances are given which include matters which are outside the more general definition, that is no reason for supposing that their application is limited by the more general words. They do not merely illustrate —they add to the terms of the definition. Sect. 60 does not confine constructive total loss to cases where the subject-matter of insurance has been abandoned, though in some instances there may be no constructive total loss unless abandonment has taken place. But even if abandonment be not a condition of a constructive total loss, it is said that in this case there has neither been abandonment nor notice of abandonment and the ship has in fact been repaired. In that case, it is argued, under sects. 61 and 62 the loss can only be treated as a partial loss, and consequently there can be no constructive total loss within the meaning of clause 5 of the freight policy.

Sect. 61 no doubt gives the assured an election whether to treat the loss as total or partial, and sect. 62 makes it a condition precedent to a claim for a total loss, that notice of abandonment should be given. But, in terms, sect. 61 contemplates the existence of a constructive total loss even where the loss is treated as partial. It was not contended before us that there could not be a constructive total loss where no notice of abandonment was given; it was admitted that notice of abandonment was merely a condition precedent to recovery in a case where a constructive total loss had already occurred. Having regard to the wording of sect. 61, abandonment may be a condition or consequence of recovery and not a condition precedent to the existence of a total loss, whether actual or constructive. A constructive total loss may exist, but if the assured wishes to take advantage of it he must give notice of abandonment, at any rate in a case where there would be any possibility of benefit to the insurer. If he does give notice and the underwriters accept the abandonment, or if the assured recover as for a total loss, the property insured thereby becomes the property of the underwriters.

If this view be sound, there was a constructive total loss albeit a conventional constructive total loss of the ship by a peril insured against, and undoubtedly the freight to be earned under the charter-party of the 23rd September, 1936, was lost. What then caused the loss of freight? The loss of the ship was constructive, but the loss of freight was actual. If, therefore, there was no provision as to loss of time, the underwriters on freight would be liable. See *Jackson* v. *Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10, C. P. 125 (Ex Ch.)); *The Alps* (7 Asp. Mar. Law Cas. 337; 68 L. T. Rep. 624; (1893) p. 109); *The Bedouin* (7 Asp. Mar. Law Cas. 391; 69 L. T. Rep. 782; (1894) p. 1).

But there is such a provision contained in clause 8, and it is contended in the present case that the loss of freight was due to loss of time, and to that only. The ship, it is said, was in fact repaired and could have carried the cargo had she been repaired in time. Indeed, if the charterers had chosen to wait, or if the repairs could have been effected in a very short time, the cargo would have been carried and the freight earned. How then, it is asked, can it be said that the conventional constructive total loss has caused the loss of freight? It is true that the loss of time caused the loss of the adventure, but such a loss is none the less due to the delay. For this result the appellants rely upon the decisions in *Bensaude* v. *Thames and Mersey Marine Insurance Company* (8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609); *Turnbull, Martin and Co.* v. *Hull Underwriters' Association* (9 Asp. Mar. Law Cas. 93; 82 L. T. Rep. 818; (1900) 2 Q. B. 402); and *Russian Bank for Foreign Trade* v. *Excess Insurance Company* (14 Asp. Mar. Law Cas. 362; 118 L. T. Rep. 645; (1918) 2 K. B. 123).

In all those cases there was a loss of the adventure by which the freight was to have been earned. Nevertheless that loss was held to be due to delay, and was therefore excluded by phraseology identical with or similar to that used in the policy now sued upon. In none of these cases, however, was there a total or constructive total loss of the ship, and in none did the provisions of clause 5 of the Institute Time Clauses, Freight, come under discussion, either alone or in relation to its effect on clause 8. The construction of those clauses and their relationship one to the other are, however, vital to the determination of the present case.

Read together it is possible to construe them in either of two ways. They may mean either (1) "If loss of freight be caused by loss of time, the underwriters shall not be liable, provided that if the vessel is a constructive total loss, then the underwriters will pay in full whether the cause of the loss of freight be loss of time or not." Or they may mean (2) "In no case will the underwriters be liable for loss caused by loss of time, whether the vessel be a constructive total loss or not." For myself I prefer the former of the two constructions, but it is enough to say that the meaning is doubtful, that the proviso as to loss of time is an exception to the general liability of underwriters, and if they leave their exemption of liability doubtful they cannot rely upon the exception but must pay the loss.

This is sufficient to dispose of the case, and accordingly I desire to reserve the question whether the loss of freight is not rightly to be regarded as caused, not by loss of time, but by the constructive total loss of the ship. Some support is lent to this suggestion by the decision in *Roura and Forgas* v. *Townend and others* (14 Asp. Mar. Law Cas. 397;

120 L. T. Rep. 116; (1919) 1 K. B. 189), a case of freight insurance in which a vessel, though originally lost by capture, was afterwards restored to her owners, so that in one sense it might be said that the loss of freight was due to the loss of time during which the ship was in the hands of the captors and not to the constructive total loss of the ship by the capture. Yet Roche, J. held, and I think rightly, that one must regard the ship as having been lost as soon as it became unlikely that the owners would recover her. She was in fact uninsured and no question of abandonment arose, but had she been insured and notice of abandonment given but not accepted, the right to recover upon the hull policy would have been precluded, not because she was not a constructive total loss, but because she had been restored and the owners who had been indemnified by the restoration could not claim to be indemnified over again. In these circumstances the learned judge held that the underwriters on freight were not protected by the warranty against liability for claim consequent upon loss of time, but were liable because the ship, though afterwards restored, was in fact a constructive total loss.

I desire also to reserve the question raised in argument by the respondents and, I think, adopted by the Court of Appeal, that under the terms of clause 5, provided the freight was in fact lost, the sum insured was payable on the happening of a total loss whether that event caused the loss of freight or not. If, it was said, the ship became an actual or constructive total loss, at any rate in a case where that loss was due to one of the perils insured against, and freight also was lost, the sum insured was payable even though the loss of freight was caused by the bankruptcy of the freighter or some extraneous conditions which prevented loading. Such a construction is, I think, inconsistent with the view expressed by Hamilton, J. in *Coker* v. *Bolton* (12 Asp. Mar. Law Cas. 231; 107 L. T. Rep. 54; (1912) 3 K. B. 315), and is not easy to reconcile with the principles of marine insurance.

In *Scottish Marine Insurance Company of Glasgow* v. *Turner* (1853, 1 Macq. H. L. Cas. 334), where there were no provisions such as those to be found in clause 5 and the ship was abandoned but freight was earned, it was held that the assured on freight were unable to recover because freight was in fact earned, and in *McCarthy* v. *Abel* (1804, 5 East 388) it was pointed out by Lord Ellenborough that the loss was not due to a peril of the seas but to the abandonment which was the act of the assured themselves. In *Coker* v. *Bolton* (*ubi sup.*), however, and *United Kingdom Mutual Assurance Association Limited* v. *Boulton* (1898, 3 Com. Cas. 330), the assured recovered owing to the presence of a clause identical with or similar to clause 5 in the present policy. In the latter case Bigham, J. held a promise to pay a loss of freight "in the event of the total loss of the vessel" to mean that the underwriters would pay a loss of freight in circumstances similar to those existing in the *Scottish Marine* case. Such a loss was in his view recoverable, not because it was a loss by perils of the seas but because the terms of the policy covered a loss by abandonment.

The learned judge's view, if right, involves an addition to the perils insured against so as to include amongst them the peril of abandonment, but even such an extension does not go so far as to determine that the mere coincidence of a constructive total loss of the ship with a loss of freight, however caused, is sufficient to enable the assured to recover under the terms of clause 5 of the policy. It is not, however, necessary to come to any final decision upon this point in the present case, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Ince, Roscoe, Wilson,* and *Glover.*

Solicitors for the respondents, *Holman, Fenwick,* and *Willan.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 24, *May* 15 *and* 16, *and June* 15, 1939.

(Before LANGTON, J.)

The Napier Star. (*a*)

Collision—Claims for loss of life and personal injuries of members of crew—Whether breach of Collision Regulations by navigating officer a breach of statutory duty by owner so as to defeat defence of common employment—Apportionment of damages—Costs—Merchant Shipping Act, 1894, *s.* 419, *sub-sect.* (1)—*Maritime Convention Act*, 1911, *sect.* 1 *and sect.* 3, *sub-sect.* (1).

This was a motion in objection to the report of the Admiralty Registrar in a reference arising out of a collision action between the owners of the British steamship N. S. *and the owners of the British steamship* L., *in which Bucknill, J. had held both vessels to be equally to blame. Claims which had been brought against the owners of the* N. S. *by the personal representatives of six members of the crew of the* L. *who had lost their lives in the collision, by one seaman of the* L. *for personal injuries, and by one passenger on board the* L. *who had also been injured, had been settled by the owners of the* N. S., *who at the reference claimed to be entitled to recover from the owners of the* L. *one-half of the amount paid in respect of those claims and one-half of the costs incurred by them in defending the various actions brought against them in respect of these claims. The learned registrar upheld, in his report, the contention put forward on behalf of the* L. *that as, if the claims had been brought against the owners of the* L., *they would have failed because of the defence of common employment which was open to the owners of the* L., *the owners of the* N. S. *were debarred from recovering from the owners of the* L. *any contribution in respect of the claims for loss of life and personal injuries of members of the crew*

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

which they had paid or any proportion of the costs they had incurred. As to the claim for personal injuries of the passenger on board the L., *the owners of the* L. *were protected by the terms of the ticket which they had issued to that passenger.*

Held, (1) *that as regards the life and personal injury claims on behalf of the crew, the duty cast upon owners of ships by sect.* 419, *sub-s.* (1), *of the Merchant Shipping Act*, 1894, *to obey the Collision Regulations is a general duty towards all the world and not a special duty to their employees; that that duty consists in the provision of proper equipment such as navigation lamps and fog signalling apparatus, and does not extend to the actual navigation of the vessel (unless the owner himself is carrying out the duties of a ship master); that the negligence which caused the damage was faulty navigation for which the master, under the Act, was primarily responsible—not a failure by the owners of the* L. *to make proper provision for the navigation of the vessel, but the misuse by one of their servants of the system in operation; and that, accordingly, as there had been no breach of statutory duty on the part of the owners of the* L. *they would have been entitled to claim the benefit of the common law defence of common employment in any action brought against them by or on behalf of injured or deceased members of the crew.*

(2) *That as regards the passenger's claim, the owners of the* L. *were protected by the terms of the ticket.*

(3) *That the costs incurred by the owners of the* N. S. *were reasonably incurred in defending actions arising out of the joint negligence of the* L. *and* N. S *As those costs were part of the* N. S.'s *damage, they were apportionable under sect.* 1 *of the Maritime Conventions Act*, 1911.

In the result, the registrar's report was upheld, save in regard to costs.

MOTION in objection to Registrar's report.

On the 18th August, 1935, a collision occurred in the Irish Sea between the British steamship *Laurentic* (18,724 tons gross) belonging to the Cunard White Star Limited and the British steamship *Napier Star* (10,166 tons gross) belonging to the Blue Star Line Limited. In the ensuing collision action, Bucknill, J. held both vessels equally to blame. Although the owners of the *Napier Star* had filed a claim for upwards of 37,000*l.*, the only item in dispute at the reference before the Registrar, L. F. C. Darby, and the merchants (the other items having been agreed at 28,069*l.* 10*s.* 1*d.*), was a sum of 4352*l.* 6*s.* 11*d.*, being the damages paid by the defendants, the owners of the *Napier Star*, in actions brought against them on behalf of six members of the crew of the *Laurentic* who lost their lives in the collision, one seaman of the *Laurentic* who sustained personal injuries, and a Dr. Papworth, who was a passenger on board the *Laurentic*, and was also injured, the taxed costs paid to the defendants' solicitors in those actions and the costs incurred by the owners of the *Napier Star* in defending the actions. It was claimed by the owners of the *Napier Star* that by virtue of sect. 3, sub-sect. (1), of the Maritime Conventions Act, 1911, and sect. 419, sub-sect. (1), of the Merchant Shipping Act, 1894, they were entitled to recover half of the 4352*l.* 6*s.* 11*d.* from the owners of the *Laurentic*. The claim was disallowed in its entirety by the learned Registrar. The findings contained in his report appear sufficiently from the headnote and judgment. In the course of the hearing, the following cases were referred to: *Groves* v. *Lord Wimborne* (79 L. T. Rep. 284; (1898) 2 Q. B. 402); *Wilsons and Clyde Coal Company* v. *English* (157 L. T. Rep. 406 (H. L.); (1938) A. C. 57); *Hedley* v. *Pinkney and Sons Steamship Company* (7 Asp. Mar. Law Cas. 483; 70 L. T. 630; (1894) A. C. 222); *Lochgelly Iron and Coal Company* v. *McMullen* ((1934) A. C. 1); *Britannic Merthyr Coal Company* v. *David* (101 L. T. Rep. 833; (1910) A. C. 74); *Butler* (*or Black*) *and another* v. *Fife Coal Company* (106 L. T. Rep. 161; (1912) A. C. 149); *Watkins* v. *Naval Colliery Company* (1897) *Limited* (107 L. T. Rep. 321; (1912) A. C. 693); *The Circe* (10 Asp. Mar. Law Cas. 149; 93 L. T. Rep. 640; (1906) P. 1); *The Cedric* (15 Asp. Mar. Law Cas. 285; 125 L. T. Rep. 120; (1920) P. 193); *Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (13 Asp. Mar. Law Cas. 81; 113 L. T. Rep. 195; (1915) A. C. 705).

A. T. Miller, K.C. and *E. W. Brightman*, for the plaintiffs, the owners of the *Laurentic*.

Gordon Willmer, K.C., for the defendants, the owners of the *Napier Star*.

Langton, J.—This is a motion in objection to Registrar's report.

On the 18th August, 1935, a collision occurred in the Irish Sea between the steamship *Laurentic* and the steamship *Napier Star*.

On the 23rd October, 1935, Bucknill, J. held that both vessels were to blame in equal degree.

Subsequently the personal representatives of six members of the crew of the *Laurentic*, who had been killed in the collision, brought actions against the *Napier Star*, and recovered damages in respect of their loss. In addition one member of the crew of the *Laurentic*, named G. Allender, and a passenger on board the *Laurentic*, named Dr. Papworth, brought actions for damages for personal injuries sustained in the collision against the owners of the *Napier Star*. The Registrar's report to which exception is taken by the present motion concerns only the damages recovered and the costs incurred in defending the life claims and personal injury actions above described. The owners of the *Napier Star* claimed before the Registrar that they were entitled to recover from the owners of the *Laurentic* one half of the full amount of 4352*l.* 6*s.* 11*d.* which they had incurred by way of damages and costs on the claims for loss of life and personal injuries.

Different considerations apply to different parts of these claims. It will be convenient, therefore, to divide this subject immediately into three heads. (1) First, by far the most important point raised by this motion concerns the liability in respect of the six life claims, and the one claim for personal injuries put forward in the names of the members of the crew of the *Laurentic*. The new and important point of law put forward to support this claim is that by sect. 419, sub-sect. (1), of the Merchant Shipping Act, 1894, shipowners are enjoined to obey the collision regulations, and that the duty so imposed upon them is a direct and personal obligation continuing upon them in such a way and to such an extent as to render the

defence of common employment impossible of application. (2) The second point, which was less confidently argued, concerns the liability of the owners of the *Laurentic* in respect of personal injuries to the passenger, Dr. Papworth. The liability in this case must depend entirely upon the view taken of the responsibility of the White Star Line upon the ticket issued by them to Dr. Papworth. (3) Finally, there was an interesting point as to whether the costs of defending the actions brought in respect of death and personal injuries should lie where they fall at present, or should, *per contra*, be brought into account in apportioning the division of loss between the two vessels.

On each of these three points the Registrar ruled against the defendants, the owners of the *Napier Star*, and he stated his reasons in a short report which is as clear as it is succinct. In respect of the first matter, Mr. Willmer, for the defendants, complained (of course, with his usual good temper) that the Registrar had done less than justice to his argument by dealing with only one facet thereof, and by apparently misapprehending the pertinence of that particular part of his address. As to this complaint I will only say that if Mr. Willmer put before the Registrar anything like the whole of the argument which he adduced before me, I should imagine that his complaint was well founded, but since I have arrived at the same conclusion as the Registrar upon this topic, I would probably be better employed in stating my own reasons for disagreeing with Mr. Willmer than in following up further his complaint against the Registrar.

In the first place it is not too much to say that the whole of the contention put forward on behalf of the defendants upon this first point is not only new, but positively revolutionary. As Mr. Miller for the plaintiffs has pointed out, the collision regulations first came into force as a complete code, sanctified and buttressed by statutory authority, as long ago as 1862. It is true that the exact point which the defendants are now seeking to make was not open for argument before the passing of the Maritime Conventions Act, 1911, but throughout the whole time during which the collision regulations have been in force, whether before or after the year 1911, not only has no one ever suggested that the owners were debarred from pleading the defence of common employment, but it has been, on all hands, assumed and even judicially stated that the defence remained open. It is, of course, no answer to a point of law that thirty or even eighty years have run their course without anyone having sufficient acumen to perceive it. It is nothing to the point that the whole legal profession should have assumed to the contrary. Nor is it fatal to its success that judges should have assumed it to be wrong if they have not actually determined the issue. It may be alarming, but it should not be considered detrimental to the merits of the point, that it is difficult to see how far-reaching the effect of the proposition contended for may be if it is judged to be sound. On the other hand, when so complete a change of legal thought is sought to be effected, it is right that the new doctrine should be closely and even jealously examined.

When the argument was presented to me, the swift and indeed almost immediate recourse to the recent case of *Wilsons and Clyde Coal Company* v. *English* (157 L. T. Rep. 406; (1938) A. C. 57) and the long line of coal company cases which was reviewed and minutely examined therein, made it clear to me that this doctrine, so strange and foreign to seafaring people, had been, so to speak, bodily imported from the cavernous depths of a coal mine. The lines of demarcation laid down by the Law Lords in the *Wilsons and Clyde Coal* case between what Lord Macmillan alludes to as "two competing doctrines, the doctrine of vicarious liability, and the doctrine of common enjoyment" have evidently prompted the present bold adventure.

It is not denied that, in so far as any judicial authority has ever touched upon the point here put forward, such authority has been uniformly against it. On the other hand, it is claimed with truth that neither the exact point presented here, nor any broader point which must be taken to have covered it, has ever been the direct subject of judicial determination. In the case of *Hedley* v *Pinkney and Sons Steamship Company Limited* (7 Asp. Mar. Law. Cas. 483; 70 L. T. Rep. 630; (1894) A. C. 222) a question arose as to the seaworthiness of a ship which had been sent to sea with stanchions and rails on board, but without having these safety appliances properly shipped in place. In the course of his opinion, which was adopted and concurred in by Lords Watson and Macnaghten, the Lord Chancellor (Lord Herschell) dealt with the suggestion that the master of the vessel had a special relation *vis-a-vis* the other members of the crew which prevented him from being regarded as being in common employment with the crew. The case of *Wilson* v. *Merry and Cunningham*, which was so fully considered in the *Clyde Coal* case, and other cases concerning the doctrine of common employment were referred to by the Lord Chancellor, and he unhesitatingly rejected the suggestion that the master was not in common employment with the crew. The case was, however, really determined upon another ground, namely, that on the principle laid down by the House of Lords in *Steel* v. *State Line*, since the rails and stanchions could well have been shipped at sea, the ship was not in law unseaworthy. A good deal closer to the present point is the observation of Hill, J. in *The Cedric* (15 Asp. Mar. Law Cas. 285; 125 L. T. Rep. 120; (1920) P. D. 193, at p. 198: "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." It was quite fairly urged that this *dictum* is *obiter* only, and that it forms no part of the *ratio decidendi*, but I would point out that it comes from a judge of the highest authority in matters concerning Admiralty and Commercial law, and that it expresses his clear and unhesitating view at a time when both the Merchant Shipping Act of 1894 and the Maritime Conventions Act, 1911, had long been in force, and had been under his particular purview.

Apart from these two pronouncements which were thus distinguished and put on one side the whole of the argument on behalf of the defendants was rested upon decisions which have nothing to do with either ships or the sea. Beginning with the case of *Groves* v. *Lord Wimborne* (79 L. T. Rep. 284; (1898) 2 Q. B. 402), Mr. Willmer traced through the line of cases which are enumerated in the registrar's reasons, the development of judicial reasoning which has led to the exclusion of the defence of common employment in certain classes of cases governed either by common law principles or alternatively by statutory enactment. As I understand his argument it is this, that although, where common law principles are concerned, the line of "vicarious liability" has been properly drawn between the sphere of provision of plant and

machinery or of a safe working system on the one hand and operation on the other hand, where a statute is concerned, one must look only to the words of the statute itself in order to determine where the line should lie. Applying this proposition to the present circumstances and looking to sect. 419, sub-sect. (1), of the Merchant Shipping Act, 1894, he claims that the wording of the section is such as to impose a continuing vicarious liability upon ship owners in the matter of obedience to the collision regulations. Bucknill, J. in the present case found the junior first officer of the *Laurentic* to blame in respect of three specific breaches of the collision regulations: first, a breach of art. 15 in not sounding his fog signal in accordance with that rule; secondly, a breach of art. 16 in not proceeding at a moderate speed in fog; and thirdly, a breach of art. 16 in not stopping on hearing a fog whistle forward of his beam. The argument accordingly runs in this way: by the section shipowners are enjoined to obey the collision regulations: by this section a continuing duty is laid upon them which they may delegate, but in respect of which they cannot escape vicarious liability; the duty so laid upon them is a duty towards their employees, and being their own duty they cannot avail themselves of the defence of common employment to escape their own duty. I gathered during his close and compact argument that Mr. Willmer was prepared to concede that, if the matter was one which rested upon common law principles, the task of navigating a ship would properly belong to the sphere of operation rather than to that of provision of material or of a safe system of working. He contends, however, that there is no room for the application of common law principles where the matter is governed by the strict words of the statute.

In order to probe this argument to the full it is necessary to look a little more closely at the wording and meaning of sect. 419. Does this enactment really place upon a shipowner a duty towards his employees which, to use the language of Lord Wright in the *Clyde Coal* case, falls within the master's province of duty and not within the servant's province of duty to his fellow servants? In this connection I would cite also from Lord Wright's opinion the following illuminating passage: "I have chosen these few examples to show that the doctrine of common employment which was hinted at in connection with a butcher's cart and has roamed in its application to colliers, seamen, railwaymen, apprentices, chorus girls, and indeed every sphere of activity, has always distinguished between the employer's duty to the employee and the fellow-servant's duty to the employee. The rule is explained on the ground that the employee by his contract of employment agrees with his employer to assume the risk of his fellow-servant's negligence."

At the outset of this inquiry it may be pertinent to observe that the duty imposed by this sub-section is not upon owners only but also upon masters of ships. Whatever else the master may be, he is always the servant of the owner (see *Hedley* v. *The Pinkney and Sons Steamship Company Limited* (1894) A. C. 222, per Lord Herschell at p. 226), so that here, in contradistinction to any statutory case under the Coal Mining Acts or the Factory Acts, such as *Groves* v. *Lord Wimborne*, we have a duty which in its very first instance is imposed equally upon the owner and one class of his servants. Surely one may ask how such a duty can be said to stand in any way in *pari passu* with the class of duty upon which this contention has been founded. How can it be said to be within the employer's province of duty and not within the servant's province of duty to his fellow-servants? The duty which is here imposed upon the owner seems to me to be a duty towards the world in general and in no sense a special duty towards his servants. Indeed, it is a class of duty which by the very words of the statute one class of his servants also owes to the world in general. If I have reached any understanding at all concerning the doctrine laid down by the House of Lords in the *Wilsons and Clyde Coal* case, it is that in that class of case the employer cannot be allowed to escape liability to his workmen by setting up the defence of common employment where the negligence which has caused the accident is a neglect of duty which he, the master, owes especially to his employee. It is because, and just because, this duty is laid upon the employer by statute towards his employee that he may not, even by delegating the duty to another, escape liability for a breach of that statutory duty. It would seem to me to be a large extension of this doctrine to hold that where an owner has a general duty towards all the world, it is to be construed as if it were a special duty to the employee in a case where it is perfectly obvious that the Legislature never for a moment contemplated that any such special duty should be imposed.

If one turns now to another aspect of this matter, namely, the ground upon which the rule in favour of the defence of common employment is explained by Lord Wright, the argument here adduced by the defendants is further attenuated.

The ground of the rule, according to the citation I have made above, is: "That the employee by his contract of employment agrees with his employer to assume the risk of his fellow-servants' negligence." Looking at this matter from a practical point of view, it is difficult to imagine a better or clearer case of agreed acceptance of risk than in the ordinary case of a ship's company. Everyone from the master downwards to the junior ordinary seaman (I almost said to the cabin boy) is fully aware of the fact that his own safety lies in the keeping of his ship-mates, and their safety in his keeping, and that negligence upon his part in anything connected with the navigation of the ship may put the safety of the whole ship's company at risk. One starts, therefore, with a class of case to which the defence of common employment is most peculiarly applicable. Is there really anything in the wording of the statute which should take the case out of the class to which it primarily belongs? The owner, say the defendants, is specially enjoined to obey the regulations: but one may reasonably ask in what capacity he is so enjoined. When one finds the owner coupled in the same sentence with the master who is his own principal delegate, one is driven to inquire into the possible reasons for this unusual collocation. Mr. Miller pointed out that in the first statute by which the Collision Regulations were sanctioned, that of 1862, s. 27, which is the section corresponding to sect. 419 of the 1894 Act, the wording is strangely in dissonance with the argument adduced for the defendants. Taking only the relevant words, the section runs as follows: "All owners and masters of ships shall be bound to take notice of all such regulations as aforesaid, and shall . . . be bound to obey them, and to carry and exhibit no other lights and to use no other fog signals than such as are required by the said regulations; and in case of wilful default, the master, or the owner of the ship, if it appear that he was in such fault, shall . . . be deemed to be guilty of a misdemeanour." It is at once apparent upon looking at this section, which, with the two

sections immediately preceding it, forms the ground-work for the present sect. 419, that the Legislature in 1862 obviously contemplated cases of infringement of the Collision Regulations in which the owner could never have been in default. Indeed, it seems arguable to me whether the owners may not have been included in these sections in the first place rather *qua* shipmasters than *qua* employers. One has to remember that eighty years ago, especially in the coasting trade, there were still many people who doubled the role of shipowner and shipmaster, and it might well be for that reason that the duty to obey the regulations was laid equally upon owners and masters. Upon consideration, however, I think that the sounder view is that which Mr. Miller was content to put forward, namely, that, in so far as the Regulations deal with the provision of proper material, as, for example, navigation lamps and fog signalling apparatus, &c., the owner has a duty to obey the Regulations, whereas, where actual navigation is concerned, the master, as being the individual in charge, is responsible in the first place, and the owner is only responsible at all if he happens to be carrying out the duties of a shipmaster. This reading of the various Acts which have dealt with duty under the Collision Regulations has not only the merit of being in accordance with the just apportionment of relative responsibility, and of being completely easy of comprehension, but it also falls into line exactly with the broad division between the sphere of provision of material on the one hand, and operation on the other, which has been adopted as the guiding principle in the cases resting upon the common law.

Another test of this matter which was put forward by Mr. Brightman, on behalf of the plaintiffs, was that if the defendants' contention be correct, it is difficult to see how the sections of the Merchant Shipping Act dealing with Limitation of Liability can be applied in the majority of cases arising out of collision. By sect. 503 of that Act, adopted and expanded in later Acts of Parliament, *e.g.*, Merchant Shipping Act, 1900 (63 & 64 Vict. Ch. 32), the owners of British or foreign ships are entitled to limit their liability in respect of damage and losses caused by reason of the improper navigation of their ships where the occurrence has taken place without their actual fault or privity. But if, in every case where an infringement of the collision regulations has led to the occurrence in question, the shipowner is personally liable for the fault, there appears to be no room for the operation of the proviso by which alone limitation can be secured. It is a somewhat staggering thought that, if this result be correct, not only has Parliament unwittingly set at nought the provisions of at least two of its own statutes, but during the last thirty years some hundreds, if not thousands, of cases upon the subject of limitation of liability have been wrongly decided.

Mr. Willmer's answer to this point is that for the purposes of limitation of liability an "owner" has not quite the same meaning as in sect. 419. In reply, he was driven to restrict the operation of his doctrine in more than one respect. In the end the owners, for the purposes of this special doctrine, were restricted to owners of British ships, and to cases where, first, the ship is in charge of someone other than the master, and secondly, the ship is found to be in fault for a specific breach of a specific regulation. Clearly a duty such as is laid by sect. 419 in terms upon the master could hardly be retransferred to the owner where the master was in charge, and Mr. Willmer did not contend for such an absurdity. Again, there would be difficulties in applying this highly specialised doctrine where the ship had been found in fault for bad seamanship not specifically dealt with in the regulations. Indeed, it was conceded, as I understood, that since the owner could never be vicariously liable in a case where the master was in charge of the ship, he would be so liable in a case where the collision was caused by a failure to blow a fog signal if the mate were in charge, not liable in the same circumstances if the master were in charge, and not liable whoever were in charge if the cause of the casualty were an act of atrocious seamanship such as anchoring unnecessarily in thick weather in the middle of a crowded fairway. In the end, therefore, it was not surprising that this in-and-out responsibility, with its swift and rather bewildering changes of incidence, produced a strange kind of owner somewhat different from the normal individual to whom the Merchant Shipping Act generally refers. Mr. Willmer then sought to distinguish between the owner, as referred to in sect. 503, and the owner whom he had created for his special purpose in sect. 419, by saying that, whereas in applying the latter section, one had to look at the nature of the duty, one was only concerned in sect 503 with the status of the person upon whom the obligation rests.

I appreciate to the full that in such cases as *Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (13 Asp. Mar. Law Cas. 81 ; 113 L. T. Rep. 195 ; (1915) A. C. 705), the court was concerned entirely with the status of the individual attacked, in order to discover whether that individual could properly be described as the owner for the purposes of the Act of Parliament, whereas in cases where the application or non-application of the doctrine of common employment is in issue, the court must look at the nature of the duty. But however jealously the court may restrict its area of vision for the purposes of sect. 503 in order to be certain that privity shall not be alleged against the owner where the real fault lies with an employee, I cannot perceive how this beneficence will avail him if, when once the ownership has been thus narrowly ascertained, the owner is unable to escape from vicarious liability.

I am not sure that I have done full justice to all the arguments put forward by Mr. Miller and Mr. Brightman for the plaintiffs, but since I am accepting the view for which they contend, any omission of this character is probably of small importance. So far as the proposition for which Mr. Willmer contends is concerned, I have, I hope, said enough to make it clear why I do not think that such is the law of England.

Turning now to the second point, namely, the damages paid to the injured passenger, Dr. Papworth, the relevant words in clause 3 of his ticket are fully set out in the Registrar's reasons, and it is conceded that the liability, in his case, of the owners of the *Laurentic* must be determined upon the terms of this ticket. So far as my somewhat lengthy experience of these passenger tickets extends, this ticket protects the company for any negligence in respect of navigation in the widest known terms. Mr. Willmer says that although negligence of the company's servants, whether in navigation or management of the steamship or otherwise howsoever, is covered by the ticket and excluded from the area of liability, there is no mention either of statutory duty or of collision. For the reasons which I have set out above I do not agree that there is any statutory duty laid upon owners, in the sense contended for, in a case where the accident has been found to have been occasioned by negligent navigation of one of the company's servants. On the assumption, however,

that I am wrong in this view, I should still be of the opinion that the very wide wording of this clause in the ticket would suffice to protect the owners of the *Laurentic*. For the purposes of this case the company are the owners, and the wording of the ticket declares that the company shall not be liable for any injury to the passenger from perils of navigation. In addition there is the exceedingly wide exception to which I have already referred in respect of the negligence of the company's servants. Whatever answer the employees of the White Star Line might be able to make to the owners by reason of their alleged statutory duty, I fail to see how such an answer could avail a third party who had presumably made his special contract without any reference to a particular relation existing between employer and servant.

The third matter put before me which concerns the costs of fighting these claims, stands, to my thinking, upon a totally different footing. In order to appreciate this matter fully, it is to be borne in mind that one starts from the position that there has been negligence on both sides. These claims must therefore be taken to have arisen just as much from the negligence of the *Laurentic* as from that of the *Napier Star*, and the fact that they have been put forward only against the *Napier Star* should not cloud one's view as to their real cause and origin.

For the plaintiffs it is said that if one looks at the proviso to sect. 3, sub-sect. (1), of the Maritime Conventions Act, 1911, it will be apparent that these claims could never have been recovered in the first instance as damages against the White Star Line. This is perfectly true if the judgment which I have just been at pains to deliver is correct. On the other hand, Mr. Willmer pointed out, with what appears to me still greater force, that the costs here claimed are not an item claimed under sect. 3, sub-sect. (1), at all. They are indeed really claimed under the first section of the Act, and constitute part of the damage or loss actually caused to the owners of the *Napier Star*. Because of the negligence of both vessels the *Napier Star* has been forced to meet these claims, and the reasonable costs of defending the claims form a part of her damage. The question whether or not the claims might or might not have been launched against the *Laurentic*, although a far more important and interesting point, has nothing to do with the costs of defending these claims in themselves. It is a mere coincidence that the two points happen to have been raised at the same time ; a coincidence which may perhaps be traceable to the unusual ingenuity of the counsel engaged. I am of opinion that these costs ought to be apportioned, and in that respect, but in that respect only, I differ from the conclusions of the Registrar.

Willmer.—Your Lordship has not said anything about the question of costs. Of course I have had to come here to obtain these crumbs. In these circumstances, although I hesitate to ask for the whole of the costs, I submit that it is a case in which I should have some relief in regard to costs.

Langton, J.—It would not be unfair to say that more than three parts of the time taken up in argument on this motion have been devoted to the greater and more important point in issue.

Willmer.—I would concede that, but I would submit that the sum recoverable in costs should be a small amount.

Langton, J.—I am more impressed by the fact that we have occupied a certain amount of time in arguing a very important point, whereas a comparatively small amount of time and expense have been devoted to the minor point.

Willmer.—On that minor point your Lordship will bear in mind I was resisted.

Langton, J.—I think, Mr. Willmer, you ought to pay your own costs and three-fourths of the costs of the other side, not the full costs.

Leave to appeal.

Solicitors for the plaintiffs, the owners of the *Laurentic : Hill, Dickinson*, and *Co.*

Solicitors for the defendants, the owners of the *Napier Star : William A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, June 16, 1939.

(Before BRANSON, J.)

Court Line Limited v. Dant and Russell Inc. (*a*)

Contract — Frustration — Charter-party — Ship detained in river owing to barricade erected by belligerents.

A ship was chartered from March, 1937, to January, 1938, at which latter date she was to be re-delivered to her owners. During a voyage pursuant to the charter she arrived at Wuhu, on the Yangtze River, on the 7th August, 1937. Shortly after that date the Chino-Japanese War began and the Chinese forces constructed a barricade of sunken ships across the river. In consequence of that, the ship was detained at Wuhu until December, 1937, when the Japanese broke through the barricade, and she was able to proceed down the river.

Held, that the closing of the river made performance of the contract impossible, as the result of events which could not have been foreseen by the parties, and that the adventure was frustrated and the contract at an end.

SPECIAL case stated by an umpire.

By a charter-party dated the 19th March, 1937, the appellants chartered their ship, *Errington Court*, to the respondents on the terms that she was to be re-delivered to the appellants at a port in Australia between the 15th December, 1937, and the 31st January, 1938. The ship proceeded on a voyage to Wuhu on the Yangtze river, arriving there on the 7th August, 1937. Shortly after that date the Chino-Japanese War started, and the Chinese forces constructed a barricade of sunken ships across the river to prevent the approach of hostile warships. As a result of that, it became impossible, as from the 16th August, for ships to leave Wuhu. The *Errington Court* discharged her cargo by the 3rd September, and remained idle at Wuhu until the 17th December. On that date the Japanese forces broke down the barricade, and the ship was able to leave.

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

In the arbitration the appellants claimed damages for alleged repudiation of the charter-party, and the respondents claimed the return of hire paid by them in advance. The umpire found that from the 16th August to the 17th December, it was impossible for the ship to proceed down the river, but that even after that period it would have been possible to re-deliver the ship in Australia within the contract time. He held that on the 3rd September the adventure was frustrated, and the charter-party dissolved, and that neither party could recover anything from the other under it.

Sir *Robert Aske*, K.C. and *A. A. Mocatta* for the appellants.

Willink, K.C. and *C. A. Roberts* for the charterers.

Branson, J.—In this case, a ship, the *Errington Court*, was chartered on a time charter which contemplated a trading for nine months to ten months between the limits defined by the institute warranties, and delivery, unless lost, at a safe port in Australia between Newcastle, New South Wales, and Port Pirie. Payment of hire was to be monthly in advance, and the captain was to prosecute his voyages with the utmost dispatch, and to be under the orders and directions of the charterers as regards employment and agency. There was an "off hire" clause (clause 15) and an "exceptions" clause (clause 16) excepting, amongst other things, restraint of princes.

The vessel entered upon her service on the 18th March, 1937, and was variously employed until in July, 1937, she loaded a cargo of lumber and scrap iron at Port Oregon for Wuhu and Shanghai. She arrived at Wuhu on the 7th August, 1937. Wuhu is 750 miles up the Yangtze river, and Shanghai is at the mouth of it. Whilst the ship was discharging at Wuhu on the 13th August, 1937, hostilities between Chinese and Japanese armed forces broke out in the neighbourhood of Shanghai, and, on the 14th August, 1937, the Chinese Government placed a boom across the river near Chin-Kiang, about 100 miles below Wuhu. This boom, while it existed, rendered it impossible for the *Errington Court* to go down the river to Shanghai. She completed the discharge of her Wuhu cargo on the 17th August, and in the normal course would have reached Shanghai on the 19th August. On the 21st August the master was ordered by the charterers' agents to discharge the Shanghai cargo at Wuhu. This was completed by the 3rd September. On the 9th December a Japanese flotilla made a passage through the boom, and the ship was able to proceed down-river on the 17th December.

The owners claimed that the ship was still on hire, but the charterers asserted that the contract had been frustrated on the 3rd September, and declined to issue further orders to the master. The matter went to arbitration, and now comes before me upon an award stated by the umpire in the form of a special case.

The umpire found that the adventure provided for by the charter-party was frustrated on the 3rd September, 1937, and the charter-party thereby dissolved, and that neither party had any further claim against the other thereunder, except as to some bunker coals with regard to which no question arises before me. He sets out in par. 19 of his award certain findings as to the opinions expressed by various persons as to the probable duration of the delay to which the vessel would be subjected, the net result of which is that it was likely to be indefinite. As the object of the Chinese in building the boom was to prevent the Japanese from getting up the river to such places as Hankow, it is obvious that they would maintain the boom for as long as they could, or until the Japanese gave up the attempt to ascend the river.

Upon this set of facts, the first question which is raised for my decision is whether—the umpire having found that the contract was frustrated—the court is bound by his decision if there is any evidence upon which it was possible for him so to find, or whether the question whether or not there was frustration is one for the court. This question is decided for me by the Court of Appeal in *Re Comptoir Commercial Anversois and Power, Son and Co.* (122 L. T. Rep. 567; (1920) 1 K. B. 868), where Bankes, L.J. says (at pp. 572 and 890): "The question whether the doctrine of frustrated adventure applies to any particular state of facts must, I consider, always be a question of law to be decided by the court upon the facts." Later, Scrutton, L.J. (at pp. 575 and 898) states the same conclusion more at length.

The next matter in controversy is as to the true basis upon which the doctrine of frustration of contract rests. Does it depend upon a term to be implied into the contract, or does it arise by operation of law as soon as it appears that the "basis of the contract has gone," whatever that expression may mean? I am not sure myself that the distinction is more than academic. In *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Limited* (115 L. T. Rep. 315; (1916) 2 A. C. 397), Earl Loreburn (at pp. 316 and 403) and Lord Parker (at pp. 323 and 422) expressly based the principle upon a term to be implied in the contract itself, and not on something *dehors* the contract, whilst Viscount Haldane (at p. 406) used language open to the construction that no implied term was involved. In *Bank Line Limited* v. *Capel* (*A.*) *and Co.* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435), Lord Finlay, L.C., referring to *Tamplin's* case, said: "It will be found that the principles of law enunciated by Lord Loreburn and by the two dissentients are identical; the difference between them being as to the application of these principles to the particular circumstances of the case."

Thus it is plain that Lord Finlay considered that there is no real distinction to be drawn. The court will not regard the basis of a contract as gone unless circumstances have altered to such an extent that the court will conclude that no reasonable men who contemplated such an alteration would be content to remain bound by the contract if it came about. If there be any material difference between the two views, however, the question is settled for me as a judge of first instance by the express decision in the Court of Appeal in the *Comptoir* case (*sup.*) to which I have already referred. Bankes, L.J. says (at pp. 571 and 886): "Having regard to the facts of the present case I do not think that the question of the frustration of the adventure, and the question whether the contract contained an implied condition that they should, in certain events, be dissolved, need be considered separately. The present is a case in which it seems to me clear that the view taken by Lindley, L.J. in *Turner* v. *Goldsmith* (64 L. T. Rep. 301; (1891) 1 Q. B. 544), and by Lord Sumner in *Bank Line Limited* v. *Capel* (*A.*) *and Co.* (*sup.*) applies, namely, that the so-called doctrine of the frustration of an adventure rests on an implied condition in the contract between the parties." This judgment does not appear to have been brought to the notice of Goddard, J. in *W. J. Tatem Limited v. Gamboa* (19 Asp. Mar. Law Cas. 216; 160 L. T. Rep. 159). I cannot think that he would not have held himself bound by it if it had been.

Next comes the question, what is the term to be implied? It is suggested on behalf of the charterers that it should be a term in general language, such as that, "if the adventure is frustrated, the charter-party shall come to an end." I do not think that this suggestion is compatible with the language used in the decided cases. The condition suggested by Earl Loreburn in *Tamplin's* case was (at pp. 316 and 406): ". . . that they should be excused if substantially the whole contract became impossible of performance, or, in other words, impracticable, by some cause for which neither was responsible."

The difficulty created by the use of a diversity of terms to define the circumstances which lead to a dissolution of the contracts has been pointed out by Lord Sumner in the *Bank Line* case (*sup.*). I do not propose to add another to the various attempts which have been made, but intend to apply to the case before me the condition suggested by Lord Loreburn. Here was a time charter for some nine months to ten months contemplating that for that period the owners should keep the ship at the disposal of the charterers to carry goods for them to any port within the prescribed limits, as and when ordered by the charterers, with the utmost dispatch. For this service, the charterers were to pay the prescribed hire. That is, in my opinion, a commercial adventure in the performance of which both parties were interested, and in respect of which both parties had continuing duties to perform. What was the effect upon this adventure of the closing of the Yangtze by the boom on the 15th August? It is true that the charterers could go on paying hire and giving orders, if so minded, but the owners could not obey the orders nor move the ship out of the river. It was urged, on behalf of the owners, that the doctrine of frustration cannot apply to a time charter unless the ship is physically removed from the control of both parties. I cannot see why the adventure in question before me was any the less frustrated than was the adventure in the *Bank Line* case (*sup.*). All power in the ship's officers to continue the adventure was taken away, in the one case, by requisition and, in the other, by the construction of the boom.

The only question left on this part of the case is whether the delay imposed was long enough to effect frustration. The authorities upon this point are again by no means unanimous. They agree, I think, in holding that the time as at which the question must be decided is the time when the parties came to know of the cause and the probabilities of the delay, and had to decide what to do. In the *Bank Line* case, Lord Sumner said: "The main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charter-party." Indeed, this was the only distinction on the facts between *Tamplin's* case (*sup.*), where the charter-party was for sixty months, of which nearly three years remained to run when the ship was requisitioned, and was held not frustrated, and the *Bank Line* case (*sup.*), where the charter-party was for twelve months, all yet to run, and frustration was held to have taken place. The court must, as the parties have to when the event arises which is alleged to cause frustration, estimate as best it can the probable duration of that event. The probabilities as to the length of the deprivation, and not the certainty arrived at after the event, are material: per Lord Sumner in the *Bank Line* case (at pp. 136 and 454).

According to Lord Shaw of Dumfermline in the *Bank Line* case, if stoppage and loss arise from a declaration of war, they must be considered to have been caused for a period of indefinite duration, and so to have effected an immediate solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure. His Lordship thought that the rule so stated would apply equally to a requisition, and I think that it must also apply to hostilities which are being carried on without a formal declaration of war. Other authorities—for example, Lord Sumner in the *Bank Line* case—indicate that the causes of frustration may have to be in operation for long enough to raise a presumption of inordinate delay before frustration takes place. The fair inference from the findings of the umpire as to what persons interested thought of the prospects of the ship getting down the river is that he concluded that the probabilities were that the ship would be kept up the river by the boom for an indefinite period. Once that conclusion is reached, the contract is frustrated. The fact that the Japanese were able to break a passage through the boom in time to permit the ship reaching Australia before the date fixed for re-delivery is immaterial.

For these reasons, I have come to the conclusion that the award is correct, and ought to be affirmed. I need not, therefore, deal in any detail with the other points which would have arisen if I had come to the opposite conclusion. If there was no frustration, the contract stands, and hire is payable, unless there is anything in the contract to prevent its becoming payable. The charterers rely on clause 15 for this. The argument depends upon whether or not the delay caused by the boom comes within the words: "any other cause preventing the full working of the vessel." In my opinion, it does not. I do not rely on *Hogarth* v. *Miller, Brother, and Co.* (7 Asp. Mar. Law Cas. 1; 64 L. T. Rep. 205; (1891) A. C. 48) for this conclusion, but upon the words of this charter-party, which are materially different from those which the court had to construe in that case. The words are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this. If there were no "off hire" period, the charterers could recover nothing in respect of coal consumed or hire paid, but they would, on the other hand, be liable for hire and damages, as suggested in clause 25 of the award.

Appeal dismissed.

Solicitors for the shipowners, *Holman, Fenwick,* and *Willan.*

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

Wednesday, June 21, 1939.

(Before Singleton, J.)

W. I. Radcliffe Steamship Company Limited v. Exporthleb of Moscow. (*a*)

Charter-party—Construction—"Discharging at two safe berths in one port"—Ship discharging at two separate docks in port of London—Cost of shifting.

A charter-party provided that the charterers should have the option of discharging at two safe berths in one port without extra charge. The ship came to London, where she discharged

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

part of her cargo at a wharf in Millwall Dock, and the remainder at a wharf in Victoria Dock. Both docks are within the Pool of London. In shifting from one dock to the other expenses were incurred.

Held, that in discharging at two separate wharves within one port the charterers were exercising the option conferred on them, notwithstanding that the wharves were in different docks. The expense of shifting, therefore, fell upon the owners.

Special case stated by an umpire. A charter-party provided as follows: "Charterers have the option of loading and discharging at two safe berths in one port without extra charge, and time for shifting not to count." In the course of the contract voyage the ship came to London, where she discharged part of her cargo at a wharf in Millwall Dock, and the remainder at a wharf in Victoria Dock. Both those docks are within the port of London. In shifting the ship from one wharf to the other, expenses amounting to 140*l.* were incurred. The owners contended that the charterers were not entitled to discharge at two separate docks in the same port, and that they should bear the extra cost of so doing. The charterers contended, and the umpire held, that in discharging at two berths they were exercising the option conferred on them by the charter-party.

A. A. Mocatta for the appellants.

J. V. Naisby for the respondents.

Singleton, J.—The question involved in this case is a very short one. The claimants, W. I. Radcliffe Steamship Company Limited and Wynnstay Steamship Company Limited, are the owners of the steamship *Llanishen*, and the respondents, Exporthleb of Moscow, were the charterers. The steamer, under the charter-party, loaded a full and complete cargo at Theodosia, and other ports mentioned in the charter-party, in September, 1938, and proceeded therewith towards Falmouth for orders to the discharging port. On the 26th September the respondents, the charterers, through their agents, gave orders to the claimants' agents that the ship was to proceed to London to discharge, first at the wharf of Messrs. McDougal in the Millwall Dock, and then at the respective wharves of Messrs. Rank and Messrs. Spillers at Victoria Dock. The claimants, through their agents, denied the right of the respondents to order the ship to discharge at two separate docks. The orders were followed, and the expense of the removal of the ship from the Millwall Dock to the Victoria Dock amounted to 140*l.* The claimants claim that sum of 140*l.* against the respondents, there being no question to be decided between the parties as to the later shift within the Victoria Dock itself.

The matter came before Mr. Cyril Miller, who was the umpire appointed in accordance with the terms of the Arbitration Act, and before him it was agreed "that both the Victoria and the Millwall Docks are geographically and commercially within the limits of the port of London." Moreover, Mr. Miller so found. The contentions of the parties, then, were based clearly and wholly upon what was the true construction of certain parts of the charter-party itself. The contention of the claimants was that "under the charter-party the respondents were not entitled to require the ship to discharge at two separate docks in the same port without paying for the expense of shifting the ship from one dock to the other." The respondents' contention was that, under the provisions of the charter-party, "they were entitled, without extra charge, to require the ship to discharge at any two safe berths within the port of discharge whatever the distance between the berths and whether they were or were not situate in the same dock or other discharging area within the port." As I have said, the question I have to determine is on this particular charter-party. There is no dispute on the common law. It is laid down in Scrutton on Charter-parties, 14th edit., p. 146, as follows: "In the absence of express provision or custom the shipowner is not bound to shift from the selected berth to suit the convenience of the charterer." The authority cited in support of that is *King Line Limited* v. *Moxey, Savon, and Co. Limited* (62 Ll. L. Rep. 252). In that case, Goddard, L.J., dealing with the question of a charter-party in another form altogether, said (at p. 253): "Under the charter-party in this form, once the charterer has designated the berth to which the ship is to go and the ship has arrived at that berth, the shipowner has discharged his full duty that he has undertaken under the contract to perform at the port when he takes his cargo on board. I do not know if it was in the mind of the county court judge who decided this case that there is any right on a charterer or his agent to order the ship, if she has once arrived at her berth which has been selected, to go to another berth at her own expense within the limits of the port. What the circumstances may be which led to the shifting of this particular ship and why she shifted is evidently a matter which has to be fully inquired into, and, therefore, I say no more about that. But the ship is not bound, once she has arrived and made fast to a berth to which she has been ordered, to shift again from that berth for the purpose of taking on board part of the cargo which is the subject-matter of the charter." That is, of course, dealing with the case of a ship which had gone to a particular port to take on board a cargo, and the berth to which she should go had been nominated or designated by the charterer. In those circumstances, she could not be called upon to move unless the charterer made arrangements, and, of course, any expense of that sort which was involved would apply in the case of a ship which had discharged at any particular berth, the berth being nominated by the charterer. The circumstances of this case, however, are not the same. It is pointed out to me, in the first place, that the charter-party, which bears the date of the 10th August, 1938, gives an option to the charterers to load at one or two ports. Nothing arises upon that, but it is interesting to notice that, at the end of clause 1 of the charter-party, it is provided as follows: "Shifting from one berth to another shall not be considered as a further place of loading. Charterers have the option of loading and discharging at two safe berths in one port without extra charge and time for shifting not to count. Further shiftings to be for charterers' account and time for shifting to count."

Counsel for the charterers submitted to me that the true meaning of the middle part of that is that the charterers can have one free shift. They have the option of loading and discharging at two safe berths in one port. The area mentioned is "port," not "dock" or "wharf." Counsel for the appellants in his argument relied chiefly on clause 21 of the charter-party, which deals with the discharge, and which is in these terms so far as relevant: "The cargo to be delivered according to the custom of the port, at such wharf, dock or other safe place (always afloat) as charterers or their agents may

direct on steamer's arrival in accordance with the bills of lading." Counsel for the appellants submitted that, if there was to be a free shift—in other words, if the option of two safe berths for discharging the cargo was to be exercised by the charterer—it must be within one wharf or dock or other safe place, by reason of the words in clause 21 of the charter-party. He said that, if the words at the conclusion of clause 1 were to be read in the way in which the charterers would have them read, clause 21 would have read, and ought to have read: "Such wharves, docks, or other safe places." In other words, they would have been in the plural. It seems to me that, if the argument of the shipowners is to be accepted, one destroys entirely the option given to the charterers by the words which are almost at the end of clause 1 of the charter-party. The charterers had the option of discharging at two safe berths in one port. They called upon the ship to proceed to London and discharge first at the wharf of Messrs. McDougal, in the Millwall Dock, and then at the respective wharves of two other firms in the Victoria Dock. Therefore a shift was called for, namely, from the Millwall Dock to the wharf of Messrs. Rank in the Victoria Dock. Those were, as I think, two safe berths in one port. They were both within the Port of London. That is admitted, and it is found by the umpire as a fact. Indeed, it could not be disputed. In those circumstances, it seems to me, that the charterers, in calling upon the ship to proceed to a discharging berth within the port of loading, first at the wharf of Messrs. McDougal, at the Millwall Dock, and then at the wharf of Messrs. Rank, at the Victoria Dock, were exercising their option under the charter-party. The umpire, in par. 6 of the special case, so finds. He says: "Subject to the opinion of the court, I hold that the respondents were entitled under the charter-party to require the *Llanishen* to discharge first at a wharf in the Millwall Dock, and then at a wharf in the Victoria Dock, without any extra charge to the respondent, and accordingly I award and determine that the claimants are not entitled to recover the sum of 140*l.* or any sum from the respondents." That is my view. In par. 7 the umpire states the question for the opinion of the court as follows: "The question for the opinion of the court is whether upon the true construction of the charter-party and upon the facts found in this case the respondents are entitled to order the steamship to discharge at two wharves in separate docks, both of which docks are within the Port of London."

As I have said, I agree with the umpire's view. I think that the answer to that question is in the affirmative. It follows, therefore, that, under par. 8 of the special case, the award set out in par. 6 stands.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan.*

Solicitors for the respondents, *Richards, Butler,* and *Co.*

House of Lords.

May 1, 2, 4; *June* 29, 1939.

(Before Lords Atkin, Thankerton, Macmillan, Wright, and Porter.)

Reardon Smith Line Limited v. Black Sea and Baltic General Insurance Company Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Charter-party—Call at port off usual route for bunkers—Stranding of ship—Jettison of part of cargo—Claim for general average contribution—Whether deviation—Meaning of usual route.

The appellants were the owners of the I. C., *an oil-burning steamer which was chartered to go to Poti, a port in the Black Sea, and there load a cargo of manganese ore, and with all convenient speed proceed to Sparrow's Point, United States of America. The charter-party provided that general average should be payable according to York-Antwerp Rules,* 1924, *and that a guarantee for the cargo's liability for general average contribution should be given by the respondents. It also provided that the steamer had liberty to call at any port or ports in any order or places to bunker. The steamer proceeded to Poti, where she loaded a full cargo of ore in accordance with the charter-party. She then proceeded to Constanza to take in fuel oil for the contract voyage. In entering the port of Constanza she ran aground and part of the cargo had to be jettisoned. In an action brought by the appellants claiming contribution to general average loss and expenditure from the respondents, evidence was given that in proceeding from Poti to Constanza, where oil fuel could be obtained at a cheaper price, the vessel was following one of the usual routes.*

Held, that the evidence was sufficient to establish that the practice of vessels proceeding on ocean voyages to call at Constanza to bunker after loading had become a usual one. Although the obligation remained on the shipowner to proceed by a usual course, evidence might always be adduced to show what the usual course was. There was no question of deviation from the contractual route.

This was an appeal by the plaintiffs from a judgment of the Court of Appeal (Slesser and Clauson, L.JJ., Greer, L.J. dissenting) dated the 12th April, 1938, reversing a judgment of Goddard, J. dated the 22nd March, 1937, in an action in which the plaintiffs claimed from the defendants contribution to general average sacrifice and expenditure incurred by the plaintiffs in consequence of the stranding of their steamship *Indian City* off the port of Constanza while in the course of a voyage from Poti to Sparrow's Point, Baltimore.

The facts are fully set out in the opinions of Lord Wright and Lord Porter.

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

A. T. Miller, K.C. and *Cyril Miller* for the appellants.

G. St. C. Pilcher, K.C. and *Gordon Willmer*, K.C. for the respondents.

The House took time for consideration.

Lord Atkin.—I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Wright. I entirely agree with it for the reasons which he has given. I find myself unable to agree with the decision of the Court of Appeal. I move that this appeal be allowed.

Lord Macmillan.—I also have had the advantage of reading in print the views about to be expressed by my noble and learned friend Lord Wright as also those embodied in the opinion of my noble and learned friend Lord Porter, which will shortly be laid before the House. With the views there expressed I find myself in entire concurrence.

Lord Wright.—This appeal raises an important question in the law of carriage of goods by sea which has given rise to difference of judicial opinion. Goddard, J. decided in favour of the appellants, but his decision was reversed by a majority of the Court of Appeal, consisting of Slesser and Clauson, L.JJ.; Greer, L.J., who dissented, agreed with Goddard, J. The substantial question is whether the appellants' vessel, the *Indian City*, had deviated in calling for bunkers at Constanza while on a voyage from Poti to Sparrow's Point, U.S.A. The vessel grounded at Constanza and sustained considerable damage besides incurring salvage, general average and other expenses.

The appellant company at the material time owned twenty-eight vessels, of which nineteen, including the *Indian City*, were capable of being readily converted into either oil or coal burners. In 1930 cheap fuel oil for bunkers became available at Constanza in Roumania. Constanza, thereupon, became largely used as a bunkering port, in particular for vessels bound from the Black Sea on long ocean voyages. In 1932 and 1933, 114 oil-burning vessels called at Constanza for bunkering only. This figure shows the importance of the port as a bunkering port. It is not necessary to analyse closely what proportion of oil-burning vessels sailing through the Bosphorus on ocean voyages bunkered at Constanza. It is sufficient for purposes of this case to record what has been accepted on both sides, namely, that 25 per cent. of the whole number called and bunkered at Constanza in the three-and-a-quarter years before the casualty which overtook the *Indian City*. I emphasise these facts, because the position of Constanza as a usual and recognised bunkering port in the Black Sea seems to me to be a key point in the case.

The charter-party in respect of which the dispute arose was dated the 1st September, 1933. It was between the appellants as shipowners and the Manganexport G.m.b.H. as charterers and was for three vessels to be nominated by the appellants. The vessels were to be of 8300 tons minimum and 9000 tons maximum capacity, and were to proceed with all convenient speed to Nicolaieff or Poti as ordered on arrival at Istanbul, and there load ore and proceed with all convenient speed to one of a range of U.S.A. ports at charterers' option. The vessels were to be addressed for Custom House business to charterers' agents at the port of loading, and were to apply there to Soyusmetimport for cargo. It was also stipulated that the vessels were to be consigned to Sovflot Nicolaieff or Sovflot Poti for loading and Custom House business. The contract provided that the owners were not to be called upon to take bunkers from charterers; and it was stated that the vessels would be burning oil. The contract gave the steamers liberty, *inter alia*, to call at any port or ports in any order or places to bunker and other purposes and to deviate for saving life or property.

The contract was for one steamer monthly in October, November, December, 1933. The *Indian City* was the third steamer nominated.

Before the voyage of the *Indian City* the appellants made twenty-eight voyages in the trade, nineteen for the same charterers, which were a Russian State Trading Corporation, and nine for other Russian State Trading Corporations. Except the first of these voyages, that performed in July, 1930, by the *Orient City*, which bunkered at Constanza on her way to Poti to load, all the appellants' vessels bunkered at Constanza on their voyage. In each case some departure from the shortest sea route from the loading port to the Bosphorus was involved. The extra distance steamed in these cases was considerably greater where the loading ports were situated in the eastern part of the Black Sea, as were Poti, Batoum or Novorossisk. The extra distance amounted approximately to 120 miles in the case of Novorossisk, and to 193 miles in the case of Poti. Where the port of loading was in Ukrainia the extra distance to be steamed in order to bunker at Constanza was fourteen or twenty-one miles, according to the port of loading; when the loading port was in the Crimea or Sea of Azov the extra distance might be about eighty miles.

The master of the *Indian City* was instructed by his owner to fuel at Constanza after loading his cargo. On arrival at Poti, Backal, who was manager at that port of Sovplot, a Russian State Corporation which was acting as charterer's agents, came on board and said he was acting as the ship's agent. He was the only person there who spoke English. The master arranged all the ship's business with him and in particular told him that he was bunkering at Constanza and gave him a cable for transmission to the oil suppliers at Constanza, ordering oil bunkers for the steamer at that port. A similar procedure had been followed in the case of the other two vessels nominated under this charter-party, and also in the case of other vessels on voyages from the Black Sea to distant ports under similar charters between the appellants and the same charterer.

The respondents in this appeal are an insurance company which were sued under the guarantee which they gave to the appellants at the request of the charterers to pay any contribution in general average, salvage or special charges due in respect of the cargo and to admit a loss of freight in general average, and also to be responsible for a balance of freight withheld, so far as the same might be held to be properly due and payable by the charterers. This agreement was in consideration of the appellants agreeing to release their lien, which they did when the cargo was eventually delivered at Rotterdam on the termination of the voyage to that port which was substituted by agreement for the contract voyage in consequence of the damage sustained at Constanza. It is not now disputed that the liability of the respondents under this guarantee is the same as the liability of the charterers under the freight contract. That liability depends on whether the *Indian City* had deviated from the

contract voyage by calling for bunkers at Constanza, so as to have lost the right to claim, in respect of the damage, expense and losses consequent on the grounding at Constanza, the protection of the exception clauses which were contained in the charter-party and which were in the usual form including perils of the seas and negligence. As the property in the cargo remained throughout at all material times in the charterers, the charter-party provisions are the contractual terms which govern the position.

The appellants do not rely on the liberty to call for bunkers which is expressed in the charter-party. That liberty accordingly need not be further considered. Its case is that what was done in calling for bunkers at Constanza was not a deviation or departure from the contract voyage, but was within the contract voyage, because the vessel was pursuing a usual and reasonable commercial route for carrying out that particular adventure. Its contention was that the charter-party words "shall with all convenient speed proceed to . . . Sparrow's Point" imported by necessary intendment that the vessel should proceed by a usual and reasonable route and that the ascertainment or identification of what was a usual and reasonable route depended on evidence, since the court, not being possessed by itself of expert navigational or mercantile knowledge, must, if need be, call in aid such evidence. This is not because the contract is ambiguous, but simply that it does not write out in full what the parties are assumed to know or to be able to ascertain. It is only an instance of the familiar rule that evidence is admissible, not of the parties' intention, but of the surrounding circumstances, in order to identify what the parties were contracting about and to identify the subject-matter of the contract. Such evidence must not contradict any express term of the contract; for example, if it had been stipulated that the vessel should not call at Constanza, the evidence would have been inadmissible. But where, as here, there is no such inconsistency between the evidence and the document, the evidence is not merely competent, but may be necessary if the court is to give effect to the contract. The general rule is that stated by Blackburn, J. in *Grant* v. *Grant* (22 L. T. Rep. 829; L. Rep. 5 C. P. 727, at p. 728): "The general rule seems to be that all facts are admissible which tend to show the sense that the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." The question here is what sense is to be attributed to the words "proceed with all convenient speed from Poti to Sparrow's Point"; that is, proceed from the one terminus to the other. The contract voyage has to be identified. It must refer to some route or other. It cannot be said as a matter of law that the meaning is necessarily by the direct sea track. In *Frenkel* v. *MacAndrews and Co. Limited* (17 Asp. Mar. Law Cas. 582; 141 L. T. Rep. 33; (1929) A. C. 545) Lord Dunedin quotes from Wills, J. in *Evans* v. *Cunard Steamship Company* (18 Times L. Rep. 374) the statement that the expression "the voyage from Bari to Liverpool" must be understood in a business sense, which were the words used by Lord Herschell in *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351). Lord Dunedin then proceeds: "That case [*i.e.*, *Evans*' case] puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was. Many cases may be figured where there is more than one route which might be used by a ship. It might be a choice between the Suez Canal, the Panama Canal, or round Cape Horn. In such a case, even if the port of starting and of destination were stated, it would be necessary to make inquiry to find out what was the usual route." Again, in *Frenkel's* case Lord Sumner to the same effect said that evidence in that case was needed to prove what the voyage was and, being admitted, showed what was a usual commercial route, which in his Lordship's opinion was reasonable under the circumstances. Lord Sumner again, after referring to opinions of Lord Esher and Lord Herschell in *Glynn's* case, goes on to say: "The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and progress takes place, really shows how clearly those great authorities desired to guard themselves in view of the fact that on many grounds deviation from the sea-track might still not be beyond the ordinary route. . . . Such things must be matters of degree, and may not always be important for all classes of ships, all kinds of cargo or all periods of trade." In *Frenkel's* case certain earlier decisions were discussed and distinguished. Thus *Leduc* v. *Ward* (6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475) was a case where goods were shipped on a general ship for carriage from Fiume to Dunkirk. The vessel, instead of proceeding direct to Dunkirk, sailed for Glasgow and was lost with her cargo at the mouth of the Clyde. It was not suggested that she was pursuing a usual route in any sense. A plea that the shippers knew and agreed that the vessel was intended to proceed via Glasgow was irrelevant because the plaintiffs were indorsees of the bill of lading, and were entitled to enforce the bill of lading according to its terms. The only other plea, which was a plea based on the deviation clause, failed because the liberty to call at any ports in any order meant ports which were substantially ports which would be passed on the named voyage. There was no question, as Lord Dunedin pointed out in *Leduc's* case, of alternative routes or a customary route which might displace the geographical route. On that footing Lord Esher spoke of the voyage being one on the ordinary sea-track from Fiume to Dunkirk, but added that an exact line is not meant, "for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer again might be different from that of a sailing vessel; I mean the ordinary track of such a voyage according to a reasonable construction of the term." Obviously in proper cases this would let in evidence of what the voyage was. In *Glynn* v. *Margetson* (*sup.*) the steamer was a general ship; oranges were to be carried from Malaga to Liverpool; the vessel, after loading the oranges, proceeded from Malaga up the east coast of Spain, then returned to Malaga, before proceeding to Liverpool. There was no claim that such a voyage was a usual or reasonable course, or was in a business sense within the voyage described in the contract. The defence was based on the deviation clause, which gave a very wide liberty to call at ports. The House held that, however wide the words were, the liberty was limited to ports "in the course of the voyage." Lord Herschell said he was using these words in a business sense. "It may be said," he observed, "that no port is directly in the course of the voyage, inasmuch as in merely entering a port or approaching it nearly you deviate from the route between direct port of shipment

and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which the right to touch and stay is given." I quote these observations because, though in a slightly different connection, they recognise the necessity of ascertaining what is the understanding of business men on the matter, presumably by appropriate evidence. In *Frenkel's* case (*sup.*) the authorities last cited were distinguished. I disregard a subsidiary point which was raised in that case on the form of the bills of lading. The real distinction drawn was that there was evidence showing that the contractual voyage was not the direct or ordinary sea route; in fact, the vessel, after loading the barrels of olive oil at Malaga with destination for Liverpool, went up the Spanish coast in the Mediterranean to various ports to Palamos, close to the French frontier, before she proceeded towards England. The shipowners did not rely on the deviation clause. They contended that the steamer was on the contract voyage and had not departed from it when the oil was damaged in a storm between Malaga and Cartagena. In support of their contention they relied on the evidence which showed that the route taken was a usual commercial route for the vessel to follow under the circumstances, and was the route which had been advertised for her for the voyage some time beforehand and was a route which was (as Lord Sumner in fact held) reasonable under the circumstances. Lord Sumner added: "I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to ships of the respondents' own line." This shows how remote such evidence is from evidence which would be required to prove a strict custom. Lord Sumner also treated the fact that the course of business was well known to those of the plaintiff's employees to whom he confided this part of his business, as strongly confirming the usual and reasonable character of such a voyage, since no objection was taken, though no estoppel or collateral agreement arose. I may also here quote certain observations from *James Morrison and Co. Limited* v. *Shaw, Savill and Albion Company Limited* (115 L. T. Rep. 508; (1916) 2 K. B. 783). The vessel in that case was one of a regular line, trading between New Zealand and Europe. The plaintiffs' parcel was shipped in New Zealand for London. The vessel made for Havre to discharge a parcel of meat. This was during the war. The vessel was torpedoed and sunk while near Havre. Evidence was given that the usual and well-known route for steamers of this line on the voyage from New Zealand to London which was always substantially followed was by Cape Horn to Montevideo or another named port, then to Teneriffe or Madeira and thence direct to London. The outward voyage was by the Cape of Good Hope. Phillimore, L.J., referring to the route as the usual route, said that it needed no liberties or permissions to justify it. He added that the call at the coaling port, which might be Teneriffe or Madeira, did not need the liberty to call at intermediate ports. "The call," he said (115 L. T. Rep. at p. 511; (1916) 2 K. B. at p. 797), "is one of the incidents of the voyage and is no departure. There are many similar instances, such as calling at weather stations to inquire about ice, or going to some State for a Government pass through territorial waters, or to pick up a pilot, or calling at a preliminary port to lighten the ship in order that she may finish the voyage with less draught. These are not, in my view, departures from the usual and customary course of the voyage." That case illustrated the serious consequences of a deviation, because the shipowners were held not to be entitled to rely even on the exception of the King's enemies to which carriers are generally entitled, even in the absence of a special contract. The effect of even an accidental deviation if not justified is illustrated in *Hain Steamship Company Limited* v. *Tate and Lyle Limited* (155 L. T. Rep. 177; 41 Com. Cas. 350) where the deviation was due to an error in transmitting orders to the master. No one would seek to minimise the importance of the rule that a vessel must not deviate without justification from the contract voyage, but that makes it also essential to ascertain correctly what the contract voyage is.

The cases cited above were cases of liners or general traders, and it may be said that the same principles do not apply in the same sense to a chartered vessel, carrying a single cargo for a single shipper or consignee. But even in such cases it is obvious that there will be in general various considerations, commercial or navigational, which determine what sea route is usual and reasonable. Thus in the old sailing ship days, routes were chosen in order to make use of trade winds, and varied from season to season. Thus between the same termini there might be several usual routes. In modern times in all long ocean voyages, the need to replenish bunkers (coal or oil) has to be considered. The doctrine of stages of the voyage which enables a shipowner to start with bunkers sufficient for the stage, so long as he fills up his bunkers at the next bunkering port, necessarily involves calling at that port, and perhaps later ports, in order to fulfil the recurring obligation to keep the vessel seaworthy in regard to bunkers. Thus to call at such ports has become an ordinary incident of the voyage. The need to do so may help to determine the general route, for instance whether it is to be by the Cape of Good Hope or the Suez Canal. A shipowner is entitled, within certain limits determined by what is reasonable, to be guided in his choice of bunkering ports by considerations of cheapness and convenience. Thus evidence was given in this case that it is usual for a coal burning ship bound to Australia by the Cape of Good Hope to bunker at Durban, where coal is cheaper instead of at Cape Town, though Durban is farther off the route. Other similar instances were given in evidence. In the voyages here in question various choices are open to the shipowner when his ship is burning oil. He may fill up his bunkers for the whole voyage at Constanza on his way to the loading port. That course may be objected to by the charterer because it may reduce the quantity of cargo his ship can load, and for the same reason may be disadvantageous to the shipowner. He may decide to fill up his bunkers after sailing from the port of loading at some convenient port. He may decide to do this at Constanza, at Istanbul, or at Algiers, or at Oran, or at Ceuta, all of which are available bunkering ports, starting from the loading port with sufficient bunkers to take the ship to the next bunkering port which he decides to use. In this way he selects the stage for bunkering. The vessel must be seaworthy for that stage, but it is the shipowner's province to fix the stage, that is, to determine where he will bunker, so long as his decision is reasonable and usual. In the present case, as in the other voyages during the relevant period, the appellants selected Constanza as the bunkering port. Their case is that they had done so a great many times without objection and save in this one case without mishap. They relied

on all the evidence to which I have briefly referred to support their claim that the route by Constanza is a usual route. The position therefore is that to call at some port for bunkers is no deviation, and the only question is whether Constanza is a usual and reasonable port of call for this purpose.

I agree with Greer, L.J. that the evidence that 25 per cent. of oil-burning vessels sailing from the Black Sea on ocean voyages call at Constanza for bunkers is sufficient to show a usual route. The shipowner is not here attempting to prove a custom. To prove a custom he would have to show that it was uniform and universal in the trade, but that is not what is in question here. Nor need he show that other routes were not available, that is, that there were not alternative ports of call at which he might bunker. There are no doubt other available ports of call for this purpose, some and perhaps all of which would involve much less extra steaming. I think the shipowner is entitled to balance the cost to him of extra steaming against the cheapness or convenience of Constanza, so long as to do so is not unreasonable in regard to the interests of the charterer or any other persons who might be concerned. It is obvious that to put into any port to bunker involves not merely extra steaming, either more or less, but the entry into and departure from an extra port, which in itself is a separate risk, however close it may be to the direct ocean route. Again it is said that the habit of bunkering at Constanza sprang up suddenly in 1930, and ceased as suddenly in 1935, at least so far as concerned the practice of the appellants. But I think a commercial habit or practice like the one claimed, may come into existence in a short time and cease as rapidly. In modern business, things are constantly changing and commercial habits may change as rapidly. That the practice of calling at Constanza for bunkers was not unreasonable, is also, I think, supported by the evidence that it was well known to responsible officials who represented the charterers on the spot, and that they never objected. I refuse to believe that if the charterers' interests had been prejudiced they would not have objected. I refuse to believe in view of all the evidence that the practice was not well known. I do not treat this evidence as evidence of a waiver, or an agreement to vary the contract which might raise questions of authority to vary a written contract. I merely regard it as Lord Sumner did in *Frenkel's* case (*sup.*) as confirming the usual and reasonable character of such a voyage which is fairly inferred from the fact that no objection was taken.

As the necessity of using ports of call for bunkering is so obvious, I think that less evidence is needed to justify that it is usual and reasonable to use a port like Constanza for that purpose, than if the ship had gone there for purposes of trade. But I do not think it necessary to lay down any specific measure of departure from the direct sea route which may be held to be reasonable. If I am asked how far I go, I say that I go as far as this case requires. The test of what is usual and reasonable in a commercial sense may arise in very different circumstances and must be decided whenever it arises by the application of sound business considerations and by determining what is fair and reasonable in the interests of all concerned.

I have found myself unable to concur in the reasons which led Slesser and Clauson, L.JJ. to reverse the decision of Goddard, J. Slesser, L.J. seems to start from the assumption that the contract stipulates for one voyage only, namely, from the port of destination to the port of discharge, being a voyage by the ordinary track by sea. I think he bases that on a view of what was meant by Lord Esher in *Leduc* v. *Ward*. But as Lord Dunedin and Lord Sumner pointed out in *Frenkel's* case, Lord Esher was not dealing with a case where there was any question of there being any usual route or routes other than the ordinary sea track. Slesser, L.J. next holds that, the contract being clear, evidence was not admissible to vary it, unless it went to prove a custom in the strict sense. It is true that if a contract is clear, it cannot be varied by evidence of a custom or even a trade usage inconsistent with its clear terms, but, in my opinion, for reasons which I have explained, the evidence is admissible here, not only on general principles but on the particular rulings in *Frenkel's* case, in order to ascertain and explain what the parties meant by their contract as applied to the facts of the case. Again I do not agree with Slesser, L.J. that there is any question here of a custom in the strict sense. The evidence, however, to prove a commercial usage is in any event not the same as that necessary to prove a custom, say, in matters of land law. And as appears from the authorities I have quoted, the question here is simply what is a usual and reasonable mode of performing the necessary operation of calling for bunkers. I observe that Slesser, L.J. adds that if the evidence were admissible, it might well be that it would prove a usual commercial route.

Clauson, L.J. seems to have treated the contract as being for a voyage Poti-Istanbul, and on that basis to have held that it was unambiguous and that there was no possibility of treating the case as a case of alternative routes, Poti-Istanbul or Poti-Constanza-Istanbul. He said that the termini of the voyage were fixed and that there were no navigational alternatives such as were contemplated by Lord Dunedin in *Frenkel's* case. With great respect, I cannot agree with the view that the charter-party does not admit of explanatory evidence. Clauson, L.J. himself admits that some owners may prefer to go direct and not call at Constanza, preferring the shorter sea route to the convenience of cheaper bunkers. Perhaps the learned Lord Justice may have been influenced in the view he arrived at by treating the voyage as one from Poti to Istanbul. There was no such voyage. The voyage was to Sparrow's Point, U.S.A., which was a vitally different voyage because it involved the necessity of providing the bunker supply for the whole voyage in appropriate stages at the shipowner's reasonable discretion. It is this which was the essence of the whole problem, and led to what were called the navigational alternatives.

For the reasons I have explained I agree with the judgments of Goddard, J. and Greer, L.J. I think that the appeal should be allowed and the judgment of Goddard, J. restored, and that the respondents should pay the appellants' costs in this House and in the court below.

Lord Atkin.—My Lords, I am asked by my noble and learned friend Lord Thankerton to say that he agrees with the opinion which has just been delivered.

Lord Porter (read by Lord ATKIN).—In this appeal your Lordships are asked to reverse the decision of the Court of Appeal who, by a majority, reversed the decision of Goddard, J.

The appellants are owners of a line of steamers which mostly operate under charter on ocean voyages. At the material date they owned twenty-eight vessels of which nineteen were steamships capable of burning either coal or oil fuel and of

being rapidly converted for the use of one or the other.

The ship with which the present appeal is concerned is one of these nineteen and is named the *Indian City*. By a charter-party dated the 1st September, 1933, the appellants undertook to provide three vessels to be nominated by them to proceed to Nicolaieff or Poti in the Black Sea as ordered by the Trade Delegation of the U.S.S.R. at Istanbul, and there take a full cargo of between 8300 and 9000 tons of ore for carriage to a port on the east coast of the United States of America.

Amongst the provisions of the charter-party are to be found the following :

" (2) The said ship . . . shall . . . proceed with all convenient speed to Nicolaieff or Poti as ordered and there load . . . a full and complete cargo of ore, 8300 tons minimum not exceeding 9000 tons maximum quantity in owners' option . . . and being loaded shall with all convenient speed proceed to . . . Baltimore (including Sparrow's Point) . . ."

" (12) The steamer is to be addressed for the Custom House business to charterers or their agents at ports of loading. . . ."

" (19) Ship to apply to Soyusmetimport at loading port for cargo, and wire on leaving last port of discharge ' Soymangan Berlin ' and ' Sovflot Istanbul ' and ' Soyusmetimport Moscow '."

" (20) . . . stranding . . . and all and every other damages and accidents of the seas . . . of whatever nature and kind whatsoever, before and during the said voyage always excepted. Steamer has liberty to call at any port or ports in any order or places, to bunker."

" (28) At Nicolaieff or Poti, steamer to be consigned to the Odessa Freight Office or their agents, Telegraphic ' Sovflot, Nicolaieff ' or ' Sovflot Poti ' for loading and Custom House business."

" (41) Owners not to be called upon to take bunkers from charterers. Vessels will be burning oil."

" (43) General average shall be payable according to York-Antwerp Rules, 1924, and shall be adjusted in London in accordance with English law and custom. Guarantee for cargo's liability for general average contribution and (or) salvage charges shall be given by Messrs. Black Sea and Baltic General Insurance Company Limited, 106, Fenchurch Street, London, E.C. 3. . . ."

The *Indian City* was the third vessel to be nominated by the appellants under this charter-party. She was ordered upon calling at Istanbul to proceed to Poti, where she arrived on the 10th December, 1933, and loaded a cargo of 8430 tons of ore for Sparrow's Point, Baltimore. After loading she sailed on the 31st December, 1933, for Constanza on the west coast of the Black Sea for bunkers. In entering that port on the 3rd January, 1934, she ran aground, considerable damage was done to the ship, and cargo to the value of 1061*l.* 14*s.* 4*d.* had to be jettisoned. Temporary repairs were completed by the 6th March, 1934, and she set sail for her destination. In the Mediterranean, however, she began to leak again and was obliged to put into Malta. There it was agreed by all the parties interested that her destination should be changed to Rotterdam, at which port she arrived on the 20th April, 1934.

As a result of the casualty, the appellants incurred by way of general average sacrifice an expenditure of 6986*l.* 5*s.* 5*d.*, and claimed from the charterers their proportion of this sum. The charterers repudiated liability for any general average, and withheld the sum of 1061*l.* 14*s.* 4*d.* from the freight in respect of the cargo undelivered. The appellants thereupon refused to deliver the cargo without some security for payment of these two sums if a legal right to their recovery could be established and in order to surmount this difficulty the respondents entered into a bond dated the 15th January, 1934, guaranteeing to the plaintiffs the payment of any contributions of general average which might thereafter be ascertained to be properly due in respect of the cargo, and by a later instrument dated the 5th March, 1934, agreed to treat the loss of freight as if it were general average.

The respondents maintained that in going to Constanza the ship had deviated from her contractual route, and it is admitted that if they are right in so contending, they are not liable either for the general average claim or for the freight withheld.

The question which your Lordships have to decide, therefore, is whether, in proceeding to Constanza to bunker, the *Indian City* deviated or not.

On behalf of the respondents it was said that the appellants were under a duty to proceed from Poti to Sparrow's Point by the direct route through Istanbul. Indeed, in their submission, the terms of the charter-party were plain and no evidence could be given in order to establish the right of the appellants to proceed by any other route. The appellants on the other hand maintained that in every case it was permissible to adduce evidence in order to establish what was the usual route and that in the present case they had established by evidence the existence of an alternative route *via* Constanza for bunkers.

The facts proved in evidence were as follows :

Up to the year 1930 no oil fuel was obtainable at the port of Constanza, but in that year cheap oil fuel became available there, and in that year the appellants began to charter their vessels to various of the Russian State Trading Corporations upon ocean voyages from the Black Sea with cargoes of ore, grain and salt.

Between July, 1930, when the first of the appellants' vessels to engage in this trade loaded a cargo of ore at Poti and the sailing of the *Indian City* from that port in December, 1933, the appellants' vessels had made twenty-eight voyages in this trade on nineteen of which the ships were under charter to the same charterers as was the *Indian City*, and upon the remaining nine voyages the ships were under charter to other of the Russian State Trading Corporations.

On each of the twenty-eight voyages except the first, the ships had taken fuel bunker oil for the chartered voyage at Constanza after loading their cargoes, and on many occasions the charterers' representatives at the various loading ports had been informed by the captains of the appellants' vessels of their intention to bunker at Constanza after leaving the loading port and no objection to the adoption of this route had been raised by any of the charterers until the casualty to the *Indian City*.

During this period, oil fuel was much cheaper at Constanza than that which was obtainable at other ports such as Istanbul, Algiers, and Ceuta, and the appellants entered into the charters by reason of the fact that oil could be obtained at Constanza at the cheaper price.

At the trial before Goddard, J. the appellants gave evidence, (*a*) as to the number of vessels bunkering at Constanza during the years 1932 and 1933, (*b*) as to the route followed by all the

appellants' vessels which had loaded at Black Sea ports in the years 1930, 1931, 1932, and 1933, and (*c*) furnished a list of the various vessels sailing from Poti in the years 1931, 1932, and 1933, showing whether or not they called at Constanza to bunker.

The result of that evidence was as follows: In 1932 and 1933 prior to the voyage of the *Indian City* 114 oil-burning vessels called at Constanza for bunker purposes only; in nine cases it was not possible to tell where the vessels loaded their cargoes, but of the remaining 105, in eighty-three instances the vessels bunkered at Constanza after loading their cargoes elsewhere at Black Sea or Danube ports or if Danube ports be excluded the vessels called at Constanza to fuel after loading their cargoes in forty-five out of sixty-five instances.

If, on the other hand, eastern Black Sea ports alone be considered, namely, Novorossisk, Tuapse, Poti, and Batum, of a total of thirty-three vessels which called at Constanza eighteen bunkered after loading and of those from Poti itself out of twenty-two oil-burning vessels, nine bunkered at Constanza after loading their cargoes. These nine, however, included the *Indian City*, and two vessels which proceeded to Novorossisk before calling at Constanza.

As against this evidence the respondents adduced two lists of vessels sailing from Poti and Novorossisk in the years 1932–3 from which it appeared that out of nineteen oil burners sailing from Poti, six called at Constanza after loading and of these six, five belonged to the appellants. These figures exclude the *Indian City* and the two vessels which sailed *via* Novorossisk. From Novorossisk the numbers were thirty-six oil burners of which eight called at Constanza after loading and four belonged to the appellants.

It was also proved that, in the case of chartered vessels other than those belonging to the appellants, the representatives of the charterers, whether those charterers were Manganexport or other Russian State trading corporations, were in a number of instances informed that the vessel intended to call at Constanza for bunkers after loading, and that no objection to this course was taken.

Moreover, in the case of the three ships nominated under the charter-party of the 1st September, 1933, the first, the *Atlantic City*, loaded at Poti, and her captain not only informed the manager of Sovfiot at that port who was acting as agent for the charterers as well as the ship, that he intended to bunker at Constanza, but before sailing handed to that agent for transmission to Constanza a cable to the suppliers of oil at that port of the expected arrival of the *Atlantic City*.

The second vessel, the *Jersey City*, was ordered to Nicolaieff, and a similar procedure was adopted to that which had taken place at Poti. In the case of the third vessel, the *Indian City*, similar information was given and a similar telegram sent.

In this state of affairs the appellants maintained that to proceed to Sparrow's Point *via* Constanza for bunkers was to proceed by a usual route, and that they were entitled to adduce the facts proved in evidence in support of their contention.

The law upon the matter is, I think, reasonably plain, though its application may from time to time give rise to difficulties. It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is unless a specific route be prescribed by the charter-party or bill of lading. In each case, therefore, when a ship is chartered to sail or when a parcel is shipped upon a liner sailing from one port to another, it is necessary to inquire what the usual route is. In some cases there may be more than one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope, or through the Straits of Magellan. Each would, I think, be a usual route. Similarly the exigencies of bunkering may require the vessel to depart from the direct route, or, at any rate, compel her to touch at ports at which, if she were proceeding under sail, it would be unnecessary for her to call.

It is not the geographical route but the usual route which has to be followed, though, in many cases, the one may be the same as the other. But the inquiry must always be, what is the usual route, and a route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels belonging to other lines or to other individuals. It is sufficient if there is a well-known practice of that line to call at a particular port.

These principles have been set out in at least two cases, one of which was decided in your Lordships' House; the first is *Evans* v. *Cunard Steamship Company Limited* (*sup.*), and the second *Frenkel* v. *MacAndrews and Co. Limited* (17 Asp. Mar. Law Cas. 582; 141 L. T. Rep. 33; (1929) A. C. 545). Each case, it is true, was concerned with a parcel of goods shipped on board a liner, and to that extent it may be said that there was a particular defined route or several defined routes known to be followed by the vessels of that line. But I do not think that the decisions turn solely upon that fact.

The observations of Lord Dunedin and Lord Sumner in *Frenkel* v. *MacAndrews and Co. Limited* (*ubi sup.*) are of more general application. "There may be," said Lord Dunedin, "either alternative routes or a customary route which in either case might displace the geographical route." And on the same page he quotes from *Evans* v. *Cunard Steamship Company* (*ubi sup.*) the words of Wills, J. "The description of the particular voyage agreed upon must be the keynote to which the bill of lading must conform. What is meant by 'the voyage from Bari to Liverpool'? Lord Herschell says the expression must be understood in a business sense. In *Glynn* v. *Margetson and Co.* (7 Asp Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351) there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports."

The noble and learned Lord proceeds: "That case puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ships really was."

Lord Sumner says: "Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection. Its effect was that the ship, having shipped the oil at Malaga, was to proceed 'via Levante' calling at various ports as far eastward and north-eastward

as Palamos, and returning thence, calling at other ports, until, having passed Malaga without calling again, she proceeded 'directo' for the United Kingdom. No question arises here as to the precise meaning of 'via Levante' or as to the ports to be called at and the order of the calls, which that expression may connote. This was shown to be a usual commercial route for the *Cervantes* to follow under the circumstances and to be the route which had been advertised for her for this voyage some time beforehand, and it was one which I think was reasonable under the circumstances. I cannot see that it is the less a reasonable and commercial route, though the evidence referred only to the ships of the respondents' own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion. The evidence further shows that these facts were well known to those of his employees to whom the plaintiff confided this part of his business, and the usual and reasonable commercial character of such a voyage was thereby strongly confirmed since no objection was taken."

It was said, however, on behalf of the respondents that the main ground of the decision in *Frenkel's* case (*sup.*) was that neither the port of departure nor the port of destination were set out in the bill of lading, and that for that reason only, evidence was admissible to ascertain the ports of departure and arrival and the course to be followed between them.

The speeches in your Lordships' House undoubtedly took the omission into consideration in reaching the conclusion at which they arrived, but I do not read the observations as confined to that ground or necessarily dependent upon it. I think that both your Lordships' house and the Court of Appeal took the wider view that in every case evidence is admissible to show what is the usual or a usual route and that if the evidence adduced is sufficient to establish a practice to follow a particular route, proceeding by that route would not be a deviation.

Such a conclusion in no way weakens the authority of or contradicts the principles laid down in *Leduc* v. *Ward* (*sup.*) and *Glynn* v. *Margetson* (*ubi sup.*). In those cases the question was not what was the route prescribed by the bill of lading, whether by custom or otherwise, as that to be followed, but whether it was permissible when once that route was ascertained to deviate from it.

In the present case no question of deviation from the contractual route arises. It is conceded that if the appellants were not entitled to proceed to Constanza as part of their ordinary route the deviation clause will not avail them.

Any doubt which I have felt in the present case has not been as to the principles applicable but as to whether the evidence was sufficient to establish the voyage via Constanza as a usual route for the appellants' vessels from Black Sea ports to America and other ports to be reached by ocean voyages. Upon consideration, however, I think there was enough to enable the learned judge rightly to find that a customary route was followed, and I see no necessity for differing from the view expressed by him and by Greer, L.J.

But in saying this I must not be taken to desire in any way to weaken the obligation of a shipowner to proceed by a usual course. The obligation remains but, as was recognised in *Frenkel's* case, evidence may always be adduced to show what the usual course is. It is in this, I think, that the majority of the Court of Appeal have erred. In their view evidence was not permissible; in my view unless a specific route is laid down in the charter-party or bill of lading it is always permissible and may be essential. No doubt *primâ facie* the route direct from Poti to Sparrow's Point through Istanbul would be the ordinary course, but I think that in this case we have evidence sufficient to show that the route had been varied and that the practice of proceeding to Constanza to bunker after loading had become a usual one. It is true that a considerable number of vessels proceeding from Black Sea ports do not call at Constanza for bunkers, and that if one is to take particulars of Poti and Novorossisk alone only about one-quarter of the ships proceeding on ocean voyages call at Constanza after loading. It is true also that the journey to Constanza lengthens the voyage by some 200 miles, and that shortly after the accident to the *Indian City* the cost of oil at Constanza increased and the appellants thereafter have taken their bunkers from Algiers instead of Constanza.

All these are matters to be considered, but a short usage, particularly where the obtaining of bunkers is concerned, may still be a sufficient usage to create a usual route.

I do not for myself place much reliance upon the argument that the representative of the respondents heard of and forwarded instructions as to the intention of bunkering at Constanza. He neither had power to nor did he purport to vary the prescribed route. Nevertheless it is, I think, an element to be considered, not as altering the contract but as showing the usual reasonable and commercial character of such a voyage.

In coming to this conclusion I find myself in agreement with Goddard, J. and Greer, L.J. and reach a conclusion which might have been that of Slesser, L.J. had he not thought no evidence as to the route to be followed was admissible. Nor do I find myself in disagreement with Clauson, L.J. when he says that a ship sailing from Poti to Istanbul would not pursue a usual course if she proceeded via Constanza. It might be difficult to prove that such a voyage was other than a deviation. But the transit with which we are concerned is one not to Istanbul but to Sparrow's Point and for such a voyage the increase in distance may be of little or no importance.

It is not necessary to prove a custom in the strict sense and the evidence given is, as I think, admissible and sufficient to establish the voyage via Constanza as a usual route.

I would allow the appeal and restore the judgment of the learned judge.

Appeal allowed.

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

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

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 23 *and* 24, *and July* 5, 6, *and* 7, 1939.

(Before LANGTON, J. assisted by Elder Brethren of Trinity House.)

The Polo. (*a*)

Collision in Bosporus—Rule that vessels proceeding up towards Black Sea must, "if it is possible and can be done without danger", follow left side of mid-channel, whilst those coming down from Black Sea must navigate close to Anatolian coast—Up-going vessel keeping close in to European shore — Down-coming vessel drifting over towards European shore—Starboard and hard-a-starboard wheel action by up-going vessel—Porting by down-coming vessel—Impact at right-angle in about centre of channel—Look-out—Persistence in wrong wheel action—Failure to stop or reverse—Both vessels equally to blame—Turkish Ministerial Decree of the 27*th December*, 1934, *art.* 2.

This was an action brought by the owners of the Greek steamship C. *against the owners of the British steamship* P. *for damages in respect of a collision which occurred between the* C. *and the* P. *in the Bosporus about five cables to the northward of Rumili Point and in about mid-channel on the night of the* 14*th November*, 1938, *in weather which was agreed to have been fine and clear. Each vessel attributed the collision and damage to the sole negligence of the other. The plaintiffs' case was that shortly before* 9 *p.m. on the* 14*th November*, 1938, *the* C., *while on a voyage from Braila to the United Kingdom, was in the Bosporus, coming down with the southerly current which was between one and two knots' force. In accordance with local rules, the* C. *was keeping to the eastward of mid-channel, and with engines working at half-speed ahead was making about five-and-a-half knots through the water. She was exhibiting the regulation lights, including the optional additional masthead light, and these were burning brightly. A good look-out was being kept on board her. In these circumstances those on board the* C. *observed distant about one mile, and bearing about half-a-point on the* C.'s *starboard bow, masthead lights and both side lights of a vessel which proved to be the* P., *and which was then rounding Rumili Point. The* C. *sounded a signal of two short blasts, and her wheel was ported a little. The* P. *sounded one short blast in reply, and the* C. *then repeated the signal of two short blasts and put her wheel hard-a-port. Another short blast was heard from the* P., *whereupon the* C. *again blew two short blasts, keeping her wheel hard-a-port. Immediately afterwards the engines of the* C. *were stopped and then put full astern, and three short blasts were sounded on the* C.'s *whistle, but the* P. *continued to come on at speed, altering course to starboard, and with her stem struck the starboard bow and anchor of the* C., *causing damage to the* C. *and forcing her round so that she came close to the shore and touched the bottom. As the* P. *approached the* C. *her green light shut in. The defendants' case, on the other hand, was that at about* 8.56 *p.m. on the day in question the* P., *which was on a voyage from Hull to Black Sea ports, was going up the Bosporus navigating against the current, the force of which they put at five knots. The* P. *was keeping to the European side of the channel, not steering a compass course but heading about N. She was making about nine knots through the water and exhibiting the regulation masthead (two), side and stern lights, all of which were burning brightly. A good look-out was being kept on board the* P. *In these circumstances the masthead and red lights of a vessel which proved to be the* C. *were observed by those on board the* P. *distant a little over a mile and bearing about one point on the* P.'s *starboard bow. Whilst the* P. *kept her course and speed, the* C. *was seen to cross on to the port bow of the* P., *and to be approaching with her red light still open. As, however, the* C. *did not cross on to her port side of the channel, the* P., *being unable on account of the proximity of the European shore to port her wheel, starboarded her wheel and blew a signal of one short blast on her whistle, to which shortly afterwards the* C. *replied with two short blasts. To this the* P. *replied with another signal of one short blast. Upon the* C. *again blowing two short blasts, the* P. *replied with one short blast and put her wheel hard-a-starboard. About the same time the* C.'s *red light shut in and her green opened, whereupon the* P. *immediately put her engines full-speed astern and sounded a signal of three short blasts, which signal was shortly afterwards repeated, but the* C. *came on and, swinging to port, struck the port bow of the* P., *doing damage. The plaintiffs blamed the* P. *for failing to comply with arts.* 23, 27 *and* 29 *of the Regulations for Preventing Collisions at Sea and with Caution No.* 3 *on Admiralty Chart No.* 1198. *The defendants alleged the failure on the part of the* C. *to observe the same articles of the Collision Regulations, and, in addition, art.* 2 *of the Ministerial Decree of the* 27*th September*, 1934, *relating to the Port of Istambul.*

Held, (1) *that the* C. *was to blame for navigating on her wrong side of the channel, thus placing the* P. *in an embarrassing predicament; the* C. *was also to blame for a bad look-out.* (2) *That the* P. *was also to blame, for having continued her starboard-wheel action and for not taking off her way in the face of the clearly*

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

manifested intention of the C. to correct her initial fault and to get back to her proper side of the channel as laid down by the local rule. His Lordship held both vessels equally to blame.

DAMAGES BY COLLISION.

The plaintiffs were the Kassos Steam Navigation Company, Limited, owners of the steamship *Chelatros* (3489 tons gross), belonging to the port of Syria, Greece. The defendants were Ellerman's Wilson Line, Limited, owners of the steamship *Polo* (1950 tons gross). The *Chelatros* was on a voyage from Braila to the United Kingdom, laden with a cargo of wheat; the *Polo*, on a voyage from Hull to Black Sea ports, partly laden with a general cargo. The collision occurred in the Bosporus in a position between Khanlijeh Point to the northward and Rumili Point to the southward and, as the learned judge found, if not actually in mid-channel, certainly not to the westward of it. The current in this reach of the Bosporus runs substantially in a southerly direction from the north, the water from the Black Sea being almost continuously higher than the water below in the Sea of Marmora, but at times this current is affected in certain parts by cross currents, thus imposing upon navigators, especially if not acquainted with these waters, a special duty of care. It was admitted in evidence that whilst the Master of the *Polo* knew the Bosporus very well, the Master of the *Chelatros* had not previously navigated a vessel through it.

In argument, it was contended on behalf of the plaintiffs that the fact that the *Chelatros*, when coming down the Bosporus, had crossed over to the westward was not the cause of the collision; that the position was similar to that for which the Port of London River By-laws provided in regard to navigation in the Thames; that the cause of the collision was the failure of those on board the *Polo* to make allowances for the *Chelatros's* westerly movement and that she should, as was required in the Thames, have given way to the *Polo* which was coming round a sharp bend (Khanlijeh Point) and navigating with the current. The *Polo* on becoming aware that the *Chelatros* was coming over to the westward, should have reversed her engines instead of starboarding and continuing to starboard, as she had done. For the defendants, it was alleged that the bad look-out kept on board the *Chelatros* was the cause of her not having kept to the eastern bank. The Master had chosen to attempt to get back to his proper side at a time when it was not safe for him to do so. The Master of the *Polo* had thereby been placed in a position of grave danger and the court should make every allowance for him on that score. Having regard to the fact that the current above Rumili Point set towards the western shore, it would have been unsafe for the *Polo* to have stopped her engines, as she would have got out of control.

Gordon Willmer, K.C. and *J. V. Naisby*, for the plaintiffs.

K. S. Carpmael, K.C. and *E. W. Brightman*, for the defendants.

Langton, J.—This is an interesting and far from simple case, and my first duty is to express the gratitude I feel towards counsel, who have given me great assistance, and towards my assessors, who have been equally helpful.

The collision from which the litigation arises took place between a Greek vessel, the *Chelatros*, and a British vessel, the *Polo*. The collision took place on the 14th November, 1938, at about 9 p.m. in the Bosporus. A good deal turns on the place of collision, and it is one of the factors to which I have had to address my mind. Broadly speaking, the circumstances were these: the *Chelatros*, a vessel of 3489 tons gross, and 360ft. in length, was coming down the Bosporus, on a voyage from Braila to the United Kingdom, and the *Polo*, a smaller vessel of 1950 tons gross and 300ft. in length, was going up the Bosporus, partly loaded with a general cargo. The draught of the *Polo* was 10ft. forward and 14ft. 1in. aft. The night was fine and clear, and there was a moderate north-easterly breeze. There was nothing in the condition of wind or weather to make the navigation specially difficult. As to the tide, on the other hand, there is a current in the Bosporus at the part at which this collision happened which is of exceptional force. The actual place of collision was above where the Devil's Current is marked on the chart as being in the full strength of its operation. But I think nobody denied that in the reach where this collision happened, between Khanlijeh Point to the northward and Rumili Point to the southward, the current runs, roughly speaking, in a southerly direction from the north, the water from the Black Sea being almost continuously higher than the water below in the Sea of Marmora. It is about this point, just below Rumili Point, that the current attains its maximum force. The current is affected at times, and in parts, by cross currents, and I am not pretending to find, as a fact, that there is a true run of current right down the reach. Indeed, the arrows on the chart indicate, and the Elder Brethren tell me, that it does not run absolutely true up and down. So difficult is navigation in this part that it is subject to a local rule, a rule issued from Istambul, as I understand—Constantinople. The passing rule, the navigation rule, in the Bosporus is this:

"All ships going out of the Bosporus towards the Black Sea must, if it is possible, and can be done without danger, navigate by following the left side of the centre line of the Bosporus (—that is to say, the European shore—) and all ships which enter the Bosporus coming from the Black Sea must navigate close to the Anatolian coast with the centre line of the Bosporus on their starboard side."

Now, it will be seen at once that that is the converse of the narrow channel rule in the Sea Rules, and vessels that follow that rule going up and keeping to their own port side will pass starboard to starboard in lieu of keeping each to their own starboard side of the channel and passing port to port as is ordained by Art. 25. It is to be observed that the words, "if it is possible and can be done without danger" are definite in that rule, and correspond to the words in Art. 25, "when it is safe and practicable." The width of the Bosporus, at the material points here, varies, but can be taken —again speaking broadly—as something about four cables, and no one in this case has disputed that it would have been perfectly safe, and perfectly practicable, for either of these vessels to have obeyed Art. 2 of the Ministerial Decree of the 27th December, 1934, and have kept to the side ordained by that Article. That is to say, it was for the *Polo* coming up to keep along the European shore, and it was for the *Chelatros* coming down to keep along the Asiatic side. In these circumstances, it is not surprising that each ship in their pleaded cases claims to have been acting accordingly.

The *Chelatros* claims that she rounded Khanlijeh Point and kept along round the Asiatic shore, and the *Polo* claims in like way that she rounded Rumili Point at a distance of a cable and kept along the European shore. The *Chelatros's* case is that she kept her course on the Asiatic side and found herself

green to green with the *Polo*; that she, the *Chelatros*, got further up porting and blowing a signal of two blasts, but that the *Polo*, for some reason, not only unexplained by the *Chelatros*, but quite inexplicable, starboarded her helm and threw herself across the course of the *Chelatros*. The *Chelatros* then continued to give signals indicating that she was porting, and ported her helm still further, finally went hard-a-port, and found herself in collision. Her pleaded place of collision is "in the Bosporus about midway between Khanlijeh Light and Rumili Point, and well over to the east side." That was the case that the *Chelatros* brought into court.

The case, on the other side, of the *Polo*, was that the *Polo*, having passed close—in evidence put at a cable—to Rumili Point, kept upon the European shore, and observed the *Chelatros*, having rounded Khanlijeh Point Light, drifting over on to the European side until she became fine on the port bow of the *Polo*, showing red to red. The evidence has been that the *Chelatros* got a point on the port bow of the *Polo* showing red to red. When the vessels approached in this way, the master of the *Polo*, who was assisted by a pilot, of whom I will say something in a moment, seems to have determined that he was in a difficulty in the sense that the *Chelatros* was on the wrong side and inshore of him, and that he had better break the local rule and starboard and attempt to pass the *Chelatros* port to port. He says that he gave no fewer than three starboard helm signals, and although at first he starboarded and steadied, and then starboarded a little more, he did, in the end, put the helm hard-a-starboard, and got into collision with the *Chelatros*.

It has to be observed here that I have had nothing at all in the way of a statement by, and no explanation of the absence of, the pilot of the *Polo*. The parties here have not been slow in obtaining all the local evidence they could get. By agreement the depositions of five fishermen have been put before me on behalf of the *Chelatros*, and the deposition of an ex-pilot, and another fisherman, on behalf of the *Polo*. There may be, as Mr. Willmer fairly admitted, a great number of reasons why the pilot of the *Polo* is not here, and there may be even more reasons why no statements have apparently been taken from him and no attempt made, by agreement, to get a statement or deposition from him. The fact remains that his pilot, who, the master says, was in charge of the navigation, is not here.

Now, addressing my mind to the two cases that I have given in broad outline, I should say something first about the credibility of the witnesses. Of the witnesses from the Greek ship I can only say this, that, at the time they gave their evidence, they did not impress me as being very careful or responsible observers, or people who were making any determined effort to tell me nothing but the truth. And when I attempt to evaluate their evidence in comparison with the other side, I am satisfied that the early part of their story is completely false. I do not think it is true for a moment that they ever got green to green with the up-going *Polo*, and I am perfectly satisfied that the master and the pilot of the *Polo* were not people guilty of such an immense piece of folly as to desire to charge across the course of a down-coming vessel which was coming down peacefully on her own side of the channel, while having all the room they could possibly desire to go up on their own side. I disbelieve entirely all the early part of the story of the *Chelatros*.

As regards the *Polo*, I wish I could say that I am in a position to accept their story in full. I am afraid that their account of their own manœuvres has been very much added to, or deviated from, by themselves. They were unhampered by any detailed account of a contemporaneous character in their log, and there have been various versions put forward by the master, Captain Hall, versions on paper which have been read to me in the shape of letters, protests, and so on. Having seen Captain Hall, and heard him cross-examined at great length, he did not, I am afraid, emerge by any means scatheless. He seemed to be very discontented—a feeling with which one may perhaps sympathise—at finding himself in court at all, and he seemed to resent exceedingly the process of cross-examination, which was conducted with perfect good temper and patience by counsel cross-examining him. But it was with very great difficulty that one could get Captain Hall to address his mind to any question and give to it any clear and definite answer. I make the allowance that he is not a young man and that the ordeal of cross-examination in this court is a considerable one, but I cannot say that I accept Captain Hall's version.

I think as to the early part that there is no difficulty at all in accepting it, and up to the point when he took action for the approaching *Chelatros* I am willing to act upon the main features of his account. I think there is every reason to do so from what I may call the internal evidence in the case. Captain Hall is an experienced seaman who knows this locality exceedingly well. He knows the navigation of the Bosporus, and he knows every point in the Bosporus, and it would take somebody a great deal better than Captain Sgourdeos of the *Chelatros* to make me believe that Captain Hall, being on his own right side, went away from that right side to the Asiatic shore for the pleasure of having a collision. I do not think that that is a sane story. What the captain did do at the point when he, or his pilot, or both together, took action, was this: I think he observed the *Chelatros* coming down, and drifting over to the European side. It is, perhaps, worthy of remark in passing that the *Chelatros*, for some reason unexplained, was proceeding at half-speed. I was advised by the Elder Brethren that although there is nothing wrong in coming down at half speed, yet a vessel is less able to be kept in perfect control in this tideway at half speed than at full speed, and there is no local regulation which would preclude her from going at full speed. Be that as it may, I find as a fact that Captain Hall, and the people on the *Polo*, saw the *Chelatros* coming down and coming over the middle line towards the European side. I do not think it is necessary to believe—I am not sure that it is claimed—that they got very close to the European shore, but they were over the middle line, and in such a way as to show their red light fine on the port bow of the *Polo*.

At this stage it will perhaps be right to deal with the place of collision. There is a certain amount of discrepancy, regarding north and south, as to where this collision happened, but on the view I have formed it happened about five cables to the northward, and slightly to the eastward, of Rumili Point. The position indicated by the master of the *Polo* would be only four cables; the position indicated and marked on my chart by the master of the *Chelatros* is some seven cables; I find as a fact that it was about five cables.

Much more important is the position as regards mid-channel. I do not know what Captain Hall may have said in Istambul, and it would not, perhaps, be either fair, or right, to put against him a statement which was only hearsay in the mouth of his agent. But in cross-examination there is no doubt that he agreed—and indeed the whole evidence in the case points unmistakably to it—

that the collision cannot have taken place, on the helm action of both sides, anything to the westward or on the European side of mid-channel. The *Polo* had been going up a cable from the European shore. On her own showing she went off four points—I think a little more—under starboard helm, and in the time it would take her to do that she could not have got to the place of collision—to any place of collision that would be to the westward of mid-channel. Similarly, if one takes it from the side of the *Chelatros*, the whole gravamen of the *Polo's* complaint against the *Chelatros* is that she got on to the European side and showed her red light to the red of the *Polo*. She came back, and came back very considerably, under port helm. She must, therefore, be nothing to the westward of the middle line—whether it was a little or rather more than a little on the Asiatic side I am not stopping to find, but it was not to the westward of the middle line.

The angle of the blow, again, has been a matter of much dispute and has ranged, I think, from an estimate by the second or third officer on the *Chelatros* of six points leading aft to four points leading forward. In my view the angle that is established is the angle spoken to by the only surveyor called on either side, Mr. Ross. I think Mr. Ross's diagram No. 1, giving four positions of the vessels in collision, is as near accurate as anything is at all likely to be. That gives the initial angle between the vessels as 89 degrees, and I think his reasoning was convincing as showing that the progress of the two vessels after the collision was very much as depicted by his drawing. I see nothing in the photographs, or in the evidence, that would displace Mr. Ross's very clear evidence on this subject.

We have, then, a position in which two vessels who were proceeding on opposite courses have come into collision at, practically speaking, a right angle. Much controversy has taken place in this case as to who whistled first, but what impresses me most in the matter is that both vessels whistled three times as their helm signal. I do not think that it is a matter of prime importance in this case to determine which vessel whistled first.

Mr. Carpmael, I think, with good reason, attacked the look-out of the *Chelatros*. He said that that vessel was allowed, negligently, to get on the wrong side of the channel, and I am prepared to find as a fact that the *Chelatros* did get negligently on to the wrong side of the channel in disobedience to art. 2 that I have read. He added too that she had a bad look-out. I am prepared to find also, as a fact, that she had a bad look-out, strengthened as I am in that by the fact that it was her case from the start, and it was the case of her officer in evidence, that the moment she saw the up-coming *Polo* she took action. If, as was said, she had been over on the Asiatic side and saw, as she says she did, the *Polo* on the European side, again it is demonstrable that she would not have taken action, she could not have wanted to take action. What she did was to take action as soon as she saw the *Polo*, because she, just as the *Polo* did, recognised that the two vessels were quite uncomfortably close.

The *Chelatros* was a loaded vessel coming down with the tide; the *Polo* was a partly laden, smaller vessel coming up against the tide. I have asked the Elder Brethren what were the probabilities, on the assumption that the two vessels acted practically together, and they tell me that if they had acted together the smaller and lighter vessel navigating against the tide would go off more quickly than the down-coming heavier vessel. They warn me to make allowance for the fact that one vessel may be handier on her helm than the other. Therefore, it would be unwise to imagine that the *Polo* necessarily went off a great deal quicker than the *Chelatros*. In making that allowance, they think it is not unreasonable, and I find as a fact, that these two vessels, acting as I, again, am certain they did, practically at the same time, went off to make this right angle of 90 degrees by an action of some 50 degrees on the part of the *Polo* and 40 degrees on the part of the *Chelatros*.

With that in one's mind, I am able to reconstruct a good deal of what happened. Each side, as I say, claims that they blew first. Mr. Carpmael claims that it was his signal that woke up the *Chelatros*. I am not prepared to find that as a fact at all. I think that these vessels had, by that time, got within a distance of under half-a-mile from one another. Again, I am not prepared to find as a fact what the exact distance may have been. It was something less than half-a-mile; it must have been more than a quarter of a mile for them to have been able to achieve the amount of helm alteration which they undoubtedly effected.

Starting, then, from a position of something between a quarter and half a mile, I have had to work out what their respective speeds were, and the time at their disposal. One cannot pretend to any exactitude. The *Chelatros* was coming down at, she says, half-speed, which I find as six knots. The *Polo* was going up at what she says was less than her complete full speed—something less than ten knots. I think it was certainly not less than nine-and-a-half, from all the indications I have of her passing the points below. Mr. Ross tells me that the speeds at the time of the collision were five to six knots on the *Chelatros* and eight to nine on the *Polo*. Mr. Ross again very fairly said that he was quite unable to quantify the speeds exactly, but he pointed to a very considerable lateral displacement of the *Chelatros*. He said: "I think the up-coming *Polo* must have had very considerable speed in order to do damage of that character."

The witnesses—Captain Hall especially—for the *Polo* claimed that they put their engines full speed astern for a period of some two minutes before the collision, and the engineer was called to verify that statement. I am sorry to say the engineer made a poor impression on me, and on Mr. Ross's evidence also it is quite palpable that they never did do anything of the kind. They may have got their engines astern for a period of about 20 seconds. I should think that that is the maximum which the *Polo* got her engines astern before the collision happened. So that I have valuable indications as to the kind of time at which the vessels acted. I have asked the Elder Brethren how long, in their estimation, it would take for these two vessels, with practically unreduced speed until the very last few seconds before the collision, to make the alteration to their respective angles, and they tell me it would take less than two minutes, but considerably more than one minute. The time at which I find these two vessels began to act was nearer two minutes than one.

Now I have to consider their relative culpabilities when I take the facts that I have found into consideration. The *Chelatros* coming down was negligently allowed to get on to her wrong side. She had a bad look-out, and she put the up-coming *Polo* into a position which not only the *Polo* recognised was a position certainly of discomfort, a position which certainly required some action, but a position which she, the *Chelatros*, considered was one that called for action, and I think the *Chelatros* thereupon took port helm action, which if it was not hard-a-port very soon became hard-a-port, in order to make the alteration which she effected.

I am not prepared to condemn the *Chelatros* for taking the action she did when she took it, but it was taken much too late and had already made a position of grave difficulty for the up-coming *Polo*. I have asked the Elder Brethren whether, in the circumstances, she ought not to have discontinued her port helm action when she heard the counter-signal of the *Polo*, indicating that the Polo was starboarding ; I have also asked them as to putting her engines astern. They advise me, as a matter of seamanship, that this vessel, coming down with so strong a tide, endeavouring to do what she could to remedy, even at a late hour, the result of her own negligence, could not be fairly said to be acting in defiance of good seamanship in continuing her movement and in not putting her engines astern. She was in this very strong current and it is quite clear that she could have got herself into grave difficulty by putting her engines astern, therefore, her offending seems to me to be limited —though it is a grave offending—to her original offence of making a position of difficulty by negligent seamanship and a bad look-out. I remark in passing that the master was, I think, making the Bosporus for the first time—at least making it for the first time downwards. He was not a man experienced in the navigation of the Bosporus, and he ought to have been specially on the look-out and very vigilant in keeping on his right side.

A point has been made that I should take notice of—the fact that the *Chelatros* after the collision made a round turn, and although it is said she struck the shore at some point in the turn with her starboard bilge she nevertheless succeeded in making a complete circle. It was said with great force that she never could have done that had she not started from the European side of mid-channel, and I want to say that I have been impressed with that point, because I think it is a good point. She certainly could not have done it had she been entirely over—well over—on the Asiatic side of mid-channel as she claimed to have been, but the point is discounted by an answer which Mr. Willmer gave that there is no doubt that by reason of the collision there was a considerable alteration of her heading and that she was helped round this turn to an extent which it is almost impossible to quantify. While, therefore, the point, broadly, is a good one and has done something to confirm me in what I should have found independently of it—viz., that she was coming down on the European side of the channel—it is not a point on which I rest my finding.

Now comes the case of the *Polo*. It is claimed by Mr. Willmer that the *Polo* was the sole offender—"be it so that I was on the wrong side of the channel, had the *Polo* merely kept on her way without ever altering at all she could have passed me, as the rule enjoins, starboard to starboard and there would have been no trouble and no collision." That form of armchair criticism, or being wise after the event, is, of course, a perfectly legitimate device of advocacy, but I have put to the Elder Brethren expressly the point as to what this man, Captain Hall, could legitimately have felt, on the finding of fact that I have now made. Assuming that the vessels were less than half a mile apart, and the *Chelatros* was still showing her red light fine on the port bow of the *Polo* in these narrow waters and in this current, was the master of the *Polo* justified in taking some action, or ought he to have gone straight over, as Mr. Willmer claimed he could have done ? They tell me that, in their view, from the point of view of seamanship, he had every right to be gravely disturbed.

Then comes the question, ought he to have done what he did ? Undoubtedly, the best thing that he could have done, in the circumstances, the correct thing to have done, was either to have stopped or at least to have slowed his engines. There was no necessity for him to keep on at full speed. He would be in perfect control against that tide at something much less than full speed, and he would have had far greater opportunity of dealing with a difficult situation. What he did was to begin to starboard. There is evidence which I do not neglect that the pilot told the helmsman to steady and it may be that at that point there was some disagreement between the master's views and the pilot's views. But I am not prepared to say that it is untrue that the pilot made, as it were, a tentative effort to starboard and then for a moment steadied. I do not think it can have been very long, but it may have been for a short moment.

In these circumstances, she undoubtedly heard—it may have been before, it may have been just after, but at the best, just after—unmistakable signals from the *Chelatros*, showing that the *Chelatros* was intending to come back. Now, at that there could be only one thing really for the *Polo* to do, which was to take off her way and give the protesting *Chelatros* every opportunity. It has to be observed that the *Polo* was at least a cable from the shore then, and if she had starboarded a little bit more she would have had water in which to port after she had got the *Chelatros's* signal. The waters were narrow and the currents were difficult, and, again, one does not desire to be critical about the action of the master of the *Polo* placed in a difficulty, but one cannot shut one's eyes to the fact that what he did was the worst thing in the world. He then went on with his starboard helm, keeping his speed, and not until the very last moment—not until 20 secs. before the collision at the outside—did it occur to him that he might at least prevent a serious collision by putting his engines astern. I think he acted too late for that action to be of any value. But during that critical time of a minute, or something more, he was doing the wrong thing in the face of serious danger. There was, it is true, the possibility of porting, but he had the imperative duty to take off his way, an imperative duty which hardly seems to have crossed his mind.

In these circumstances, what is the proper apportionment of blame ? It seems to me that it is impossible to distinguish between them. The *Chelatros* made the difficulty, and although in the end she cannot be blamed for the efforts she made to get out of it, she did put the *Polo* in circumstances of great difficulty. In those circumstances no one could blame the master of the *Polo* for not doing the ideally best thing. It is a quite different thing to do the wrong thing and to go on doing the wrong thing, and it is because he did the wrong thing in continuing his starboard helm and accentuated it by putting it to hard-a-starboard and by failing to put his engines astern, that the *Polo* must be held to blame.

Therefore, in my judgment, in this case both vessels are equally to blame.

There are one or two minor matters I should deal with. First of all as to the evidence of the fishermen, whose statements were read on behalf of the *Chelatros*, I can only say there is a curious family resemblance in the evidence they gave, and this family resemblance is only one of the criticisms to be directed against them. The evidence is, by no means, precise, and I cannot help a suspicion that the attention of these gentlemen was first called to either of the vessels by the fact that counter-whistling was going on between them. I cannot feel that it would be right to attach

importance to their evidence, inexact as it is as to who whistled first. With regard to their evidence respecting the place where the collision happened, it is unfortunately made far less valuable by the fact that they never state exactly where they were, so that it is difficult to say, or check, what they mean by saying that it took place 400 metres or 500 metres from the place where they were. On the other hand, Mr. Carpmael, for the *Polo*, produced almost a ready-made judgment from an ex-pilot who, as I say, has been conspicuous by his absence. Of course, I have had the temptation upon me of adopting a judgment which has been so readily made. I cannot feel, however, that a gentleman who is looking at it from the European shore really saw everything there was to be seen, and the judgment is so much the more positive than informative that I feel it would not be right to adopt it as my own. Therefore, from the point of view of the so-called independent evidence, I am afraid I have had very little assistance.

The result of the case, therefore, must be both ships equally to blame.

Solicitors for the plaintiffs, *Constant* and *Constant*.

Solicitors for the defendants, *Botterell* and *Roche*, agents for *Hearfield* and *Lambert*, of Hull.

May 22 *and* 25 ; *and July* 11, 1939.

(Before LANGTON, J.)

The Millie. (*a*)

Collision in Manchester Ship Canal — Limitation of liability—Whether owners of vessel sunk in canal and obstructing fairway can limit liability as against canal company in respect of expenses incurred by company in raising and removing the sunken vessel—Effect of public Act of Parliament on private Act—Merchant Shipping Act, 1894, *s.* 503 ; *Merchant Shipping* (*Liability of Shipowners and others*) *Act*, 1900, *ss.* 1 *and* 3 ; *Manchester Ship Canal Acts*, 1885, 1897 (*s.* 9), 1904 (*s.* 51), *and* 1936 (*s.* 32, *sub-ss.* (1) *and* (2)).

In this action, the plaintiffs, owners of the steam barge M., *sought a decree of limitation of liability in respect of the damages arising out of a collision between the* M. *and the Danish steamship* S. *which occurred in the Manchester Ship Canal on the 28th February*, 1939. *The* M. *sank and became an obstruction in the canal, and in pursuance of their statutory rights and duties, the canal company raised and removed her, thereby incurring considerable expense. In seeking to limit their liability, the plaintiffs, who admitted the collision was caused by the negligent navigation of the* M., *joined the Manchester Ship Canal Company as defendants, but the canal company contended that by virtue of sect.* 32 *of the Manchester Ship Canal Act*, 1936, *they were entitled to recover from the plaintiffs all expenses incurred in connection with the raising and removal of the* M., *and that in respect of the canal company's claim the plaintiffs were not entitled to limit their liability under the Merchant Shipping Acts. The other defendants did not appear and were not represented.*

Held, (1) *that, although the liability for the expenses incurred by the canal company was a liability arising under a private Act of Parliament, those expenses were not loss or damage caused to the canal company's property or rights within the meaning of the Merchant Shipping Act*, 1894, *s.* 503, *as extended by the Merchant Shipping* (*Liability of Shipowners and others*) *Act*, 1900, *s.* 1. (2) *That it seemed wrong to say, although the matter was doubtful, that the expenses in question were proximately caused by the negligent navigation of the* M. (3) *That, accordingly, the plaintiffs were not entitled to limit their liability as against the Manchester Ship Canal Company.* (4) *That as regard their claim to limit their liability in respect of the other defendants, the plaintiffs would be granted decrees of limitation.*

The learned judge added that had it been necessary for him to determine the question (*which, having regard to the way he had decided the case, it was not*), *he would have had great hesitation in holding that where a private Act of Parliament and a public Act were in conflict, the private Act, even though much subsequent in date, should be held to override the public one.*

LIMITATION ACTION.

The plaintiffs were William Cooper and Sons Limited, owners of the steam barge *Millie*, and they claimed declarations limiting their liability in respect of loss and damage caused by reason of a collision between the *Millie* and the Danish steamship *Sigrun*, which occurred in the Manchester Ship Canal on the 28th February, 1939. The plaintiffs' case was that on that day, the *Millie*, whilst on a voyage from the River Mersey to Manchester laden with sand, collided with the *Sigrun* in the Manchester Ship Canal immediately above Mode Wheel Locks, that she sank athwart the fairway and became an obstruction to vessels navigating the canal. The plaintiffs admitted that the collision, sinking, and obstruction were caused by the negligent navigation of the *Millie* by those on board her, but without the fault or privity of her owners. There was no loss of life or personal injury as a result of the collision and sinking. The *Millie* was raised, temporarily repaired, and otherwise dealt with by the Manchester Ship Canal Company, who, by letter dated the 7th March, 1939, informed the plaintiffs that the company held them liable for the expenses which the company might incur in raising and removing the wreck. These expenses had amounted up to the 14th March, 1939, to upwards of 1200*l*. Claims were also made or intimated against the plaintiffs by the owners of the Norwegian steamship *Lorentz W. Hansen*, the Danish steamship *Niobe*, the Norwegian motor vessel *Elisabeth Bakke*, for delay to those vessels occasioned by the sinking of the *Millie*, and the owners of the *Sigrun* had notified the plaintiffs that, should it be discovered upon an examination of that vessel in dry dock that

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

she had been damaged below the water line, they would hold the plaintiffs responsible. The tonnage of the *Millie*, ascertained in accordance with the provisions of the Merchant Shipping Acts for the purpose of limitation of liability, was 110.35 tons, and as the claims would exceed the aggregate amount of 8*l.* per ton of the vessel's tonnage as so ascertained, the plaintiffs offered to pay into court 882*l.* 16*s.* with interest at 4 per cent. being the aggregate amount of 8*l.* per ton of the *Millie's* tonnage.

Of the defendants only the Manchester Ship Canal Company appeared and were represented. They contended that under the Manchester Ship Canal Act, 1936, the Manchester Ship Canal Company not only had power to raise and remove all wrecks, but were also given the right to recover "all the expenses incurred" in so doing from the owners of the sunken vessel. Limitation of liability did not apply to a case such as this.

By sect. 503 of the Merchant Shipping Act, 1894:

"(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: (*a*) Where any loss of life or personal injury is caused to any person being carried in the ship; (*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (*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, vessel, 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 of their ship's tonnage."

By sect. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900:

"The limitation of the liability of the owners of any ship set by sect. 503 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 water, or whether fixed or moveable, by reason of the improper navigation or management of the ship."

And by sect. 3 of that Act:

"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."

By the terms of sect. 9 of the Manchester Ship Canal Act, 1897, certain provisions of the Merchant Shipping Act, 1894, including sub-sect. (2) of sect. 503 are expressly saved and applied to the Manchester Ship Canal Act, 1897.

Sect. 51 of the Manchester Ship Canal Act, 1904, provides a saving clause, as follows:

"Nothing in this Act contained shall exempt the canal or docks or the company from the provisions of the Merchant Shipping Act, 1894."

Sect. 32 of the Manchester Ship Canal Act, 1936, (omitting irrelevant parts) is as follows:

"(i.) Wherever any vessel is sunk stranded or abandoned in any part of—(*a*) any . . . canal . . . forming part . . . of the undertakings: . . . the company may if they think fit cause the vessel to be raised or removed. . . .

"(2) The company may recover from the owner of any such vessel all expenses incurred by the company under this section in connection with that vessel. . . ."

In the submission of counsel for the plaintiffs, this new statutory right given to the canal company by their Act of 1936, was subject to the provisions of the Merchant Shipping Acts in regard to limitation of liability, as a special local Act could not override the provisions of a general Act.

In the course of the hearing, the following cases were referred to: *Great Northern, Piccadilly and Brompton Railway Company* v. *Attorney-General* (98 L. T. Rep. 731 (H. L.); (1909) A. C. 1); *Hall Brothers Steamship Company* v. *Young* (*ante*, *p.* 269; 160 L. T. Rep. 402; (1939) 1 K. B. 748 (C. A.)); *Furness Withy and Co. Limited* v. *Duder* (18 Asp. Mar. Law Cas. 623; 154 L. T. Rep. 663; (1936) 2 K. B. 461); *The Moslyn* (17 Asp. Mar. Law Cas. 367; 138 L. T. Rep. 403 (H. L.); (1928) A. C. 57); *The Chr. Knudsen* (18 Asp. Mar. Law Cas. 347; (1932) P. 153); *The Ella* ((1915) P. 111); *The Molière* (16 Asp. Mar. Law Cas. 470; 132 L. T. Rep. 733; (1925) P. 27); *The Countess* (129 L. T. Rep. 325; (1923) A. C. 345).

Judgment was reserved.

James A. Petrie for the plaintiffs.

Eustace W. Brightman for the defendants, the Manchester Ship Canal Company.

Langton, J.—This case raises directly a matter of some importance both to shipowners and to canal and harbour authorities. The matter comes before the court in a suit for limitation of liability by the owners of the steam barge *Millie*. On the 28th February, 1939, the *Millie* collided with the Danish steamship *Sigrun* in the Manchester Ship Canal. In consequence of the collision the *Millie* sank in the fairway of the canal, and became an obstruction to vessels navigating in the canal. The Manchester Ship Canal Company, in pursuance of their statutory rights and duties, raised the *Millie* and removed her from the canal, and have, in so doing, incurred considerable expense.

The plaintiffs in the present action claim to limit their liability in respect of the collision between the *Millie* and the *Sigrun*, and have joined as defendants to the action the Manchester Ship Canal Company. By their statement of claim they admit that the collision was caused by the negligent navigation of the *Millie* and offer to pay into court the sum of 882*l.* 16*s.*, which is the aggregate amount of 8*l.* a ton on the tonnage of the *Millie* ascertained according to the Merchant Shipping Acts.

The Manchester Ship Canal Company refuse to admit that the plaintiffs can limit their liability in respect of the expense incurred in raising and removing the *Millie*. In support of this refusal they point first to sect. 32 of the Manchester Ship Canal Act, 1936, by which they claim to be entitled to recover all the expenses that they have incurred in connection with the *Millie*, and secondly, they say that none of the Merchant Shipping Acts which deal with limitation of liability apply to an expense such as they have incurred in raising and removing the barge.

At a first glance the wording of sect. 3 of the

Merchant Shipping (Liability of Shipowners and others) Act, 1900, seems to have been drawn in such wide terms as to cover any liability to which an owner might have become subject as a result of a negligent collision. It will be remembered that this Act incorporates and extends the already wide power of limitation conferred upon shipowners by sect. 503 of the Merchant Shipping Act, 1894, and it will be noted that sect. 3 of the 1900 Act expressly declares that the right of limitation "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." Upon the wording of this section Mr. Petrie, for the plaintiffs, founded a strong argument that no subsequent private Act, such as the Manchester Ship Canal Act, 1936, could be held to have taken away what this general Act had intended to confer. The answer put forward on behalf of the canal company was that no such right ever had been conferred either by the 1894 Act or by the 1900 Act, and that in any case the right conferred by sect. 32 of the Manchester Ship Canal Act, 1936, was absolute in its terms and the Act contained no saving of any section or portion of the Merchant Shipping Acts.

If I had to determine this matter upon the latter of these arguments, I should have had great hesitation in holding that where a private Act of Parliament and a public Act were in conflict, the private Act, even though much subsequent in date, should be held to override the public one. Upon this point one cannot but bear in mind the language of Lord Loreburn, speaking as Lord Chancellor, in the case of *Great Northern, Piccadilly and Brompton Railway Company* v. *Attorney-General* (98 L. T. Rep. 731 (H. L.) ; (1909) A. C. 1, at p. 6): "It may be a hard case, but the result cannot be avoided by appealing to this clause, sect. 40, in a private Act. The courts will take every means of defeating an attempt by a private Act to affect the rights either of the Crown or of other persons who have not been brought in. And I desire to say for myself that I am not satisfied in regard to these private Acts of Parliament that there are sufficient means either for securing accurate drafting or for safeguarding the rights of persons other than those who are concerned in the private legislation." I have, however, formed the view that this extremely difficult and important matter falls to be determined rather upon a close consideration of the wording of the statutes in question, than upon a mere broad estimation of the comparative values of a public and a private Act.

It is necessary first to examine with care the full and exact limits of the rights conferred by Parliament upon shipowners in the matter of the limitation of their liability. For this purpose one must turn first to sect. 503 of the Merchant Shipping Act, 1894. By this section the owners of a ship are afforded the relief of limitation in the four cases enumerated in sub-sect. (1) under the sub-headings (*a*), (*b*), (*c*), and (*d*). It is sufficient for the present purpose to note that all these sub-headings are concerned with damage or loss caused to persons or things on board either the ship doing the damage or some other ship which has been affected by the damage. It was not until the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, that the area of this right of limitation was extended to a wider field than that of carrying ships. By sect. 1 of this Act of 1900 the right of limitation was extended 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, . . ." I have already adverted to the wide terms and the extension contained in sect. 3 of this Act, and it only remains to be noted that these include "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, . . ."

At this point it is, I think, instructive to compare the wording of the Manchester Ship Canal Act, 1936, upon which the canal company rest their case. Omitting irrelevant words sect. 32 runs as follows :

"(1) Whenever any vessel is sunk stranded or abandoned in any part of—

"(*a*) any . . . canal . . . forming part . . . of the undertaking ; . . .

the company may if they think fit cause the vessel to be raised or removed. . . .

"(2) The Company may recover from the owner of any such vessel all expenses incurred by the Company under this section in connection with that vessel. . . ."

Since the canal company claim that the expenses which they have incurred in raising and removing the *Millie* do not fall under any of the heads through which the shipowners are entitled to claim limitation, the wide words of sect. 1 of the Merchant Shipping Act of 1900 fall to be specially considered. I do not go back to sect. 503 of the Act of 1894, because it seems to me to be unarguable that the expenses in question could possibly fall under any of the sub-headings there enumerated. In sect. 1, however, of the 1900 Act the right is extended to "any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable." It is evidently arguable that although expenses may not be loss or damage strictly so-called, equally the right of the ship canal company to an unobstructed fairway has in this case been interfered with, and it is no great stretch of language to describe the price of restoring that right as a form of loss or damage. The difficulty, however, is to see how the loss or damage in question is caused to any property or rights. To state the matter as exactly as possible : the right of the ship canal company is infringed by an obstruction : the removal of the obstruction causes a certain expense : but neither the right nor the property of the company has thereby suffered any loss or damage. To illustrate the matter in legal language, the canal company in seeking to recover these expenses under its statutory rights is proceeding rather by way of a simple action for debt than by laying its action in tort against the shipowner.

This class of test in matters of construction, namely, to attempt to gauge the meaning by applying notionally the appropriate legal remedy, has lately received sanction in the Court of Appeal in the case of *Hall Brothers Steamship Company* v. *Young* (160 L. T. Rep. 402; (1939) 1 K. B. 748 (C.A.)). In that case, and in an earlier case of *Furness Withy and Co.* v. *Duder* (154 L. T. Rep. 663 ; (1936) 2 K. B. 461) the whole matter in dispute came to be resolved upon this class of test. I do not pretend to cite these cases as authority in the present instance, since, in both of them, the words for construction were far narrower than the wide language of sect. 1 of the 1900 Act. I only recall them here to justify the application of the same kind of criterion as one of the tests in what is to me a nicely balanced question of language.

Or again, taking the words of sect. 1 under consideration, all the rights thereby conferred are in respect of loss or damage caused "by reason

of the improper navigation or management of the ship." A point much pressed by Mr. Brightman, for the canal company, was that the expenses which he claimed in full were not in any proper or legal sense caused by reason of the improper navigation of the *Millie*, but were caused by the fact of her having become an obstruction, which in turn was due to the fact that she sank in that particular spot, and not to the remote cause of her sinking, which happened to be the negligence of those on board of her. If, for example, the *Millie* had been sunk without negligence on the part of those in charge of her in the self-same spot, her owners could have had no answer to the claim by the canal company to recover the expense of raising her. It would, indeed, be remarkable, though not without precedent (see *The Mostyn*, 138 L. T. Rep. 403 (H. of L.); 1928 A. C. 57) if the canal company were placed in a worse position because those who had infringed their rights had been negligent than they would be if the shipowners had not been negligent. I own that I am not very much impressed by this line of argument, not only because it did not suffice to convince the House of Lords in the case of *The Mostyn*, but also because it is possible to imagine that the Legislature, if they addressed their minds to the point in question, might have felt that the dock company should be made to share, together with others who had suffered damage, an abatement of recompense in order to relieve the shipowner hardly pressed by a grievous calamity. On the other hand I am very greatly impressed by the inadequacy of the language, even in this widely drawn section, to cover an item of expense not immediately connected with the actual occurrence of the original loss. Without attempting to enter too deeply into the baffling problem of causation, I doubt whether this expense can be said to be directly caused by the improper navigation of the *Millie*, and for both of these reasons, though principally upon the ground of the inadequacy of the language, I am of opinion that the statute does not cover the expenses incurred by the canal company.

Only one decision was cited to me upon this aspect of the question. In the case of *The Chr. Knudsen* (1932, P. 153), Bateson, J. decided that expenses incurred in and about the lighting, buoying, removal and destruction of a barge sunk in the Stalbridge Dock, Garston, constituted "damage done by a ship within sect. 22, sub-sect. (1) (*a*) (iv.) of the Supreme Court of Judicature (Consolidation) Act, 1925." The learned judge states the question tersely and even bluntly on page 156 as follows: "The question, therefore, which I have to determine is whether the claim of the plaintiffs is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stalbridge Dock, and the *Chr. Knudsen* did damage to that dock by sinking the barge and causing an obstruction in the dock." I do not know whether it is necessary for me to try to determine whether I should have arrived at the same conclusion as Bateson, J. in that case. It is perhaps sufficient to point out that the statute then under consideration was not the present one, and the language is by no means identical. The distinction between actions for tort, which are plainly covered by the words "any claim for damage by a ship," and actions for debt, which may be only a remote result from damage done by a ship, was not apparently brought to the mind of the learned judge in argument. I cannot, therefore, regard this decision, much as I respect it, as being a direct authority upon the present point, and apart from this decision the point appears not to be covered by any authority at all.

At the outset of his argument, Mr. Brightman, for the Canal Company, laid great stress upon the case of *The Countess* (1922, P. 41, and 1923 A.C. 345; 129 L. T. Jour. 325). In that case the *Countess*, by negligently putting her engines ahead instead of astern, crashed through the dock gates belonging to the Mersey Docks and Harbour Board, and, after doing, and receiving, serious damage, had to be beached. The actual damage done to the defendants' docks and works amounted to 10,014*l.* Independently, however, of this large sum, the Mersey Docks and Harbour Board incurred another expense amounting to 1048*l.* in patching the *Countess*, getting her into dock and repairing her for her owners. The controversy in the case, which was eventually carried to the House of Lords, centred upon certain questions which affected the plaintiffs' right to limit their liability. So far as the Mersey Docks and Harbour Board were concerned, the larger figure of 10,014*l.* was greatly in issue in the litigation, but from first to last no point was taken concerning the amount of 1048*l.* It was throughout conceded that this amount stood outside the limitation proceedings and would have to be paid in full. At first sight these facts seem to amount to at least a precedent, if not an authority, in favour of Mr. Brightman's contention; but upon closer examination I do not think that they afford me any guidance whatever. To begin with, it is quite obvious that so far as this smaller figure is concerned, since the *Countess* was in danger where she lay beached, the Harbour Board could have claimed at least this sum, and might well have been awarded a great deal more if they had claimed by way of salvage. Secondly, the sum in question was at least partly incurred by way of repair to the plaintiffs' vessel, an item for which the plaintiffs could under no circumstances limit their liability; and, thirdly, since the whole matter went by agreement so far as this smaller sum was concerned, and one cannot know at this date all the circumstances of this agreement, it would be very unwise to regard the case as constituting even a precedent on one side or the other.

There remain to be considered some further questions concerning the history of the private legislation of the Manchester Ship Canal.

The leading statute dealing with the Manchester Ship Canal appears to have been the Manchester Ship Canal Act, 1885. Since that time numerous Acts have dealt with the rights of the company, and with portions of the property which it owns, usually referred to therein as the "undertaking." In some of these Acts express reservations have been specially inserted in order to save the rights of other parties under the Merchant Shipping Acts. For present purposes the most striking clause of this character is perhaps clause 9 of the Manchester Ship Canal Act, 1897. By the terms of this section certain provisions of Part VIII. of the Merchant Shipping Act, 1894, referring to the liability of shipowners, including sub-sect. (2) of sect. 503, are expressly saved and applied to the Manchester Ship Canal Act, 1897. Furthermore, the section contains an express rignt to shipowners to limit their liability for any damage to a certain portion of the canal which, as I understand it, includes the part in which the accident at present under consideration took place. Again, in 1904, another private Act was passed, containing, in sect. 51 thereof, a saving of certain provisions of the Merchant Shipping Act, 1894, and of other general Acts relating to Docks and Harbour dues.

The existence of these savings in some of the private Acts, and the absence of any such saving in the Manchester Ship Canal Act, 1936, provided ground for argument upon both sides in the present case. Mr. Petrie, for the plaintiffs, pressed upon me the saving in sect. 9 of the Canal Act, 1897, as showing that the canal company were not intended by Parliament to be on any special or privileged footing as regards a shipowner's right to limit his liability. Against this, Mr. Brightman, for the canal company, pointed with force, first, to the fact that the Canal Company's Act of 1936, which conferred the special right as to recovery of all expenses, was bare of any saving clause such as was contained in the earlier private Acts. He contended that it was inconceivable that such an omission could possibly have been made *per incuriam*. Secondly, he argued that the absence of such a saving clause afforded strong confirmation of his reading of the Acts relating to limitation of liability of shipowners, since this very pointed omission afforded evidence of the difference which the Legislature intended to draw between a right to limit in respect of damage or loss on the one hand, and these special or remote expenses on the other.

To sum up, the three principal points in favour of the shipowners' contention are, first, that the words both of sect. 1 and of sect. 3 of the 1900 Limitation Act are extremely wide. The words of sect. 1 seem almost designed to cover any form of damage and expenditure; they even refer to rights on land or on water. Secondly, the words in sect. 3 are definite in applying the Act to cases arising under a private Act of Parliament, and the Act upon which the Manchester Ship Canal Company relies is a private Act of Parliament. For the reasons I have stated I do not think that the liability in question can properly be classed under the heading "loss or damage," but it cannot be denied that it is a liability which arises under a private Act of Parliament. Thirdly, the judgment of Bateson, J. in *The Chr. Knudsen*, although not an authority directly in point, undoubtedly gives to the shipowner great warrant for the argument that this class of expense falls within the wide words of the statute. Against this there appear to me to be strong points in favour of the canal company. First, on a close examination of the words upon which the shipowners are compelled to rely, a fair interpretation of these words does not seem to include the expense in question. Secondly, upon the application of the rule of proximate cause it seems, although a matter of doubt, to be wrong to say that this expense was proximately caused by negligence. The statute gives relief against all damage or loss caused by negligence, but it does not necessarily give relief in respect of incidental expense arising out of some special circumstances which supervene after the first effects of the negligence have already been exhausted. Thirdly, there is the noticeable absence of any clause saving the rights of limitation conferred by the Merchant Shipping Act in a class of private statute where such savings have often been made, and as to which the full force of Lord Loreburn's observations in the case of *Great Northern, Piccadilly, and Brompton Railway Company* v. *Attorney-General* hardly applies, since it cannot be imagined that the Manchester Ship Canal Company could get a private Act through Parliament without the ship-owning body being at least fully aware of the powers against themselves which were being asked for and granted. In conclusion, I would say that the point appears to me to be a nicely balanced one, and in the absence of any guidance from previous authority the best interpretation which I can put upon the terms of these statutes results in favour of the Manchester Ship Canal Company. Accordingly, the plaintiffs' claim to limit their liability against these defendants in respect of this head of expense fails.

Leave to appeal granted.

Solicitors for plaintiffs, *Pritchard, Sons, Partington*, and *Holland*, agents for *Batesons* and *Co.*, of Liverpool.

Solicitors for defendants, the Manchester Ship Canal Company, *Hill, Dickinson*, and *Co.*

June 15 *and* 16, *and July* 10, 11, *and* 12, 1939.

(Before LANGTON, J., assisted by Elder Brethren of Trinity House.)

The Mathura. (*a*)

Collision off Dungeness — Dense fog — One vessel on voyage from Schiedam to Vancouver sounding "lying stopped" signals —Other vessel on voyage from Calcutta to London proceeding up English Channel blowing fog signals—Engines of "lying stopped" vessel put slow ahead just prior to collision—Alteration of course by other vessel— Up-going vessel held two-thirds to blame; other vessel, one-third—Costs in same proportion—Regulations for Preventing Collisions at Sea., arts. 15, 16, 23, 27 *and* 29.

This was an action brought by the owners of the Norwegian motor vessel B. *against the owners of the British steamship* M. *in respect of a collision between the* B. *and the* M. *which occurred in the English Channel about three miles to the southward and westward of Dungeness in thick fog at about* 11.45 *a.m. on the* 5*th March*, 1938. *The case for the plaintiffs was that shortly before* 11.45 *a.m. on the day in question, the* B., *a steel twin-screw motor vessel of* 4883 *tons gross, was in the English Channel about three miles S.W. true from Dungeness whilst on a voyage from Schiedam to Vancouver, B.C., in ballast. The* B., *which had previously been in collision in about the same position with the steamship S. W., was lying, with her engines stopped, stationary in the water, and was sounding signals of two long blasts for fog at regulation intervals. In these circumstances those on board the* B. *heard a signal of one long blast, apparently right ahead, and a long way off. The* B. *sounded two long blasts in reply, and thereafter signals of one long blast from the other vessel and of two long blasts on the* B. *were exchanged. As, after some time, the vessel ahead appeared from her signals to be approaching rapidly, the* B. *put her engines full speed astern and sounded three short blasts on her whistle. As the* B. *began to gather sternway, a signal of one long blast was heard from another vessel, which appeared to be right astern of the* B., *and*

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

accordingly the B. *stopped her engines and then put them slow ahead in order to take off her sternway. Thereafter the engines of the* B. *were again stopped, it being observed that the* B.'s *heading had altered meanwhile to about N.W. magnetic. On becoming stopped in the water, the* B. *sounded two long blasts on several occasions, receiving in reply signals of one long blast from the approaching vessel which, however, now appeared to be bearing about abeam on the* B.'s *port side. After an interval, as the approaching vessel appeared to be drawing aft, the* B. *put her engines slow ahead, and sounded one long blast on her whistle. As the* B. *gathered headway, a vessel, which afterwards proved to be the* M., *came into view about* 100 *yards distant, and bearing a little forward of the* B.'s *beam. As the* M. *was seen to be approaching at speed and to be heading for the bridge of the* B., *the* B. *put her engines full speed ahead, and her wheel was ordered astarboard, but before the latter order was carried out, the* B.'s *wheel was ordered and put hard aport in an endeavour to swing her stern clear of the* M. *The* M. *continued on at speed, however, and with her stem struck the* B. *just abaft the engine room, doing damage to the* B. *In their defence, the defendants denied negligence, and their case was that the* M., *a steel screw steamship of* 8890 *tons gross, whilst on a voyage from Calcutta to London, was, on the* 5*th March,* 1938, *in the English Channel to the southward and westward of Dungeness, proceeding upon a course of N.* 56 *degrees E. true and at a speed of about five knots through the water, and sounding long blasts for fog in accordance with the regulations, when, shortly before* 11.33 *a.m. those on board her heard two long blasts from a vessel (which afterwards proved to be the* B.), *apparently bearing on the* M.'s *starboard bow. The* M. *immediately stopped her engines and sounded a signal of one long blast in reply; the vessels thereafter continued to exchange these signals. As the* B. *broadened on the* M.'s *starboard bow, the* M. *altered her course* 15 *degrees to port, and thereafter worked her engines at "slow ahead," "dead slow," and "stop," as required to maintain steerage way. Shortly afterwards, in order to avoid getting too close to a tug and tow on her port side, the* M. *was brought back on to her original course of N.* 56 *degrees E. true, maintaining steerageway and sounding signals of one long blast at regulation intervals. The* B. *was heard to be sounding signals of two long blasts until a signal of one long blast was heard from her, when the* M.'s *engines were immediately put full speed astern, and three short blasts were sounded on the* M.'s *whistle. It was then that the* B. *loomed up in the fog, distant about* 400*ft., and bearing about two to three points on the* M.'s *starboard bow. Three short blasts were again sounded on the* M.'s *whistle, but the* B., *coming on and swinging to starboard, struck the stem of the* M. *with her port side aft, causing damage to the* M. *The* B. *was heard to sound three short blasts, but those on board the* M. *were unable to say what was the precise moment at which they heard them. It was alleged by the plaintiffs that those in charge of the defendants' vessel had failed to comply with articles* 16, 27 *and* 29 *of the Collision Regulations, whilst the defendants, who blamed the* B. *for the collision, alleged that those on board her had failed to comply with arts.* 15, 16, 23, 27, *and* 29. *The place of collision having been found by the learned judge to be substantially as pleaded by the plaintiffs, namely, three miles, as near as might be, to the S.W. of Dungeness,*

Held, (1) *That the* M. *was to blame for excessive speed and alteration of course.*

(2) *That the* B. *was to blame for going slowly ahead just before the collision, after having intimated to the* M. *that she was lying stopped in the water.*

(3) *That the blame should be apportioned as to two-thirds upon the* M., *and as to one-third upon the* B.

(4) *That the costs should follow the apportionment of blame.*

DAMAGE by collision.

The plaintiffs, Messrs. Westfal Larsen and Co. A/S, were the owners of the Norwegian motor vessel *Brimanger* (4883 tons gross, and 2999 tons net register, 415ft. in length and 56ft. in beam, fitted with Diesel engines of 625 h.p. nom.), belonging to the port of Bergen. The defendants were Messrs. Brocklebank, Limited, of Liverpool, owners of the steamship *Mathura* (8890 tons gross and 5480 tons net register, 501ft. in length overall and 63ft. in beam, fitted with oil-fuelled steam turbine engines of 1147 h.p. nom.). At the time of the collision, the *Brimanger* was in ballast, the *Mathura* laden with a general cargo. Each vessel alleged that the collision was due to the negligence of the other. Both parties denied that there had been any negligence on the part of those in charge of their own vessel. The angle of the collision (which occurred in dense fog in the English Channel about three miles south-west of Dungeness and at about 11.45 a.m. on the 5th March, 1938) was found by the learned Judge to have been between 70 and 80 degrees, the parts of the vessels which struck being the stem and starboard bow of the *Mathura* and the port side of the *Brimanger* just aft of her engine-room, about opposite the forward end of No. 4 hatchway. The remaining circumstances of the collision appear sufficiently from the headnote and the judgment. The case of the *Haarfagre* (64 Ll. L. Rep. 69) is referred to by Langton, J. in the course of his judgment, as regards the duty of vessels lying stopped in the water, and, as will be seen, was applied by the learned judge in the present instance. In that case Langton, J. held a vessel (the *British Reliance*) partly to blame for a collision in fog because, having stopped, she then went ahead when the bearing of the other vessel (the *Haarfagre*) was not sufficiently ascertained and in circumstances in which she might have led that other vessel to imagine that she was still stopped, and because she did not stop immediately she again heard the other vessel ahead.

H. G. Willmer, K.C. and *Vere Hunt*, for the plaintiffs.

K. S. Carpmael, K.C. and *E. W. Brightman*, for the defendants.

Langton, J.—This has proved a most difficult and troublesome case and owing to nobody's fault it has run an unusual and rather an unhappy course.

The collision in question happened as long ago as the 5th March, 1938. I have been hearing the evidence from the two sides at various dates during this year—June and July of this year—and I have had only a continuous run of the case during the last two days of argument. A case which is presented in that fractional way, after a long interval, necessarily suffers from the start, and the case has been complicated in the present instance by the unusual character of the records of both sides. I think it is the length of time, together with the unusual character of the records, which has made really a considerable difficulty in the case. Some features, however, have emerged clearly, and it is from the clear features that I have been forced to make up my mind.

The ships in collision were the plaintiffs' ship, the *Brimanger*, a twin-screw motor vessel, belonging to the port of Bergen, of 4883 tons gross and 415ft. in length, and the defendants' vessel, the *Mathura*, a larger vessel of 8890 tons gross, a single-screw turbine, of 501ft. in length.

On the day in question the *Brimanger* had been coming down the Channel in light trim and bound from Schiedam to Vancouver, British Columbia, in ballast, and the *Mathura*, which was heavily laden, was coming up Channel on her voyage from Calcutta to London. About fifty minutes—I say advisedly "about" because none of the times on the *Brimanger* is very precise—about fifty minutes before the collision with the *Mathura*, the *Brimanger* had had a collision, in the neighbourhood of Dungeness, with a vessel called the *South Wales*. I am told that that collision is the subject of litigation, and, therefore, I would say nothing about it, and really, as far as this case is concerned, there is very little to be said about it in any event. Suffice it to say that the *Brimanger's* people say that the collision with the *South Wales* happened somewhere about three miles to the south-westward of Dungeness and that the collision they had subsequently, some fifty minutes later, happened near about the same locality.

Round this question of the place of collision a great deal of controversy has raged in the present case. The *Mathura* says that the collision happened six miles to the southward and westward of Dungeness, and the importance of that feature is that it makes the run of the *Mathura* from a position off the *Royal Sovereign* Lightvessel very much the less to the place of collision and in proportion as that run is the less, so is the speed of the *Mathura*—a most important factor in the present case. I have heard arguments at very great length, but a very great deal depends on one's estimate of time. I have had the assistance of the Elder Brethren and they have given me their calculation to add to the various calculations that have been made by learned counsel. I am satisfied, on the evidence and on my understanding of the calculations—the calculations point, the *Mathura* says, to not less than six miles to the south and westward—that, as the *Brimanger* says, the place of collision was about three miles to the south-west of Dungeness. That, I know, has this additional force, that it coincides really with the main features of both sides. I have been much pressed by Mr. Carpmael, for the *Mathura*, to say that the story I have had from the Norwegian vessel the *Brimanger*, was a tissue of falsities, that it was not the real truth and that the real truth lay with the *Mathura*. I cannot accept that at all; and I do not think that it is at all a justifiable criticism of the evidence and it was not the impression which the Norwegian witnesses made on my mind. Captain Lange, the master of the Norwegian vessel, met Mr. Carpmael most fairly in cross-examination. He admitted what was put to him as errors very frankly and he gave me the impression of a man who was trying his best. Equally, I should like to say of Captain Hanna, the experienced master of the *Mathura*, that I acquit him of any desire to deceive by an invented story. But I think that both these masters have been inexact, and I think that of the two Captain Hanna has been much the more inexact. I will detail, in a moment, my reasons for so saying and pass to one or two of the matters which rest upon solid ground.

In finding the place of collision, which I do clearly, at three miles, as near as may be, to the S.W. of Dungeness, we have something to begin with. Secondly, there is the angle of the blow. As to that, the parts of the vessels which struck were the stem and starboard bow of the *Mathura* and the port side of the *Brimanger*, just aft of her engine-room and in a strong place about opposite the forward end of No. 4 hatchway. I had very good evidence from Mr. Foster, on behalf of the *Brimanger*, and some evidence also, which I have taken into account, from Mr. Blackett, on behalf of the *Mathura*. I prefer the evidence of Mr. Foster because it seemed to me that he has made a more exhaustive study of the whole subject, and on his showing the angle was 70 degrees. Mr. Blackett made it a little wider—80 degrees. Of the two, as I say, I prefer the evidence of Mr. Foster. I am sure Mr. Blackett will not imagine I am treating him with any disrespect when I say that in this case I prefer the evidence of Mr. Foster—supported by the various drawings and measurements—that the angle was probably nearer 70 degrees than 80 degrees. There again there is something solid upon which one can build.

When one comes to the records of the vessels one is on very difficult ground, but, as regards the speeds at collision, again, I think, I have something upon which I can build with some certainty. There again the surveyors differed, but not by a great deal, and I am satisfied from the evidence that I have heard, and again taking the records such as are reliable, that the speeds of these vessels at collision were: the *Brimanger*, about four knots; and the *Mathura*, about three knots.

Now, going back to such material as is reliable on the records, the trouble about the *Brimanger's* records is that they are curiously involved and at times contradictory. The collision, according to the *Brimanger*, may have taken place at 11.45, at 11.44 or at 11.40, and it is very unusual to find in documents apparently carefully kept, such an extraordinary discrepancy. Again, when one tries to put them together—that is to say, taking the deck log and the engine-room log together—one gets into every kind of difficulty. They seem to have had the most haphazard methods on that vessel of time-keeping. One finds in the deck log that at 9.53 the clock was put back fifteen minutes, and no one could give any reasonable account of why that time should have been selected to put the clock back fifteen minutes. Turning to the engine-room record one finds, in a rather unlikely place, a note that the clock was put back thirteen minutes at 11.38, and there does not seem any particular reason why 11.38 should be selected as the moment to correct the engine-room time, nor why different times should be selected for putting back the

different clocks. Apart from that, the times, as far as the material times are concerned in this case, seem to have started with some discrepancy. The deck record reads: "At 3.10 fog set in. Speed was reduced and gave fog signals." The engine-room record gives: "Stand-by 3.15 o'clock, slow ahead 3.20." It would rather seem at that moment that the engine-room was ten minutes ahead of the deck, but as the clocks were then jumping about in the way I have suggested it is almost impossible to marry these two records so as to make any consecutive sense of them.

As regards the collision itself, on the other hand, no one can blame the *Brimanger* for not giving an entirely detailed account in their log. As I have already pointed out, the details are so full as to be confusing. Three different times are given for the collision. They evidently attempted at some time to put down into their log everything that they knew or remembered, or thought that they remembered, about this collision, and the detail is as full as anyone can desire.

When one turns to the *Mathura's* records they seem to have kept their records with such an amount of economy as to have produced nothing at all. It is a material part of the whole case for the *Mathura* that, after hearing the fog signals of the *Brimanger* in the first instance, she altered her course some 15 degrees to the northward from N. 56 E., and then, after running some ten minutes, came back again to the original line, or to within a degree of it, and ran another ten minutes before the collision. I fail to find in her record any note of this remarkable alteration at all. Moreover, I have the working chart of the master of the *Mathura*, in which he noted down carefully, as he would, his times of passing objects, such as the *Royal Sovereign*, and the course run from the *Royal Sovereign*. This course line is completely innocent of any alteration of any kind, and it is very difficult to imagine at all that a careful experienced seaman running in the narrow waters of the Channel in dense fog, making points like Dungeness at very close range, would in fact make a serious alteration of 15 degrees, and transfer his course, which had been calculated at some two cables to the northward of its original line, without making any record on his chart or in any book of this quite serious alteration. Therefore, as far as the records of these two ships are concerned, there is very little that I find that I can rely upon.

What is agreed that I can rely upon is that the last engine movement of the *Mathura* was to put her engines full astern for a period of between two-and-a-half and three minutes before the collision actually happened. That is recorded in the engine-movement book of the *Mathura*; it is recorded in the bridge movement book of the *Mathura*; and Mr. Willmer fairly says for the *Brimanger* that he does not challenge those books so far as they record movements. He challenges very sharply the estimates of speed that this powerful vessel, the *Mathura*, puts upon her various movements—what she calls her half speed, her slow speed or her dead slow speed. But he does not challenge the actual movements recorded, and, indeed, unless one imagines that the people from the *Mathura* had in fact concocted a not very rosy story, it would be difficult to challenge those last movements.

Now, if one takes this engine movement book—which is confirmed by the bridge movement book in all essentials, except as to half a minute here and there—it appears that for seven or seven-and-a-half minutes, in the last ten minutes before the collision, the *Mathura* was moving at either "dead slow" or "slow ahead"; that after being some four-and-a-half and four minutes "slow"—the last two ahead movements—she stopped and put her engines "full astern." Now, one has to estimate what was the speed of this vessel, the *Mathura*, what she had been doing, and what was her speed. I have asked the Elder Brethren, on the assumption that at the time of collision she was making three knots, if she had put her powerful engines astern for two-and-a-half to three minutes before the collision, what speed she was making before that time, and they tell me not less than seven knots. Now, Mr. Willmer has put forward many calculations as to the speed of the *Mathura*, and on all those calculations I have come to the conclusion, on what the Elder Brethren have advised me, that this vessel must have been making something like seven knots when she put her engines full astern three minutes before the collision.

Now that throws a flood of light on the speed and method of approach of the *Mathura* to this place of collision. She says that she heard the whistle of the *Brimanger* some twenty minutes before the collision—we will assume in her favour that that is possibly, and broadly, right. She says that having heard it she made various engine movements, and one need not trouble very much about them. Naturally the records in her engine movement book "stop" at 11.9. Considering she was not in collision, on her own time, until 11.33½, no one can complain that she did not stop, at any rate, in accordance with the rules, on hearing the other vessel's whistle. She stopped well before the collision. One finds the same record in the bridge movement book at 11.19. The original stop for the *Brimanger* was earlier still, and again recorded some ten minutes earlier. It has been no part of the attack upon her that she made any breach, either technical or real, of the fog rules by not stopping on hearing the other vessel. What is said of her is that, having stopped, she went on, and went on at far too great a speed, and that her speed was the principal contributory factor to this collision.

Now comes the question of her alteration of course. Taking what Captain Hanna has said as to the course record, I have to say that I do not accept that. I am not saying that it is an invention, in the sense that Captain Hanna was foolish enough to invent the fact that he put his helm to port and put his helm to starboard again. No officer wants to come and tell me that he altered his helm twice when approaching another vessel in fog. Their only other witness who is here is his helmsman. It may be said, in the circumstances, that he was the principal witness that could support him, but there is no record of it, and his account of why he did it does not convince me at all. He says that he hauled up to the northward 15 degrees because he heard the pilot boat blowing. I made, I think, some natural criticism at an early stage of the fact that I saw nothing in the pleadings about it. That was immediately removed by Mr. Brightman telling me that it was in his original instructions. Of course, when Mr. Brightman tells me that, I accept it at once from him. I am not pretending to say that this was a pilot boat which Captain Hanna first thought of in the witness-box, but I think the process in his mind, as nearly as can be accounted for, was that, having no record, he perhaps, with the assistance of his helmsman, said: "Why did we alter?" and then he thought that they altered for the pilot boat. It occurred to him, in the circumstances, that the helmsman had heard the pilot boat, but he had not. He never heard the pilot boat blow, and we know, in truth and in fact, that the pilot boat was never to the westward of Dungeness—it was picked up somewhere to the eastward of Dungeness, and no one heard the pilot

boat at all. I am afraid the pilot boat is a myth and that Captain Hanna is completely wrong when he says that he altered for the pilot boat. He never did anything of the kind, nor did he alter—although he says he did now—15 degrees to the northward.

What I am afraid he did was that as he approached this vessel, the *Brimanger*—as many seamen do feel in the circumstances—he felt some uncertainty as to where she was. He was also navigating under difficult circumstances with two other vessels on his port side running up to the northward of him, the first a tug and tow and the second an American vessel, and we now know from the *Brimanger's* side that there was another vessel astern slightly to the southward of the *Brimanger*. Hearing, it may be, any of those whistles, or all of them, or feeling that he was getting too much to the southward, I think it is true that Captain Hanna altered his course and altered it, not once, but twice, and a worse thing for him to have done it is difficult to imagine. I am not losing sight of the fact that Mr. Carpmael pressed upon me the idea that the *Brimanger* was not apparently confused by his alteration of course, because they seemed to imagine him as keeping a fairly steady bearing from them. But here was the *Mathura* approaching the *Brimanger* in what I am advised was a totally unseamanlike way and in what from my point of view I hold to have been a negligent way. I think it is wrong for a vessel approaching another in fog to alter her course unless there is some good and sufficient reason for it, and I do not find—cannot find—that there was any good and sufficient reason for the *Mathura* to alter her course either to the northward or to the southward in the way in which she did in this case. It seems to me that that was a wrong and negligent thing to do, and the Elder Brethren have advised me that it was a most unseamanlike thing to do.

But the gravamen of the charge against her is speed, and I am satisfied that she was coming from the *Royal Sovereign*, in these circumstances of dense fog, much too fast, and that she put her engines ahead—what she called from "dead slow" to "slow"—and got a speed which she, a big unwieldy vessel, was unable to get off when the really dangerous moment occurred. She says that she can get 70 per cent. of her power astern. The Elder Brethren have taken that into account in the estimates they have made, and, accepting that she was getting off her way, that she was going much too fast and approaching the *Brimanger* in an unseamanlike way, to my mind, is now beyond controversy.

Now I come to the *Brimanger*. There, as I say, there is no lack of record. Her story is, if possible, over documented, and her master was a frank person. The difficulty is to understand exactly why she made what Mr. Willmer has frankly admitted was a mistake in coming ahead at the last moment. It may be that the nerves of the master of the *Brimanger* were somewhat shattered by the previous collision and were none too steady at this moment, but otherwise her conduct, which had been eminently prudent during the greater part of the approach of the *Mathura*, seems almost inexplicable at the last venture. Having been in collision at 10.55 with the *South Wales*, she appears to have held herself as best she could, with very little current at the time, off Dungeness, as far as one can glean from the information on the chart—she appears to have held herself in much the same position for some half an hour until she heard the whistle of the approaching *Mathura*. Her first action on hearing the whistle of the *Mathura* was everything that one could have desired. She was stopped in the water, and she gave proper signals of two long blasts, and at another time, when she felt it would be prudent to go astern, she gave three short blasts, all of which were heard, and apparently appreciated, on board the *Mathura*. Then, finding she had got stern way, she came slow ahead and brought herself again to a standstill, but, at an unlooked-for moment and at a very short time before the collision, she made up her mind that she ought to help the approaching *Mathura* by going ahead. "I went ahead," the master said, "to get out of his way."

I had a case not very long ago—the *Haarfagre* (64 Ll. L. R. p. 69)—in which I expressed what I felt as regards the duty of a vessel lying stopped in the water, and neither counsel seems to have criticised those observations at all sharply; in fact, they seemed to accept them as being a fair estimate of the duty of a vessel in those circumstances. It has been put as high as saying that a vessel which is blowing two long blasts invites the other to come ahead and pass her. I said in that case—and I see no reason at all to withdraw from what I said—that that is putting the matter too high. It is not an invitation. On the other hand, it is, as I said there, a very clear advertisement that the vessel is stopped. The vessel which blows two long blasts can have no complaint if the other vessel comes ahead and takes steps to pass her; and, therefore, I went on to say, the vessel that has blown for a considerable period a signal of two long blasts ought to be very, very careful about coming ahead again. She should only do it in circumstances that she feels make it imperative on her part to do it. It is very apt to confuse the person who has heard her blow the two long blasts and has made up his mind that that is a vessel stopped in the water, and who has taken action accordingly.

As I say, I see no reason to depart at all from what I said in the case of the *Haarfagre*, and the result is that the *Brimanger* must also be to blame. The *Brimanger* came ahead—came cautiously ahead—but came ahead in a way which I think undoubtedly led to this collision. She did not come ahead with speed, but had she remained where she was I think there can be no doubt that this collision would have been avoided—narrowly avoided, but avoided. But having lost her headway and also being angled somewhere up to the northward—between north-west and north—she came ahead and came really across the course of the approaching *Mathura*. Had she only been on her original heading all might have been well, but this case illustrates, even more than what I said in the *Haarfagre*, the danger of a vessel which has been stopped coming ahead again for an approaching vessel. It is a commonplace among seamen that if you lose your way you are almost certain to lose your heading, and there is no doubt that this vessel lost her heading considerably, and she proceeded on a heading between north and north-west across the course of the *Mathura*. The two vessels came into sight at a distance which is variously estimated at between 400ft. and 150ft.—as far as I can say from the various movements, probably at something less than 300ft.—and then the *Brimanger* put her engines full speed ahead. I am not blaming her for that. The Elder Brethren advise me that, in the circumstances, it was good seamanship. She had to avoid being hit in the engine-room, if she possibly could, and undoubtedly, by putting her engines ahead in the way she did, she did avoid being hit in the engine-room. If she had not put her engines full ahead she certainly would have been hit, as far as one can calculate the matter. So that that last movement of putting her engines full ahead was not negligent, and, in the

result, she was struck in a comparatively strong place opposite the forward end of No. 4 hatchway. She is, therefore, to blame for one thing, and one thing only, namely, for coming ahead when it was not necessary to do so, and coming ahead after she had lost her headway.

In these circumstances, one has to apportion the blame, and I have no doubt that the major portion of the blame falls upon the *Mathura*, but the blame to be apportioned to the *Brimanger* is not slight. Therefore, I think the proper proportion should be two-thirds and one-third—the *Mathura* two-thirds to blame for the collision, and the *Brimanger* one-third to blame.

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

Solicitors for the defendants, *Hill, Dickinson* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 20, 21, 22 *and* 23, *and July* 18, 1939.

(Before SCOTT, FINLAY, and DU PARCQ, L.JJ., assisted by Nautical Assessors.)

The Hurunui; Foyster v. New Zealand Shipping Co., Limited (a)

Collision—Claim for loss of life by personal representative of member of crew—Vessels on crossing courses—Duty of stand-on vessel where no action taken by give-way vessel—Art. 21, *Note, of Regulations for Preventing Collisions at Sea, construed.*

This was an appeal from a decision of Sir Boyd Merriman, P. in an action to recover damages under the Fatal Accidents Act, 1846, *and the Law Reform (Miscellaneous Provisions) Act,* 1934, *instituted in the Admiralty Court by M. F. F., the widow of a member of the crew of the Lowestoft steam drifter* R. *who was drowned in a collision between the* R. *and the liner* H. *which occurred on the morning of the* 19*th November,* 1937, *off Lowestoft in hazy weather, and as a result of which the* R. *was sunk. The plaintiff's case was that, between* 9 *and* 10 *a.m. on the day in question, the* R. (95 *tons gross*), *which was bound from Lowestoft to fishing grounds in the North Sea, was about six miles to the southward and eastward of Lowestoft. According to the only survivor of the crew of ten hands of the* R., *the cook, the weather at the time was hazy, visibility being moderate; there was a light wind, and the tide was flood of a force of about one knot and setting to the southward; the* R. *was on a southerly and easterly course and was proceeding at full-speed ahead, making about eight knots through the water. In these circumstances, he observed a steamship which afterwards proved to be the* H., *about one to one-and-a-half miles distant and bearing, as he thought, a little forward of the* R.*'s starboard beam. The* R. *maintained her course and speed, but the* H., *without taking any or any sufficient action to aid in averting a collision, came on and with her stem struck the starboard side, well aft, of the* R., *causing the* R. *to sink almost immediately afterwards with the loss of all hands excepting himself. Whilst admitting that the* R. *was to blame for the collision, the plaintiff alleged that those on board the* H. *were also negligent in that they failed to keep a good look-out; failed to take such action as would best aid to avert a collision, when collision could not be avoided by the action of the* R. *alone; failed to ease, stop or reverse their engines in due time or at all; failed to give any warning of their approach; failed to indicate their manœuvres by the appropriate or any whistle signal; and failed to comply with the Note to Art.* 21 *and with Arts.* 27, 28, *and* 29 *of the Regulations for Preventing Collisions at Sea. The defendants denied liability and claimed that the collision was solely due to the negligent navigation of the* R. *Their case was that shortly before* 9.24 *a.m. on the* 19*th November,* 1937, *the* H. (9315 *tons gross*) *whilst on a voyage from London to the River Tyne partly laden with a general cargo, was in the North Sea about five miles E.S.E. of Lowestoft High Light. The wind was south-easterly, a moderate breeze, there was a slight haze and the tide was setting to the southward and was of about two knots force. The* H. *was on a course of N.* 15° *E. true, she was making about eleven knots through the water and a good look-out was being kept on board her. In these circumstances a number of fishing vessels were observed by those on board the* H. *off Lowestoft, and, as the* H. *got nearer to them, those on board her particularly observed the* R. *distant about one to one-and-a-half miles, bearing about two-and-a-half to three points on the* H.*'s port bow, and on a course crossing that of the* H. *at approximately right angles. The* H. *kept her course and speed, those on board her keeping a careful watch of the* R. *until it was seen that a collision could not be avoided by action on the* R. *alone, when the wheel of the* H. *was put hard-a-starboard and a signal of one short blast was sounded on her whistle. The engines of the* H. *were stopped and immediately afterwards put full-speed astern, three short blasts being sounded on her whistle, and a double ring of full-speed astern was given on her telegraph, but the* R. *came on without taking any steps to avoid a collision and struck the stem of the* H. *with her starboard side about amidships. Very shortly afterwards the* R. *sank. The defendants blamed those on board the* R. *for negligently failing to keep a good look-out; failing to keep clear of the* H.*; attempting to cross ahead of the* H.*; failing to ease, stop or reverse the engines of the* R. *in due time or at all, and failing to comply with arts.* 19, 22, 23, *and* 29 *of the Regulations for Preventing Collisions at Sea. In the court below the learned President had held that, whilst the* R. *was admittedly to blame, the* H.

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

was also to blame in that she had failed to comply with the Note to Art. 21 *of the Collision Regulations by not reversing her engines soon enough.*

According to art. 19 *of the Collision Regulations, when two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side must keep out of the way of the other, and by art.* 22 *every vessel which is directed by the Rules to keep out of the way of another vessel must, if the circumstances of the case admit, avoid crossing ahead of the other.*

Art. 21 *is as follows: "Where by any of these Rules one of the two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."*

Art. 27 *provides that in obeying and construing the Rules, due regard must be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the Rules necessary in order to avoid immediate danger.*

Held, (1) *that the learned President was right in holding that this was not a case in which art.* 27 *could be invoked, but* (2) *that the language of the Note to art.* 21 *assumes that the give-way ship will continue to endeavour to perform her duties, especially her duty under art.* 19, *and therefore that the "aid" of the stand-on ship should primarily be directed to helping the give-way ship to carry out that duty, that interpretation of the Note being supported by the words "alone," "also" and "aid." The Note leaves the duty of the give-way ship unimpaired.* (3) *That if the pilot of the* H. *was wrong in not reversing until he knew the* R. *was not going to alter course (and the court was not prepared, on his explanation of his reasons for the (wheel) action which he took, to hold that he was wrong), it would not be right to treat such an error of judgment, if error there was, as a ground for judicial condemnation of him for negligence, and that the pilot could not be blamed for deciding to abstain from reversing at the first moment when he recognised that action under the Note was incumbent on him nor for postponing it till he knew that the need for keeping maximum steering control of his ship had passed, as a consequence of the wholly unexpected refusal of the* R. *to alter course.* (4) *That upon the evidence, as soon as ever it was plain to the pilot of the* H. *that the* R. *was not going to alter course in response to his signal of one short blast, he went full astern, and that he did so without any such delay as could be regarded as blameworthy in the Admiralty Court.* (5) *That accordingly the Note to art.* 21, *as construed by the Court of Appeal, did not warrant the decision of the learned President; that the* R. *was alone to blame; and that the appellants were entitled to judgment, with costs both in the Court of Appeal and below.*

CLAIM for loss of life in collision.

The plaintiff was Mrs. May Florence Foyster, of Kessingland, who sued the defendants on behalf of herself and her five children for damages in respect of the death of her husband, William Foyster, the engineer of the Lowestoft steel screw steam drifter *Reclaim*, drowned when that vessel sank after a collision with the defendants' steamship *Hurunui* of Lowestoft on the morning of the 19th November, 1937. The defendants were the New Zealand Shipping Company, Limited, owners of the *Hurunui*. The *Reclaim*, a vessel of 95 tons gross, 86.3ft. in length and 18.6ft. in beam, fitted with engines of 34 h.p. nom. and manned by a crew of ten, all, save one, of whom lost their lives in the collision, was bound from Lowestoft to fishing grounds in the North Sea and, according to the account given by her cook, the only survivor, was on a southerly and easterly course, making, at full speed ahead, about eight knots through the water. The *Hurunui*, a steel screw steamship of 9315 tons gross and 5808 tons net register, 470ft. in length, 62ft. in beam, fitted with double reduction geared turbines of 1018 h.p. nom., and manned by a crew of seventy-three hands all told, was on a voyage from London to the Tyne, laden with a part general cargo, steering a course of N.15 degrees E. true and making about 11 knots through the water, the tide being southerly of about one or two knots force. Although the pleaded case on behalf of the plaintiff was that the *Hurunui* was first observed when she was about one to one-and-a-half miles distant and upon a bearing which the only survivor of the crew of the *Reclaim* estimated to have been a little forward of that vessel's starboard beam, the *Reclaim*, the give-way vessel upon whom a duty was cast by the Collision Regulations to keep out of the *Hurunui's* way, took no action at all. The *Hurunui*, on the other hand, as the stand-on vessel, kept her course and speed in accordance with her duty under the Regulations, until her pilot estimated—at a time which was stated in evidence and accepted by the Court below to have been about forty seconds before the collision—that the moment had come when, it being clear to him that the vessels were so close to each other that a collision could not be avoided by the action of the *Reclaim* alone, the *Hurunui* must, in accordance with the obligation cast upon her by the Note to Article 21 of the Regulations, take such action as would best avert collision. That action consisted in hard-a-starboarding the wheel of the *Hurunui* (and sounding the appropriate whistle signal) with a view to giving the *Reclaim* more sea-room. At that particular moment, the distance between the vessels, as found by the learned President, was between one-and-a-quarter and one-and-a-half cables. This hard-a-starboarding by the *Hurunui* was followed very shortly afterwards by the stopping and then reversing of her engines, a double ring of full speed astern being given, but there appeared, according to the evidence, to have been an interval of about twenty seconds between wheel and engine action. The learned President, on these facts, held that although the *Hurunui* could not be said to have taken action too late, the action which she first took when realising that a collision could not be averted by action of the *Reclaim* alone was not the best to avoid a collision, in that whatever else she did at that moment the *Hurunui* ought then to have put her engines full astern, and that when she did put them astern it was too late.

On the hearing of the appeal, counsel for the appellants contended that the view which the learned President had taken of the *Hurunui's* duty under the Note to Art. 21 was erroneous, and that at the time when she first took action those on board her were entitled to expect that the *Reclaim*, who, up to that moment, had done nothing, would wake up on hearing the *Hurunui's* signal of one short blast and take such action as, aided by the action taken by the *Hurunui*, might have avoided the collision. On behalf of the respondent, it was contended in that not ordering their engines full astern at the moment when they took action, those on board the *Hurunui* were guilty, not merely of an error of judgment, but of a delay in taking the proper action which amounted to negligence.

Scott, L.J.—That is a very serious proposition, is it not?

Counsel.—No. Seconds are of the gravest importance when vessels are so close and are going at such a speed.

Their Lordships reserved their decision, but before the Court rose, Scott, L.J. said that the court had put to the Nautical Assessors the following questions to which they had replied as follows:—

Q. 1. What ought the pilot of the *Hurunui* reasonably to have expected the *Reclaim* to do on hearing the one blast signal from the *Hurunui*?—A. To wake up and put her wheel either hard-to-port or hard-to-starboard.

Q. 2. What was the latest point in time or distance at which it ceased to be possible for the *Reclaim* to avoid collision without any action by the *Hurunui*?—A. About three of the *Reclaim's* lengths from the *Hurunui's* track.

Q. 3. What action could the *Reclaim* have taken which would have prevented the collision (*a*) at the moment just before, or just after the pilot of the *Hurunui* blew his one short blast, and (*b*) at the moment when the pilot of the *Hurunui* blew his three short blasts?—A. (*a*) Turn either way; (*b*) turn to port, as it was getting too late to turn to starboard.

Q. 4. Would any and if so what risk to the *Reclaim*, or danger of impeding any action the *Reclaim* might take, have resulted if the order "Full speed astern" had been given (*a*) instead of, or (*b*) in addition to the order "Hard-a-starboard"? A. The answer to each part of the question is in the affirmative if the *Reclaim* had starboarded; but in the negative otherwise.

In the course of the hearing in the Court of Appeal, the following cases were referred to:—*The Bywell Castle* (4 Asp. Mar. Law Cas. 207 (C. A.); 41 L. T. Rep. 747; (1879) 4 P. D. 219); *The Tasmania* (6 Asp. Mar. Law Cas. 517 (H. L.); 63 L. T. Rep. 1; (1890) 15 App. Cas. 223); *The Utopia* (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C. 492); and *The Heranger* (19 Asp. Mar. Law Cas. 250; 160 L. T. Rep. p. 241; (1939) A. C. 34).

Lewis Noad, K.C. and *E. W. Brightman* for the appellants (defendants).

R. F. Hayward, K.C. and *H. L. Holman* for the respondent (plaintiff).

Scott, L.J.—This is an appeal by the New Zealand Shipping Company, Limited, the owners of the steamship *Hurunui*, from a judgment of the learned President holding her to blame in an action in which the personal representatives of one of the crew of the *Reclaim*, a steam drifter of the port of Lowestoft, were plaintiffs. The *Reclaim* had been sunk by collision with the *Hurunui*, all ten hands of the drifter being drowned except the cook. It is a crossing case in which the *Hurunui* was the stand-on ship. The *Reclaim*, as the give-way ship, beyond all question was to blame, but she is not a party to the action; no question of apportionment of blame arises for decision; the conduct of the *Reclaim* is only material in so far as it affected the conduct of the *Hurunui*. The ground for the decision of the learned President was that, in order to comply with the Note to Art. 21, the *Hurunui* ought to have reversed earlier than she did. *Primâ facie* that is a decision with which the Court of Appeal should be very slow to disagree, but the application of the Note to the facts of the present case raises certain aspects which have, so far as I know, not been considered in any reported case, and they have led me to the conclusion that, in spite of the above presumption, we ought in this case to differ from the learned President's judgment.

The collision took place in daylight between 9 and 10 a.m. on the 19th November, 1937, in the North Sea about five miles E.S.E. of the Lowestoft High Light. There was a slight haze, but visibility was fair. The *Hurunui* was proceeding on a course of N. 15 degrees E. true at about eleven knots; the *Reclaim*, with other fishing drifters, was coming out into the North Sea on an easterly course. At the material time the course steered by the *Reclaim* was at about right-angles to the course of the *Hurunui*, with the *Hurunui* on her starboard hand. It was, therefore, the duty of the *Reclaim*, under Arts. 19 and 22, to keep out of the way of the *Hurunui* and, if she crossed her course, to do so by starboarding and passing astern of her.

The *Hurunui* was 470ft. long, 9315 tons gross register, drawing 19½ft. forward and 21½ft. aft, with some 4600 tons of cargo on board, and a resultant displacement of about 11,000 tons; she had double reduction geared turbine engines, giving her a full speed of twelve-and-a-half knots on sixty to sixty-five revolutions.

The distinguishing feature of this case is that drifters like the *Reclaim* have a very small turning circle, and are capable of altering course very quickly and in a very small water space—and this characteristic is well known to North Sea pilots. The pilot of the *Hurunui*, a Trinity House pilot of thirty years' standing, with long experience of the North Sea and consequently familiar with the behaviour and capabilities of drifters, was in charge of her navigation, with the second and fourth officers assisting.

The *Reclaim* was 87ft. long and was proceeding at about eight knots. Until shortly before the collision a similar drifter of the same size but rather more engine power, called the *Marshal Pak*, was quite near her on her port side and proceeding on a parallel course.

The captain of the *Marshal Pak* was called as a witness at the trial and was the only independent witness in the case. He said that the *Reclaim* was a similar craft to his own and that such drifters were so handy for manœuvring that even at full speed they could, with the helm hard over, change direction to the extent of 180 degrees in a turning circle of 180ft. As the two drifters proceeded and the *Hurunui* came nearer, the master of the *Marshal Pak* expected the *Reclaim* to give way; but, as she did not and seemed to be keeping her course and speed, he decided to act on his own. He accordingly slackened speed and starboarded under the stern of the *Reclaim* with a view to passing astern of the

approaching *Hurunui*. In fact, he passed so near to the *Reclaim* that the *Marshal Pak* fouled the latter's log line. Shortly after this, as the *Reclaim* still made no sign of altering course, the pilot of the *Hurunui*, who was watching her closely, came to the conclusion that it was time for him to come to her aid in order that with his assistance a collision might be averted. Art. 21 is in these terms :—

> "Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.
>
> "*Note.*—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

As a pure matter of construction, the language of the Note seems to me to assume that the give-way ship will continue to endeavour to perform her duties, especially her duty under Art. 19, and, therefore, that the "aid" of the stand-on ship should primarily be directed to helping the give-way ship to carry out that duty; the words "alone," "also," and "aid" all point to that interpretation.

There were at the trial various discrepancies in the estimates of times and distances, both as between different witnesses and as between the story told in the box by witnesses and their own statements in depositions and other documents made shortly after the accident, when memories were fresher; and a Court of Appeal ought to be extremely slow in differing from the trial Judge on such matters; and this is especially so if he has absolved the witnesses from any intention to mislead—as he did in his judgment in the present case. I make this observation here because in quoting passages from the transcript I desire to guard against the impression that I am necessarily accepting without qualification the particular estimate of the witness. But with that reservation a quotation from the pilot's evidence-in-chief will help to an understanding of the position. Mr. Noad was examining the pilot of the *Hurunui* in chief: "From the point of time when the *Marshal Pak* gave way and passed under the stern, can you tell my Lord in your own way what happened? A.: I watched her very, very carefully, and watched the bearing, which did not appreciably change, and I was amazed that she stood on, seeing that her colleague had given way. When she got within about one-and-a-half cables—one-and-a-quarter cables—something like that, very close, I could see then that she could not avoid collision, unless I took some action to help her. So I ordered the wheel hard-a-starboard, gave one blast on the whistle; I watched for a few seconds—I could not say how long, it might have been twenty seconds—and then rang the engines full astern and gave three blasts on the whistle. Q.: Did you mean to convey that you vary the engines over from 'full ahead' to 'full astern,' in one order? A.: No, I paused at the 'stop.' Q.: Perhaps you will just describe to my Lord more in detail? A.: I had my hand on the telegraph, and pulled it to 'stop,' and I watched for a few seconds, and I shortly rang again, 'full astern.'" Then Mr. Noad asks this: "With reference to your order to the helm, how did that come with reference to the telegraph order you have just spoken of, to 'stop'?" A.: The helm was hard-a-starboard when she was going full speed ahead, and it continued to be hard-a-starboard till I stopped for a few seconds, and then went full astern. Q.: What I wanted you to tell my Lord was, the order 'Hard-a-starboard' was how long before the order 'Stop'—that is what I wanted to get? A.: Ten or fifteen seconds, I should say, my Lord." Then (later): "Up to that time had the *Reclaim* done anything? A.: Nothing at all. She apparently kept her speed and course and gave no whistle signals whatever." Then in cross-examination (by Mr. Hayward): "So that the position was so urgent that hard-a-starboarding the wheel was desirable? A.: Yes. Q.: At any rate, until this time, this other vessel had shown no sign of altering course to come under your stern? A.: No. Q.: On the other hand, she had shown every sign of keeping her course and speed? A.: Yes. Q.: That is to say she was apparently intending to cross ahead of you, was she not? A.: Well, I could not believe it, I was amazed. (The President): Is that what she apparently was trying to do? A.: Well, my Lord, I should say that she had no look-out whatever. (Mr. Hayward): If she had no look-out whatever then she would keep her course and speed and would tend to cross ahead of you? A.: Yes. Q.: Am I right in saying this, pilot, that the indications that you received were that this vessel, either by reason of bad look-out, or for some other reason unexplained, was attempting to cross ahead of you? A.: Well, right up to the last few seconds I expected him to take action. Q.: Never mind what you 'expected' him to do; I am asking you what you saw him do? A.: I saw him crossing ahead of me. At any second he could have cleared me had he taken action." I draw attention to the pilot's word "amazed," because it brings out so clearly, first, that he then thought there was no reason whatever why the *Reclaim* should not obey Art. 19, and, secondly, that he must therefore have been expecting the *Reclaim* to act, and must have continued for some seconds to expect the *Reclaim* to take action.

This sense of extreme surprise, of utter inability to understand her inaction or to forecast her future action, was equally felt by the master of the *Marshal Pak*, who was just watching. He was being examined in chief by Mr. Noad: "Did you see or hear anything from her? A.: Yes. After I had crossed the *Reclaim's* stern, I heard three blasts, three short blasts." Then (later): "Q.: When the steamer gave three short blasts, in your view, could the *Reclaim*, if he had borne away then, have gone clear? A.: Oh, yes, he had ample time for to clear, but I think if he had tried to get under the steamboat's stern it would have been a tight nip, but I think it might have been done. Q.: Did you watch the *Reclaim* right up to the time of the collision? A.: Yes. (The President): Won't you, before you go on, get from him how he says she could have got clear in ample time, if it was going to be a tight nip to get under her stern? (Mr. Noad): I am much obliged, my Lord. (To the witness): You said it was going to be a 'tight nip' to get under her stern, that is, by starboarding? A.: Yes. Q.: What do you think there would have been ample time to do? A.: He could have ported and cleared him all right. Q.: He could have ported and cleared him all right? A.: Yes. Q.: I was going to ask you whether you watched him all the time? A.: Yes. Q.: Right up to the collision, and I think you said you did? A.: Yes. Q.: Did the *Reclaim* do anything before the collision? A.: No, he stood on his course, and kept his speed. Q.: Did you see any reason for it? A.: No, I could not understand, I was flabbergasted. (The President): You dropped your voice then, you could not understand what?' A.: Why he was standing on his course and kept his speed. Q.: You added a word that I wanted particularly to hear? (Mr. Hayward): He said: 'I was flabbergasted.'

(The President): That is it." The word "flabbergasted" is even more expressive than the pilot's "amazed." The master of the *Marshal Pak* was cross-examined about distances but was not cross-examined on his opinion, very definitely expressed in his examination-in-chief, that the *Reclaim* could at any time have got out of the way, right up to the moment of the three blast signals, either by starboarding, though that would then "have been a tight nip," or by porting, for which "there was still ample time."

The pilot was very properly cross-examined as to what was in his mind at the time and particularly as to why he did not go full speed astern at the time he hard-a-starboarded—either instead of or in addition to that manœuvre. He gave the reason that he expected the *Reclaim* to port; and that he thought he could best aid her by starboarding. I can see no ground for rejecting that reason as either untrue or inadequate. The pilot was being cross-examined by Mr. Hayward: "Pilot, at this time, was there not a duty on you to take such action as shall best aid to avert collision? A.: Yes. Q.: That was a duty which concerned you and you alone? A.: Do you mean that the give-way ship shall not take action? Q.: I am not troubling about the duty of the give-way ship; I am troubling about your duty—your duty to yourself under the Note to Art. 21? A.: Yes. Q.: And under that Article I think you agree with me it was your duty to take such action as would best aid to avert collision? A.: Yes. Q.: But what you did was to hard-a-starboard your wheel and hope that the other vessel would do something? A.: Yes. I told him what I was doing, and I expected him to do something too. Q.: And if you had, at that time, gone full astern you would have given him more time to do something? A.: I do not agree. I think I was giving him more time by sheering away from him—more time and more room."

Whether consciously intended or not, the implication of these questions is that when the Note comes into operation it transfers the whole responsibility to the stand-on ship. This is, of course, a legal misconception; the Note leaves the duty of the give-way ship unimpaired. There are some questions which bear on that aspect. "Q.: *Therefore, if you had gone full speed astern when you went hard-a-starboard, you would have stopped the vessel quicker than you did stop her? A.: Yes. (The President): And given him still more time? A.: When I put the helm hard-a-starboard, I gave one blow. He was very close to me. I was a big ship and he was a small one, and must have seen me, if he was keeping a look-out. I expected him to take action. I expected him to hard-a-port, and what I expected was that my port quarter would catch him. I wanted to keep my ship under control by going ahead enough, expecting that he would continue on his course, on the same course. Q.: I want to understand exactly what you mean by saying: 'I thought my port quarter would catch him'? A.: I expected him to port, and my port quarter would then be swinging up towards him if he ported. Q.: You thought your port quarter would catch him under the hard-a-starboard action? A.: Yes. Q.: Without your going astern? A.: Yes. Q.: Just listen to this and tell me if it is correct: 'If I had gone full astern when I hard-a-starboarded I should have gone off more to starboard'? A.: Yes. Q.: 'I expected he would take action when I gave one short blast'? A.: Yes. Q.: 'I thought that he would port'? A.: Yes. Q.: 'I thought my port quarter would catch him'? A.: Yes. Q.: 'I wanted to keep my ship under control'? A.: Yes. Q.: Then you said: 'I thought my port quarter would be swinging into him and would catch him as he ported without my also going astern.' You assented to that, that is what you mean? A.: Yes, my Lord. (Mr. Hayward): And is this right, pilot, and the reason you went astern was to avoid your port quarter striking the starboard quarter of the other vessel? A.: No. I went astern because he was taking no action. To avoid collision, I thought the only thing then was full astern. Q.: Pilot, surely the answer you have given to my Lord—I am afraid I do not understand it. (The President): Do not you understand it? (Mr. Hayward): I do not understand the reason for the answer—I understand the answer. But, pilot, why not take off your way at once? A.: Because I wanted to keep my ship under control. (The President): If I may paraphrase that—if I understand your meaning, it is this—that if you had gone full astern you would have made your swing greater and hit him with your port quarter? A.: If he ported. Q.: As you expected him to do? A.: Yes, if he ported. Q.: That is what I understood your meaning to be, that is right, is it? A.: Yes, my Lord. (Mr. Hayward): If he ported you would expect him to keep his speed? A.: Yes. Q.: So that if he had ported he would be running away from you at eight knots? A.: Yes. Q.: Now, pilot, your stern—your port quarter—would have no chance of getting near him, if he ported? A.: I beg to differ. Q.: What? A.: I do not agree. I expected to have to hard-a-port to stop my stern swinging, if he ported. Q.: Well, you told my Lord what you feared would happen if he ported and you had hard-a-starboarded and gone full astern, but suppose, if instead of hard-a-starboarding, you, at the outset, had gone full astern, until then there would not have been the least chance of your quarter swinging into him? A.: No, but I should not have had control of the ship. I did not see how, at that stage, we could avoid a collision. I expected we could avoid sinking him; I expected him to come alongside. (The President): At what point did you see you could not avoid collision? A.: When I gave one blast on the whistle and went hard-a-starboard—not exactly at that time, a second or two after that, when he took no action."

The passage following Question 335 is, I think, particularly important as indicating the pilot's real reason for only starboarding and not also then reversing. The whole of this passage is important because I do not think that the learned President's judgment makes sufficient allowance for this point in the pilot's evidence. The touching of the two quarters would be a collision and he wanted to keep full helm control of his ship in order to minimise the violence of that kind of collision, which was the one against which he had to guard if, as he expected, the *Reclaim* ported. The opposite turning circles of the two vessels would necessarily tend to bring their opposite quarters into proximity with risk of collision. I think the necessary inference from his evidence is that the moment he saw that the *Reclaim* was definitely ignoring his signal he then at once went full speed astern.

On the various questions of time there was, as I have already said, a good deal of discrepancy in the evidence—as is usual; and perhaps there was more than usual. But there is no doubt about certain facts, and if they be stated in order of chronological happening I think that they clear up the questions of times. There were two stages in the mental processes of the pilot's mind corresponding to outward events. As he watched the *Reclaim* approaching he was all the time expecting her to alter

* Question 335; to which his Lordship refers later in his judgment.

course, and he was "amazed" when she continued quite inexplicably to be holding on right across his course. He drew the inference that her look-out for some reason was completely absent; he then sounded his one blast signal. That was the beginning of stage 1. The signal was calculated to have two effects: to wake up all those concerned in the navigation of the *Reclaim*, and also to tell her that the *Hurunui* was giving her extra sea-room to manœuvre in. Both surely were definite "aids" to the due performance by her of her own duty; and neither proposed to relieve her of that duty. The pilot's evidence is clear that the reason why in the first instance he limited his action under the Note to helm action and abstained from engine action was that he felt certain she would alter course; which way she was likely to alter does not seem to me to matter much. Of course, if she reversed and stopped altogether—which she was free to do—it would relieve the *Hurunui* of any further duty towards her, and therefore that possibility did not concern him—or us.

If the pilot in fact thought she was more likely to port than starboard, his mind would necessarily be at once pre-occupied with the consequence of her porting rather than with the consequences of a starboarding on her part, which he did not expect. If she ported he needed helm control, because he thought there was then a risk of the *Reclaim's* starboard quarter touching the *Hurunui's* port quarter as each swung out near the other. And for this reason he thought he must maintain full speed in order to retain maximum helm control; for if and when a touching of the two quarters became imminent he hoped to lessen the force of the blow by a sudden hard-a-port helm action, which would swing the stern of the *Hurunui* to starboard and away from the *Reclaim*.

The important point for our decision of the case is that he had a perfectly clear and definite reason for not reversing until he knew the *Reclaim* was not going to alter course. It may or may not have been the best nautical reasoning; I do not suggest that it was not, but I do say that it would be utterly wrong to treat such an error of judgment, if it was an error, as ground for a judicial condemnation of him for negligence. If I am right in this conclusion, it follows necessarily that he cannot be blamed for deciding to abstain from reversing at the first moment when he recognised that action under the Note was incumbent on him, nor for postponing it till he knew that the need for keeping maximum helm control of his ship had passed, as a consequence of the wholly unexpected refusal of the *Reclaim* to alter course.

This first stage of the pilot's mental processes thus lasted only a very short time—just until he realised that the *Reclaim* was not taking helm action. It is at that point that stage 2 began. But I think there can be no doubt at all that, as soon as ever it was plain to him that the *Reclaim* was not going to alter course in response to his one blast, he immediately went full speed astern without any delay, or at any rate without any delay for which he could be blamed in the Admiralty Court.

The real ground of the learned President's decision was, I think, that in his opinion the pilot ought to have reversed instead of, or concurrently with, his single blast and starboard helm. I have given my reason for differing on that ground. But it is desirable to answer any suggestion that even if the pilot was justified in taking only helm action at first, he delayed too long before he followed it up with his order for full speed astern. This is a question as to what his duty was and how he acted in what I have called stage 2. He was severely cross-examined as to why he did not reverse at the moment when he first took action. His answer was on the line of reasoning I have already indicated. That he was telling the truth is borne out by the evidence. As soon as ever he came to the conclusion that he had to act under the Note in addition to giving his helm order and blowing the one blast, he put his hand on the telegraph (Question 191) and gave his "stop" order almost concurrently with blowing the whistle. It is true that he himself said the interval might be 10 or 15 seconds (Question 196), but that seems to me to be one of those time estimates which are so untrustworthy. The second engineer, Thom, who was actually standing by at the manœuvring valve when the "stop" order came down, gave evidence that at that same time he heard the one sharp blast on the whistle (Question 886); and the evidence of the second officer, who was on the bridge, was to the same effect (Questions 684 and 685), and I think their evidence ought to be accepted, because it is based on events and not mere estimate.

The remaining question is as to whether the pilot delayed too long after his "stop" order in giving his "full astern" order. Here, events afford better proof than estimates. In the first place, the very nature of the position makes it practically certain that as soon as ever the pilot saw that in spite of his one blast signal the *Reclaim* was failing to take any action, he must have realised the immediate need for reversing, and did so without delay. The fact that from giving the order to stop he kept his hand continuously on the telegraph shows that he was only waiting momentarily to see if the *Reclaim* did or did not take action in response to his signal and to her duty. The learned President asked the pilot if, when he sent for the master, he rang "Stand-by" on the engines, and the pilot replied "No." I do not criticise the question, but there are two answers to the implied criticism—that the pilot had not then got his mind on the probable need for reversing: (1) that the pilot, having rung "stop" and kept his hand on the telegraph, knew that the engineers would in fact be standing by; and (2) that "stand-by" was not an appropriate order, because on the *Hurunui*, by an arrangement between bridge and engine-room, it meant "dead slow"—because there was no "dead slow" on the dials of their telegraphs. The evidence of the second officer as to his movements from the moment of the "stop" order to the shock of collision, which I have already read, seems to me conclusive that there was no undue delay between the "stop" order and the "full speed astern" order.

The captain of the *Hurunui* presumably had had a night on the bridge and was at the critical time asleep in his cabin, there being no reason to expect trouble. In fact, he was very sound asleep, for he heard no signals at all; so that the time he took after being wakened to reach the ladder and feel the impact throws no light on the length of time that the engines had been working astern; but the second officer would take very few seconds between saying he would call the captain and getting halfway down the ladder.

The learned President really based his judgment on the view that the total time which elapsed between the one blast signal and the collision was much shorter than the pilot's various time estimates indicated, so short indeed that the collision was much more immediately imminent when he first acted than he described. It is possible that the

learned President had in mind some of the estimates of time given by the pilot or others in terms of seconds, or even by the engine-room records, which are expressed in terms of minutes or half minutes, but the events to my mind show that there was no unreasonable delay.

It seemed to the court, looking thus at the story in terms of events, that there were certain questions of seamanship on which we should consult our Assessors. The questions and answers were as follows:

(1) What ought the pilot of the *Hurunui* reasonably to have expected the *Reclaim* to do on hearing the one blast signal from the *Hurunui*?—A. To "wake up" and put his wheel either hard to port or hard to starboard.

(2) What was the latest point in time or distance at which it ceased to be possible for the *Reclaim* to avoid collision without any action by the *Hurunui*?—A. About three *Reclaim's* lengths from *Hurunui's* track.

(3) What action could the *Reclaim* have taken which would have prevented the collision: (*a*) at the moment just before, or just after, the pilot of the *Hurunui* blew his one short blast; (*b*) at the moment when the pilot of the *Hurunui* blew his three short blasts?—A. (*a*) Turn either way. (*b*) Turn to port, as it was getting too late to turn to starboard.

(4) Would any and if so what risk to the *Reclaim* or danger of impeding any action the *Reclaim* might take, have resulted if the order "Full speed astern" had been given (*a*) instead of, or (*b*) in addition to the order "hard-a-starboard"?—A.: The answer to each part of the question is in the affirmative if *Reclaim* had starboarded; but in the negative otherwise.

The effect of the first three answers is to justify the expectation of the pilot of the *Hurunui*, when he first decided to take action, that the *Reclaim* would alter course; for they make it clear that the *Reclaim* could without difficulty have avoided the *Hurunui* by using either helm. The fourth answer seems to disagree with the pilot's view that if the *Reclaim* ported, the *Hurunui's* quarter and the *Reclaim's* quarter were likely to touch, but if he was (as I think) properly observing the directions of the Note to art. 21 by the action which he first took, this difference of nautical opinion does not touch the question of liability; and, indeed, I do not think it would import negligence by the pilot even if he did form an opinion at the time which is now doubted by our Assessors. It is true that he never said anything about the *Reclaim* starboarding, but, that being her duty as a crossing vessel, he may well have had that possibility in his nautical mind.

Reading the mind and actions of the pilot in the light of these answers, I cannot see that he was in any way to blame. The duty of aiding the *Reclaim* imposed on him no duty to reverse until he had satisfied himself that the natural way of aiding her, namely, by waking her up and giving her more sea-room, was insufficient. He says he concluded in a matter of 10 to 15 seconds that the *Reclaim* was not altering course; but whatever the exact number of seconds were, I think the measure of the interval is to be found in the fact that he was waiting for her to port, for the simple reason that he could not believe that after his signal she would still keep her course; and I cannot blame him for that delay. I think the principle of the *Bywell Castle* (4 Asp. Mar. Law Cas. 207 (C. A.); 41 L. T. Rep. 747; 4 P. D. 219), approved by the House of Lords in the *Tasmania* (6 Asp. Mar. Law Cas. 517 (H. L.); 63 L. T. Rep. 1; 15 App. Cas. 223), and by the Privy Council in the *Utopia* (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C. 492), protects him.

For these reasons, much as I hesitate to differ from the learned President on what at first sight looks like an issue of fact, I feel that the Note does not warrant the decision below, and that the appellants are entitled to our judgment. The appeal will be allowed with costs here and below.

Finlay, L.J.—I am of the same opinion. The matter has been examined in detail by Lord Justice Scott, and agreeing, as I do, with his judgment, it is not necessary that I should express my view at any length, but I desire, out of respect to the President, from whom we are differing, to add a very few words; and I may say, by way of preface, that the hesitation and difficulty which I have felt in this case has arisen mainly from my reluctance to differ from the President upon what is mainly, though I think not exclusively, a question of fact. But I desire to say that I am prepared to accept without qualification all the findings of the President as to the actual facts as to times, distances, etc. Where I feel constrained to differ is as to the inference to be drawn from the facts which he has found, and also, if I correctly understand his judgment, as to the proper construction of art. 21 and the Note.

It is distasteful to have to criticise the navigation of the *Reclaim* when all those on board her with the exception of the cook, who had, of course, no responsibility for navigation, were drowned; but justice for the living makes it necessary for me to say that in my opinion the cause of the accident was the negligence of the *Reclaim*, negligence which persisted right up to the moment of collision and which far transcends the negligence so constantly dealt with in the Courts where some action is taken when other action would have been more appropriate, or action is taken late when earlier action would have been appropriate. Here, the *Reclaim* was navigated without any regard for her own safety, or the safety of others, and she persisted in that course of conduct when warned by the blast of the *Hurunui*. In these circumstances, if indeed any blame attaches to the *Hurunui*, it appears to me that the language of Lord Justice James in the *Bywell Castle* (*sup.*) exactly fits the case:

"I desire to add my opinion that a ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men."

On the facts of this case I am not prepared to hold that the pilot of the *Hurunui* made any mistake at all. It is important to remember that his duty under the Article and the Note was only to aid the give-way ship, the *Reclaim*, in action to avoid the collision. Here, the *Reclaim* took no action whatever to avoid the collision, and it was therefore difficult, if not indeed impossible, to aid her. We are advised by our Assessors that the pilot ought reasonably to have expected the *Reclaim*, on hearing the one blast signal, "to 'wake up' and put his wheel either hard-to-port or hard-to-starboard." The pilot himself said that he thought that the *Reclaim* would go to port. He may have had in his mind perhaps subconsciously the possibility of the

Reclaim going to starboard, although he did not say so in his evidence, but however that may be, it seems to me that he was certainly entitled to suppose that she would probably go to port. If she had gone to port, the action which the pilot took in starboarding would have given her effectual aid in avoiding the collision. If she had gone to starboard, it seems to me probable that for the engines of the *Hurunui* then to be reversed would have been to add to the risk of collision.

In these circumstances, I am of opinion that the *Hurunui*, in blowing the blast signal when she did, and starboarding when she did, acted in accordance with sound rules of navigation, for I agree with the President in thinking that the *Hurunui* cannot be blamed for taking action either too early or too late.

I am further of opinion that the pilot was justified in not reversing his engines until, to his amazement, he saw that the *Reclaim* was herself taking no action.

If, however, it were held, contrary to my view, that some blame attached to the navigation of the *Hurunui*, then I think that the principle enunciated by Lord Justice James in the passage quoted above applies, and that nothing done or omitted to be done by the *Hurunui* can affect the fact that this lamentable accident was due to nothing but the negligence and reckless navigation of the *Reclaim*.

du Parcq, L.J.—The decision of the House of Lords in the *Heranger* (19 Asp. Mar. Law Cas. 250; 160 L. T. Rep. 241) is a recent example of the principle, now well established, that an appellate tribunal should be slow to disturb the finding of a Judge in a case which depends, as that case depended, "on the rules of good seamanship, or what a prudent seaman ought to do, not on the breach of any specific Rule or Regulation." (See the speech of Lord Wright at p. 100). I am satisfied, however, that the decision in the present case must turn on the construction of the Regulations, and that on their true construction no blame can fairly be imputed to the *Hurunui*.

The learned President's judgment, as I read it, may be summarised very shortly as follows: The *Hurunui* took no action until the vessels were within a short distance, from one and-a-half to one and-a-quarter cables, of each other. This was well under three-quarters of a minute before the collision. She was probably not too late in taking action then, but, having waited till that moment to take action, she "ought, whatever else she did, to have put her engines full astern." Many circumstances in the case, and the pilot's own evidence, lead to the conclusion that the pilot did not in fact go astern till some 20 seconds after he first took action by hard-a-starboarding, and this was much too late.

The passage in the judgment which deals with the pilot's evidence brings out clearly the view taken by the President as to the application of the Regulations to this case, and it is a view which, with all respect, I believe to be erroneous. The President stated his opinion that the pilot had said things, which, taken in conjunction with the other matters to which he had alluded in his judgment, made it plain that the rule (that is, the Note to art. 21) had not been complied with, and later, used these words:

"The inference, I am satisfied, is this, that his own view of the matter was that at the time when he acted he could not really avoid a collision; but that taking what I am convinced was the proper action to be taken, when action was taken, namely, going astern, would, according to the witness's evidence, have made the situation more dangerous and not less dangerous. It seems to me to follow, and at any rate I have no hesitation in finding as the result of Mr. Posgate's evidence, that he went astern much too late. He ought not to have postponed action until taking the obvious course of reducing his speed, and getting his way off as much as possible would, in his own estimation, have aggravated the danger rather than have diminished it . . . He ought to have gone astern a great deal sooner than he did."

This passage taken by itself would provide no clear answer to the question whether the *Hurunui* was late in taking action—whether, that is, she took action as soon as she found herself so close to the *Reclaim* that collision could not be avoided by the action of the *Reclaim* alone. At an earlier stage in his judgment, however, the President seems to have accepted the view submitted to him by Mr. Hayward on behalf of the plaintiffs, which was, not that the *Hurunui* acted too late, but that when she did act she took the wrong action. Before this court, the plaintiffs' counsel, far from suggesting that the *Hurunui* acted too late, put forward the view that if it were right to judge her by mathematical standards, she might well be found to have acted too soon. Nobody has sought to blame her on the ground that she acted too soon, according to the practical standards of the mariner. It seems to follow that she acted at the right moment. If so, then to say that it would then have been dangerous to go astern surely indicates, not that the pilot was in any way to blame, but that going astern was, to say the least, not the action which would then have best aided to avert collision.

It is to be observed that the pilot's evidence is not quite accurately stated in the judgment. The pilot is quoted as having said: "When I gave the one blast and hard-a-starboarded, I did not think collision could be avoided, though I thought a sinking could." The transcript, which counsel agreed was correct in this particular, shows that what he said was that "a second or two after" he had hard-a-starboarded, when the *Reclaim* took no action, he saw that he could not avoid collision. This statement does not involve an admission that the pilot left it till too late to take action, and certainly does not point to the conclusion that if, instead of hard-a-starboarding when he did, he had gone astern, a collision would have been avoided.

A short quotation from Lord Wright's speech in the *Heranger*, *sup.*, at p. 102, indicates clearly the questions which arise in this case:

"Rule 21 is specific and imperative, the 'keep on' ship is to keep her course and speed, subject to the qualification contained in the Note that if that vessel finds herself so close that collision cannot be avoided by the giving way vessel alone, she shall take such action as will best aid to avert collision, in addition to which Regulation 27 provides for a departure from the Rules in order to avoid immediate danger."

It is, I think, manifest that the learned President did not regard this case as one in which art. 27 could be invoked, and I respectfully think that he was right in treating art. 21 (together with the note) as solely applicable to it. There was here no "immediate danger," other than the danger against which the note prescribes the proper action, and the most notable of all the "special circumstances" in this case was the readiness with which the *Reclaim* could manœuvre.

Thus, the first question is whether the *Hurunui* took action as soon as she found herself so close to the *Reclaim* that collision could not be avoided by the action of the *Reclaim* alone. This question calls for a definite answer. I have no doubt that the answer should be "Yes." The advice given to us by our

assessors supports this view. The plaintiffs' leading counsel expressly disavowed any attempt to challenge it, and, on the evidence, I think that he was right to do so. Finally, I am disposed to think that the learned President himself was prepared to answer this question in the affirmative. I would only add that if the *Hurunui* had taken earlier action and the *Reclaim* had acted differently, the pilot might well have been convicted of an inexcusable breach of art. 21.

It now becomes necessary to consider a second and perhaps more difficult question, which may fairly be stated as follows: Did the *Hurunui*, when the time came for her to act, take such action as would best aid to avert collision? The difference between the rival contentions urged upon us may be expressed by saying that whereas the appellants lay great stress on the word "aid" in the Note, the respondents prefer to emphasise the word "best." Both words are important. It is necessary to remember that when what has been called "the last safe moment" arrives, and "collision cannot be avoided by the action of the giving-way vessel alone," it may well be equally true to say that collision cannot be avoided by the action of the stand-on vessel alone, and that the Note does not impose on the stand-on vessel the sole responsibility for averting collision. It is no less true that the stand-on vessel must take such action as will not merely aid, but best aid, to avert collision.

Now, the moment chosen, and (as has been conceded) rightly chosen for action by the *Hurunui*, was "well under three-quarters of a minute before the collision." The *Reclaim* was steering a true course, though an unwise and improper one, and there was nothing to suggest to the pilot that those on board were incapable of rational action. In fact, we know from the cook's evidence that a skipper and a mate were in charge of her, and there is no hint of anything having been amiss. She was, it may be repeated, so handy a vessel that it must have seemed possible that she was leaving it till the very last moment to go to port or to starboard. One may well believe that it seemed almost inconceivable to the pilot in these circumstances that, on getting the warning of the one short blast, the *Reclaim* would fail to take such action as, with the room given to her by the *Hurunui's* action in starboarding, would avoid collision. Our assessors say, from the point of view of good seamanship, that the pilot of the *Hurunui* ought reasonably to have expected the *Reclaim* at that juncture to put her wheel either hard to port or hard to starboard. I find it impossible to say in these circumstances that the pilot was guilty of a breach of the regulations, or of negligence, in hard-a-starboarding without at once going astern.

It may be said that going astern would have "best" aided to avert collision in the events that happened, and it is of course easy to be wise after the event. I will assume (though there may be some doubt about this) that if the pilot had gone astern at the moment when he hard-a-starboarded, he would have got way off the ship in time to avoid colliding with the *Reclaim*, notwithstanding her persistence in crossing his bows. On this assumption, it must, I think, be equally true that, by going astern, the *Hurunui* would have put the *Reclaim* in a position of jeopardy if the *Reclaim* had elected to turn to starboard, and it was surely not less likely that the *Reclaim* would turn to starboard than that she would keep on her course. If any meaning is to be given to the word "aid" in the note, the stand-on ship must (apart from very special circumstances) be entitled to rely on a reasonable degree of co-operation from the giving-way vessel, and her action must be judged, not solely by what the giving-way ship finally did or failed to do, but by what she might reasonably have been expected to do. The pilot appears to have been wrong in thinking that if the *Reclaim* had turned to port, as he expected her to do, he would have endangered her by going astern. But if, as our assessors tell us, he ought to have expected that she might turn to starboard (and I think that he was bound to take this possibility into account) then it appears to me that he did the right thing, even if he did not give the best reasons for it in the witness-box. It is not negligence to do the right thing for the wrong reason.

I am of opinion that no breach of the regulations has been proved against the *Hurunui*, that there was no negligence on the part of her pilot, and that this appeal should be allowed.

Scott, L.J.—The appeal will be allowed, with costs here and below.

Leave to appeal to the House of Lords.

Solicitors for the appellants (defendants): *Wm. A. Crump* and *Son.*

Solicitors for the respondent (plaintiff): *Holman, Fenwick,* and *Willan,* agents for *Chamberlin, Talbot,* and *Bracey,* Lowestoft.

October 12 *and* 13, 1939.

(Before SLESSER, MACKINNON, and DU PARCQ, L.JJ.)

Compagnie Primera de Navagaziana Panama v. Compania Arrendataria de Monopolio de Petroleos S.A. (*a*)

Charter-party—Construction—Contract for two voyages—Deviation on first voyage—Whether charterers entitled to refuse to perform second voyage.

The owner of a ship let it to charterers under a charter-party which provided, inter alia, *that the charter-party should remain in force for two consecutive voyages at the same rate of freight and on the same terms and conditions as therein provided. In the course of the first voyage the ship called at a port in circumstances which constituted a deviation. The charterers thereupon treated the whole charter-party as at an end and refused to give orders for the second voyage.*

Held, that the charter-party, on its proper construction, was an indivisible contract and that the deviation during the first voyage, if not waived by the charterers, entitled them to repudiate the whole charter-party.

Decision of Branson, J. (19 *Asp. Mar. Law Cas.* 280; 160 *L. T. Rep.* 386) *reversed.*

APPEAL from a decision of Branson, J., reported 19 Asp. Mar. Law Cas. 280; on a special case stated by an umpire.

By a charter-party dated the 30th December, 1937, the respondents, who were ship-owners, let their

(*a*) Reported by H. A. PALMER, Esq., Barrister-at-Law.

ship, the *Yolanda*, to the appellants for a voyage from the Black Sea to a Spanish port.

The charter-party contained (*inter alia*) the following provisions :—

"1. That the said tank vessel being tight staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall as ordered on arrival at Istanbul with all convenient dispatch sail and proceed to Constantza or a safe port in the Russian Black Sea . . . and there load from the factors of the said charterers a full and complete cargo of gas oil and [or] fuel oil and [or] diesel oil and [or] crude oil in bulk . . . and being so loaded shall therewith proceed (as ordered on signing of bills of lading) direct to one port Spanish Mediterranean, Cartagena-Barcelona range both inclusive . . . and deliver the same on being paid freight at the rate of 35*s*. per ton of oil intake quantity.

"9. . . . The vessel has liberty to call at any ports in any order . . . and to deviate for the purpose of saving life or property.

"12. The vessel to have leave to tow or be towed and to assist vessels in all positions of distress or to call at any port or ports for bunker supplies.

"32. This charter-party is to remain in force for two consecutive voyages at the same rate of freight and on the same terms and conditions as herein provided. . . ."

The dispute related to a claim by the shipowners for damages in respect of losses and expenses alleged to have been incurred by them as a result of the failure of the charterers to give orders for the second voyage referred to in clause 32 of the charter-party.

The umpire found the following facts :

(*a*) The *Yolanda* duly loaded a cargo of oil at Constantza in accordance with the charter-party and sailed from the port on the 22nd January, 1938, for Valencia. At the time of sailing she had on board fifty-eight tons of bunker coal, her total bunker capacity being 876 tons. The vessel's normal consumption was thirty-five tons a day, and the normal distance covered was about 150 miles a day.

(*b*) On leaving Constantza the captain intended to go to Zonguldak for bunkers and set his course for that port. Zonguldak was about 125 miles eastwards of the Bosporus and was not a port on the ordinary route from Constantza through the Bosporus. At a point between Constantza and Zonguldak, the exact position of which was not proved, at 6.30 p.m. on 23rd January, 1938, the captain altered his course to proceed to Istanbul because he considered that owing to weather conditions bunkering at Zonguldak would not be safe.

(*c*) The *Yolanda* arrived at Istanbul on the 24th January, 1938, and took on 308 tons of bunker coal.

(*d*) The *Yolanda* sailed from Istanbul for Algiers, where she had been ordered to take on board a non-intervention officer before proceeding to Valencia to discharge. She proceeded by the ordinary route towards Algiers and between the 25th and 31st January met with weather which was no worse than might have been reasonably expected for the time of year.

(*e*) On the 1st February, the *Yolanda* was off Bona, a North African port some 240 miles east of Algiers, and she then had seventy-five to eighty tons of bunkers on board, which would have sufficed to enable her to reach Algiers.

(*f*) On the 1st February, the *Yolanda* called at Bona and took on board 220 tons of bunkers, and having left that port she was on the 2nd February captured by warships flying the Spanish Nationalist flag and was ordered to proceed to Palma, where she arrived on the 3rd February, and where she subsequently discharged her cargo.

(*g*) The charterers were not aware of the course which had been taken by the vessel in the Black Sea until a much later stage in the proceedings. They were, however, aware on or about the 3rd February that the vessel had called at Bona, but they did not know until the arbitration the quantity of bunkers on board on arriving off that port.

(*h*) On the 15th February the charterers' agents were informed that the *Yolanda* was lying at Palma, and on the 28th February they were informed that the vessel had on the previous day left Palma and would be arriving at Algiers the same afternoon. At the same time the shipowners' agents asked the charterers to give orders for the vessel's next loading port, it being indicated that she had been forced to discharge her cargo at Palma.

(*i*) On the 1st March the charterers' agents were informed that the *Yolanda* was proceeding from Algiers to Istanbul for orders, in accordance with the charter-party. . . . They referred to deviations during the first voyage and reserved their rights in respect thereof.

(*j*) Further correspondence took place, and the charterers contended that the giving of orders was not required until the vessel reached Istanbul.

(*k*) On the 12th March the shipowners' agents stated that the vessel was nearing Istanbul and again asked for orders. On the 14th March the charterers' agents definitely declined to give any orders for the second voyage. Thereupon the shipowners chartered the vessel elsewhere and indicated that they would claim damages from the charterers.

The umpire was of opinion that there was not sufficient evidence before him to establish the existence of a custom that vessels proceeding from Constantza via the Bosporus habitually bunkered at Zonguldak, and he accordingly found as a fact that when proceeding towards Zonguldak the *Yolanda* departed from her direct course in accordance with the charter-party.

The umpire found as a fact that at the time when the *Yolanda* altered her course for Bona she had a sufficient quantity of bunkers on board to enable her to reach Algiers, and he accordingly further found as a fact that in proceeding to Bona the *Yolanda* again departed without necessity from her direct course under the charter-party.

After hearing estimates, the umpire decided that the shipowners' loss by reason of the non-performance of the second voyage would not have exceeded 2,200*l*., and he accordingly found as a fact that that sum represented the amount of loss on the part of the shipowners attributable to the alleged breach or non-performance of the charter-party.

On the above findings of fact the umpire reserved for the decision of the Court the following questions :

(*a*) Whether either or both of the said departures of the *Yolanda* from her direct course under the charter-party amounted in law to deviations.

(*b*) If the answer to (*a*) was in the affirmative, whether such deviation or deviations had the effect of relieving the charterers from further performance of the charter-party dated the 30th December, 1937, and in particular from the necessity of giving orders for a second voyage in accordance with clause 32 of the charter-party.

Branson, J. held that the deviation to Bona was within the liberties of the charter-party, but that the deviation to Zonguldak was an unauthorised deviation. As to whether that deviation had been waived by the charterers, he held that the facts as found by the umpire were insufficient to enable him to determine that question. He held, however, that such deviation would not in any event relieve the charterers from performing the second voyage on the ground that the case was analogous to a contract for the delivery of goods by instalments and the deviation on the first voyage did not lead to the implication that the owners did not intend to fulfil the contract for the second voyage.

The charterers appealed.

A. T. Miller, K.C. and Sir *John Forster* for the appellants.

Sir *Robert Aske*, K.C. and *R. Colinvaux* (for *A. A. Mocatta*) for the respondents.

Slesser, L.J.—The arbitrator has found as a fact in this case that, as regards the first voyage which the charter-party contemplates, there has been at least one, and I think two, deviations from that contract voyage which would justify the charterers in repudiating the contract. The first was that the ship, instead of proceeding directly from the port of loading to the contemplated port, deviated, for the purpose of bunkering, to a port called Zonguldak instead of going directly to Istanbul. The second deviation was to a port called Bona at a time when it was not necessary, in the view of the arbitrator, for the purpose of bunkering, to deviate there.

It is conceded that, if the charter-party was one for this one voyage only, there was found such deviation as would enable the charterers to repudiate the whole of the contract (see *Hain Steamship Company Limited* v. *Tate and Lyle Limited*, 155 L. T. Rep. 177). The difficulty, however, arises because the charter-party contemplates a second voyage. After providing that the vessel "shall, as ordered on arrival at Istanbul, with all convenient dispatch, sail and proceed to Constantza or a safe port in the Russian Black Sea," and then proceed, as may be directed, "to one port Spanish Mediterranean, Cartagena-Barcelona range, both inclusive," there is added by clause 32: "This charter-party is to remain in force for two consecutive voyages at the same rate of freight and on the same terms and conditions as herein provided." That is to be read in this way, that, the first voyage being completed, the ship must again arrive at Istanbul and, as ordered, proceed to Constantza or a safe port in the Russian Black Sea, and go as directed "to one port Spanish Mediterranean, Cartagena-Barcelona range, both inclusive."

Sir Robert Aske contends that the mere fact that there has been a deviation on the first voyage does not enable the charterers to do what they purported to do, namely, to repudiate the whole contract, but that the obligation with regard to the second voyage still stands, though it may be that damages are obtainable for the wrong done by the deviation on the first voyage. He is really seeking to import into the contract the principle which is so familiar in the cases of contracts for the sale of goods by instalments, such as *Mersey Steel and Iron Company* v. *Naylor, Benzon, and Co.* (51 L. T. Rep. 637; 9 App. Cas. 434). The question, in my opinion, depends entirely on the construction of the particular charter-party into which these charterers and owners have entered, which indicates what was in the contemplation of the parties and what they had agreed to do. In my view, this was one indivisible contract for the purposes of the two voyages.

I come to that conclusion for many different reasons. First, there is, to my mind, no indication that the contract is to be regarded as anything but one contract, for the purpose of one voyage in a certain prescribed way followed immediately by what is aptly described as a consecutive voyage. Clause 22, which deals with the loading date, provides: "Should vessel not be ready to load by the 25th January, 1938, charterers to have the option of cancelling this charter"—not "this voyage," but "this charter." So far, it is clear that if the vessel were not in the port on the 25th January, both voyages could have been cancelled. It is to be noted that there is no loading date stated with regard to the second voyage. The second voyage was to be on the same terms as the first, but clause 22 cannot apply to the second voyage because that clause is dealing with the date of the 25th January, which can only be applicable to the first voyage. All that can be said with regard to the second voyage is that, at the end of the first voyage, there is an obligation, within a reasonable time, to be at Istanbul to receive the directions, which are to be given under clause 1 in the case of both voyages, where the ship is to proceed to, and receive directions as to the final destination.

Another reason why I come to the conclusion that this contract is indivisible is this. It is provided in clause 32 that "the irrevocable credit for the freight on the second voyage is to be established before vessel sails from last discharging port on her first voyage." Clause 26, which deals with irrevocable credit, says: "Charterers undertake to establish irrevocable credit for the freight on the first voyage under this charter-party within five days of signing this charter-party." That, of course, cannot be applicable to the second voyage, and, in substitution therefor, the date for providing the irrevocable credit for the second voyage is to be before the ship sails from last discharging port on her first voyage. This indicates to my mind that this contract is one, and contemplates the second voyage as beginning on the termination of the first voyage, some of the obligations on the second voyage being dependent on the obligations of the first voyage being discharged.

Another reason which occurs to my mind is this. It is provided that the freight shall be at the same rate on the second voyage as on the first voyage. I think it may be reasonably assumed that, in coming to that arrangement, the parties had in mind that the first voyage was going to be performed and that if the first voyage was not performed the whole market conditions might change. The freight seems to be fixed on the assumption that the whole of this contract is going to be carried out.

For these reasons I find myself regretfully differing from the learned judge, who took the view that there was nothing in this deviation which prevented the obligations arising under the second voyage.

There is, however, raised in this case another question. It is said that even if this contract, as I think, has been repudiated as a whole by the deviation, or would *primâ facie* have been so repudiated, there is in fact here a waiver. That question depends on an exact finding of the facts as to the knowledge of the charterers at the time when they refused to perform the contract. The learned judge has come to the conclusion that there is not, in the special case, sufficient material on which to come to a conclusion whether that waiver does or does not exist. He puts it in this way: "If it were necessary to do so, it would be proper to request the umpire to assist the court by finding as a fact whether there had been a waiver or not. It is

contended on the one hand that, upon the true construction of the language used in the special case, the umpire has found that there was no waiver, because he has found that the knowledge in the charterers, which they must have had before they could be held to have waived a breach of the contract, was not in their possession until a late stage in the arbitration proceedings. It is contended, on the other hand, that the proper construction of the special case does not lead to any such result. In my view the clause in the special case which is material upon this point is ambiguous. It reads as follows: 'The respondents were not aware of the course which had been taken by the vessel in the Black Sea until a much later stage in the proceedings. The respondents were, however, aware on or about the 3rd February, 1938, that the vessel had called at Bona.' Now, as a matter of construction, if one had to give a concluded opinion about it, it would appear to me that the meaning of that clause is that the respondents were not aware of the course which the vessel had taken in the Black Sea until some time after the course had been taken, because of the expression 'until a much later stage in the proceedings.' No other stage in the proceedings, if 'the proceedings' mean arbitration, had been referred to at all by the umpire, and I think it must have meant that they did not know until some time after the event had happened. Now, that is not sufficient to enable this court to come to an opinion as to whether there had been a waiver or not and, if waiver were material, I should have felt obliged to remit the case to the arbitrator for a finding of the necessary facts, to wit, the fact as to the date when the knowledge that the ship had shaped her course for Zonguldak had come to the charterers."

In my opinion the learned judge was right in saying that, on the view that this contract was repudiated, the matter ought to be referred back to the umpire for the reasons which he states, and I think, therefore, that the matter should be referred back in accordance with the learned judge's opinion.

MacKinnon, L.J.—I agree. There was apparently considerable discussion before Branson, J. whether putting into the port of Bona was a deviation, or whether it was a deviation permitted by the terms of the charter-party. I think it is quite unnecessary to go into that. There is no doubt that on the voyage from Constantza towards Istanbul there was a deviation, as has been found by the arbitrator. In the lamentably obscure statement of the facts I am able to gather that the charterers knew of the deviation at a later date than when they knew about putting into Bona. If that was so, whether putting into Bona was a second deviation is quite immaterial, because there was undoubtedly a deviation by going off to Zonguldak. For that reason I express no opinion on the question whether there was a second deviation by putting into Bona.

The contract between these parties contains this provision: "Should vessel not be ready to load by the 25th January, 1938, charterers to have the option of cancelling this charter." Those words are incapable of any doubt. If the vessel did not arrive at Constantza and be ready to load by the 25th January, the charterers could cancel both voyages and cancel the whole contract. In addition to that express provision, there is also an implied term in this charter-party, as in all charter-parties, that the shipowner shall prosecute the voyage or voyages without deviation. The nature of that implied term has often been stated in the courts, and nowhere more clearly, or with more emphasis, than in the comparatively recent case of *Hain Steamship Company Limited* v. *Tate and Lyle Limited* (155 L. T. Rep. at p. 179), where Lord Atkin said: "I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms." Similar language was used by Lord Wright (at p. 182). The effect of deviation, which is the breach of that implied term in the contract, is accurately stated in Scrutton on Charterparties (14th edit., p. 310): "An owner whose ship deviates in the sense defined above thereby commits a fundamental breach of his contract of carriage. The other party to such contract, on becoming aware of the deviation, can either treat the breach as a repudiation bringing the contract to an end, or elect to waive the deviation as a final repudiation and treat the contract as still subsisting, reserving his right to damages." In other words, if the implied term was written out in the contract, as the cancelling clause 22 is, it would be something to this effect: "The shipper shall proceed on the agreed voyage or voyages without deviation except to save life or avoid danger to ship or cargo; if the shipowner breaks this undertaking the charterer, on knowing of it, may cancel this charter-party."

In this case it is said that the charterers, on becoming aware of the deviation, did treat the breach as a repudiation which brought the contract to an end, and that if they brought the contract to an end they brought the whole contract to an end just as effectively as they would have done if they had exercised their option under clause 22 on the vessel's arriving at Constantza on the 26th or 27th January. That, in my view, is the legal position as regards this matter, a view of the law on which I differ from Branson, J.

As I have pointed out—to re-read from Scrutton on Charterparties—"The other party to such contract"—that is the charterer—"on becoming aware of the deviation, can either treat the breach as a repudiation bringing the contract to an end, or elect to waive the deviation as a final repudiation and treat the contract as still subsisting." The statement of facts in the special case is unfortunately so obscure that it is quite impossible, as Branson, J. said, to be satisfied which of those alternatives is the true inference to be drawn from what the parties agreed in this case. I think that the case must, therefore, as Branson, J. thought, go back to the arbitrator to reconsider the facts and state them properly and clearly for the information of the court. When he has done that, the case should go back to Branson, J. or the judge taking the Commercial List, who will then deal with the special case, as so supplemented by the further findings of the arbitrator, in the light of the law as we have laid it down.

du Parcq, L.J.—I agree, and I do not think I can usefully add anything.

Solicitors for the appellants, *Middleton, Lewis, and Clarke.*

Solicitors for the respondents, *Holman, Fenwick, and Willan.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 24, *and May* 8, 1939.

(Before LANGTON, J.)

The Amazone (*a*)

[This decision has been affirmed by the Court of Appeal (*post* p. 351).—Ed.]

Action in rem *for possession of yacht—Diplomatic immunity of foreign military attaché—Diplomatic Privileges Act*, 1708, *s.* 3.

By sect. 3 *of the Diplomatic Privileges Act*, 1708: "*. . . all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador . . . authorised and received as such by her Majesty . . . or the domestick or domestick servant of any such ambassador . . . may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever.*"

This was a motion on behalf of Commandant Léon Hemeleers-Shenley to set aside a writ for possession of the yacht Amazone *and the warrant of arrest issued at the instance of his wife, Madame Una Hemeleers-Shenley, on the ground that, as an assistant military attaché on the staff of the Belgian Embassy in London, he and his property were entitled to diplomatic immunity. The defendant entered a conditional appearance under protest. The yacht was registered in the defendant's name and was laid up at Southampton in the hands of Messrs. Thornycroft, who took their orders from him. The plaintiff's case was that the yacht had been purchased with her money and that the defendant acted as her agent in everything connected with it. She contended that the defendant's right to possession should be decided before the question of diplomatic immunity could be investigated, and that diplomatic immunity did not exist in respect of privately owned property.*

Held, that the first point for determination was whether the defendant did or did not possess diplomatic immunity, that on the evidence he had diplomatic immunity, that he had such possession of the yacht as would necessitate legal process to issue to deprive him of it, and that therefore the writ must be set aside.

THE HEARING was adjourned in order that an inquiry could be addressed to the Foreign Office as to the diplomatic status of the defendant. On the adjourned hearing it was ascertained that the Foreign Office had certified that the defendant was received by H.M. Government as assistant military attaché from 25th October, 1920, and that since that date his name had been included in the list prepared under the Diplomatic Privileges Act, 1708.

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

J. V. Naisby for the defendant.

G. St. C. Pilcher, K.C. and *O. Bateson* for the plaintiff.

Langton, J.—This motion raises an interesting and not altogether unimportant point with regard to the immunity enjoyed by ambassadors and members of their suite in this country. The writ was issued by Madame Una Mary Gardner Hemeleers-Shenley. As originally issued it was against the *Amazone*, a motor-vessel (which is admitted to be a private yacht), but the writ has been amended and is now addressed to the owners and parties interested in the ship *Amazone*. By the writ the plaintiff claims, as sole owner of the yacht, the possession of the yacht. It is, therefore, a possession action as known in this court. The defendant is Commandant Léon Hemeleers-Shenley, who occupies a position as Assistant Military Attaché to the Belgian Embassy. He has put in a provisional appearance to the writ, and claims by the motion that the writ should be set aside on the ground that he enjoys diplomatic immunity under the statute of Anne.

When the matter was originally before me there was certain evidence on affidavit by both parties, and I decided that the right thing to do was to cause a letter to be written to the Foreign Office in order that the position of the defendant should be regularly and properly established. That letter was written by the Registrar, and an answer was received from the Foreign Office, and included in their reply was a certificate which is in these terms. [His Lordship read the certificate, and continued :]

The list prepared under the statute of 7 Anne, c. 12, as I understand it, is one which the Foreign Office prepares from names submitted by the members of the various diplomatic corps of those recognised by His Majesty as enjoying diplomatic immunity. It is, therefore, now beyond question that the defendant does enjoy full diplomatic immunity.

Another question arises, which has been the subject of evidence, as to the present possession of the yacht. The plaintiff claims that she has possession of it. The defendant, on the other hand, says that he has possession. I am perfectly satisfied from the evidence that the defendant has such possession of this yacht as would render it necessary for some legal process to take effect in order to deprive him of that possession. With the information which is before me, I do not think it is necessary to go any farther than that. The yacht is for the moment in the hands of Messrs. Thornycroft and is laid up for the winter. Messrs. Thornycroft's representative stated that they have taken their orders from Commandant Hemeleers-Shenley. The yacht is registered in his name in the port of Antwerp. That, to my mind, constitutes sufficient possession for all the purposes of this motion.

Mr. Pilcher, on behalf of the plaintiff, takes two points. He says, first, that possession, for the purposes of a matter of this kind, is not established by such facts as I have enumerated. He points out that any one item in a number of matters to which we are accustomed to refer in order to decide where possession lies would not of itself constitute a proper claim to possession. For example, the payment of wages, or the payment of a servant, may easily and properly be performed by a person acting as agent for the person in possession. I hope I have given that point the attention which it deserves, but on the question of fact the evidence is overwhelmingly in favour of present possession being in the hands of the defendant.

Mr. Pilcher's second point was that immunity differs in quality and extent where, for example, an ambassador, or a member of his suite, is concerned, as compared with the immunity enjoyed by a sovereign State. Whereas the immunity enjoyed by a sovereign State rests on national considerations, the immunity of an ambassador is derived entirely from the statute of Anne, and is limited by the wording of the statute. It is said, therefore, that the two matters cannot be considered as being of the same genus, and that I should be wrong in looking for authority to such cases as *The Cristina* (19 Asp. Mar. Law Cas. 159; 159 L. T. Rep. 394.) I do not think that it is necessary for me to go into the full implications of any possible differences between the immunity enjoyed by a sovereign State and the immunity enjoyed by the representatives of that sovereign State. In support of his proposition Mr. Pilcher cited *Novello* v. *Toogood* (1 B. & C. 554), in which case the man claiming immunity was a British-born subject attached to the suite of the then King of Portugal. He appears to have been a person of unusual versatility, because from the Chief Justice's statement he was a lodging-house keeper, a teacher of languages, and a prompter at the Opera House. He was seeking immunity on the remarkable ground that because he had some appointment with the ambassador—namely, that of chorister to the ambassador—the house which he occupied, and which he rented partly as a lodging-house, should, therefore, be immune from any process with regard to rates. The case was decided *in banco* and was given, as it appears to me, rather more consideration than it merited. The Chief Justice and Bailey, J., according to the report, seem to have founded their decision on the point that the goods seized—that is, the goods seized in the lodging-house—were not necessary for the purposes of the ambassador. But in this case there is no question of the defendant being a person of such vertiginous versatility as was the plaintiff in the case which I have just cited, and that very proper decision is no authority for the proposition that a possessive action can be commenced against a duly accredited member of the ambassador's suite.

The defendant and his wife are, unhappily, at issue as to the possession of, and ultimately, as I understand it, the ownership of, the yacht which, undoubtedly, belongs to one or other, or to both of them. In the existing circumstances I think I can derive useful guidance from the opinions which have recently been delivered in *The Cristina* (*sup.*). Lord Atkin there said: "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereigns or to personal private property. In this country it is in my opinion well settled that it applies to both." Those two propositions are further developed by Lord Atkin in the same case.

Lord Maugham gave his opinion in these terms (at pp. 167 and 402 of the respective reports): "The immunity of a foreign government and its ambassador as regards property does not stand on the same footing. The statute of Anne protects the goods and chattels of 'the ambassador or other publick minister . . . received as such . . . or the domestick or domestick servant of any such ambassador or other publick minister.' It is clear, I think, that the property in the goods and chattels would have to be established if necessary in our courts before the immunity could be claimed. The ambassador could not be sued in trover or detinue: but if the property were not in his possession and he had to bring an action to recover it I am of opinion that he would have to prove in the usual way that the goods were his property. Speaking for myself, I think the position of a foreign government is the same. There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador or by one of his servants would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State."

It is to be observed that this opinion of Lord Maugham's is in no sense in conflict with the propositions which are laid down by Lord Atkin, but is in fact complementary to them. What appears to me to result from this clear statement of the law is that, first, it must be determined whether the defendant does or does not enjoy diplomatic immunity. If he does, it is my duty to see whether an action of this kind in any way impleads him or brings property in his possession into issue. In my judgment it does both directly. It claims actually an arrest of property in his possession and it would be necessary for him personally to come into this court in order to set up his claim to possession. In effect the writ commences an action in detinue against him; the very class of action which Lord Maugham has said in terms will not lie. The property being in his possession, and he enjoying immunity, I am unable, having no jurisdiction, to go into the matter any further. The motion, therefore, succeeds and the writ must be set aside, with costs.

Solicitors for the defendant, *Stephenson, Harwood* and *Tatham*.

Solicitors for the plaintiff, *Janson, Cobb, Pearson* and *Co.*

July 26, 27, *and October* 17, 1939.

(Before LANGTON, J., assisted by Elder Brethren of Trinity House.)

The Varmdo (*a*)

[This decision was affirmed by the Court of Appeal on 2nd May, 1940 (*post* p. 370) ED.]

Collision—Navigation in Copenhagen Sound—Crossing rule—Narrow channel—Regulations for Preventing Collisions at Sea, 1910, *art.* 25.

This was an action of damage by collision. The steamships of the plaintiffs and the defendants came into collision near the Lappegrund Light Vessel in the Copenhagen Sound. When the vessels first sighted each other's lights the

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

plaintiffs had the starboard light of the defendants' vessel on their port bow, and the defendants had the port light of the plaintiffs' vessel on their starboard bow. Under the Regulations for Preventing Collisions at Sea, 1910, *art.* 25, i.e., *the crossing rule, it was the duty of the defendants' vessel to keep out of the way. It was, however, contended by the defendants that the collision occurred in a part of the Sound that constituted a "narrow channel" within art.* 25 *and that therefore it was the duty of each vessel to keep to her own starboard side of the channel.*

Held, without making any binding pronouncement for the future, that the Copenhagen Sound in the neighbourhood of the Lappegrund Light Vessel should not be declared a narrow channel for the purpose of the Collision Regulations, that the crossing rule applied, and that the defendants' vessel was alone to blame for the collision.

DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Jeanne M.*, and her master and crew suing for their lost effects. The defendants were the owners of the steamship *Varmdo*. The collision occurred on the night of December 17th, 1938, near the Lappegrund Light Vessel in the Copenhagen Sound. The *Jeanne M.* was proceeding up the Sound in a northerly direction, and the *Varmdo* was coming through the Sound in a southerly direction. They were on crossing courses when they first sighted the lights of each other; the *Jeanne M.* had the starboard light of the *Varmdo* open on her port bow, and the *Varmdo* had the port light of the *Jeanne M.* on her starboard bow.

G. Willmer, K.C. and *J. V. Naisby*, for the plaintiffs.

K. S. Carpmael, K.C. and *H. L. Holman*, for the defendants.

Cur. adv. vult.

Langton, J. read the following judgment:— This case raises a question of some importance. Apart from the fact that the *Jeanne M.* foundered as a result of the collision, which in itself renders the case of interest to a considerable number of persons, although happily the foundering was not accompanied by any loss of life, a question of general interest also emerges. The collision took place in the waterway which separates Sweden and Denmark known as the Sound, and this case raises directly the point as to whether the Sound, or that part of it in which the collision actually occurred, should be held to be a narrow channel.

For reasons which I shall give hereafter I have come to the conclusion that the *Varmdo* was alone to blame for the collision, and I have further come to the conclusion that her case, which was not well founded in fact, was also misconceived in law, in that it was based upon the supposition that the Sound, at least in that part of it in which the collision occurred, was a narrow channel. I desire, however, to make it clear at the outset that so far from attempting in any way to bind any one who may have to consider this question in the future, I do not even wish to exclude myself from arriving at a different determination upon different evidence in a future case. I must, therefore, only be taken to be laying down that upon the evidence before me on this occasion, and with the advice which I have received from the Elder Brethren, who have given me valuable assistance, I have reached the determination that it is not at the present moment either right or desirable to hold that the Sound in the way of the Lappegrund light vessel should be declared to be, or treated as, a narrow channel for the purposes of the Sea Rules.

Reverting now to matters of detail, the *Jeanne M.* was a British vessel of 1973 tons gross and 279 feet in length. The *Varmdo* is a Swedish vessel of 2,956 tons gross and 318 feet in length. The collision took place about 8.30 p.m. on 17th December, 1938. The *Jeanne M.* was proceeding up the Sound in a northerly direction, and having approached the Kronborg Light at Helsingor, on a course of N. ½ E. magnetic, altered her course to N. by W. ½ W. magnetic when abreast of that light. The *Varmdo*, which was coming through the Sound in a southerly direction, was on a course of S. 45° E. magnetic when the *Jeanne M.* was first sighted.

According to the defendants' case, the *Varmdo* was thereafter navigated at first under a light starboard helm, and eventually under a hard-a-starboard helm, in order to comply with what they claimed to be the regulation prevailing in the Sound, namely, the narrow channel rule laid down by art. 25. I have considerable doubt as to whether on the night in question the devotion of the master of the *Varmdo* to art. 25 was anything like so intense as it became before me at the trial of this case in July. Indeed, I doubt very much whether Captain Nilsson was really concerned until he got into court with the application of this rule to his navigation. On the other hand I have borne in mind that he is not only a native of Sweden, but is accustomed to make this voyage month after month and year after year. I see no reason to doubt that he has a customary and also a sensible method of making it, and it may well be that in consideration of the set of the current and the general trend of the traffic, he has found it convenient to make his south going journey upon the general lines which he has described. It may even be a practice for local vessels to allow the south bound ship to pass nearer to the Lappegrund light vessel than the vessel going north, though it is noteworthy that the observer called from the light vessel negatived any regular practice in this matter. Whether or no such practice exists, and there is no evidence before me that it does, such a practice could in itself create no right of way in navigation. Unless, therefore, I can be satisfied upon evidence, and upon all the other factors which would render it proper to declare this place to be a narrow channel, it is clear from a glance at the chart that vessels approaching each other in the manner and upon the course which I have described would be subject to the crossing rules. There is no manner of doubt that when these two ships became conscious of one another, and began to navigate with reference to one another, the *Varmdo* had the *Jeanne M.* on her starboard bow and the *Jeanne M.* had the *Varmdo* on her port bow. The *Varmdo* had thus the duty to keep out of the way of the *Jeanne M.*, and the latter had the corresponding duty to the *Varmdo* to keep her course and speed. In addition it is conceded that the current was running to the northward, that is, against the *Varmdo* and under the *Jeanne M.*, and there was thus by the ordinary rules of seamanship the additional duty upon the *Varmdo* to ease her speed and allow the *Jeanne M.* to pass clear ahead of her if they should happen to arrive at a turning point, such as the Lappegrund light vessel, so nearly simultaneously as to make it necessary for one to give way to the other in order to pass the point in safety.

[His Lordship then dealt with the questions of fact at issue between the parties. He said that the case for the *Jeanne M.* was that, having altered to N. by W. ½ W. magnetic and proceeded for some minutes upon her new course, the *Varmdo* passed across her course and on to her starboard bow. Very soon afterwards the *Varmdo* was seen to alter suddenly and without warning to starboard and to open her red light and shut in her green. The *Jeanne M.* thereupon ported her wheel a little and blew two short blasts. Immediately afterwards the position became practically hopeless, because the *Varmdo* continued to swing to starboard and the engines of the *Jeanne M.* were put full speed astern. The *Varmdo* came on, struck the *Jeanne M.* with her stem in the way of No. 2 hold on the starboard side, and the *Jeanne M.*, after attempting manœuvres to beach herself, sank in the Sound.

The defendants, his Lordship said, agreed that the vessels were originally on crossing courses, but denied that they had ever crossed the course of the *Jeanne M.* in such a way as to show their green on her starboard bow. They claimed that very soon after observing the two masthead and red lights of the *Jeanne M.*, the *Varmdo* was put under slight starboard helm, and so kept for some minutes, while the vessels continued to approach. Their case against the *Jeanne M.* was that it was usual for north going vessels to pass Lappegrund upon a course of N. by E. to N.N.E. at a distance from the light vessel of some 500 metres, thus leaving room for down coming vessels to pass port to port between the north going vessels and the Lappegrund Light. Instead, however, of maintaining her course the *Jeanne M.*, at a time when her lights were already bearing fine on the starboard bow of the *Varmdo*, turned to port and opened her green light to the *Varmdo*. She then continued to come on, shutting in her red light, and sheering or altering her course towards the *Varmdo*, making it impossible for the *Varmdo* to pass between the *Jeanne M.* and the Lappegrund light vessel, and throwing herself across the course of the *Varmdo*.

On these issues, his Lordship said he found first, that the collision occurred about 200 metres to the eastward and a little to the northward of the Lappegrund light vessel; secondly, that the headings of the respective vessels at the time of the collision were much as claimed by the *Jeanne M.*, namely, N.W. and S.W.; and thirdly, that the *Varmdo* crossed the bows of the *Jeanne M.* in such a way as to show her green light on the starboard bow of the *Jeanne M.*]

[His Lordship continued as follows:] On any conceivable findings of fact it would seem to me that the *Varmdo* must be held to blame for giving no warning by whistle signal during the many minutes that she was acting and acting in relation to the *Jeanne M.* under starboard helm. As was laid down clearly in *The Karamea* (15 Asp. Mar. Law Cas. 430; 126 L. T. Rep. 417; (1922) 1 A. C. 68) if the helm action be light it is perhaps even more important to give notice thereof by whistle signal, since it is clearly less easy for the other vessel to perceive the effect of such helm action than where the action is sudden and heavy. Upon my findings of fact, however, the first and most important delinquency of the *Varmdo* is her breach of art. 19 in that, being a crossing vessel, she had an imperative duty to keep out of the way of the *Jeanne M.*, but took no proper or sufficient steps in due time so to do. In the second place she is much to blame upon the line I have developed above in failing to blow any signal during the time that she was using a light starboard helm. She is further to blame in keeping a bad lookout in what I have in previous cases called the broad sense, namely, in keeping an inaccurate observation upon the approaching vessel. She is also to blame in a matter of seamanship in not reducing her speed when she realised, or ought to have realised, that she would be approaching the *Jeanne M.* in the neighbourhood of the Lappegrund light vessel, since by so doing she might have facilitated their passing in safety at that point. Finally, having passed as I find she did on to the starboard bow of the *Jeanne M.*, it was inexcusable in the circumstances to starboard again from such a position. She had practically the whole of the channel upon her port side, and, had she stood on without any alteration at all, would have in fact avoided the collision, or alternatively could have made everything doubly safe by porting away from the *Jeanne M.*

The *Jeanne M.*, on the other hand, obeyed the Collision Regulations in keeping her course and speed under art. 21. The most serious point against her is as to whether she altered too soon in view of the stringency of the duty which lay upon her. Mr. Carpmael rightly and fairly pressed the family resemblance which the case bears to that of *The Orduna* ((1921) 1 A. C. 250), but I am satisfied that the analogy is not a real one. The distances were much shorter than those in *The Orduna* (*sup.*), and the necessity to take immediate action was accordingly far more urgent. It is true that, by porting, the *Jeanne M.* in fact broadened the angle of the blow, but the Elder Brethren advise me that in the circumstances this manœuvre of porting offered the best chance of escape since it was always possible that those on board the *Varmdo* would recognise their error in time to reverse their helm and engines and thus avoid the *Jeanne M.* or at least themselves reduce the angle and force of the collision.

In all the circumstances, therefore, I find the *Varmdo* alone to blame for the collision.

In conclusion, reverting to the broad point of interest as to whether the Sound is a narrow channel, it may be useful to recapitulate the considerations which have led me to a determination upon this question in this particular case. As I have noted above, the chief and guiding consideration has been that there was no evidence whatever outside the opinion expressed by Captain Nilsson that any part of the Sound, or this part in particular, was treated by shipping in general as subject to the narrow channel rule. Secondly, I had the advantage of the advice of one of the Elder Brethren who is exceedingly familiar with the navigation of this water-way. He advised me without the slightest hesitation that in his experience it has always been treated as open water and without regard to art. 25. Again, when one looks at the matter apart from evidence or skilled advice, from the point of view of general expediency one cannot but be struck by the fact that in this actual locality hard by the Lappegrund light vessel are two important local ports of Halsingborg and Helsingor. If any ruling is to be laid down construing any portion of the Sound to be a narrow channel it would seem important to make some subsidiary ruling as to how the vessels entering or leaving these ports are to conduct their navigation when respectively entering or leaving the channel. It was pressed upon me by Mr. Willmer that it would be almost impossible to declare any portion of the Sound to be a narrow channel because of the difficulty of delimiting the focal points and of declaring where any such narrow channel should begin. For my own part I would not feel so much

pressed by this difficulty as by the complication which arises from the presence of the two local ports in what is almost the narrowest part of the whole channel. I cannot at the moment recall any case of collision in my experience which has had for its locus in quo this well frequented spot. It would hardly seem, therefore, that the dangers of navigation here are at present peculiarly acute, but if future experience should go to show that a closer and clearer ruling would be desirable, I would not have it to be imagined that I have pretended to examine the whole problem in all its bearings, and to have attempted to pronounce any final judgment thereon.

Solicitors for the plaintiffs, *Sinclair, Roche* and *Temperley*, for *Vaughan* and *Roche*, Cardiff.

Solicitors for the defendants: *Bentleys, Stokes* and *Lowless*, for *Bramwell, Clayton* and *Clayton*, Newcastle-upon-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

November 22, 1939.

(Before SCOTT, CLAUSON and GODDARD, L.JJ.)

A/S "Tank of Oslo" v. Agence Maritime L. Strauss of Paris: s.s. "James Hansen." (*a*)

Charter-party—Construction—"To proceed (as ordered on signing bills of lading) direct to one safe port East Coast, United Kingdom, or on the Continent, Bordeaux/Hamburg range"—Charterers' "option of discharging at two safe ports as above"—Exercise of option before time of signing bills of lading.

By a charter-party it was provided that a ship should load in the United States of America a full and complete cargo of petroleum. By clause (1) *:—The ship "being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to one safe port East Coast, United Kingdom, or on the Continent, Bordeaux/Hamburg range." By clause* (26) *:—"Charterers have the option of discharging at two safe ports as above and in the event of this option being exercised charterers are to pay extra freight; 6d. per ton on the whole cargo shipped for two ports on the same coast and in the same country." The charter was in printed form, but the words in clause* (1)*—"one safe port East Coast, United Kingdom, or on the Continent" and clause* 26 *were typewritten.*

Held, that the option of discharging at two safe ports need not be exercised at the moment of the signing of bills of lading. The words "as above" in the words of clause (26)*, "option of discharging at two safe ports as above" referred to the typewritten words in clause* (1) *:—"one safe port East Coast, United Kingdom or on the Continent," and meant that the two safe ports must be within the range there specified.*

(*a*) Reported by C. G. MORAN, ESQ., Barrister-at-Law.

APPEAL from a decision of Atkinson, J. on a case stated by an umpire. The appellants, the A/s Tank of Oslo, were shipowners who chartered a Norwegian tanker, *s.s. James Hansen*, to the respondents, Agence Maritime L. Strauss of Paris, to load in the United States a full and complete cargo of petroleum. By clause (1) of the charter-party it was provided that she "being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to one safe port East Coast, United Kingdom, or on the Continent, Bordeaux/Hamburg range." By clause (26):—"Charterers have the option of discharging at two safe ports as above and in the event of this option being exercised charterers are to pay extra freight as follows:—6*d.* per ton on the whole cargo shipped for two ports on the same coast and in the same country. Ports between Bordeaux and Dunkirk to be considered as on the same coast. 1*s.* per ton on the whole cargo shipped for two ports on different coasts or in different countries." The charter was in printed form, but the words in clause (1): "one safe port East Coast, United Kingdom or on the Continent" and clause (26) were typewritten.

The original intention, as appeared from the correspondence between the parties, was that the vessel should proceed from Philadelphia, the loading port, to Le Havre. On 8th January, 1937, some time before the date of loading, 23rd January, 1937, the charterers indicated to the owners that they wished the vessel to go to "an option extra port—Bordeaux." By the correspondence that followed it appeared that the shipowners wanted the order of call to be Le Havre first and then Bordeaux, but the charterers wanted the order to be Bordeaux first and then Le Havre, and to this the shipowners agreed before the date of loading. When the cargo had been loaded from the factors of the charterers, the Atlantic Refining Company, that company, as such factors, tendered the bill of lading, which provided that the vessel should proceed only to Le Havre, and the master signed the bill of lading. Neither the factors of the charterers, nor the master of the vessel knew of the arrangements made between the charterers and the shipowners that the vessel shall proceed first to Bordeaux and then to Le Havre. The vessel sailed on 24th January, 1937.

Whilst the vessel was crossing the Atlantic the shipowners agreed with the charterers that the ship should proceed to Bordeaux and then to Le Havre, accepting the charterers' offer of a banker's indemnity against risks which the shipowners might incur by changing the ship's voyage as specified in the bill of lading, but the shipowners claimed from the charterers any extra costs which they were put to by the change. This the charterers refused to pay and, there being an arbitration clause in the charter-party, the matter went to arbitration.

The umpire found that the owners incurred additional expense amounting to 517*l.* 15*s.* 11*d.*, but that the charterers had paid the 6*d.* per ton additional freight under clause (26) which amounted to 216*l.* He took the view that the words in clause (1) "as ordered on signing bills of lading" governed the option clause and that the option clause could only be exercised at the actual time and place of signing the bill of lading, as the correspondence which took place before the loading of the ship showed only a provisional exercise of the option. Accordingly, he found for the shipowners for the sum of 517*l.* 15*s.* 11*d.*, less 216*l.* = 301*l.* 15*s.* 11*d.*, but he stated a special case for the court in which two questions were asked:—"Whether upon the facts as found by the umpire and upon the true

construction of the documents: (1) Orders for the discharging port or ports must be given at the time of signing bills of lading; (2) When bills of lading are presented by the charterers' factors endorsed for a different destination the charterers have thereby altered or waived any earlier orders given by them or are estopped from denying that the destination so endorsed is the proper one." Atkinson, J. answered both these questions in the negative, in favour of the charterers.

The shipowners appealed.

Sir Robert Aske, K.C., and *H. M. Pratt* for the appellants (shipowners).

Valentine Holmes for the respondents (charterers).

Scott, L.J.—In this case the appellants are shipowners and the respondents are charterers. Under the charter, a Norwegian tanker was chartered to load in the United States a cargo of oil or petroleum spirit of sorts. The charter contains an arbitration clause, and a dispute between the owners and charterers in London was referred to arbitration, and the umpire has stated a case raising the questions of law on which our decision depends. The charter-party is a tanker charter-party in English. It does provide that the contract shall be governed by the laws of the flag of the carrying vessel which in this case was Norwegian, the ship being owned by a Norwegian company. No evidence was given of any difference between English law and Norwegian law, and, therefore, the court applies English law to the solution of the problems to which it has to address its consideration.

The dispute is as to whether when the ship sailed from the American port of Philadelphia for Europe she was under obligation to go to two ports on this side, namely, Bordeaux and Le Havre, or whether, as the owners say, she was only under obligation to go to Le Havre.

The dispute arose in this way. The charter contained a provision in clause (1) that the ship should load from the factors of the charterers the cargo and that, "being so loaded shall therewith proceed (as ordered on signing bills of lading), direct to one safe port East Coast, United Kingdom, or on the Continent, Bordeaux/Hamburg range." The words down to "direct to" are in the printed form of charter, and the additional words which I have just read, "one safe port East Coast, United Kingdom, or on the Continent" are in type. Gummed on were three additional typed clauses, of which only that numbered (26) is relevant to the dispute. That says: "Charterers have the option of discharging at two safe ports as above and in the event of this option being exercised charterers are to pay extra freight as follows:—6*d.* per ton on the whole cargo shipped for two ports on the same coast and in the same country. Ports between Bordeaux and Dunkirk to be considered as on the same coast. 1*s.* per ton on the whole cargo shipped for two ports on different coasts or in different countries." Bordeaux and Le Havre both being in France, the 6*d.* per ton would be the correct extra freight on the exercise of that option by the charterers.

What happened was that shortly before the loading of the ship at Philadelphia, the sailing date being the 23rd January, 1937, as it turned out, the charterers had intimated to the shipowners that they desired to exercise the option and have the ship go to two ports. The phrase "two safe ports as above" in clause (26) refers, I think, to the typewritten words in clause (1) following after the printed words "proceed (as ordered on signing bills of lading) direct to," &c. It means that the two safe ports must be within the range there specified "as above." The charterers wanted the ship to go to Bordeaux first and then to Le Havre. The charterers are a firm in Paris. The shipowners wanted the order of ports to be Le Havre first and then Bordeaux. Correspondence took place between them as to whether the rotation should be the one which the charterers desired, or the one which the shipowners desired. The charterers insisted on their rotation, that is, Bordeaux first, and the shipowners agreed to comply with their wishes. That is all that happened on this side of the Atlantic, but on the other side of the Atlantic, when the cargo had been loaded from the factors of the charterers, an American company called the Atlantic Refining Company, that company tendered the bill of lading as factors of the charterers and only one bill was tendered. That bill of lading provided that the ship should proceed to Le Havre only, and nothing was said in it about two ports or about Bordeaux. After the ship had sailed the owners and charterers on this side learned that only one port had been put in the bill of lading. Then a correspondence took place between them, and the shipowners agreed with the charterers that the ship should proceed to Bordeaux first and then to Le Havre, and they accepted the charterers' offer of a banker's indemnity against risks which the shipowners might incur by changing the ship's voyage as specified in the bill of lading but the shipowners required them to pay any extra costs which the shipowners were put to by the change, over the 6*d.* a ton extra for the option of going to two ports.

The matter went to arbitration, as I have said, and the umpire decided that the charterers were liable under the arrangement made because they had no right, after presenting the bill of lading for one port, to call upon the shipowners to send the ship to two ports. The umpire decided that the correspondence which took place before the loading of the ship was only what he called a provisional exercise by the charterers of their right of requiring the ship to go to two ports; he took the view that under the charter-party the printed words in clause (1) ("as ordered on signing bills of lading") made that moment of time the appropriate moment for the exercise of the option for the two ports, and that consequently the intimation given by the charterers by correspondence before the ship sailed that they wished it to go to two ports was merely a provisional exercise of the option and that when their factors tendered the bill of lading for one port, that was the definitive exercise of the option.

He accordingly decided in favour of the shipowners, but left these two questions to the court: "Whether upon the facts as found by me and upon the true construction of the documents: (1) Orders for the discharging port or ports must be given at the time of signing bills of lading; (2) When bills of lading are presented by the charterers' factors endorsed for a different destination, the charterers have thereby altered or waived any earlier orders given by them or are estopped from denying that the destination so endorsed is the proper one." He said that if the court found that the answer to the first question should be in the affirmative, or that the answer to the first question should be in the negative and the answer to the second question should be in the affirmative, then he gives the shipowners the sum of 30*l.* odd and costs, but that if the court answers both questions in the negative then he gives the charterers the costs, with nothing to pay by way of damages or indemnity to the owners.

So the question is a very short one, and in my view, though at first I was inclined to be with counsel for the appellants in his argument that the interpretation of the charter required the conclusion that the exercise of the option for two ports must be made at the time of signing bills of lading, I have come to the conclusion that that argument is wrong on the ground pointed out by counsel for the respondents, that it is necessary to distinguish between exercising the option for two ports and the naming of the particular ports which has to be effected according to the charter on signing bills of lading. Counsel for the respondents further submitted that under the charter the charterers had an absolute right to say that the ship should go to two ports, without naming what ports, at the time when they exercised that right—called an option in clause (26)—and that when they had exercised it in accordance with the ordinary rule about options in contracts, the contract then came to be *ipso facto*, by the exercise of that right intimating to the owners what their exercise was, namely, two ports, a charter for two ports, and that when that had happened it was then necessary to approach the question as to what was the effect, in a charter for two ports, of the charterers' factors tendering for signature a bill of lading for one port.

The first point to realise is that, as between the charterers and the shipowners, the bill of lading, when signed by the master, was a mere receipt for the cargo loaded and did not alter the contract as between shipowner and charterer. That is a matter of law. Then in addition there is this point of fact. In the correspondence which passed between the charterers and the shipowners through the owners' various agents in London and Oslo, the charterers had not only said: "We exercise the option for two ports," but they had said: "We exercise the option for the two ports of Bordeaux and Le Havre." The shipowners clearly assented to that exercise of their option, and as between the shipowners and the charterers, I think it was at least common ground—possibly a binding contract also—that the ship should go to these two ports in that order.

That being so, what is the effect of the charterers' factors tendering the bill of lading for one port? Clearly that happened through a mistake, for which, no doubt, the charterers were primarily responsible, in that they had not told their factors to make out the bill of lading for two ports. Then, secondly, it was a mistake on the part of the master; he signed that bill of lading because he had not heard from his owners that the option for two ports had been exercised, and, therefore, looking at the charter, thought it was only a charter for one port, and consequently, had no reason to suppose that the naming of one port only in the bill of lading was a mistake. Correspondence took place afterwards which has no bearing at all on the question of liability, because it merely relates, in my view, to the amount payable in case the owners were entitled to hold the charterers, as they did, to the one port named in the bill of lading. As a matter of fact, in this case the one bill of lading did not leave the possession of the charterers or their agents at all, and the risk of third parties taking one proceeding or another in consequence of the bill of lading not corresponding to the actual voyage of the ship, never arose. But we need not in this case consider the rights of third parties which might have accrued, since there is no evidence before the umpire that any did accrue. On the contrary, the evidence was that the bill of lading remained a receipt, and nothing more.

Now, that is the whole story, except the conclusion. In my view, in this particular case, on these particular facts, the option for two ports was duly exercised by correspondence. There is nothing in the charter which compels that exercise at the moment of signing bills of lading, because I think that clause relates only to the naming of a port or ports, and since the bill of lading was, as between ship and charterers, not a new contract at all, but only a receipt by the master of the charterers' goods, in my opinion, it had no operative effect at all as between these two parties.

It follows from this that my judgment must be for the charterers and against the shipowners upon the question asked, and they will be answered, as I have indicated, in accordance with the judgment given by Atkinson, J. below. He took the view that the umpire was wrong in his interpretation of the charter and that the position was one in which the charterers were right. I think he made certain minor slips in regard to some of the correspondence, but in effect the judgment which I have just delivered is to agree with the learned judge in the conclusion at which he arrived.

Therefore, that will be a dismissal of the appeal. I will consider the question of the particular answers to the questions, if they have to be answered at all.

Valentine Holmes.—I have got the order of Atkinson, J. here, my Lord, and they have been answered sufficiently.

Scott, L.J.—Very well.

Clauson, L.J.—I agree.

Goddard, L.J.—I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors for the appellants: *Sinclair, Roche* and *Temperley.*

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

December 14, 1939.

(Before SLESSER, MACKINNON and GODDARD, L.JJ.)

The Amazone (*a*)

Action in rem *for possession of yacht—Diplomatic Immunity of foreign military attaché—Diplomatic Privileges Act*, 1708, *s.* 3.

Motion on behalf of Commandant L. H.-S. to set aside a writ of possession of the yacht Amazone *and the warrant of arrest issued at the instance of his wife, Madame U. H.-S., on the ground that, as an assistant military attaché on the staff of the Belgian Embassy in London, he and his property were entitled to diplomatic immunity. The defendant entered a conditional appearance under protest. The yacht was registered in the defendant's name and laid up at Southampton in the hands of Messrs. Thornycroft, who took their orders from him. The plaintiff's case was that the yacht had been purchased with her money and that the defendant had acted in everything connected with it as her agent, and that until he had proved it to be his property he could not claim immunity.*

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

Held by Langton, J., that the defendant had diplomatic immunity and that the writ should be set aside.

Decision of Langton, J. (*ante, p.* 345) *affirmed.*

G. St. Clair Pilcher, K.C. and *Owen Bateson* for the appellant.

Gordon Williams, K.C. and *G. N. W. Boyes* (for *J. V. Naisby*, on war service) for the respondent.

Slesser, L.J.—This is an appeal from a judgment of Langton, J. arising on a motion to set aside a writ in the case of Hemeleers-Shenley, plaintiff, and all persons claiming an interest in the vessel *Amazone*, defendants, in Admiralty. Madame Hemeleers-Shenley is the wife of a gentleman who at all material times was the assistant military attaché to the Belgian Embassy. It appears from the evidence on affidavit that Madame Hemeleers-Shenley was a wealthy lady, and that from time to time she assisted her husband and enabled him to live in that state of life which they thought appropriate. Among other things, it appears that he was put financially into a position to order Messrs. Thornycroft to built a yacht, the *Amazone*. This vessel was built apparently entirely to the orders of Commandant Hemeleers-Shenley; he discharged, so far as regards Messrs. Thornycroft, any financial liabilities which arose from the building of the yacht, and his name appears in the register as the owner of the boat. Nevertheless, disputes having unfortunately arisen between the husband and wife, his wife contends that she is the owner of the boat. Her writ, dated 30th March, 1939, claims, as sole owner of the *Amazone*, to have possession decreed to her of the said vessel.

The learned judge has come to the conclusion that the possession of this vessel is now in the husband, and, so far as that matter is concerned, I think the learned judge was right in coming to that conclusion. Indeed, it appears to be conceded by the affidavits filed on behalf of the plaintiff and is so stated in the affidavit of the husband. What is said, however, is that the husband is immune from being impleaded in this action to test whether he is or is not the owner of the *Amazone* and entitled to possession, by reason of the fact that, as is stated by the Foreign Office, he possesses diplomatic privilege. It is said by Mr. Pilcher that the certificate of diplomatic privilege, having stated that he is Assistant Military Attaché, goes on to say that his name has been included in the list prepared under the statute of 7 Anne, c. 12; and it is argued—by reason of the fact that his name appears in that list and there is no statement by the Foreign Office beyond that—that if he cannot show diplomatic immunity under that statute, he cannot resist these proceedings.

In my view, that is to put an entirely too narrow construction upon the certificate of diplomatic privilege of the Foreign Office. True it is that the husband's name may be compiled under that list, but I read the certificate as informing the court, as it so states, that he is the assistant military attaché, and that he is a person having diplomatic privilege not only under the statute but also under the common law—such privilege as would normally attach to an assistant military attaché. What is said by Mr. Pilcher on behalf of the appellant is that, if reliance is to be placed upon the Diplomatic Privileges Act, then the language of sect. 3 is not sufficient to enable the respondent here to avail himself of its protection unless he can show that the goods referred to in the action are actually his—a matter which can only be determined after the action has been heard and determined.

The statute first recites that: "Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattueof, Ambassador Extraordinary of his Czarish Majesty. . . ." Then in sect. 3 appear these words: "And to prevent the like insolences for the future, be it further declared by the authority aforesaid, That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any Ambassador, or other publick minister of any foreign prince or state, authorized and received as such by Her Majesty, her heirs or successors, or the domestick, or domestick servant of any such Ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

Mr. Pilcher says it has not yet been established that these are the respondent's goods or chattels, and therefore the question whether they may be "distrained, seized, or attached"—matters prohibited by the statute—cannot be said necessarily to apply to this husband as a diplomatic servant until that matter has been litigated.

It is clear, I think, and it has been stated very clearly in earlier cases—it is not necessary to repeat it again—that 7 Anne, c. 12, was merely in the nature of a penal statute, as the preamble says, to deal with the persons who do the kind of things struck at by the preamble. In sect. 4, for example, it provides for punishment of attorneys who seek to enforce process and says that they "shall suffer such pains, penalties, and corporal punishment, as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted." I do not know that any attorney has ever been corporally punished under this statute for such proceedings. It may be that in a certain view the attorneys in this case might be in peril of receiving such punishment; but we have not got to adjudicate upon that point.

This question in substance has already been considered and I think decided in the case of *Parkinson* v. *Potter* (53 L. T. Rep. 818; (1885) 16 Q. B. 152), in which it is assumed—and earlier cases have said the same thing—that this statute of Queen Anne is by no means exhaustive of the common law dealing with diplomatic immunity. In that case an action was brought on a lease against an attaché of a foreign embassy, and it was argued, rather as it is argued here, that the language of the statute was not satisfied because it was not shown that the goods were the property of the person seeking the diplomatic immunity; and that in the statute of Anne there is no mention of an attaché, which is perfectly true; it deals with the ambassador and his domestic servants. But Mathew, J., disposing of that argument, says (at p. 157): "Then it was urged that, assuming that De Basto was an attaché, it did not follow that he was within the privilege of the embassy; and our attention was called to the provisions of the statute 7 Anne, c. 12, s. 3, which only mentions the ambassador and his domestic servants. But it appears from the authorities that the privilege of the embassy is recognised by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are

privileged, and that an attaché is within that privilege."

Now, that being so, I ask myself: what is the privilege, quite apart from the statute of Anne, and how far does it extend? I think that all the text-books and authorities agree, and I do not think it is necessary to give any very copious citations. So far as text-books are concerned, I will content myself with quoting Dicey's "Conflict of Laws," 5th edit., p. 196: "An ambassador or other diplomatic agent accredited to the Crown by a foreign State cannot, at any rate without his sovereign's consent, be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized." There is nothing, I think, in any of the authorities to throw doubt upon that proposition except an early statement of Sir Edward Coke in his "Institutes," which qualifies the immunity of the ambassador in a way which ever since has been disagreed with.

Finally I may mention the observations of Lord Warrington of Clyffe in *Engelke* v. *Musmann* (139 L. T. Rep. 586, at p. 593; (1928) A. C. 433, at p. 458): "I have also thought it unnecessary to say anything about the statute of Anne. It is well settled that the questions we have been discussing do not depend on the statute but are principles of common law having their origin in the idea of the comity of nations."

Mr. Pilcher is prepared to admit that, once we may travel outside the statute of Anne, subject to the doubt expressed whether this person is a diplomatic agent otherwise than for the purpose of the statute, there would be here a complete protection. Now, in this action there can be no doubt at all that Commandant Hemeleers-Shenley, who is impleaded, is a person coming within the privilege of the embassy. Once that is established, it follows from all the authorities from Grotius downwards that he may claim his immunity.

In my view the learned judge was right in coming to the conclusion to which he did come. I myself express no opinion whether the defendant is or is not protected under the statute of Anne; it is sufficient for my purpose to say that he can derive his protection from the common law. I think, therefore, this appeal fails.

MacKinnon, L.J.—I agree. The argument is that, inasmuch as the words of sect. 3 of the Act do not exactly fit the nature of the present action, therefore it cannot be stopped on the application of the respondent. But it is perfectly natural that sect. 3 of the Act should have referred to the matter in the way it does, because the normal way at that time of commencing any civil proceeding was by arrest by way of mesne process or by distraint. It is plain under the authorities that the Act was not meant to define exhaustively the nature of the diplomatic privilege, but was merely confirmatory of the common law. Slesser, L.J. has referred to several authorities in which that has been laid down. There is only one further case which I think is equally clear, and that is *Magdalena Steam Navigation Company* v. *Martin* ((1859) L. J. Q. B. 310). In that case a similar question arose and a kindred argument upon the terms of the statute of Anne was addressed to the court. Lord Campbell deals with that and deals with the authorities, and says: "Reference was frequently made during the argument to the statute of 7 Anne, c. 12; but it can be of no service to the plaintiffs." Then he discusses that, and says: "At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the courts of the country to which they are accredited." That is repeated in the last sentence of his judgment: "It certainly has not hitherto been expressly decided, that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant."

I agree with that; I think this appeal is quite unfounded, and it should be dismissed with costs.

Goddard, L.J.—I agree. It is well established that it is the common law of this country that not only ambassadors but members of their suites are exempt from judicial process. The statute of Anne is declaratory in the first, second and third sections, and it really does not achieve any change in the law by the subsequent sections. It is not a change in the law, but an addition to the law, for sect. 4 imposes penalties on attorneys, solicitors, sheriffs, bailiffs, and other ministers of justice who issue or execute writs against the person of the ambassador or his suite. Then sect. 5 provides that persons subject to the bankruptcy laws who put themselves into the service of any such ambassador or public minister should not take any manner of benefit by this Act—referring, that is, to traders. That may or may not mean that if a trader attached himself to the suite of an ambassador he should not have any immunity; but I think it clearly means that a solicitor who sued a person within the description of sect. 5 would not be liable to any pains and penalties under sect. 4. Sect. 5 of the Act gives immunity also to a solicitor who sues a person not on what is commonly called the diplomatic list; it provides that "no person shall be proceeded against as having arrested the servant of an ambassador or publick minister, by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex. . . ." This is a striking instance of the inaccuracy of a marginal note, because the marginal note says that: "No merchant &c. to have any benefit of this Act; nor the servant of an ambassador, unless his name be registered &c." That is not what the section provides; it says that solicitors and others are not to be liable to penalties for proceeding against servants of an ambassador who are not registered; and it has since been held that, though a servant is not registered, he may yet have diplomatic privilege.

I agree with MacKinnon, L.J. that in the time of Queen Anne all common law actions which were started in the Queen's Bench by a writ of latitat, or in the Common Pleas by a writ of capias, or by similar processes in the Court of Exchequer, contemplated the arrest on mesne process of the defendant, or, if that could not be effected, a writ of distringas on his goods to compel him to put in an appearance; and, therefore, that those common law processes were dealt with by sect. 3 was no more than logical. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Janson, Cobb, Pearson* and *Co.*

Solicitors for the respondent: *Stephenson, Harwood* and *Tatham.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 1, 1940.

(Before Atkinson, J.)

Imperial Smelting Corporation, Ltd. v. Joseph Constantine Steamship Line, Ltd. (*a*)

[This decision was reversed by the Court of Appeal on 18th June, 1940 (*post* p. 381), but the latter decision has subsequently been reversed.—Ed.]

Contract—Charter-party—Frustration of commercial object of adventure—Implied term—Allegation that frustration caused by negligence—Burden of proof.

When, in an action claiming damages for breach of contract, the defendant proves that an event has occurred which has frustrated the commercial object of the contract and the plaintiff then alleges that that event has been caused by the defendant's negligence, the burden of proving that the defendant has been guilty of negligence is on the plaintiff, and his action fails unless he can discharge that burden.

Special case stated by an arbitrator, which raised the question of the onus of proof in cases where one party to a contract alleged that the object of the contract had been frustrated, and the other party alleged that the frustration was due to the former's negligence.

The material facts were as follows. A ship belonging to the appellant shipowners was chartered by the respondent charterers to proceed to Port Pirie, and there load a cargo of ore for carriage to a named port. The ship reached the harbour at Port Pirie, and while she was lying in the roads, and before she became an arrived ship, an explosion occurred in one of her boilers, which so damaged her that the owners were obliged to give notice that they were unable to perform the charter-party. It was common ground that the damage done to the ship was such as to frustrate the commercial object of the voyage.

It had been impossible to explain the cause of the explosion, and there was no evidence, one way or the other, as to whether it was due to the negligence of the owners or their servants. In those circumstances the arbitrator held that the charterers were entitled to damages for breach of the charter-party. The owners now contended that the event causing frustration must be treated as an implied exception in the charter-party, and that they were entitled to rely on it unless it could be shown that the occurrence was due to their negligence.

Sir Robert Aske, K.C., and Devlin (for *A. A. Mocatta* on war service) for the appellants.

Pilcher, K.C., and *Charles Stevenson* for the respondents.

Atkinson, J.—This is a special case stated in an interim award to determine a question of liability on a claim for damages by the charterers against the owners of a ship for failure to load a cargo. The charter-party is dated 5th August, 1936, and was an agreement between the shipowners, Joseph Constantine Steamship Line, Ltd., the owners of the vessel *Kingswood*, and certain agents for the claimants. It provided that the said vessel should proceed to Port Pirie, in South Australia, for the purposes of the charterers and there load a full cargo of a certain description. The vessel was estimated to arrive at Port Pirie about the end of December, or early January.

There was an exceptions clause, clause 7: "The act of God," and then various other exceptions are mentioned, ending up with "and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the owners . . . and all the above exceptions are conditional on the vessel being seaworthy when she sails on her voyage but any latent defects in the machinery, hull, or tackle shall not be considered unseaworthiness: provided the same did not result from want of due diligence of the owner or owners, or any of them, or of the ship's husband or manager."

The other relevant clause is clause 29: "This charter-party is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof. This charter-party is subject to the terms and provisions of the Sea Carriage of Goods Act, 1924 (Australia), and the conditions thereby implied in the bill of lading shall be deemed to form part of and be incorporated in this charter."

The ship left the Tyne for Durban in October, 1936. She then proceeded with cargo to Lourenço Marques, and in the first week of December sailed from there in ballast for Port Pirie in order to load the cargo provided for by the charter-party. The *Kingswood* anchored in the roads of Port Pirie on 26th December, and on the following day the master tendered what purported to be a notice of readiness. This was not accepted as a proper notice, and it was agreed that the steamer should remain at anchorage until 4th January, and should then proceed to her berth. It was agreed in the case before me that the steamer never became "an arrived ship." The case finds that "at approximately 8.55 a.m. on Sunday, 3rd January, 1937, while the steamer was still anchored in the roads there occurred an explosion of extreme violence from the auxiliary boiler. As to the general features of the explosion there is no dispute. It was internal in the sense that it took place within the circumference of the boiler and it was due to the fact that there was a sudden opening of communication between the water and steam space and one or both of the combustion chambers." Then: "There is no doubt that the plain tubes and the majority of the stay tubes became at some stage displaced from their positions in both the front and back tube plates. Further there is common ground as to what immediately supervened. The energy released was such that the main boilers, situated aft of the auxiliary boiler, were set aft by the concussion of the explosion 4 ft. and 5 ft. 6 in. respectively at which points their movement was arrested, whereas the auxiliary boiler itself was projected forward through two watertight bulkheads, finally piercing the collision bulkhead at the forward end of No. 1 hold and breaking the shell plates at the starboard bow. The distance travelled by the auxiliary boiler before it came to rest in the fore peak was approximately 164 ft." I am told that when it did come to rest the boiler itself—that is, the outside shell—was still intact. The respondents gave notice that they could not perform the charter-party, and it was agreed between the claimants and the respondents that the delay caused by the damage to the steamer was such as to frustrate the commercial object of the adventure. As it could not be

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

repaired in Australia, the steamer was brought back to this country, and there was the usual examination by surveyors for both parties, also a Board of Trade inquiry under the Boiler Explosions Acts, 1882 and 1890, and there has been a long inquiry before the arbitrator in this case. The result of that inquiry before the arbitrator is expressed in paragraph 7 of the case: "Neither those who were responsible for conducting the Board of Trade inquiry nor any of the witnesses who gave evidence before me claimed to be able to state with any certainty the causes of the disaster or the sequence of events that led up to it. The explosion was one of an unprecedented character and no sequence of events which was other than improbable was suggested as capable of having given rise to it."

The question of law involved in this case arises in this way. The claimants claim damages for failure to load. The owners plead the destruction of the ship as a navigable unit and claim that the contract was thereby frustrated without liability on their part. They also rely on the exceptions clause and the articles of the schedule to the Australian Sea Carriage of Goods Act, 1924. The claimants in reply say that the frustration arose from the default of the owners, and that they are not entitled, therefore, to rely upon it.

The general rule is that impossibility of performance is no answer to a claim for breach of contract. But there are certain exceptions to the rule, and among them are certainly personal contracts, where performance necessarily depends upon the contractor being alive and in sufficiently good health to perform his contract and performance becomes impossible through death or illness; and also contracts where the possibility of performance necessarily depends upon the continued existence of a specific subject-matter and the performance becomes impossible owing to the destruction of that subject-matter. In such cases the contract or the adventure contemplated by the contract is said to be frustrated and the contract is at an end, and no action lies for damages for breach. But to quote Lord Sumner in *Bank Line, Limited* v. *Arthur Capel and Company* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435): "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated."

In the case of *Maritime National Fish Limited* v. *Ocean Trawlers, Limited* (18 Asp. Mar. Law Cas. 551; 153 L. T. Rep. 425; (1935) A. C. 524), the facts of which are not very material for my purpose, Lord Wright said this: "The essence of 'frustration' is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of Lord Sumner in *Bank Line, Limited* v. *Arthur Capel and Company*," and then he reads the passage which I have just read. Then he goes on: "A reference to the record in the House of Lords confirms Lord Sumner's view that the court below had not considered the point, nor had they evidence or material for its consideration. Indeed, in the war-time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability." The point arose in the *Bank Line* case because the Admiralty, I think, wanted three trawlers, and the defendants had selected the three which should be handed over, one of the three being the one, the subject of the contract upon which that particular action was brought. "However, the point does directly arise in the facts now before the Board, and their Lordships are of opinion that the loss of the St. Cuthbert's licence can correctly be described, *quoad* the appellants, as 'a self-induced frustration.' Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Company* (17 Asp. Mar. Law Cas. 8; 134 L. T. Rep. 737; (1926) A. C. 497), quotes from Lord Blackburn in *Dahl* v. *Nelson Donkin and Company* (44 L. T. Rep. 381; App. Cas. 38), who refers to a 'frustration' as being a matter 'caused by something for which neither party was responsible': and again he quotes Brett, J.'s words in *Jackson* v. *Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. R. 10 C. P. 125), which postulate as one of the conditions of frustration that it should be 'without any default of either party.' It would be easy, but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their default to excuse them from liability under the contract." In passing it will be noticed that Lord Sumner said reliance cannot be placed on a frustration which is self induced, he does not say "on a frustration which is not proved to be not self induced." The passage which I have read from Lord Wright's judgment seems to me to imply the same idea. There, of course, the facts showed conclusively that there had been a self-induced frustration, and he was dealing with it on that assumption.

It is agreed, I think, before me that the main question of law raised by the case is this: Is it for the person who has failed to perform his contractual obligation and is setting up a case of frustration to prove affirmatively not only that performance became impossible owing to circumstances bringing him within the second of the exceptions I have indicated, but also that the impossibility was not due to any negligence on his part; or is it for the party claiming damages to prove that the impossibility was due to the negligence of the defaulting party? That is the main point of law raised, and both sides agree that there is no direct authority on it.

I put the question in this way. Supposing a ship, the subject-matter of a charter-party such as this, is lost with all hands on the outward voyage, nothing being known of the circumstances, that is, nothing from which any inference can be drawn: does the shipowner lose because he cannot disprove negligence, or does the charterer lose because he is unable to prove negligence? I might go a step further. Supposing a ship is lost with all hands by striking a mine, and that much is known: then is the shipowner to prove that a proper watch was being kept, and that the ship was being navigated with proper skill, in order to succeed in establishing frustration, or has the charterer to prove that there was some negligence in the navigation or look-out

which might have been responsible for the loss? Perhaps it is not yet finally settled whether the true basis upon which the doctrine of frustration of contract rests is the term to be implied into the contract, or whether it arises by operation of law as soon as it appears that the basis of the contract has gone.

In *Blackburn Bobbin Company Limited* v. *T. W. Allen and Company Limited* (119 L. T. Rep. 215; (1918) 1 K. B. 540 at pp. 217 and 545) McCardie, J., in putting the principle, said this: "It was put with clearness by Lord Shaw in *Horlock* v. *Beal* (114 L. T. Rep. 193 at p. 208; (1916) 1 A. C. 486 at p. 512), where he said: 'The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties.' It was stated with equal clearness by Lord Haldane in *F. A. Tamplin Steamship Company* v. *Anglo Mexican Petroleum Products, Limited* (115 L. T. Rep. 315 at p. 317; (1916) 2 A. C. 397 at p. 406), where he said: 'The occurrence itself may . . . be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.' In every case it is now necessary 'to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract': per Lord Loreburn in the *Tamplin* case." So you have three quotations there, the first two, from Lord Shaw and Lord Haldane, putting it on the basis of the foundation of the contract having disappeared, the third, by Lord Loreburn, suggesting that a term to the same effect would be implied into the contract.

Branson, J., has pointed out in the case of *Court Line Limited* v. *Dant and Russell Incorporated* (19 Asp. Mar. Law Cas. 307), that the Court of Appeal in *Comptoir Commercial Anversois* v. *Power Son and Company* (122 L. T. Rep. 567; (1920) 1 K. B. 868) had decided in favour of the former view, and said that so far as a judge of first instance was concerned, the matter was concluded. If I accept what he says as right, that means that some term has to be implied into the contract. But in what words is the implied term to be deemed to be expressed? Are they to be words simply indicating that the destruction of some specific subject-matter should put an end to the contract, or that the continued existence of such specific subject-matter should be deemed to be of the basis of the contract? Does negligence become relevant merely on the same principle that a man cannot rely upon an exceptions clause if his negligence has caused the excepted event: or must the implied term be deemed to contain words putting upon the parties seeking to be relieved the burden of disproving the negligence, that is to say, of proving frustration without default, and how far has the proof to go?

I must seek what guidance I can from analogous cases. I think I can find some from the way in which the question of proof of negligence has been dealt with in other cases—I cannot say of a similar character, but, at any rate, of a not very dissimilar character, to the one with which I have to deal to-day. On the one hand I have cases under sect. 502 of the Merchant Shipping Act, 1894 (57–58 Vict. c. 60). That section is: "The owner of a British sea-going ship . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity" in certain specific circumstances. It has been held that the onus of disproving actual fault or privity is on the shipowner. The first case in which that was held was *Asiatic Petroleum Company, Limited* v. *Lennard's Carrying Company, Limited* (12 Asp. Mar. Law Cas. 381; 109 L. T. Rep. 433; (1914) 1 K. B. 419), in the Court of Appeal, and Hamilton, L.J., dealt with the point showing that, at any rate, in his mind it was one which was not free from doubt. "Can it be said that the cargo was burnt without the actual fault or privity of the owners? Though I think that the whole onus lies on the shipowner of proving as a defence loss by a fire, of which he can predicate that it happened without his actual fault, and that 'without his actual fault or privity' in sect. 502 of the Merchant Shipping Act, 1894, differs in this respect from negligence in connection with expected perils in a bill of lading (*The Glendarroch*) (7 Asp. Mar. Law Cas. 420; 70 L. T. Rep. 344; (1894) P. 226). I need not decide it, for the facts proved are quite sufficient for the purpose, let the onus lie where it may." In the House of Lords it was decided quite clearly that under that section the onus lay and lay entirely on the owners setting up the section. That decision has been followed, as, of course, it would have to be, in the cases of *Paterson Steamships, Limited* v. *Robin Hood Mills* (58 Lloyd's List Reports 33), and *Standard Oil Company of New York* v. *The Clan Line Steamers, Limited* (16 Asp. Mar. Law Cas. 273; 130 L. T. Rep. 481; (1924) A. C. 100). The ratio of those decisions seems to be this, that the section creates a statutory exceptions clause and that it is for the person setting up the clause to bring himself within it. On the other hand, there are cases on exceptions clauses in charter-parties and it is beyond dispute that when a loss apparently falls within an exception the burden of showing that the owner is not entitled to the benefit of the exception on the ground of negligence is on the person so contending: *The Glendarroch* (*sup.*), and that has been followed again and again. It is difficult to see why the implied frustration term should be treated in the same way as a statutory exceptions clause rather than in the same way as an express exceptions clause. Again, if a prima facie case of perils of the sea is made out and the plaintiff alleges unseaworthiness, the proof is upon the person alleging it: *The Northumbria* (10 Asp. Mar. Law Cas. 314; 95 L. T. Rep. 618; (1916) P. 296).

Consider, too, the cases of incapacity through illness. There the principle is the same as, for instance, *Robinson* v. *Davison* (24 L. T. Rep. 755; L. R. 6 Ex. 269). Illness may well be due to neglect, but it has never been suggested in cases dependent on sickness that the sick person must prove absence of negligence for the reason that illness raises no presumption of negligence. At any rate, I have looked at all the cases I can find on this and I can find no suggestion anywhere that a person setting up illness as frustrating the possible performance of the contract has been called upon to prove an absence of fault on his part.

Then there are the cases arising under sect. 7 of the Sale of Goods Act. The language is very much the same, I suppose, as that in which the principle of frustration might be expressed even in an extreme form. Where there is an agreement to sell specific goods and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyers, the agreement is thereby avoided. Blackburn, J. in the case of *Taylor* v. *Caldwell* (8 L. T. Rep. 356; 3 B. & S. 826) referred,

for example, to the case of *Rugg* v. *Minett* (11 East, 210). In that case there is no suggestion whatever that the vendor had to prove that he was not responsible for the fire which had destroyed the goods which had been sold and the property in which had passed. There had been many fire cases. *Taylor* v. *Caldwell* (*sup.*) was one. *Appleby* v. *Myers* (16 L. T. Rep. 669; L. R. 2 C. P. 651) was another. I can find no suggestion in any of those cases that the person relying upon fire as an excuse for his breach of contract has been called upon to prove that the fire was in no way due to any negligence on his part. I suppose the fire does not raise a presumption of negligence, but be that as it may, I have sought vainly for any suggestion that where fire has produced impossibility of performance the person setting it up has to prove exactly how it happened through no conceivable fault of his own.

Again, there are the bailee cases. I shall refer to those cases later on in my judgment. I need merely say at the moment that they do not impose upon a bailee anything like the burden that it is sought to impose upon the person setting up frustration in this case. I want to refer to the case of *Taylor* v. *Caldwell* for this purpose. I am looking at the report in Smith's Leading Cases. It is a complete report—I have ascertained that—and I am reading from p. 609 of vol. 2 of Smith's Leading Cases. The learned judge was dealing with the condition that ought to be implied or with what was the basis of the contract, and he said: "These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused." He says that rule of law was established by *Rugg* v. *Minett* (*sup.*), to which I have already referred. His judgment ended in this way. "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music hall at the time when the concerts were to be given: that being essential to their performance." It will be noted from that that there is not a word said about negligence or proof of negligence or disproof of negligence being deemed to be incorporated yet it is quite clear from his earlier statement of the principle that impossibility of performance from the perishing of the thing had to be without the default of the contractor. The inference one would draw from that is this, that the implication is simply that the destruction of the subject-matter terminates the contract, but that, of course, you cannot rely upon it if it is established or shown that your own default has really brought about that destruction. It goes on: "We think, therefore, that the music hall having ceased to exist, without fault of either party, both parties are excused." It may be a trifling and small indication but I think it is an indication that Blackburn, J. there seems to be treating negligence in this way, not that the implied term has any reference to it, but that the implied term cannot be relied upon any more than an exceptions clause if the trouble has been brought about by the default of the owner. *Howell* v. *Coupland* (33 L. T. Rep. 832; L. R. 9 Q. B. 462), was a potato case. It will be remembered that there was a sale of 200 tons of regent potatoes grown on land belonging to the defendant at so much a ton to be delivered by September or October. In March the defendant had 68 acres ready for potatoes which were sown and were amply sufficient to grow more than 200 tons in an average year. In August potato blight appeared and the crop failed, so that the defendant was able to deliver only 80 tons. The plaintiff brought an action for the non-delivery of the other 120 tons, but he failed. The only reason why I refer to this case is this: That the principle of *Taylor* v. *Caldwell* (*sup.*) was applied and nowhere was there any suggestion that there was any burden upon the defendant to disprove that his potatoes suffered from this blight through any default of his own. It was taken for granted that it was the act of God—well, I do not know that that was said—but, at any rate, there was no suggestion whatever that there was any burden on him to show that any want of skill or proper protection of his crop or proper treating of it had anything to do with this blight. In *Appleby* v. *Myers* (*sup.*), one gets a little more guidance. There A. had contracted to do work and supply materials upon the premises of B. for a specific sum to be paid on the completion of the whole. A. had done part of the work when the building was destroyed by fire and he was claiming payment for what he had done and it was held that he had no claim because he was not entitled to payment until he had completed his contract and the impossibility of completing it had come about through this fire, and, therefore, he could not recover. Blackburn, J. said this (at pp. 671 and 658): "We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded and sue on a *quantum meruit*. But we do not agree, with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties." It will be noted that he said "We agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work . . ." which seems to imply some established default. That is clear at the end of the judgment where he says: "We think that on the principles of English law laid down" (*Cutter* v. *Powell* (6 Times L. Rep. 320), *Jesse* v. *Roy* (3 L. T. Ex. 268)), and so on, "the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete or that there is something to justify the conclusion that the parties have entered into a fresh contract." In all the cases which I have looked at that is the only sentence I can find which clearly

indicates on whom was the burden—"or it can be shown that it was the defendant's fault that the work was incomplete." It was Blackburn J., who had laid down the principle in *Taylor* v. *Caldwell*. When applying that principle in *Appleby* v. *Myers* he uses an expression which seems to me to indicate that it was his view that in the case of a plaintiff claiming damages as on a breach it is for him to prove that it was the defendant's fault that the work was incomplete. I can see myself no reason why the implied term should be so framed as to exclude the general rules governing the incidence of proof in the law of negligence or why those rules should not apply to the problems raised in this case. Those rules have in the main been built up in actions for tort, but they apply equally where the question of breach of contract depends upon whether there has or has not been negligence. As a general rule a party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong.

To quote Lord Wensleydale in *Morgan and others* v. *Sim and others* (11 Moore's Privy Council Cases, 307 at p. 312), he must show "that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed." Bowen, L.J. laid down some helpful rules relating to the onus of proof in *Abrath* v. *North Eastern Railway Company* (49 L. T. Rep. 618, 11 Q. B. 440). I am reading from pp. 622 and 456: "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails, if he makes a prima facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof." In such a case as this, the plaintiffs begin by proving that the ship did not arrive within the contract time, or at all. If the case stopped there, the plaintiffs win; but the owners then prove an accident which destroyed the ship as a navigable unit. The owners prove an event which was an immediate, direct and dominant cause of that destruction. If the case stopped there, what is the position? Who wins? Well, I do not think the answer is a simple one; but in my view the onus of ultimately satisfying the tribunal that the ship was at fault rests on the claimants. Whether or no they have discharged that onus, must be judged by applying the following principles. The first is this. If it appears that the accident proved was of such a nature as to raise a presumption of negligence, that is, to afford some evidence of negligence, the onus is on the owner to destroy that presumption created by the nature of the accident. (2) If it appears that the accident was of such a nature as to afford no evidence of negligence, the onus is on the charterer to prove negligence in fact. (3) Where the onus is upon the owner under the first principle that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as strong (that is, equally consistent with the facts) as the inference that it was caused by negligence.

The first principle, of course, rests upon the law laid down by Erle, C.J. in *Scott* v. *London and St. Katharine's Dock Company* (13 L. T. Rep. 148; 3 H. and C. 596), which was this: "There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." The proper inference to be drawn may be strong or it may be weak.

The *Merchant Prince* (7 Asp. Mar. Law Cas. 208; 67 L. T. Rep. 251; (1892) P. 179), is an example of a case where the inference was very strong because a ship navigating the entrance to the Mersey ran into a ship which was at anchor. I need not read the case; but the substance of it was that in a case of that kind, where there was at any rate such apparent negligence which it was very difficult to explain, the presumption had to be got rid of, and the defendant there was called upon to prove conclusively that the accident was brought about by some means for which he was not responsible, and he failed to do it. But how far this presumption ought to be drawn and the strength of the presumption to be drawn, is perhaps well illustrated by Willes, J. in what he said in *Czech* v. *The General Steam Navigation Company* (17 L. T. Rep. 246 at p. 249; L. R. 3 C. P. 14 at p. 19). "I will, however, assume that it is so for the purpose of this case, but it does not therefore restrict the plaintiffs as to the nature of the evidence by which such negligence shall be proved. To explain this by an illustration. If a shipment of sugar took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case I think the shipowner would not be liable, because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew: the injury alone, therefore, would be no evidence of negligence on their part. But if it was proved that the sugar was damaged by fresh-water, then there would be a strong probability that the hatches had been negligently left open and the rain had come in and done the injury, and, though it would be possible that someone had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the injury had been occasioned by negligence in the management of the ship." In other words, that indicates that it must always depend on the circumstances whether a presumption of negligence should be drawn, or whether it should not be drawn.

In *Ballard* v. *North British Railway Company* (1923 S. C. 43), in the House of Lords, there is to my mind a most illuminating judgment of Lord Dunedin on this point. He differed in his conclusion on the facts from the other members of the House, but what

he there said has been referred to again and again with approval. It was an action for damages. Negligence was alleged in the handling of railway trucks in a goods yard; but the facts do not really matter for this purpose. Lord Dunedin says (at p. 53): "The foundation of all actions of the kind we are considering must be negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends on whether, in the circumstances of that particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence. Thus, there is a class of cases dealing with injury occurring to a servant owing to a defective plant." And he gives a number of illustrations. Then he goes on: "Yet it is significant to notice that these cases may be unduly applied, and Lord Justice-Clerk Moncreiff found it necessary to correct the tendency in *Macfarlane* v. *Thompson* (12 R. 232). The accident there was due to a casing falling from the boiler on which the pursuer was working and injuring him. His Lordship had been a party to the judgments in *Fraser* v. *Fraser* (9 R. 946), and *Walker* v. *Olsen* (9 R. 846). Lord Craighill had said (12 R. at p. 235): 'It would, I think, be very unfair to the master to hold that where the cause of the accident was unascertained, or, it may be, unascertainable, it is to be held that the cause must necessarily have lain in some defect of the machinery, and that the master must therefore be found liable,' and the Lord Justice-Clerk said (12 R. at p. 235): 'I only add to what Lord Craighill has said a single sentence for the purpose of explaining my meaning in the opinions I have delivered in cases referred to. It has been sought to interpret these opinions as authority to the effect that you must presume from the fact that an accident has occurred that there was some defect in the machinery. I do not think that any such interpretation can be put upon what I said there. What I did say was that, provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect was one for which he was not to blame, but that is a totally different thing from saying you must infer faults or defects in the machinery where there is no evidence to that effect in any of the surrounding circumstances.'" Then he goes on a little lower down. "Taking the cases in which the mere fact of the accident is relevant to infer negligence, it is sometimes said, and the Lord Ordinary has said it, that there is then raised a presumption of negligence which the defender has got to rebut. I think that this is too absolute a method of expressing the legal result in all cases. It was the same feeling that, I think, led Lord Adam to say in *Milne* v. *Towsend* (19 R. 830 at p. 836): 'The *res* can only speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained.' If indeed 'relevant to infer' and 'necessarily infers' were the same thing, then I think it would be right to say that, when an accident arises in cases where the doctrine is applicable then a presumption of fault would arise which must be overcome by contrary evidence, and that is the way that the Lord Ordinary has looked at the matter. But, 'relevant to infer' and 'necessarily infers' are not synonymous, and the difference becomes of moment in a case like the present. I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott* v. *London and St. Katharine's Docks Company* (*sup.*), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon. I think this view of mine is borne out by the expressions used in the case of *Scott*." Then he quotes the principle I have already read. The importance of that case of *Ballard* to my mind is as to when that presumption, if it is fair to raise it from the nature of the accident, is removed. In his view it is removed if the defence can show a way in which the accident may have occurred without negligence.

Here, this ship and the boiler being under the owners' management, and the explosion of the boiler being somewhat unusual (perhaps very unusual nowadays) it may be, I must assume, that it affords some evidence of want of care. Whether every boiler explosion is an accident of such a nature as fairly to raise such an inference, I do not know; but it is not necessary to come to any decision as to that, because in this case there has been a Board of Trade inquiry, a prolonged examination of the circumstances before an arbitrator, and certain findings, the result of which has been set forth in the case stated. With whatever inferences and presumptions an inquiry may start, however often the onus may shift as to matters of evidence, the ultimate question must be; has it been established that the respondents were to blame for the accident? That is in substance taken from *Wakelin* v. *London and South Western Railway Company* (55 L. T. Rep. 709; 12 App. Cas. 41). It was a case of a woman suing for the death of her husband, caused by the alleged negligence of the railway company. Lord Halsbury says (at pp. 710 and 44): "It is incumbent upon the plaintiff to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails." Then Lord Halsbury proceeds: "If the simple proposition with which I started is accurate, it is manifest that the plaintiff who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in the sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails." Then Lord Watson (at pp. 711 and 47), pointed out that it is not enough merely to prove acts of negligence. The defendants may be guilty "of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." The relevance of the principle there seems to me to be this. If at the beginning of the case you can only prove two sets of facts, one consistent with negligence and one

which is not consistent with negligence, you have not proved your case. Of course, if at the end of the case that is the position again the plaintiff has failed. If in the result the facts are even, if the tribunal is unable to say that the facts are more consistent with negligence than with the absence of negligence, I think the plaintiff fails.

Brett, J. in *Hanson* v. *Lancashire and Yorkshire Railway Company* (20 W. R. 297 at p. 298) says: "It seems now to be clearly established that in order to render the company liable for negligence, it is necessary to give affirmative proof of negligence on their part: and it is not sufficient merely to prove the occurrence of an accident, and to rely upon that as prima facie evidence of negligence. In some cases, *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party which relies upon the negligence of the other to turn the scale." It follows from that that if at the end of the case the balance is even and the scale has not been turned, the claim fails. FitzGibbon, L.J. in *Powell* v. *M'Glynn* ((1902) 2 I. R. 187 at p. 190) says: "Where there are two hypotheses, one involving and the other not involving negligence, each equally consistent with the evidence, the plaintiff cannot succeed."

That principle has been applied in three or four recent cases, to which I will now refer. The first is *The Kite* (18 Asp. Mar. Law Cas. 413; 149 L. T. Rep. 498; (1933) P. 154). That was an Admiralty case, tried by Langton, J. There had been a collision between a barge which was being towed and, I think the buttress of an arch. The passage I want to refer to is at pp. 418, 502 and 168: "Have the plaintiffs proved that the defendants were negligent? The plaintiffs say: 'You were towing the barge; the barge struck the bridge.' That I think is sufficient to shift the burden of proof for the moment, and it is for the defendant to give an explanation of how this occurred. When he has given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly how the occurrence did happen, but leave an equal possibility that it happened without negligence as with negligence. It may, on the other hand, be sufficient to exclude any question of negligence at all. Those are all possibilities of what may result from the explanation. Before I pass from that I will cite one case which I think is of great assistance in this question." Then he refers to *Ballard* v. *North British Railway Company* (*sup.*), and reads that passage from Lord Dunedin's judgment which I have read, the one which contained the relevant words: "If the defenders can show a way in which the accident may have occurred without negligence," and so on. He applied that principle of law to the case which he was there deciding.

The next case to which I want to refer (and this is a bailee case) is the case of *Brook's Wharf and Bull Wharf Limited* v. *Goodman Brothers* (156 L. T. Rep. 4; (1937) 1 K. B. 534). That was a case of goods deposited in a warehouse, which had been stolen. The law, I think, is pretty clear about the position of the bailee in those circumstances. If he cannot produce the goods, he has to disprove negligence; he has to explain non-production in some way. The point which I want to refer to in this case is as to how far he has to go; because it may be very difficult to suggest that a shipowner is in a worse position than a bailee. But even assuming he is in the same position, something has happened—the ship is not there. He has got to explain it. But what is it the bailee has to show? The judgment in this case was given by Lord Wright, M.R., Romer, L.J., and Macnaghten, J., who was sitting in the Court of Appeal, who both agreed with the judgment of the Master of the Rolls. The case had been tried by Branson, J. who accepted the evidence of the defendants that they had a careful system under which normally goods were safe. But it was argued that there had been no explanation given as to how the goods had been stolen. All they had done was to say they had a reasonably good system; but that was not sufficient. It was argued that they had not discharged the onus on them, because they had not explained how the goods had gone, how the thieves had got in, or why. The Master of the Rolls said this (at pp. 6 and 539): "In the present case, the stealing of the goods being admitted, the plaintiffs have given evidence that they have taken all reasonable precautions"—they were suing for money due to them, and the defendants were counter-claiming for the value of the goods, which is why they are called plaintiffs—"to protect the goods against the risk of theft and they" (that is the warehousemen) "say that they have satisfied the burden of proof which rests upon them, and that they are outside the rulings I have just quoted. They further rely on a statement of the rule given (in a dissenting judgment, it is true) by Lord Dunedin in *Ballard* v. *North British Railway Company* (*sup.*)." He reads that same passage. Then he says: "I think this is merely stating the same rule as that stated by Lord Loreburn and Lord Halsbury from another aspect. If the plaintiffs show that they took all reasonable and proper care of the goods, the mere fact that they were, notwithstanding, stolen is not sufficient any longer to make them liable for negligence. Their explanation is, then, that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. Hence, I think the plaintiffs discharge the burden of proof upon them if they can show that the theft took place notwithstanding that they had taken all reasonable precautions to guard against the danger." The interesting point is this. If the bailee can show, as Lord Dunedin put it, that this may have happened consistently with the absence of negligence on his part, then they have discharged the burden. If it is something which could not happen without negligence on their part, why the position is different. But they are able to discharge the onus by saying: "We have shown that they have a reasonable system here. The theft has none the less taken place. It is just as consistent—the thieves being specially clever people, who could break in and steal these goods, notwithstanding our system—with the absence of negligence as with negligence; and, therefore, we have discharged the onus which is upon us."

The case that was relied on from which Lord Wright had quoted certain passages was the case of *Joseph Travers and Sons Limited* v. *Cooper* (12 Asp. Mar. Law Cas. 444; 111 L. T. Rep. 1088; (1915) 1 K. B. 73. That is an illuminating case. Goods had been loaded into a barge and the barge, while lying alongside the wharf, had sunk. The barge owners were being sued by the owners of the goods. Pickford, J. had tried the case in the first instance. It was proved that the man who ought to have been on the barge in charge of it had left the barge and was not there. There were two theories as to how the barge had sunk. Mud sucking was one solution and under-pinning another. Pickford, J. had held that there was negligence proved because

the man was not there, but he said, " I am unable to say that if he had been there he would have been able to prevent this accident, and, therefore, I cannot say that his negligence was the cause of the accident," and so he found for the defendants. That decision was reversed in the Court of Appeal and it is rather interesting to see how it was put there. Buckley, L.J. says : " They have proved negligence, but the learned judge has held that they fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison Pollexfen and Blair* v. *Walton*, decided on 10th May, 1909, I doubt whether he would have decided this point as he did. The language of Lord Loreburn in that case seems to me to be directly in point. It was a case in which a firefloat, which was being towed, was lost, and the reason why she sank was unknown because there was no one on board her as there ought to have been. Lord Loreburn said : 'Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good '." Lord Halsbury said the same thing in the judgment which has been quoted from by Buckley, L.J. What it came to was this. If the plaintiff can prove negligence in the bailee, then it is for the bailee to prove that that negligence was not the cause of the loss. That principle was applied in *Travers* v. *Cooper*. I think that if in the interests of time I merely read a few words from Phillimore, L.J.'s judgment it will be sufficient. " And this gives rise to the question, on whom was the burden of proof ? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that when the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage." The obligation was expressed in very guarded language and it is based, I think, entirely upon this, that the burden is on the bailee to explain everything if and when it was proved that he has been guilty of some definite negligence which might account for the accident. It is not for the plaintiff in such a case to prove that it did ; it is for the defendant to prove that it could not. In *The Stranna* (19 Asp. Mar. Law Cas. 115 ; 157 L. T. Rep. 462 ; (1937) P. 130), Langton, J. again applied the same principle.

Applying the principles to which I have referred to this case, to what conclusions do the findings of fact lead me ? Paragraph 3 of the case described the accident, an accident which would be incredible if it were not the fact, if it had not really happened. You have a boiler which is intact at the end of the explosion. You have an internal explosion which produced such extraordinary external pressure in one direction as to cause, without a breach in the boiler, the ship's far heavier boilers to shift 4 to 5 ft. 6 in. and yet at the same time to propel the boiler itself in which the explosion occurred 164 ft. through all obstacles in the way.

Paragraphs 7, 8 and 9 of the case must be referred to. I have read part of paragraph 7. The first part of paragraph 7 sets out the ultimate conclusion that : " The explosion was one of unprecedented character and no sequence of events "—that includes no sequence of events through negligence—" which was other than improbable was suggested as capable of having given rise to it." Then he says : " The matter was rendered still more difficult by reason of the fact that the donkeyman who on the morning in question was the only person to be in the stokehold during the ninety minutes preceding the explosion was not available as a witness. He had been paid off in Australia about three weeks after the explosion. No report of his actions during this most material time had been asked for by the respondents and what he did or failed to do is a matter of mere surmise." There is no suggestion that the owners had any reason for supposing that the evidence of the donkeyman would be material. I do not think there is any suggestion of bad faith there. It is merely stating the fact and the position is the same as if he had been killed in the explosion itself and was not there to help.

Then there is a paragraph dealing with tubes, paragraph 8 : " Considerable debate took place before me on the claimants' allegation that the stay tubes were corroded and excessively thin and that this condition had caused or contributed to the disaster." It seems clear from the facts enumerated that some tubes had been renewed in 1934. In 1936 it had passed the annual boiler survey. "Though two of the sixty stay tubes had by reason of leaks been blanked off and stoppered at this date no adverse comment on this known fact was made. During the remainder of the year ten more of these stay tubes leaked and were similarly stoppered. Before reaching Durban the total of stoppered tubes was seven and at that port four more leaked and received the same treatment." The tubes were sent to England and the owners made arrangements to fit a full set of new stay tubes on return to England. Then : " A twelfth leaked on the 27th December." The arbitrator proceeds : " I find however that owing to the impossibility of examining these tubes it is the recognised practice that they are not renewed until they have shown by repeated leaks that they require renewal. The condition of the stay tubes at Port Pirie is no ground for a finding of negligence against the respondents' board or superintendent staff. Further though the frequent failures should have indicated to the chief engineer that there was risk of further similar failures, the consequences of such failures reasonably to be anticipated would not be more serious than delay while the boiler was out of action together with some risk of scalding men in the stokehold." I read that paragraph as a paragraph clearing the owners from any suggestion of negligence with regard to the tubes. There can be no negligence in the chief engineer. Of course, he must have appreciated that there might be some similar failures. It must have been, I imagine, on his information that the new set had been ordered, but however much he appreciated it he was not responsible for the corrosion. Nobody was. That is clear. It was a wear and tear process which is inevitable. There it is—you cannot do anything about it until you get your ship into a place where you can make renewals and put in a

new set. All he can do, as soon as the tube leaks, is to blank it off in the way described. There is no danger to be apprehended from a leaking tube. That is proved both by the practice which the arbitrator finds, that they are not renewed until it is shown by repeated leaking that they require renewal. There is no suggestion of danger about it if the leak is blanked off. They are not the engines which propel the ship, but only the auxiliary boiler. It is not the boiler which feeds the engine, it is only the auxiliary boiler. I do not see any suggestion there of negligence on the part of anybody on the ship. If anybody could be negligent about that, it must be the owners who have sent the ship out with tubes in such a condition that they cannot properly see the voyage through. But there is no negligence on the part of people who have to do the best they can with what they have got.

The arbitrator proceeds in paragraph 9: "Three principal theories of the disaster were formulated (1) that by an improbable collocation of events an explosive mixture of coal-gas and air was formed in the starboard combustion chamber; that the explosion so caused administered a shock to both combustion chambers and fractured a number of corroded tubes in the port tube nest and that the port back tube plate, thus weakened, was rendered liable to be set down in the manner found." There is a theory, not based on negligence at all, in which the explosion took place before anything happened to the tubes. That explosion fractured the tubes. But whether they fractured more readily or not, he has already found that the circumstance that they had corroded did not import negligence on the defendants' part. Therefore, the first theory advanced is a theory which rests upon no suggested negligence on the part of the defendants at all and none is established. The second theory was "that by reason of one or more of the acts of negligence alleged in the particulars to paragraph 9 of the points of defence the water was allowed to get too low: that the top of the port combustion chamber thus became overheated (the starboard fire was out during the night 2nd–3rd January): and that the disconnection of the port tubes resulted from ensuing buckling of the port back tube plate." That is a theory based on negligence. Then: "(3) that the initial explosion was due to some explosive substance accidentally present in the coal, the explosion of which in the starboard furnace led to the same result as under (1)." How does the learned arbitrator go on? He says in paragraph 10: "As to (1) I am not satisfied that the facts occurred as suggested. Accordingly I am not satisfied that the condition of the tubes contributed in any way to the disaster. On the other hand I consider this theory to be possibly correct and accordingly am not satisfied that the corroded condition of the tubes did not contribute to the disaster." He has already said that all the suggested theories were not other than improbable, but what he is saying there is: "I cannot say as a fact that it happened that way. Possibly it did. It is possible that the tubes had in some way contributed to the result, but I have already found there has been no negligence on the part of the respondents *qua* the tubes." Then as to the second theory he says: "I am not satisfied that the facts occurred as suggested. I am not satisfied that any of the servants of the respondents were guilty of any of the negligence alleged. On the other hand I consider the theory to be possibly correct and accordingly I am not satisfied that negligence on the part of servants of the respondents did not cause or contribute to the disaster." Again that is not putting it higher than this. A theory has been suggested which may possibly be correct. It is an improbable theory. There is no evidence whatever to support it. I cannot say that it is not possibly correct. But is possibility enough? That has been disposed of long ago by Willes, J. in *Daniel* v. *Metropolitan Railway Company* (L. R. 31, P. 216 at p. 222), when he said this: "It is necessary for the plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is a reasonable probability that the accident resulted from the want of some precaution which the defendants might or ought to have resorted to."

Then the learned arbitrator proceeds in paragraph 11 to say: "I am not satisfied that the true cause of the disaster has as yet been suggested." Therefore, it seems to me in the result you have this position. Various suggestions have been made: various theories advanced: none of them is other than improbable. The worst I can say against the defendants is that on one of these improbable suggestions it is possible that their negligence was the cause.

If it is right to apply the principles which I have been laying down, of course the case against the owners fails. It is plain that it has not been established that they were guilty of negligence and there is no finding of any negligence. The worst finding against them is under the one heading of possibility of negligence.

Can it really be described as a case of "self-induced frustration"? The value of the principle of frustration would be almost destroyed if the mere possibility of relevant default could deprive the person seeking to take advantage of it of that right.

Even supposing that I am wrong in my view as to where the burden rests, in what words must the burden on the owner be expressed in the implied condition? Is it really to be a burden which is not discharged by a finding that there was no evidence of default and that no default which was other than improbable could be suggested as a possible explanation of the accident? Is the burden to be still heavier than that? Is it to be a burden which is discharged only by proof that no fault could possibly have contributed to the accident on any theory, however improbable? I cannot bring myself to think that. I am not going to frame the term which is to be deemed to be implied, but even if there is some burden on the shipowner other than that implied by the ordinary principles of the law of negligence, I cannot think that the term to be implied must be so extreme as to prevent him from availing himself of the principle in a case like this. After all, the basis of an implied term is that it is supposed to be of such a character that if it had been mentioned at the time of the contract, both parties would have said: "Yes, we both meant that; put it in." Am I really to think that the shipowner would readily and as a matter of course have assented to the incorporation of a term which deprived him of the right of relying upon the doctrine of frustration unless he could prove in any circumstances that by no possibility could any negligence of his have accounted for the accident on any theory however improbable?

In my opinion on any view the proper answer to the main question raised is that the burden has not been discharged and that the claim ought to fail.

There are two other points raised with which I must deal. The owners say if they are wrong about that nevertheless they are entitled to rely on the exception of "accidents of navigation." Well I do not think the clause applies before the contract voyage begins. Even if it does, I think that the case of *The Southgate* ((1893) P. 329), and the

case of *Svenssons Travaruaktiebolag* v. *Cliffe Steamship Company* (147 L. T. Rep. 12; (1932) 1 K. B. 490), make it clear that this would not be "an accident of navigation."

As to the other plea concerning the incorporation of the Carriage of Goods Act, Art. IV (2) (*a*), even if those articles applied before the contract voyage had begun, to my mind they only refer to damages or injury to goods. It is quite clear from the position in which they are in the Act, that they only refer to goods. If you read them into this charter-party, it does not seem to me you are entitled to change their meaning and I think the principle of *Hamilton and Company* v. *Mackie and Sons* (5 Times L. R. 667), would apply. Even if you read them in, you have to give them the same meaning as they have where they are in the Act, and if that be so they would not afford any assistance to the charterers.

In the result I answer the question in favour of the appellants here, that is, in favour of the shipowners, the respondents in the arbitration, and I think the claimants in the arbitration are not entitled to recover damages.

Solicitors for the appellants, *Holman Fenwick* and *Willan*.

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

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

[ADMIRALTY BUSINESS].

February 21, 22, 23, 26; *March* 8, 1940.

(Before HODSON, J.)

The Lapwing; Baxendale v. Fane (*a*)

Marine insurance—Damage to yacht—Perils ejusdem generis *with perils of the sea—Institute Yacht Clauses—Master's negligence.*

The plaintiff claimed for a particular average loss under a policy of marine insurance which insured his yacht against perils of the sea and all other perils ejusdem generis. *The policy was subject to the Institute Yacht Clauses, c. 5 of which provided that the insurance also covered damage to hull caused by the negligence of the master. The plaintiff arranged that the yacht should be moved from Southwick to Shoreham for docking. She left for Shoreham in the charge of the manager of the Sussex Yacht Works, the company which was to clean and paint her, and was so negligently docked that she sustained damage.*

Held, in an action against one of the subscribing underwriters (1) *that, although it was intended that the yacht should be docked, it was not intended that she should be so negligently docked as to be allowed to sit on a dangerous bottom, and that the intervention of the negligence of those responsible for the docking provided the fortuitous circumstances entitling the plaintiff to recover in respect of a loss due to a peril* ejusdem generis *with a peril of the sea,* viz., *stranding; and* (2) *that at the time of the docking the manager of the company was the "master" within the Merchant Shipping Act,* 1894, *and prima facie responsible for the docking, and that the plaintiff was also covered by clause* 5 *of the Institute Yacht Clauses in respect of damage to hull caused by negligence, whether or not the damage was due to a marine peril.*

ACTION on a policy of marine insurance.

The plaintiff, Guy Baxendale, claimed under a policy of marine insurance on his yacht *Lapwing* the proportion of the subscription of the defendant Charles William Fane. Insurance was against the ordinary marine perils and was subject to the Institute Yacht Clauses, c. 5 of which provided that the insurance was "also specially to cover . . . loss of or damage to hull or machinery directly caused by . . . negligence of master, mariners, engineers, or pilots."

The plaintiff contended that the *Lapwing* suffered a particular average loss by perils insured against or alternatively by the negligence of the master or mariners. The defendant denied that the damage, if any, suffered was covered by the policy.

H. G. Willmer, K.C., and *R. E. Gething* (for *W. L. McNair,* on war service) for the plaintiff.

K. S. Carpmael, K.C., Cyril Miller and *Stephen Miller,* for the defendant.

Cur. adv. vult.

Hodson, J. — The plaintiff is the owner of the yacht *Lapwing* and claims for a particular average loss under a time policy of Marine insurance dated the 31st May, 1937, the period covered by the policy being the 25th May, 1937, to the 24th May, 1938. The plaintiff was insured under the policy against perils of the sea and all other perils *ejusdem generis* and the policy was subject to the Institute Yacht Clauses which provide, *inter alia,* as follows:—Clause 5: This insurance also specially to cover (subject to the free of average warranties or any special conditions of the policy) loss of or damage to hull or machinery directly caused by the following: Explosion, bursting of boilers, breakage of shafts or any latent defect in the machinery or hull; Negligence of master, mariners, engineers or pilots provided such loss or damage has not resulted from want of due diligence by the owner of the vessel or any of them or by the managers; Clause 6: No deduction of thirds new for old shall be made except in respect of sails and running rigging.

The last mentioned clause is material on the question of the quantum which the plaintiff is entitled to recover if successful. The defendants contend that the damage (if any) suffered by the *Lapwing* was not covered by the policy.

The facts are as follows:—The *Lapwing* is a wooden vessel 77 ft. long, built in 1897 by a well-known firm of yacht builders. She was purchased by the plaintiff in 1937 for 2300*l.* He made improvements, bringing the cost up to about 3000*l.* and she was insured for this figure. In spite of her age she was, although not completely watertight, a seaworthy vessel. In May, 1937, the plaintiff arranged to have her moved from Southwick, where she had been laid up, to Shoreham, in order that she might be put in an open-ended tidal dock and have her bottom cleaned and painted by the Sussex Yacht Works, Limited. On 12th May she left Southwick for Shoreham with a man named O'Connor, the

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

manager of the Sussex Yacht Works in charge, and a Mr. Campbell Muir, the engineer employed by the owner, in charge of the engines. She was unable to get into the dock on the 12th as another small yacht had not floated off. She was berthed against a free wharf during the night. On the 13th she was moved into the dock with O'Connor still in charge and thereafter the casualty occurred from which the plaintiff's claim arises.

Originally the plaintiff's claim was that she was so negligently berthed that as the tide fell she sat on a block of water-logged timber under her keel about 23 ft. abaft the stem with her stern overhanging the sill of the dock and that she fell over on her starboard side and her keel and false keel were set up and crushed, her planking was started and she was generally seriously strained. By an amendment at the hearing, as a further and alternative claim, it was pleaded that on 18th May, having been taken out of the dock and cross baulks of timber having been laid across the bottom of the dock, she was again so negligently berthed by those in charge of her that as the tide fell she came to rest in such a position that the damage was increased. There is no doubt that the vessel did suffer severe hogging strain, including serious damage to her keel, in consequence of one or other of these dockings.

On the 14th or 15th the owner noticed that the vessel had listed to starboard but nothing seriously amiss was found until Monday, 16th May, when the engineer noticed that the vessel was leaking seriously. She had previously leaked only to the extent of about six gallons a day, which required about twenty strokes of the pump to clear her. On this occasion it took two men about six hours to clear her. He next discovered a rope floating in the water on the starboard side just before the foremast which was made fast to something he could not see. This rope was subsequently found to have been attached by the work's foreman to a water-logged block of timber about 10 in. square and 3 ft. long. The block was eventually hauled out by the night watchman and placed on the dockside. On the same day the engineer found that the lid of the coal bin would not come up and was prevented from so doing by the stanchion which runs from deck to keel in way of the foremast. In this area he found that the deck had been forced up and the galley and saloon floors were set up. He saw one and heard another glass portlight crack. On the same day the engineer communicated with the owner. On the 18th, having been taken out of the dock, the vessel was floated in again so that she came to rest on seven cross baulks of timber, and in this position she was first surveyed. It then appeared that she was seriously strained. On 13th June she was moved and properly slipped. She was subsequently surveyed on several occasions and the damage investigated. Her keel and false keel were found to be set up and crushed in two places, namely, 22 ft. abaft the stem and 31 ft. 4 in. forward of the stern post. The damage to the forward part of the keel was very nearly in way of the damage which had previously been discovered by the engineer. It is quite true that no one saw the block under the keel although if she had been resting on it at low water when the dock was dry one would have expected the block to have been seen in this position if it were there. However, between 13th and 16th the vessel must have lifted and fallen on the tide several times, not necessarily in quite the same place.

It was said by the defendants that the damage (if any) caused forward in the position where the block is supposed to have been can be otherwise explained and that the plaintiff has not proved that damage was caused by the keel resting on the block. He relied on the shape of the bottom of the dock. This consisted of 40 ft. of concrete forward, not flat but slightly convex, so curved that the maximum convexity, allowing for the fact that the ship was not hard up against the fore-end of the dock, would be almost immediately in way of the damaged stanchion. Aft of the 40 ft. there were 12 ft. of broken concrete and aft again shingle and mud. The shape of the dock bottom might thus account for the damage, apart from the forward damage to the false keel. As to this it was contended that there was in that area no fresh damage to the keel and no damage to the false keel. If there was any trifling damage to the false keel it was said to be consistent with an indentation made, perhaps, by a stone and of no significance. If the indentation is significant it was claimed that it may well have been made by the vessel resting on one of the seven baulks on which she was resting subsequently when she was surveyed.

I have formed the conclusion from the evidence given as to the damage in this area, including the damage to the keel and the damage to the false keel conforming thereto, that the block of wood was the cause of the original damage. It is clear that whether the vessel was lying partially supported by the block or on the dock bottom, instead of being properly supported by blocks for her whole length, she was placed in a dangerous and improper position and the straining which she suffered was a natural consequence of this docking. The same applies to the position which the vessel subsequently occupied on the seven cross baulks, the first five of which were on the 40 ft. of undamaged concrete. Both her stem and stern were overhanging to a considerable extent, entirely unsupported, and the supported position of the keel would naturally take the convex shape of the dock. It was estimated by one of the surveyors that the keel had dropped 36 in. from the horizontal. Any damage which she had previously suffered would be likely to become more serious so long as she lay in this position. No one can say precisely what proportion of the serious damage which was established over the whole ship was due to the first docking, especially as she was not surveyed until after the second docking. I have come to the conclusion on the evidence that the plaintiff has established that the bulk of the damage was due to the first docking although it may well have been and probably was accentuated by the second docking.

The defendants contended that, although there might be something to be said for the water-logged block as constituting the cause of a casualty *ejusdem generis* with a peril of the sea, the plaintiff has not established that the block was ever under the keel at any time and that the damage can perfectly well be explained by the shape and condition of the dock and the improper docking of the vessel therein on the two occasions. The contention in law is that neither the dock bottom nor the baulks can be a peril of the sea or within the general clause of the policy. Lord Herschell dealt with this subject in his speech in *Wilson, Sons and Company* v. *Owners of Cargo per the Xantho* (6 Asp. Mar. Law Cas. 207; (1887) 57 L. T. Rep. 701; 12 App. Cas. 503), where he says: "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again it is well settled that it is not every loss or damage of which the sea is the

immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the wind and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds and waves. I think this is too narrow a construction of the words and it is certainly not supported by the authorities or by common understanding. It is beyond question that if a ship strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea, and a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category."

Since she was deliberately placed on the dock bottom and on the seven baulks it was said that you have something which must happen as opposed to something which may happen ; and reliance was placed in particular on the decision in *Magnus* v. *Buttemer* (1852, 11 C. B., 876). In that case damage which resulted from a ship taking the ground on the falling of the tide in a tidal harbour in a spot where she was properly placed for unloading, was held not to be a stranding within the ordinary terms of a policy of insurance. As Maule, J., said (at p. 882) : "Here, nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident." It was contended that this case cannot be distinguished from *Magnus* v. *Buttemer* since it was the design that she should take the ground as the tide fell. I do not think the mere presence or absence of deliberation or design is a true test in ascertaining whether there has been a casualty covered by the ordinary terms of a marine policy. If that were so, the test could not properly be applied in many cases which are clearly covered by a policy. In a normal case of collision, although the collision be not brought about deliberately, yet the acts leading up to the collision may often be deliberately performed. It is true that it was intended that the vessel should be docked, but not that she should be so negligently docked as to be allowed to sit on a dangerous bottom, and I think the intervention of the negligence of those responsible for the docking provides the fortuitous circumstance which entitles the plaintiff to recover under the terms of the policy. In *Magnus* v. *Buttemer* (*sup.*) there was nothing beyond what may be called ordinary wear and tear. In this case there was an accident.

In *Bishop and Another* v. *Pentland* (1827, 7 B. & C. 219), a vessel was moored alongside a quay in a tidal harbour. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore to prevent her falling over upon the tide leaving her. The rope with which she was fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side and was thereby stove in and injured. Bayley, J., said (p. 224) : "I think that so long as the vessel was on the ground, and lashed to the posts on shore, she was not stranded ; but when she fell over on her side, and lay on the ground in that position, she was stranded. The falling over, then, was not in the ordinary course of the voyage but in consequence of an unforeseen accident, out of the ordinary course of the voyage, namely, the breaking of the rope." In that case it appeared that the vessel falling over and taking the ground was probably due to the negligence of the crew in not providing a rope of sufficient strength. I have come to the conclusion that whether the damage was caused by the vessel sitting on the block or on the uneven bottom of the dock or on the seven baulks of timber, or by a combination of these things, in each case the plaintiff has established a loss due to a peril *ejusdem generis* with a peril of the sea, namely, stranding. The plaintiff also relies on clause 5 of the Institute Yacht Clauses and says that the damage was directly caused by the negligence of the master. It was said by the defendants that O'Connor was not the master, but the manager of the Yacht Works. It was argued that, although he may, perhaps, be treated as the master for some purpose, for example he might have subjected the ship to a maritime lien in the event of collision occurring between Southwick and Shoreham, yet he was not the master within the meaning of the clause when he was docking the vessel. "Master" has been defined in many statutes. In the Merchant Shipping Act, 1894, sect. 742, "master" includes every person (except a pilot) having command or charge of any ship. I have no doubt that O'Connor was the master of the vessel at the time of the first docking. He was still in charge of her. The fact that he was at the same time manager of the Yacht Works and was the servant of the Yacht Works, not of the plaintiff, seems to me to make no difference. Indeed, his dual position enables his negligence to be the more clearly established because he was in a position to know what was the nature of the bottom of the dock in which he was placing the vessel. If, however, part of the damage is to be attributed to the second docking the situation is not so clear. There was put in evidence by the plaintiff a statement sent to him by the defendant's solicitors, which purports to show that a Mr. Page became the master of the vessel on 16th May, *i.e.* before the second and after the first docking. It is not clear whether he had, in fact, taken charge of the vessel at the time of the second docking ; and it was argued on behalf of the defendants that it would be unjust to find negligence against him, especially as he has not been called to give his account of the event. The allegation of negligence against the master was made in the pleadings and I find that the plaintiff has established that the ship was negligently docked on both occasions. It was not incumbent on him to call the masters or either of them to establish this negligence. The master being in charge of the ship is prima facie responsible for the docking of the ship in a proper manner.

I have, therefore, come to the conclusion that the plaintiff is covered under clause 5 of the Institute Yacht Clauses in respect of loss of or damage to hull caused by negligence of the master, whether or not the damage was due to a marine peril.

His Lordship assessed the damages at 1,575*l.* and gave judgment for the plaintiff against the defendant for two-sevenths of this amount, with costs.

Solicitors for the plaintiff, *Keene, Marsland* and *Co.*

Solicitors for the defendant, *Ince* and *Co.*

April 23, 1940.

(Before BUCKNILL, J.)

The Gusty and the Daniel M. (*a*)

Collision in Greenwich Reach, River Thames, between two vessels—Life salvage—Subsequent collision, not due to negligence, with third vessel attempting to save life—Doctrine of assumption of risk—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 6.

Claim by the owners of the motor launch Daphne *against two defendants—the owners of the steam tug* Gusty *and the owners of the motor vessel* Daniel M.*—in respect of a collision which occurred in Greenwich Reach, River Thames, on* 16*th August*, 1939, *and which followed on a collision between the* Gusty *and the* Daniel M., *for which the owners of the latter vessel had admitted sole liability.*

The plaintiffs' case was that the Daphne, *while proceeding up the River Thames, saw the* Gusty *and the* Daniel M. *in collision, and heard shouts for aid from the* Gusty, *which was seriously damaged and filling with water. The* Daphne *ran in under the stern of the* Daniel M. *and went across the bows of the* Gusty *to save the lives of those on board. The* Daniel M. *was still in the hole she had made in the side of the* Gusty, *and when she backed out to enable the* Gusty *to beach herself, the* Gusty, *which had still slight headway, came ahead, struck the* Daphne *and seriously injured her. The court held that the second collision, between the* Gusty *and the* Daphne, *occurred without negligence on either side.*

By sect. 6 *of the Maritime Conventions Act*, 1911, "*the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel . . . render assistance to every person, even if such person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of a misdemeanour.*"

Held, that sect. 6 *of the Maritime Conventions Act*, 1911, *applied to the tidal waters of the Thames, and that therefore the plaintiffs were not volunteers, but were under a duty to go to the assistance of the* Gusty *; that the* Daniel M. *owed a duty to the* Daphne, *as to every vessel lawfully navigating the river, not to be negligent ; that the doctrine of assumption of risk did not apply ; that everything which occurred after the first collision followed naturally as a result of it, and that there was no* novus actus interveniens : *and that therefore the plaintiffs were entitled to judgment against the owners of the* Daniel M.

Principles laid down in Haynes *v.* Harwood (152 L. T. Rep. 121 ; (1935) 1 K. B. 146) *applied.*

DAMAGE BY COLLISION.

The plaintiffs were the owners of the motor launch *Daphne*. The defendants were (1) the owners of the steam tug *Gusty*, and (2) the owners of the motor vessel *Daniel M*. The circumstances of the collision are set out in the headnote, and the facts appear fully in the judgment.

W. W. Porges for the plaintiffs.

K. S. Carpmael, K.C., and *G. N. W. Boyes* (for *J. V. Naisby*) for the first defendants.

R. F. Hayward, K.C., and *H. E. G. Browning* for the second defendants.

Bucknill, J.—This is a claim by the owners of the motor launch *Daphne* against two defendants, the owners of the steam tug *Gusty* and the owners of the motor vessel *Daniel M.*

The *Daphne* is a wooden motor launch 40 ft. in length, 8 ft. in beam, and fitted with engines of 40/50 horse-power, and, at the time of the collision, was manned by a crew of three hands.

The *Gusty* is a steel screw steam tug of 62 tons gross, 71 ft. long and 18 ft. beam, and, at the time of the accident, had a crew of four hands and a passenger, a Mr. Purt, on board.

The *Daniel M.* is a steel screw motor ship of 448 tons, 149 ft. long, 26 ft. beam, and at the time of the collision was manned by a crew of seven hands.

The damage complained of by the plaintiffs was done to the *Daphne* by the stem or bluff of the starboard bow of the *Gusty*, which struck the starboard side of the *Daphne* and did her such serious damage that she had to be beached. The collision occurred in Greenwich Reach, on the north side of mid-channel, off Felstead Wharf, on the afternoon of 16th August, 1939. The weather was fine and clear, there was no wind and the tide was flood of a force of about 3 knots.

The *Daphne* was proceeding up river and making a speed of some seven to eight knots through the water when her master saw on her starboard side the *Daniel M.* in collision with the *Gusty*. The *Gusty* was proceeding up the river with a petrol barge in tow, full of petrol, and the *Daniel M.* was coming out from the south side of the river, and, in trying to head down river, the *Daniel M.* ran into the port side of the *Gusty* in the way of the engine-room, holing her and causing her engine-room to fill with water. The master of the *Daphne* heard shouts for assistance from the *Gusty*, and immediately ran in under the stern of the *Daniel M.*, which at that time was headed about half-athwart from head down river, and went across the bows of the *Gusty* for the sole purpose of trying to save life—I am satisfied about that. The master of the *Daphne* did that simply because he thought, and very properly thought, that those on board the *Gusty* were in danger of losing their lives and that he must go to help them. The force of the impact had knocked one of the crew of the *Gusty* into the water, but, fortunately, he was picked up in time by an inspector of the river police in a launch ; another of the crew of the *Gusty* was hanging on to a rope from the bows of the *Daniel M.* ; the two men in the engine-room of the *Gusty* had been called out from the engine-room just before the collision ; and, as the *Daphne* came alongside the *Gusty*, Mr. Purt, the passenger, jumped for his life into the *Daphne*.

Now everything happened very suddenly and very quickly. It is difficult to say with precision exactly what happened, but I accept the evidence of the master of the *Gusty* that he kept his engines going full speed ahead up to the time of the collision with the *Daniel M.* because he thought that, if he

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

stopped and reversed, his tank barge would run up on to his stern, get out of position and make the collision still more serious than it was. He was quite right to do that, and he was quite right also to call the men out of the engine-room. The result was that the engines were running ahead at the time of the collision. The collision brought the *Gusty* up because the blow was just aft on the *Gusty*, and that, I think, explains the fact that the man who fell overboard swam some little distance up-river from the *Gusty* before he was picked up. Then the *Daniel M.* backed out of the wound, and as soon as she had done that the master of the *Gusty* told the stoker on the tug to shut off the steam from the engines. That was done, but the *Gusty*, released from the *Daniel M.*, had some slight headway. She was deep in the water and sinking rapidly. She had some slight headway, and the result was that she struck the *Daphne* and did the damage which is the subject of this claim. It was a very near thing whether the *Gusty* would sink in deep water or would be beached, but the master, who acted extremely well and kept his head, succeeded in getting her on to the beach before she filled.

Those are the essential facts of the case, and I am quite satisfied that the collision between the *Daphne* and the *Gusty* was not due to any negligence on the part of the *Gusty* or of the *Daphne*. The *Daphne* did her best to save life; the master of the *Gusty* did his best to save his tug and the lives of those on board and, by an unfortunate accident, the damage was done. This finding excuses the *Gusty* from any liability for this damage, because it is admitted here that the first collision between the *Daniel M.* and the *Gusty* was solely caused by the negligence of the *Daniel M.*; the *Gusty* therefore, not being negligent in respect of either collision, cannot be held liable for the damage to the *Daphne*.

As far as the *Daniel M.* is concerned, I cannot see that she was negligent in backing out of the wound in the *Gusty*. The *Gusty* was taking in water all the time and, in order that the *Gusty* should get on to the beach, she had to be released from the *Daniel M.* I cannot see that the *Daniel M.* did anything that was negligent after the first impact, but she was negligent and did cause the first collision.

The interesting question thus arises whether, under those circumstances and under the circumstances which led up to the second collision, she is also liable for the damage to the *Daphne*. The first question is, did she owe any duty to the owners of the *Daphne*? The *Daphne* was proceeding up the river highway in the ordinary way and she had a perfect right to be there, and although it is true that, to quote the words of Greer, L.J., in *Haynes* v. *Harwood* ((1935) 152 L. T. Rep. 121, at p. 122; (1935) 1 K. B. 146, at p. 152), "Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim," I think that in this case the *Daniel M.* owed a duty to the *Daphne* just as much as she owed a duty to any other ship lawfully navigating the waters of the Thames in her vicinity.

The next question which I have to consider is whether the *Daphne*, in doing what she did, was a volunteer, and took upon herself the risk of sustaining damage while going to the assistance of the *Gusty*, or whether she did what she did do under a duty. Now it was quite clear to the master of the *Daphne*, even if he had not heard the hailing, that the *Gusty* and those on board were in a position of very great danger, and I think that sect. 6 of the Maritime Conventions Act, 1911, applies to the tidal waters of the Thames at Greenwich. That section is as follows: "6. (1) The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person even if such person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of a misdemeanour. (2) Compliance by the master or person in charge of a vessel with the provisions of this section shall not affect his right or the right of any other person to salvage." The second sub-section seems to indicate that a duty is thrown on the master of the vessel to render assistance to every person at sea in danger of being lost, because it clearly states that, whatever he does on that duty, he is still to be regarded as a volunteer so far as salvage is concerned. It is a well-known principle of law that a salvor has to be a volunteer; if he has a duty to do what he does, he cannot claim salvage. It is satisfactory to notice that to-day that section is loyally obeyed by His Majesty's subjects at times under very difficult circumstances. The principle of the section seems to bear out the words of Cockburn, C.J., in *Scaramanga* v. *Stamp* (5 C. P. D. 295, at p. 304) where he says: "To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences." The principle of the law as far as actions of this kind on land for the purpose of saving life is concerned is dealt with in *Haynes* v. *Harwood* (*sup.*), and both Greer, L.J., and Maugham, L.J. (as he then was), accept the statements by Professor Goodhart in the Cambridge Law Journal, set out in the report. Professor Goodhart says there: "The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty." Greer, L.J., goes on to say: "In my judgment that passage not only represents the law of the United States, but I think it also accurately represents the law of this country." I should add that Professor Goodhart's article deals with the law as derived from the American cases, and Greer, L.J., accepts that as being the law of this country.

Now, was there what is called a *novus actus interveniens* in this case? I have dealt with the question as to whether the master of the *Daphne* was a volunteer, and I hold that he was not; he had a duty to perform and was moved by a sense of duty, and, not exercising any choice in the matter, he went to the assistance of these men. In a sense, certain things were done after the first collision. Notably, the *Daniel M.* backed out from the wound, and the *Daphne* approached and got into a position on the starboard bow of the *Gusty*. That is quite true, but those were acts which followed in the natural sequence of events. They were all actions which followed naturally and properly as a result of the first collision and, in my view, there was no *novus actus interveniens* to break the chain of causation.

That being so, I think that the principle laid down in *Haynes* v. *Harwood* (*sup.*) applies to this case, and that the plaintiffs are entitled to judgment against

the second defendants with costs, and such costs will include the costs of the first defendants.

Solicitors: for the plaintiffs, *R. S. Jackson* and *Bowles*; for the first defendants, *Ingledew, Sons* and *Brown*; for the second defendants, *J. A.* and *H. E. Farnfield.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 1*st*, 1940.

(Before ATKINSON, J.)

Vrondissis v. Stevens. (*a*)

Insurance—Marine—Policy on freight—Exception for loss of freight arising from loss of ship—Distinction between constructive total loss caused by impossibility of repair and constructive total loss caused by cost of repair exceeding repaired value.

A policy of insurance on freight contained an exceptions clause providing that loss of freight should not be recoverable if arising from a constructive total loss of the ship. While the policy was on foot the ship struck a rock and was so badly damaged that the voyage had to be abandoned. It was admitted, for the purpose of arguing a point of law, that the ship had become a constructive total loss. The shipowner sued on the policy.

Held that, if the ship had become a constructive total loss owing to repair being impossible, the loss of freight arose from the loss of the ship, and the exceptions clause applied. But if the ship had become a constructive total loss because the cost of repair exceeded the repaired value, the completion of the voyage had not become impossible, and the loss of freight did not arise from the loss of the ship, and the exceptions clause did not apply.

POINT OF LAW set down for argument under Order XXV, r. 2. The plaintiff, a shipowner, had insured against loss of freight by a Lloyd's policy underwritten by the defendant and others. The policy contained an exceptions clause as follows: "In the event of total loss and/or constructive and/or arranged and/or compromised total loss of vessel, total loss and/or constructive total loss of freight arising therefrom is not recoverable hereunder."

While the policy was in force the ship struck a rock and was beached in a damaged condition. She was towed to a neighbouring port and again beached and the cargo was discharged. It was found impossible to repair her so that she could complete her voyage carrying cargo, and the voyage was therefore abandoned. It was admitted, for the purpose of arguing the point of law, that the ship had become a constructive total loss.

The plaintiff sued on the policy, contending that the freight had become a constructive total loss by perils insured against. The defendant contended that the loss of freight arose from the loss of the ship, and therefore that it fell within the exceptions clause.

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

Cyril Miller and *Stephen Murray* for the plaintiff.

Sir Robert Aske, K.C. and *A. J. Hodgson* for the defendant.

Atkinson, J.—This is an action brought on a policy of marine insurance, underwritten by the defendant and others, by the owner of a ship, the *Antonios Vrondissis*, for loss of freight. The freight, valued at 3000*l.*, was covered for 12 months from 15th October, 1935, to 15th October, 1936. Par. 2 of the points of claim alleges that: "On or about 3rd August, 1936, while the said steamship was on a voyage from Kem to Hull with a cargo of wood, the freight thereon became a total or, alternatively, a constructive total, loss by perils of the sea, or other perils, losses, or misfortunes within the meaning of the said policy. Particulars: Shortly after sailing from Kem with the said cargo on board the said steamship on 3rd August, 1936, struck a reef or rock in the vicinity of the Kem Reef, and was so severely damaged thereby that she had to be beached. After extensive salvage operations and the discharge of part of the said cargo, the said steamship, on or about 13th August, was towed to Archangel, where, on or about 15th August, she was again beached in the river and there remained, filling with water at every tide. The remainder of the said cargo was discharged at Archangel, but no dry dock was available at Archangel, and the said damage was so severe that it was impossible to repair the said vessel so as to enable her to complete the said voyage with the said cargo on board, and the said voyage was abandoned. Alternatively, the said damage was such that a prudent uninsured owner would not have proceeded with the said voyage and/or was such that to repair the said damage so as to enable the said steamship to complete the said voyage with the said cargo on board would have cost more than her value when so repaired and/or more than the benefit to be derived therefrom."

The points of claim, therefore, contain an allegation of a loss of freight based on the impossibility of repair so as to complete the voyage with the cargo, and an alternative allegation of a constructive total loss of freight based on the commercial impossibility of repair sufficient to complete the voyage with the cargo.

The defence, by par. 2, puts all the allegations in issue, and in par. 3 raises a point of law about the terms of the policy. That paragraph reads: "Alternatively, by reason of the facts and matters in the said particulars"—that is, in the particulars of the points of claim—"the *Antonios Vrondissis* was and became a constructive loss, and notice of abandonment was given to her hull underwriters by the plaintiff on or about 6th August, 1936. And any total or constructive total loss of freight (which is not admitted) was and is not recoverable under the express terms of the policy and/or of the contract of insurance on freight. Particulars: (*a*) The said policy expressly provided: 'In the event of total loss and/or constructive and/or arranged and/or compromised total loss of vessel, total loss and/or constructive total loss of freight arising therefrom is not recoverable,' and any total, or, alternatively, any constructive, total loss of freight arose from the loss of the vessel as aforesaid."

On 12th April last an order was made as follows: "That the terms of the policy and slip being admitted and the defendant (for the purpose of argument only) admitting the allegations made in par. 2 of the points of claim, there be tried as a preliminary issue the point of law raised in the pleadings of whether or not on a proper construction

of the true contract of insurance the plaintiff is entitled to recover from the defendant." The intention beyond doubt had been to get a decision on the point of law raised in par. 3 of the defence, but it soon became clear that the ship did not, as a matter of law, become a constructive total loss merely by reason of the facts and matters alleged in the statement of claim. Therefore counsel agreed on an addition to the order, and this comes in after the words " Points of Claim " : " and the plaintiff having admitted that the *Antonios Vrondissis* was in fact a constructive total loss and that notice of abandonment was given to the underwriters on hull on 6th August, 1936, and stating that no impossibility arising through loss of time as alleged under par. 2 as aforesaid," and it then goes on, " there be tried as a preliminary issue." But there has been no agreement why or how the ship became a constructive total loss. I am left in doubt whether the ship was a constructive total loss because it was reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because the cost of repairing the damage would have exceeded the value of the ship when repaired. It may be that the ship was impossible of repair, either permanently or for the completion of that voyage with her cargo of timber, the most buoyant of cargoes, and in that event the question of the cost of repair would not arise. On the other hand, it may be that the ship was repairable, but that the cost was prohibitive both for the purposes of sect. 60 of the Marine Insurance Act, and as alleged in par. 2 of the statement of claim.

I do not think that this procedure is very appropriate where so much is left in doubt and when the court must express a view on a hypothetical set of facts, a view which does not determine the action but leaves it still to be tried.

The argument has mainly turned on the effect of two recent cases in the Court of Appeal dealing with commercial loss of freight, and I have a suspicion that both sides know or suspect that it will turn out that the ship was repairable but at a prohibitive expense. The question of law is as to the meaning and effect of the exception in the freight policy which I have read in part from par. 3 of the defence. The policy, which is a printed form down to a point, covers freight valued at 3000*l.*, and then comes this typewritten clause : " Subject to the Institute Time Clauses (freight) as attached hereto." It will be remembered that clause 5 of those Time Clauses states : " In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered," and clause 6 provides : " In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damage or break-up value of the vessel or wreck shall be taken into account." Then, going back to the typewritten clause in the policy, having, as I say, incorporated the Institute Time Clauses, it states : " In the event of total loss and/or constructive and/or arranged and/or compromised total loss of vessel, total loss and/or constructive total loss of freight arising therefrom is not recoverable hereunder."

The question in the case is : Does the alleged loss of freight " arise from " the constructive total loss of the ship ? It is contended for the defendant that the plain intention of the parties was to exclude liability under the policy where there has been a total or a constructive total loss of ship. The underwriters, if that was their intention had as a model a very simple clause in the Institute Time Clauses for policies on hulls which was incorporated in the hull policy in this case, because clause 18 reads : " In the event of total or constructive total loss, no claim to be made against the underwriters for freight, whether notice of abandonment has been given or not." If they had copied that clause, a clause with which they must have been familiar, no question would have arisen, but they have chosen to incorporate the words " arising therefrom," and it is therefore necessary to determine what the effect of that addition is. In my view, if a ship becomes a total loss, and the owner cannot perform his contract of carriage, his loss of freight is consequential on the loss of the ship and arises therefrom. If a ship is properly abandoned as a constructive total loss on account of the actual loss appearing to be unavoidable, repair being physically impossible, again, in my view, any loss of freight is consequential on such constructive total loss of the ship and may be fairly be said to arise therefrom. Such a loss of ship is not necessarily followed by loss of freight. The disaster may happen so close to the port of discharge that the cargo may be saved, but if there is a loss of freight in such circumstances I think that it does arise from the constructive total loss of the ship. So, too, if the owner loses possession of the ship, as by capture by an enemy, and it is unlikely that he can recover it. Loss of freight is consequential on and arises from such loss as, for example, in *Roura and Forgas* v. *Townend and Others* (14 Asp. Mar. Law Cas. 397 ; 120 L. T. Rep. 116 ; (1919) 1 K. B. 189). But what is the position if a ship becomes a constructive total loss because, although repair is physically possible, the cost would exceed the value when so repaired and the ship is therefore abandoned to her underwriters and the freight is not in fact earned ? Can it be said that the loss of freight is consequential on or arises from that constructive total loss ?

In the two recent cases referred to, *Carras* v. *London and Scottish Assurance Corporation Limited* (18 Asp. Mar. Law Cas. 581 ; 154 L. T. Rep. 69 ; (1936) 1 K. B. 291), and *Kulukundis* v. *Norwich Union Fire Insurance Society* (19 Asp. Mar. Law Cas. 37 ; 155 L. T. Rep. 114 ; (1937) 1 K. B. 1), the Court of Appeal has made it quite clear that the question of commercial loss of freight depends on whether the charter-party under which it was to be earned was destroyed by perils of the sea. It is, in truth, a question arising as between the shipowner and freighter and is an entirely different question from the question of the commercial loss of the ship as between the shipowner and hull underwriter. In the latter case commercial loss is established if it is proved that the cost of the complete repair of the ship, making no allowance for any general average contribution, is greater than the repaired value. Very often the insured value is taken as the repaired value. Clause 17 of the Institute Time Clauses so provides, and is incorporated in the plaintiff's policy on the hull in this case. By agreement any sum can be fixed in advance as the repaired value. The test may thus be very artificial. As between shipowner and underwriter of freight the question depends on whether the shipowner is excused as between himself and the freighter from the performance of his contract of carriage. His obligation primarily is to perform that contract and carry the cargo to its destination. It is only if he can establish a commercial loss which will excuse him from the performance of the obligation as between him and the freighter then he

can claim on his freight policy. The rule as to when a commercial loss is established as between owner and freighter is not the same rule, nor is it a branch of the same rule, as that which applies between owner and hull underwriter: see per Greene, L.J. in the *Kulukundis* case (19 Asp. Mar. Law Cas. at p. 40; 155 L. T. Rep., at p. 117). Loss of freight is established on proof that the costs of temporary repairs to the vessel sufficient to enable her to carry her cargo to its destination, less the estimated general average contribution to be made by the cargo, would have exceeded the repaired value of the ship.

Three matters of difference at least emerge between the tests of commercial loss for the purpose of establishing loss of freight. In the one case it is the cost of permanent repair without allowing for general average contribution compared with a repaired value which may be artificial; in the other it is the cost of temporary repairs allowing for general average contribution as compared with the actual repaired value. In *Carras* v. *London and Scottish Assurance Corporation* (*sup.*) the value of the ship repaired was 13,000*l.*; the agreed repaired value 30,000*l.* The cost of permanent repair exceeded 13,000*l.* but was less than 30,000*l.* There was therefore no constructive total loss of ship. But the cost of temporary repairs exceeded the value of the ship so repaired, and it was held that commercial loss of freight was established. Clearly this loss did not arise from any constructive total loss of the ship, because there was none, but if the agreed repaired value had been its true value of 13,000*l.* then a constructive total loss of the ship would have been established. But could that change of figure effect a change of causation of the loss of freight? In my opinion, it could not. Contrasting the two contracts, Greene, L.J. in the *Kulukundis* case said (19 Asp. Mar. Law Cas. at p. 40; 155 L. T. Rep., at p. 117): "The contract here is a totally different contract, and there seems to be no ground in logic for assuming that the facts, which will constitute a commercial loss for the purposes of the one contract, are necessarily the same as those which will constitute a commercial loss for the purposes of the other. If there are analogies between the two cases, they are analogies and nothing more."

In my judgment, if it be the fact that the freight was lost in the present case because, although the ship could have been repaired and enabled to complete the voyage, yet it would have cost more to effect such temporary repairs, allowing for general average contribution, than the repaired value of the ship, such loss did not arise from the fact (if it be the fact) that the cost of permanent repairs, allowing nothing for general average contribution, would have exceeded the sum of 11,000*l.* On the other hand, if it was not a matter of expense, if the ship could not have been rendered fit to complete the voyage with her cargo of timber, I think that it may fairly be said that the loss of freight did, within the meaning of this clause, arise from the fact (if it be the fact) that there was a constructive total loss of the ship in the sense that total loss appeared to be unavoidable and there was a physical impossibility of repair.

I think that that answers the question which is left to me, and what the result of the case will be depends on what is proved.

Solicitors: for the plaintiff, *Ince Roscoe, Wilson* and *Glover*; for the defendant, *William A. Crump* and *Son.*

COURT OF APPEAL.

May 2 *and* 3, 1940.

(Before Sir Wilfrid Greene, M.R., Scott and MacKinnon, L.JJ.)

The Varmdo (*a*)

Collision—Navigation in Copenhagen Sound—Crossing rule—Narrow channel—Regulations for Preventing Collisions at Sea, 1910, *art.* 25.

Action of damage by collision. The steamships of the plaintiffs and the defendants came into collision near the Lappegrund Light Vessel in the Copenhagen Sound. On first sighting each other's lights the plaintiffs had the starboard light of the defendants' vessel on their port bow, and the defendants had the port light of the plaintiffs' vessel on their starboard bow. Under the Regulations for Preventing Collisions at Sea, 1910, *art.* 25, *the crossing rule, it was the duty of the defendants' vessel to keep out of the way. The defendants, however, contended that the collision occurred in a part of the Sound constituting a "narrow channel" within art.* 25, *and that therefore it was the duty of each vessel to keep to her own starboard side of the channel.*

Held by Langton, J. that the waterway in question ought not to be declared a narrow channel for the purposes of the Regulations, that the crossing rule applied, and that the defendants' vessel was alone to blame.

Appeal from a decision of Langton, J. (*ante* p. 346; (1940) P. 15).

K. S. Carpmael, K.C. and *E. W. Brightman* (for *H. L. Holman* on war service) for the appellants.

Gordon Willmer, K.C. and *G. N. W. Boyes* (for *J. V. Naisby* on war service) for the respondents.

On appeal the defendants did not contest the decision of Langton, J. that the waterway was not to be treated as a narrow channel. They therefore admitted that they were to blame under the crossing rule, but urged that the *Jeanne M.* was also at fault in failing to keep her course.

Appeal dismissed, the court holding on the facts that the Jeanne M. *was not to blame.*

Solicitors for the appellants, *Bentleys, Stokes* and *Lowless*, for *Bramwell, Clayton* and *Clayton*, Newcastle-upon-Tyne.

Solicitors for respondents, *Sinclair, Roche* and *Temperley*, for *Vaughan* and *Roche*, Cardiff.

(*a*) Reported by F. A. P. Rowe, Esq., Barrister-at-Law.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 29, 30, *and May* 7, 1940.

(Before SIR BOYD MERRIMAN, P.)

The Gabbiano (*a*)

Prize Court—Contraband cargo—Enemy destination—Diversion by sellers to British port—Pre-war contract—Payment by buyers before shipment—Bills of lading to sellers' order—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 19, *sub-s.* (2)—*Costs—Prize Court Rules*, 1939, *Order XVIII, r.* 1.

This was an action in which the Crown sought condemnation as contraband of the cargo of manganiferous ore shipped at an Egyptian port on an Italian ship for Stettin, Germany, under a contract between the claimants, a British firm, as sellers and a Czechoslovakian firm as buyers. The contract was made in December, 1938, *and in it the buyers agreed to pay* 85 *per cent. of the amount of the provisional invoice against shipping documents and to pay freight at chartered rates on the ship's arrival and to pay the balance of the purchase price against the final invoice. Clause* 8 (a) *of this contract provided: "If, after loading, any steamer stemmed under this contract is lost, or is, for any reason, unable to deliver the cargo or any part thereof, the quantity of ore so undelivered by such steamer shall be written off the contract quantity unless otherwise mutually agreed between buyers and sellers." The buyers in April*, 1939, *exercised their option to receive the goods at Stettin. As by then Czechoslovakia had been annexed by the German Reich, the buyers had to apply for permission to make payment in sterling in accordance with the contract. In June*, 1939, *a provisional invoice was sent at the buyers' request for the full price, without any deduction in respect of freight, and it contained these words: "c.i.f. Stettin . . . payments to be made in net cash in British sterling by cheque in London." In July*, 1939, *payment was made in sterling of the full amount. By a charterparty dated* 14*th July*, 1939, *the* Gabbiano *was chartered for the carriage of the goods from Abu Zenima to Stettin, and she sailed on the* 27*th August. The bills of lading were made out for delivery to order or assigns, freight and other conditions as per charterparty, and contained in type the words "Stettin for final delivery to" the buyers. The* Gabbiano *was at Messina on the outbreak of the war, and the claimants, who still retained the bills of lading, arranged that she should proceed to the United Kingdom on payment of additional freight. At Gibraltar the ship and cargo were seized as prize and sent to Cardiff.*

The claimants contended that the property in the goods at the time of seizure remained in them and that the goods were not liable to condemnation. The Attorney-General agreed that, in view of the diversion by the claimants of the cargo to an English port, the case should be decided upon the basis that the goods should be released to the claimants if the property was held to be in them at the date of the seizure.

Held, that clause 8 (a) *of the contract provided a valid business reason for taking the bills of lading to the sellers' order, that the claimants intended to reserve the right of disposal and that the property remained in them, and that they had therefore established their right to the release of the proceeds. Although the Prize Court Rules*, 1939, *Order XVIII, r.* 1, *appears to leave the question of costs to the discretion of the judge, this discretion must be exercised judicially, and the direction of the Privy Council in* The Baron Stjernblad (14 *Asp. Mar. Law Cas.* 178; (1918) *A. C.* 173; 117 *L. T. Rep.* 743) *that "if there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages," is a rule of law which must guide the exercise of the discretion.*

ACTION for condemnation of cargo.

The Crown sought condemnation as prize of a cargo of 9000 tons of manganiferous ore, or the proceeds thereof, shipped at Abu Zenima, Egypt, on the Italian steamship *Gabbiano* for Stettin, Germany. The claimants, the Sinai Mining Company, a British company, contended that at the date of the seizure the property remained in them and that therefore the cargo was not liable to condemnation.

The *Attorney-General* (*Sir Donald Somervell, K.C.*) and *C. T. Miller*, for the Procurator-General.

B. J. M. McKenna, for the claimants.

Cur. adv. vult.

Sir Boyd Merriman, P.—In this case the Crown asks for condemnation of a cargo of 9000 tons of manganiferous ore, or the proceeds thereof, shipped from Abu Zenima, a port in the Sinai Peninsula, on an Italian ship, *s.s.Gabbiano*, for Stettin, under a contract made between the claimants, as sellers, and the Vitkovice Mines, Steel and Ironworks Corporation, a Czechoslovakian company, as buyers. The claimants, the Sinai Mining Company, an English company, contend on the other hand, that at the material date, namely, the date of the seizure by the Crown, the property in the goods remained in them, and that as the shipment took place in the ordinary course of business, under a pre-war contract, neither the contract nor the shipment being made in anticipation of war, the goods are not subject to condemnation, notwithstanding their enemy destination: see, for example, *The Miramichi* (112 L. T. Rep. 349; (1915) P. 71), approved in *The Parchim* (14 Asp. Mar. Law Cas. 196; 117 L. T. Rep. 738; (1918) A. C. 157). It was pointed out by the Attorney-General, on behalf of the Crown, that that contention could not be accepted without qualification where the goods seized were, as in this case, absolute contraband under the Order in Council; but having regard to all

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

the circumstances of this case and, in particular, to the fact that the claimants themselves arranged for the diversion of this cargo to an English port, he was content that the case should be decided upon the basis that the goods should be released to the claimants if the property was held to be in them at the date of the seizure.

The facts are as follows. The contract for the sale of this ore was made through the sellers' agents, a Dutch firm at Rotterdam, on 23rd December, 1938; the quantity was to be one steamer cargo of 6000/8500 tons in sellers' option, and shipment was to be between July and December, 1939, also in sellers' option. As the subsequent history shows that the buyers were prepared to receive the quantity actually shipped, nothing turns on the fact that this exceeded the contract quantity. The quality was described as Sinai manganiferous ore, guaranteed to contain a minimum of 25 per cent. metallic manganese in a dry state, and the price was to be 10½*d.* per unit of manganese and 4*d.* per unit of iron in the ore, dried at100 degrees centigrade per ton of 1000 kilos, c.i.f. Gdynia, Danzig or Stettin, one port in buyers' option. Moisture was to be deducted from the weight. Clause 6 of the contract provided for weighing and sampling during the discharge of the steamer conjointly by representatives of the buyers and sellers, for the method of arbitration in the event of differences, and for the ascertainment of the quantity of moisture at the same time. It follows that there could be no final ascertainment of the price until the prescribed tests had been made. The buyers agreed to pay 85 per cent. of the amount of the provisional invoice, to be based on certain percentages of content to which I need not refer in detail, in British sterling in London against shipping documents, and to pay freight at chartered rates in net cash in British sterling to the steamer's agents at the port of discharge immediately on the arrival of the steamer, and to pay the balance of the purchase price in British sterling against presentation of the final invoice to be rendered on ascertainment of the weight and analysis.

Among the general conditions was the following clause, on which great stress was laid by the claimants: "8. (*a*) If, after loading, any steamer stemmed under this contract is lost, or is, for any reason, unable to deliver the cargo or any part thereof, the quantity of ore so undelivered by such steamer shall be written off the contract quantity unless otherwise mutually agreed between buyers and sellers."

By letter of 11th April, 1939, the buyers exercised their option to receive the goods at Stettin, and in the same month modifications of the contract whereby the weight to be invoiced was to be the official railway wagon weight, ascertained at the port of discharge, and the sellers were to arrange the insurance of war risks for their own account, were agreed to. By that date Czechoslovakia had been incorporated in the German Reich. One effect of this was that the buyers had to apply for permisssion to make payment in sterling in accordance with the contract. Accordingly, on 8th June, 1939, at the request of the buyers, through the Rotterdam agents of the sellers, a provisional invoice was sent for the full price, without any deduction in respect of freight. The invoice contained these words, "c.i.f. Stettin, contract dated 23rd December, 1938, payments to be made in net cash in British sterling by cheque on London in favour of the Sinai Mining Company," though on receipt of it, the sellers' agents called attention to the fact that the buyers would only have to pay in due course 85 per cent. of the provisional value against the documents. In fact, on 11th July, payment of the full amount of the invoice, 14,889*l.* 8*s.* 8*d.* was made in sterling. The affidavit filed on behalf of the claimants makes it clear that this departure from the contract terms of payment was entirely at the buyers' instance, and that they are unable to give the reason for their making the voluntary payment in advance. By charterparty dated 14th July, 1939, the *Gabbiano* was chartered for the carriage of these goods from Abu Zenima to Stettin and sailed on 27th August, 1939. In giving instructions to their agents at the port of discharge, the claimants announced that they would be paying the freight. The bills of lading, in English form, are dated 27th August, 1939. They acknowledged shipment of the goods by the claimants for the voyage from Abu Zenima to Stettin; and after the printed words, "to be delivered in like good order and condition at the aforesaid port of" there is inserted in typewriting the words, "Stettin for final delivery to" the buyers. They are made out for delivery to order or assigns, freight and other conditions for the same as per charterparty dated London, 14th July, 1939.

On the outbreak of war on 3rd September, 1939, as appears from a letter dated 4th December, 1939, written on behalf of the claimant, the Procurator-General, the *Gabbiano* was at Messina, bunkering, and her owners informed the claimants that they proposed to discharge the cargo there; but the claimants, who still retained the bills of lading, protested, and arranged that the ship should proceed with the cargo to the United Kingdom on payment of additional freight. At Gibraltar, on or about 18th September, she was seized by H.M.S. *Leda*, and a writ was issued in the Prize Court at Gibraltar. On 26th September, a prize crew was provided by H.M.S. *Cormorant*, and the ship sailed for Cardiff, where she arrived on 3rd October. Meanwhile, on 27th September, the Prize Court at Gibraltar pursuant to sect. 1 of the Prize Court Act, 1915, remitted the proceedings to this court. In fact, a fresh writ in this court was issued on 9th October, 1939, as upon the seizure of 26th September. I am invited by both parties to ignore the proceedings in the Gibraltar Prize Court. I am also invited to ignore as irrelevant a purported sale of the cargo, afterwards cancelled, to buyers in Cardiff.

The cargo was, in fact, sold soon after arrival in this country and has already, no doubt, been put to some good use. I am, therefore, only concerned with the disposal of the proceeds, and the sole question now to be determined is whether the property remained in the claimants at the date of seizure.

Before considering the arguments, there are two observations to be made upon the vital documents, the contract and the bills of lading. At the hearing Mr. McKenna put in, by consent, though it had not been referred to in the claimants' affidavits, a letter of 27th July from the claimants in London to their Sinai office at Abu Zenima containing the following specific instructions with regard to this shipment: "s.s. *Gabbiano*, for your guidance, documents for this cargo should be made out to order and the originals sent to this office." It is, therefore, impossible to say of these bills of lading as was said of those in the same form in *The Parchim* (*sup.*), that the form was determined by the sellers' agent without knowledge of the contract and, though it may have been determined on general instructions from his principal, without particular

instructions given in view of the particular contract. Moreover, although the payment was made more than six weeks before shipment, no request was made by, or on behalf of, the buyers that the bills of lading should be made out to their order. In the claimants' affidavit, already referred to, it is sworn that the bills of lading were taken in this form in order that they might retain the right of property in and possession of the goods in themselves until they assigned the bills of lading to the buyers. They were still in their possession at the time of the first seizure, but had been endorsed to the prospective buyers under the abortive contract already mentioned before the ship sailed from Gibraltar.

Also, the original contract exhibited to the affidavits is typewritten throughout. There is no question, therefore, of an inadvertent failure to delete, as inappropriate to the particular contract, a stock clause in a printed form of contract.

The Attorney-General's argument may be summarised as follows. This contract is expressed to be a c.i.f. contract. Under such a contract it is customary to take the bills of lading to sellers' order, but this is only because payment is to be made against tender of the shipping documents and the seller is not prepared to part with the property in the goods until that condition is fulfilled: see *Stein, Forbes & Company* v. *County Tailoring Company* (13 Asp. Mar. Law Cas. 422; 115 L. T. Rep. 215). In such cases it is appropriate to invoke the prima facie presumption under sect. 19, sub-sect. 2, of the Sale of Goods Act, 1893, that the seller reserves the right of disposal, with the result that the property in the goods does not pass notwithstanding that the shipment of the goods for the purpose of transmission to the buyers would otherwise operate as an unconditional appropriation, and the property in the goods would pass under rule 5 of sect. 18. In this case, however, payment was made in advance of shipment, not merely of the percentage of the price which the contract provided should be made against shipping documents, but of the full amount of the provisional invoice, not in accordance with the contract, but because of European events supervening after the contract had been made. In these circumstances it would, he argued, be wrong to draw the prima facie inference that the sellers reserved the right of disposal, as there was no business reason why they should do so. Therefore, the property passed to the enemy buyers on shipment. He relied upon *The Parchim* (*sup.*) as illustrating the kind of circumstances in which the prima facie inference from taking the bills of lading to sellers' order should be negatived.

Now, the contract in *The Parchim* differed from that in the present case in many essential respects. It was a contract for the sale of a whole cargo per *Parchim*, which had, to quote Lord Parker's judgment, "far more of the characteristics of a contract f.o.b. Taltal than it has of a contract c.i.f. European port." Again, he says: "The contract is for the sale of the whole cargo of a named ship. On shipment, or at any rate on notification of shipment, the cargo is at the risk of the buyer, who has to pay for it whether it arrives or not. The cargo is to be insured for buyer's account and benefit and insured at its arrived value, including profit, which the buyer alone could make. The buyer takes over the charterparty and names the port of discharge. The only matter which seems to point to an intention not to pass the property on shipment is the form in which the bills of lading were taken." It is plain that their Lordships thought that Sir Samuel Evans had laid too much stress on the form of the bills of lading, and had not given as much effect as he ought to have to the fact that the contract was for the sale of the whole cargo of a named ship, and that the cargo was clearly at the risk of the buyers from a time anterior to the capture. In this case, however, the provision as to risk in clause 8 (*a*) is the converse of that in *The Parchim*. Not only are the buyers not at risk if, after loading, the ship is lost, or is for any reason unable to deliver the cargo, or any part thereof, but the undelivered ore is written off the contract quantity, meaning, as I understand it, that the contract is cancelled wholly, or pro tanto, as the case may be. Save that it illustrates the proposition that other facts in the case may be such as to rebut the prima facie inference to be drawn from the form of the bills of lading, I do not think that *The Parchim* assists me in the decision of this case. For a like reason I am not much impressed by the argument that a c.i.f. contract is a sale of documents and not a sale of goods, and that as the price had been paid in advance the sellers must have taken the shipping documents as agents for the buyers. Except as a way of expressing that a c.i.f. contract is to be performed by the delivery of the shipping documents the phrase has been disapproved: see *Arnhold Karberg and Company* v. *Blythe, Green, Jourdain and Company* (13 Asp. Mar. Law Cas. 235; 114 L. T. Rep. 152; (1916) 1 K. B. 495) per Bankes, L.J., and per Warrington, L.J.; and see *Malmberg* v. *H. J. Evans and Company* (41 Times L. Rep. 38; (1924) 30 Com. Cas. 107) per Scrutton, L.J. Successive editions of Chalmers' Sale of Goods Act, 1893, including those edited by Sir Mackenzie Chalmers himself, contain the following passage in the notes to sect. 32: "It is sometimes said that a c.i.f. contract is a contract for the sale of documents rather than a sale of goods; but the cases show that it is a contract for the sale of insured goods, lost or not lost, to be implemented by the transfer of proper documents." The contract in this case is certainly not a contract for the sale of goods lost or not lost.

The essentials of a c.i.f. contract proper have been summarised authoritatively in several well-known judgments. I am content to refer, without quotation, to the recapitulation of them by Lord Atkinson in *Johnson* v. *Taylor Brothers and Company, Limited* (122 L. T. Rep. 130; (1920) A. C. 144). By this test, clause 8 (*a*) of this contract is inappropriate to a c.i.f. contract proper (compare Scrutton on Charterparties, in the notes to art. 59, at p. 206, and Judge Kennedy's book on c.i.f. contracts, at p. 5), for the goods are not at the buyers' risk in the events referred to in that clause. Nevertheless, the contract may remain, as it is expressed to be, a c.i.f. contract but with variations: see for example *In re Denbigh Cowan and Company* and *R. Atcherley and Company* (125 L. T. Rep. 388) and *Karinjee Jivanjee and Company* v. *William F. Malcolm and Company* ((1926) 25 Ll. L. Rep. 28). For example, if the circumstances provided for in clause 8 (*a*) never arose, the contract would, in normal conditions, be performed according to its tenor as an ordinary c.i.f. contract. Nor would any practical inconvenience result if the contract had to be resolved in whole or in part by a loss covered by the insurance policy after the buyer had taken up the documents, or even if he had taken them up after, but in ignorance of, the loss. If, however, a total loss occurred to the knowledge of the parties before tender of the documents, the argument on both sides assumed, as I think correctly, that, contrary to the law applicable to a c.i.f. contract proper (see *Manbre Saccharine Company* v. *Corn Products Company* (120 L. T.

Rep. 113; (1919) 1 K. B. 198), the sellers could not call upon the buyers to take up the documents, at any rate if the sellers still retained the bills of lading in their own possession at the material time. Nor would there seem to be any business convenience in their doing so. But it is unnecessary to decide what the legal position would be in this and other hypothetical contingencies. It is sufficient to say that I can see no answer to Mr. McKenna's argument that the presence of clause 8 (*a*) in this contract, in the circumstances which have actually occurred, affords a valid business reason for taking the bills of lading to the sellers' order, and that in the circumstances of this case it cannot be said that the only business reason for so doing had disappeared with the payment of the whole price in advance. I do not think that the claimants were guilty of any breach of contract in so doing; but, even if they were, the legal position is not affected: see, for example, *Gabarron* v. *Kreeft* (3 Asp. Mar. Law Cas. 36; 33 L. T. Rep. 365; (1875) L. R. 10 Ex. 274), where there was no question of securing the price and where, as in the present case, the right of disposal was in fact used to withdraw the goods entirely from the contract. Nor does it seem to me that the inclusion in the bills of lading of the words "for final delivery to" the buyers makes any difference. These words seem to me merely to emphasise what would otherwise be implied from the shipment, that the goods were appropriated to the contract, but do not, in my opinion, affect the question whether, within the meaning of sect. 18, rule 5, and sect. 19, they were appropriated unconditionally. I can see no reason for holding that in taking the bills of lading to their own order the sellers did so as agents for or on behalf of the buyers (see *Mirabita* v. *Imperial Ottoman Bank* (3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. 597; (1878) 3 Ex. D. 164) per Cotton, L.J.) or for drawing any other inference from their so doing than that they intended to reserve the right of disposal and thus to retain the property in the goods.

For these reasons I hold that the claimants have established their right to the release to them of the proceeds of this cargo.

McKenna asked that the claimants should be awarded costs.

C. T. Miller: By the Prize Court Rules, 1939, Order XVIII, r. 1: "The costs of and incident to all cases shall, except when otherwise provided by any agreement, or by statute, be in the discretion of the judge." This discretion should be exercised according to the manner in which it had been exercised in the past.

Sir Boyd Merriman, P.—Order XVIII, r. 1, of the Prize Court Rules appears to leave the costs in these matters to the unfettered discretion of the judge, but that discretion, like any other exercise of discretion, must be exercised judicially, and I find a very plain direction from the Privy Council in *The Baron Stjernblad* (14 Asp. Mar. Law Cas. 178; 117 L. T. Rep. 743; (1918) A. C. 173), as to the principle of law on which this discretion should be exercised. Lord Parker said: "If, on the other hand, there were suspicious circumstances justifying the seizure, the claimant is not entitled to either costs or damages." It is quite plain from the context that that was intended to be laid down as a rule of law guiding the exercise of the discretion.

I am not going to repeat the various circumstances which have been urged in this case, but to my mind it is a very plain case in which the Crown were fully justified in exercising their right as captors, and in bringing this matter before the court for investigation. I think in those circumstances that I ought not to make any order as to costs.

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

Solicitor for the claimants, *Allen* and *Overy.*

House of Lords.

April 4, 8, *and May* 30, 1940.

(Before LORDS MAUGHAM, ATKIN, WRIGHT, ROMER and PORTER.)

Canadian Transport Company Limited v. Court Line Limited. (*a*)

Time charter-party—Charterers to load, stow and trim cargo—Under supervision of the captain—Improper stowage—Damage for, paid by shipowners to bill of lading holders—Recoupment by shipowner's indemnity club—Owners to give time-charterers the benefit of club insurances—"So far as club rules allow"—Liability of Charterers—Interpretation of rules.

By clause 8 of a time charter-party: "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load, stow and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' and tally-clerks' receipts. Owners to give time-charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and, in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules which owners would have otherwise borne." The franchise, according to the club rules, was a provision that the shipowner was to bear the first 10*l. as between himself and the club.*

By rule 2 of the West of England Steamship Owners Protection and Indemnity Association Limited, of which the shipowners were members: "The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay and shall have, in fact, paid as follows . . ." There followed a number of paragraphs dealing with the head of "protection." Then the rule deals with "indemnity," and under sub-rule (i) provides: "For other claims arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise arising through other causes than 'improper navigation,' the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents, the association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect."

(*a*) Reported by C. G. MORAN, ESQ., Barrister-at-Law.

By rule 17 : " *No assignment or subrogation by a member of his cover with this association to charterers or any other persons shall be deemed to bind this association to any extent whatsoever.*"

During the currency of the charter damage was caused by improper stowage to parcels of grain, shipped under bills of lading to the extent of 101*l.* 3*s.* 4*d. The holders of the bills of lading claimed this amount from the shipowners and the association paid that sum to them, the shipowners remaining liable to refund* 10*l. to the association. The shipowners then claimed this sum from the time-charterers.*

Held that by the first half of clause 8 *of the charter-party this liability fell primarily upon the charterers. For the words " under the supervision of the captain " did not replace the liability on the shipowners. Accordingly the shipowners succeeded in their claim unless the words in the second half of clause* 8 :—" *Owners to give time-charterers the benefit of their protection and indemnity club insurances as far as club rules allow " prevented them.*

Held also that whether these words meant (1) *that the shipowners would assign to the charterers their right of action against the club, or* (2) *that the shipowners being indemnified by their club would forgo their right to sue the charterers, rule* 17 *of the rules of the Association in the first case and rule* 2 (*i*) *in the second case, forbade the shipowners giving the benefit suggested.*

Judgment of the Court of Appeal (*Scott and Clauson, L.JJ.—Goddard, L.J. dissenting—* 19 *Asp. Mar. Law Cas.* 283; (160 *L.T. Rep.* 621) *affirmed.*

APPEAL from a judgment of the Court of Appeal reversing a judgment of Lewis, J. on a case stated by an arbitrator.

The facts are fully stated in the opinion of Lord Porter.

Sir Robert Aske, K.C., and *Cyril Miller* for the appellants.

G. St. Clair Pilcher, K.C., and *G. M. W. Boyes* (for *H. L. Holman* on war service) for the respondents.

The House took time for consideration.

Viscount Maugham.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Atkin on this appeal. As regards the first point, that since the duty of the charterers to stow was expressed to be " under the supervision of the captain " the responsibility for stowage was thrown upon the shipowners, I have had no doubt, nor I believe have any of your Lordships. The contention is clearly an ill-founded one for the reasons given by my noble and learned friend.

As regards the second point which arises on the true construction of that part of clause 8 of the charter-party which provides that the owners are to give to the charterers the benefit of their protection and indemnity club insurances " as far as club rules allow," taken in conjunction with the club rules, I must confess that I have felt considerable doubt. The club rules, particularly rule 2 and rule 17, seem to me to present almost insoluble problems of interpretation, and a judicial mind must recoil from applying to the construction of written documents the principle of mere conjecture. On the whole I think the solution adopted by my noble friend is the best solution of which the case admits, and I concur with what he has said on the point.

I therefore agree with the order of the Court of Appeal and am of opinion that this appeal should be dismissed.

Lord Atkin.—My Lords, this appeal arises on a special case stated by the sole arbitrator on a claim by the respondents the owners of the *s.s. Ovington Court* against the appellants the charterers of the ship on time charter for damages for improper stowage. The charter-party is dated 28th January, 1937, and though it is in time charter form it is for the hire of the ship for a voyage from Rotterdam to the North Pacific and return to the United Kingdom or Continent. The ship apparently proceeded to Vancouver and there loaded a cargo in respect of which the present claim arises. The special case is particularly niggardly of facts. It does not state from what port the ship sailed or at what port she arrived ; it does not state the nature of the cargo, except that some was wheat in bulk, or how the damage arose. It does not annex the bills of lading upon which the owners' original liability arose. None of these particulars are in fact essential for determination of the case ; but it is unusual to have to decide a commercial case such as this without being able to satisfy one's ingrained curiosity about them ; and the learned arbitrator may be congratulated upon having achieved a degree of abstraction which is certainly rare and perhaps admirable.

By clause 8 of the charter-party " . . . the charterers are to load stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo as presented in conformity with mates' and tally clerks' receipts." By clause 24 the charter was expressly made subject to the terms of the Carriage of Goods by Sea Act of the United States, 1st April, 1936, and the Canadian Water Carriage of Goods Act, 1936. On arrival at the port of discharge, wherever it was, a claim was made by holders of bills of lading of wheat in bulk against the shipowners for damage to the goods. The damage was due to improper stowage. The case finds that the owners were liable to pay to the receivers under the bills of lading 101*l.* 3*s.* 4*d.* We are not told why, but if as we were informed the ship loaded at Vancouver, presumably the liability arose under Art. III 2 of the rules under the Canadian Water Carriage of Goods Act which correspond to those in the English Carriage of Goods by Sea Act, 1924. The shipowners claimed to recover this sum which had been paid to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under the provisions of clause 8. The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, &c., " under the supervision of the captain." This, it was said, threw the actual responsibility for stowage on the captain ; or at any rate threw upon the owners the *onus* of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired. My Lords, it appears to me plain that there is no foundation at all for this defence ; and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course ; he has in any event to protect his ship from being made unseaworthy ; and in other respects no doubt he

has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt they might escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely—any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract. This view of the clause is supported by the decision of Lord Fairfield, Greer, J. as he then was, in *Brys and Gylsen Limited* v. *J. and J. Drysdale and Company* (1920, 4 Ll. L. Rep. 24). It is true that the judge does not refer to the words "under the supervision of the master" which were in the relevant clause; but this seems to me all the more significant. It is obvious that that very experienced judge attached no importance to the words as affecting the liability of the charterers arising from their contract "to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master." The charterers were held liable for dead freight due to faulty stowage by the stevedore. This defence fails.

The second defence also arises under clause 8 of the charter-party, "owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and, in case of shortage or damage to cargo, charterers to bear the franchise according to the club rules which owners would have otherwise borne." The shipowners were members of The West of England Steam Ship Owners Protection and Indemnity Association, Limited, the rules of which are annexed to the case. Under rule 2 the members are protected and indemnified in respect of losses or claims which they are liable to pay for (i) claims arising in respect of the shipment, carriage, discharge or delivery of goods arising through other causes than improper navigation. The association therefore accepted the liability in respect of the bill of lading owners' claim, paid them direct the amount of this claim, and are putting forward the present claim in the name of their member by virtue of their right of subrogation. The charterers in effect say to the shipowners "You have promised to give us the benefit of your insurance. You have either received or are entitled to receive the 101*l.* due to the bill of lading holders from your insurers, or they have paid the bill of lading holders direct. In any case we don't get the benefit of your insurance if we have to pay you; and if indeed we were to pay you you would have to hand over to us the amount you received from your insurers or were entitled to receive from them." I myself have had much difficulty in appreciating what the clause really means. It cannot mean that the owners are to hold the charterers covered against the same risks as those against which the association hold the owners covered. It cannot extend to losses which the owners incur but not the charterers: to losses which the charterers incur but not the owners. But I suppose it may refer to losses which the owners incur by reason of a default by the charterers as in the present case. But in such a case it is obvious that the owners are destroying any right of subrogation which the insurers would have against the charterers. It will be observed that this is not the case of the owners contracting with the charterers that the latter are not to be liable to them in respect of negligence or breach of contract. Insurers have to put up with exception clauses, though their risks are no doubt increased thereby. But this clause leaves original liability untouched. For example, it would have no effect when the owner happened not to be insured in a club, or where the rules of the club did not allow the benefit of the insurance to be given by the member. I suppose though I do not think it necessary to decide that a man may contract with another on the terms that if he is injured by that other then if he happens to be insured he will look to his insurers in relief of the wrong-doer. But I am satisfied that such a contract is very unusual, and I should suppose would make it very difficult for the man to renew his insurance; and the last class of insurers to permit such a contract would, I should assume, be any form of mutual insurance society such as a club. The clause is only applicable so far as the club rules allow. There are two rules relied upon by the respondents as indicating that the giving of the benefit suggested by clause 8 of the charter is not allowed by the club. The first is clause 2 (i) the first words of which, granting the indemnity to the owners, I have read. It continues "the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents. The association shall be entitled to take credit for any profit accruing by the member by reason of any wrongful act of his servants or agents up to the measure of its loss, or recover for its own account from third parties any damages that may be provable by reason of such neglect." This is quite unintelligible on the strict reading of the words; what is meant by such neglect? The word "neglect" has not been used before. The only preceding reference to negligence is the negligence of the members' servants or agents which could not cause provable damages against third parties. Endeavouring to give some meaning to the clause I think that the true construction must be damages provable against third parties by reason of their wrongful act or their negligence. If this be so then the rule seems to me to be inconsistent with permission to the members to give the third party the protection of the insurance in defeasance of this right.

The second rule upon which the respondents rely is rule 17. "No assignment or subrogation by a member of his cover with this Association to charterers or any other persons shall be deemed to bind this Association to any extent whatsoever." The reference to "subrogation" is obscure, and so far as I can see unmeaning. But "assignment" appears to me to cover that which is intended by clause 8 of the charter. There would seem to be no difference between agreeing to "give the benefit of insurance," and "assigning the cover." I have already discussed the difficulty of giving a real content to the relevant words of clause 8. But if and when they apply it would seem to follow that after loss the charterers would be entitled to claim by way of equitable assignment the sum due by the club to the owners, or received by the owners from the club. In any case clause 8 seems to express an assignment by the owners to the charterers of their cover with the club—"give them the benefit of their insurance": and such assignment does bind the club "to any extent whatsoever": for if it operates at all, it would appear effectively to deprive the club of its right of subrogation. For these reasons which are substantially those of Scott and Clauson, L.JJ., I think that this defence also fails. I agree with the order made by the Court of Appeal and am of opinion that this appeal should be dismissed with costs.

Lord Wright.—My Lords, the arbitration out of which this appeal arises was between the respondents as owners of the *s.s. Ovington Court* and the appellants as charterers under a charter-party dated the 21st January, 1937, whereby the owners agreed to let and the charterers agreed to hire the steamship on a voyage from Rotterdam where she was to be placed at the charterers' disposal to the North Pacific and return to United Kingdom or Continent, via any port or ports at charterers' option, at a rate of hire of 5*s.* 0*d.* per day per ton on her dead weight. The steamship was to be employed in carrying lawful merchandise and in lawful trades between the specified limits. Of the various clauses in the charter clause 8 is the only one which I need particularise. It is as follows: "The captain shall prosecute her voyages with the utmost dispatch and shall render all customary assistance with the ship's crew and boats. The captain (although appointed by the owners), shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo as presented in conformity with mates' and tally clerks' receipts. Owners to give time charterers the benefit of their protection and indemnity club insurances" (then follow words here printed in italics which were substituted for certain words struck out) "*as far as Club Rules allow* and in case of shortage or damage to cargo—charterers to bear the franchise according to the club rules, which owners would have otherwise borne." The issue turns on this clause read in connection with the rules of the West of England Steam Ship Owners Protection and Indemnity Association Limited of which the respondents were members.

The award is very bare in stating the facts. No doubt the learned arbitrator stated all the facts placed before him. He stated that under the charter-party the respondents became liable to pay 101*l.* 3*s.* 4*d.* to receivers under bills of lading dated 18th March, 1937, covering wheat in bulk for damages for failure to deliver the said goods in the same good order and condition as when shipped. The damage to the goods was due to improper stowage. The sum of 101*l.* 3*s.* 4*d.* was paid in full by the association to the receivers, the respondents remaining liable to refund 10*l.* in respect thereof to the association. This 10*l.* is the franchise which according to the club rules the owners had to bear in respect of the loss.

The learned arbitrator does not exhibit the bills of lading, but it is obviously assumed that the owners were liable under them to the receivers for improper stowage; indeed that must have been so if they were issued on the North Pacific Coast, and were, as they must have been, subject either to the United States Carriage of Goods by Sea Act, 1936, or the Canadian Water Carriage of Goods Act, 1936. The award stated that no evidence was adduced by either party as to the loading, save that it was admitted that the damage was due to improper stowage. There was no evidence, it added, of the extent, if any, to which there was supervision by the captain, nor was their any evidence of protest or approval by him in respect of the stowage.

The learned arbitrator made his award in the form of a special case for the decision of the Court, whether on the facts found and the true construction of the contract the respondents were entitled to recover 101*l.* 3*s.* 4*d.* or 10*l.* or nothing. He awarded, subject to the opinion of the Court that they should recover 10*l.*, and in the alternative awarded that they should recover 101*l.* 3*s.* 4*d.* or nothing.

His award was upheld by Lewis, J. but the Court of Appeal by a majority upheld the alternative award of 101*l.* 3*s.* 4*d.*

There are two quite separate questions. The first is whether the appellants as charterers are liable to indemnify the respondents in respect of their liability under the bills of lading for improper stowage. Both Courts below have answered that question in favour of the respondents. The other question is whether that obligation is under clause 8 of the charter-party and the club rules reduced to 10*l.* as the learned arbitrator, Lewis, J. and Goddard, L.J., dissenting in the Court of Appeal, thought, or whether as the majority of the Court of Appeal thought, it was not reduced or affected at all. I agree with that latter opinion.

It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but in order to avoid damage to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charter-party to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect. But under clause 8 of this charter-party the charterers are to load, stow and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage, except as qualified by the words "under the supervision of the captain," which I shall discuss later. The charterers are granted by the shipowners the right of performing a duty which properly attaches to the shipowners. Presumably this is for the convenience of the charterers. If the latter do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders. Justice requires that the charterers should indemnify the shipowners against that liability on the same principle that a similar right of indemnity arises when one person does an act and thereby incurs liability at the request of another, who is then held liable to indemnify. That such a liability on the part of the charterers is contemplated is shown by the last words of clause 8 which supposes that the charterers may incur liability for "damage to cargo."

So far I think is clear. What then is the effect of the words "under the supervision of the master"? These words expressly give the master a right which I think he must in any case have, to supervise the operations of the charterers in loading and stowing. The master is responsible for the seaworthiness of the ship and also for ensuring that the cargo will not be so loaded as to be subject to damage, by absence of dunnage and separation, by being placed near to other goods or to parts of the ship which are liable to cause damage, or in other ways. A striking instance of bad stowage of this character is to be found in the case of *Elder Dempster and Company* v. *Paterson Zochonis and Company* (131 L. T. Rep. at 449; (1924) A. C. 522). But I think this right is expressly stipulated not only for the sake of accuracy, but specifically as a limitation of the charterers' rights to control the stowage. It follows that to the extent that the master exercises supervision and limits the charterers' control of the stowage, the

charterers' liability will be limited in a corresponding degree. The learned arbitrator was evidently of this opinion. He expressly found that there was no evidence of the extent, if any, to which there was supervision by the captain or of protest or approval by him in respect of the stowage. He obviously held, and as I think rightly held, that there was in this case no ground for imposing any limitation on the charterers' liability to the shipowners in respect of the improper stowage.

The matter is one of some importance in mercantile affairs because a clause of this type is not uncommon. The amount involved here is small, but the liability in other cases may be very considerable. A vessel may be totally lost owing to improper stowage or very severe damage done to cargo. But there does not appear to be any express decision on the point, though in *Brys and Gylsen* v. *J. and J. Drysdale and Company* (1920, 4 Ll. L. Rep. 24), Greer, J. seems to have been of the same opinion as that which I have expressed. The master's power of supervision is obviously not limited to matters affecting seaworthiness.

The learned arbitrator did not award to the respondents the full amount which they claimed, but only 10*l.*, obviously because he thought that the appellants were entitled under clause 8 to the benefit of the respondents' club insurances, and hence could only claim 10*l.*, the franchise which they had to bear. In my opinion he was not right in that view.

The relevant words of clause 8 of the charter can only mean that the respondents agree to give the appellants the same rights as they have against the club, which is in substance the right subject to the franchise to be paid the amount of the loss. But this would nullify the right which the club has on payment to its member, to make a claim in the name of the member against the appellants as being the persons whose default has caused the loss. It is obvious, and indeed was admitted at the Bar, that it is just this claim which is being brought in the present arbitration. The appellants' contention, if right, would thus defeat the club's right of subrogation. If that were effectively done by the respondents without the consent of the club, the respondents would be liable for and the club would be entitled to recover, the value of the right of subrogation from the respondents, *West of England Fire Insurance Company* v. *Isaacs* (75 L. T. Rep. 564; (1897) 1 Q. B. 226). It is not very probable as a matter of business that the respondents would enter into such a bargain with the appellants, and it is just as improbable that the club would sanction it. Though such a bargain would affect the right of subrogation, I do not see how it has any other effect. In the facts of this case, the respondents have had to pay the bill of lading holders, they have been indemnified by the club, and the club according to the appellants' claim is now to be deprived of its legal right to claim over against the persons who have caused the damage. This position is entirely different from the position when the remedies against the person in default are limited by the provisions or exceptions in the contract under which the liability arises. There is in clause 8 no exceptive limitation on the appellants' liability to the respondents. Whatever may be the effect of the particular words in question of clause 8, it is subsequent to the liability of the shipowner to the bill of lading holders. Clause 8 can only come into operation when the liability has been incurred. It cannot affect the amount of that liability. It is not either in form or substance, a promise that there shall be no liability on the appellants to indemnify the respondents. If that were the effect the appellants would not need the protection of the respondents' insurance with the club. I am unable to agree with what I understand to have been the reasons of Goddard, L.J. in his dissenting judgment.

Without express sanction on the part of the club, I think the appellants' claim would be inadmissible. I turn to the club rules to see if "the club rules allow" what the appellants contend for. I find however that the rules which are vouched as material negative the appellants' contention. So far as concerns the club, the claim against them here in question must have been based on the indemnity section of rule 2 which provides that members are "... indemnified as shipowners in respect of losses or claims arising without their actual fault or privity which they shall have become liable to pay and shall have in fact paid." Rule 2 (i) headed by the word "Indemnity" is as follows: "For other claims arising in respect of the shipment, carriage, discharge or delivery of goods or merchandise, arising through other causes than 'improper navigation'" [which comes under the head of Protection] "the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents the Association shall be entitled to take credit for any profit accruing to the members by reason of any wrongful act of his servants or agents, up to the measure of its loss, or recover for its own account from third parties any damages that may be provable by reason of such neglect." But for the obscurity of the words "such neglect" it would be clear that the club was stipulating as against its members to have the right to recover on its own account, so far as is necessary to recoup itself for its liability to its member, the damages which the member would be entitled to recover from the person in default. In other words, the latter part of the clause confirms expressly to the club a right corresponding in substance to the ordinary right of subrogation. If the words had been not "such neglect" but "the neglect of the third parties or their servants or agents" no question could have arisen. It is certainly difficult to construe "such neglect" with literal or technical accuracy. But I think it can be fairly construed as referring back to the earlier words "negligence or default of their servants or agents." "Such neglect" on that view reiterates the same idea in application to third parties, to whom alone the latter words relate. This gives a reasonable and intelligible meaning to the words, which otherwise are simply unintelligible. On this interpretation which I think is right rule 2 (i) is expressly inconsistent with the appellants' claim. The rule so far from allowing, definitely disallows what the appellants contend for.

I think then that Rule 2 (i) excludes such a claim as that of the appellants. If, however, the appellants assert that what they are contending for is to be entitled to claim as assignees of the right to be indemnified which the respondents as members have or had against the club, the claim would obviously be most anomalous in many ways, but it is enough here to say that in my opinion rule 17 would conclusively dispose of it. It provides that "No assignment or subrogation by a member of his cover with this Association to charterers or any other persons shall be deemed to bind this Association to any extent whatsoever." I shall ignore the word "subrogation" to which I have failed to give any intelligible meaning. I think it is probably no more than an amplification, technically inaccurate, of the word "assignment." In my opinion, the way of construing clause 8 of the charter-party most

favourable to the appellants, is that it amounts to an agreement in equity by the respondents to assign to them the benefit of their insurance or cover with the club, and that the claim which has arisen against the club has become in equity assigned to the appellants. If that be the meaning (and there are many obvious considerations which make me feel that it is much too favourable to the appellants) then rule 17 clearly and expressly nullifies any such agreement to assign.

I agree in substance with the reasoning of Scott and Clauson, L.JJ. in the Court of Appeal. In my judgment the appeal should be dismissed.

Lord Romer.—My Lords, I have had the privilege of reading the opinions which have just been delivered by my noble and learned friends, Lord Atkin and Lord Wright. For the reasons which they give, I also agree that this appeal should be dismissed.

Lord Porter.—My Lords, this case comes to your Lordships' House on appeal from a decision of the Court of Appeal given on the 3rd of May, 1938. The dispute was originally submitted to arbitration, in which the award was stated in the form of a Special Case. It is upon that Special Case that your Lordships have to determine the rights and liabilities of the parties.

The case is very shortly stated and the facts may, I think, be set out in its wording without unduly lengthening my opinion. They are as follows :

1.—By a charter-party dated the 28th January, 1937, a copy of which is annexed hereto and forms part of this case, the claimants agreed to let and the respondents agreed to hire the *s.s. Ovington Court* for a voyage to the North Pacific and return to the United Kingdom or Continent.

2.—The said charter-party further provides (*inter alia*) as follows :

" 8. The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency; and charterers are to load stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo as presented, in conformity with mates' and tally clerks' receipts. Owners to give time charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo charterers to bear the franchise according to the club rules, which owners would have otherwise borne."

3.—At all material times the claimants were members of the West of England Steamship Owners Protection and Indemnity Association Limited, and the said steamship was entered in Class 1 Protection and Indemnity. A copy of the rules of the said Association is annexed hereto and forms part of this case.

4.—The said rules provided as to Class 1 (*inter alia*) as follows :

" 2. The members are protected and indemnified as shipowners in respect of losses or claims arising without their actual fault or privity, which they shall have become liable to pay, and shall have in fact paid as follows :

" INDEMNITY.

" (i) For other claims arising in respect of the shipment, carriage, discharge, or delivery of goods or merchandise arising through other causes than 'improper navigation' the intention being to mutually protect and indemnify the members against the negligence or default of their servants or agents.

* * * *

" Provided that, except in respect of claims for loss of life and personal injury the member shall bear the first 10*l.* of any one claim attaching to either the protection or indemnity section of the rules . . .

" 17. No assignment or subrogation by a member of his cover with this Association to charterers or any other persons shall be deemed to bind this Association to any extent whatsoever."

5.—During the currency of the said charter-party the claimants became liable to pay the sum of 101*l.* 3*s.* 4*d.* to receivers under certain bills of lading, dated the 18th March, 1937, and covering wheat in bulk, as damages for failure to deliver the said goods in the same good order and condition as when shipped. The damage to the said goods was due to improper stowage.

6.—The said sum of 101*l.* 3*s.* 4*d.* was paid in full by the said Association to the said receivers, the claimants remaining liable to refund 10*l.* in respect thereof to the said Association.

* * * *

11.—Save that it was admitted that the damage was due to improper stowage, no evidence was adduced by either party as to the loading. There was no evidence of the extent, if any, to which there was supervision by the captain nor was there any evidence of protest or approval by him in respect of the stowage.

In these circumstances the respondents who were the shipowners claimed that the appellants who were the charterers were liable under the terms of clause 8 of the charter-party to indemnify them in respect of the loss sustained by reason of bad stowage. The appellants maintained that on the true construction of the clause the liability for proper stowage was upon the ship and not upon the charterers and that in any event the charterers were entitled to rely upon the latter part of the clause by which the owners were to give them the benefit of their insurances.

The learned arbitrator awarded the claimants 10*l.* only, viz., the amount of franchise which the shipowner had to bear before he received any indemnity from his club. This award was affirmed by the learned Judge to whom the award was referred. The Court of Appeal, however, reversed these decisions and found in the terms of one of the alternative awards that the claimants were entitled to recover 101*l.* 3*s.* 4*d.*

Before your Lordships' house the charterers maintained that they were free from any liability to the shipowners. In their submission the responsibility for loading, stowing and trimming the cargo was that of the owners through their master and not of the charterers. Alternatively they contended as they had also contended before the learned arbitrator that they were liable only for the 10*l.* awarded by him because even if the obligation of safe stowage was imposed upon them they were entitled to the benefit of the indemnity club insurances, and as the shipowners had been recouped by the club for all their loss except the 10*l.* franchise, no further loss was payable by the charterers. The shipowners on the other hand said that it was the charterers who were under an obligation to stow safely and that the

indemnity which was promised to them was only available so far as the club rules allowed. The club rules, as they alleged, did not so allow, and for this contention they relied not only upon clause 17 quoted in para. 4 of the special case, but also upon the rest of the wording of clause 2 (1) of the club's rules which after beginning as set out in para. 4 of the Special Case, continues as follows :

> "The Association shall be entitled to take credit for any profit accruing to the member by reason of any wrongful act of his servants or agents, up to the measure of its loss, or recover for its own account from third parties any damages that may be provable by reason of such neglect."

The question to be determined is obviously one which depends solely upon a true interpretation of the charter-party. The grounds upon, and the circumstances under which liability for stowage falls either upon the shipowner or charterer as the case may be, have been discussed in a number of cases, four of which involved a consideration of liability as between shipowners and charterers themselves. They are *The Catherine Chalmers* (2 Asp. Mar. Law Cas. 598 ; 1875, 32 L. T. Rep. 847); *Sack* v. *Ford* (1862, 13 C. B. (n.s.) 90); *Harris* v. *Best-Ryley and Company* 1892, (7 Asp. Mar. Law Cas. 272 ; 68 L. T. Rep. 76); and *Brys and Gylsen Limited* v. *J. and J. Drysdale and Company* (1920, 4 Ll. L. Rep. 24).

I do not for myself find much assistance from the decisions in any of these cases. The wording in all except *Brys and Gylsen Limited* v. *J. and J. Drysdale and Company* (*sup.*), is very different from that used in the present charter-party, and though in the last-mentioned case the wording is similar to that in the present, the learned Judge who tried the case accepted the view that the liability was imposed upon the charterers apparently without being asked to give any very close consideration to the matter. Speaking for myself, however, I am in agreement with what I understand to be not only his view in that case but also the view of all the tribunals which in the present case have had to consider the meaning of the charter-party. In my opinion by their contract the charterers have undertaken to load, stow and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases, as *e.g.*, where the stability of the ship is concerned the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers. The primary duty of stowage, however, is imposed upon the charterers and if they desire to escape from the obligation they must, I think, obtain a finding which imposes the liability upon the captain and not upon them.

In the present case there is no such finding and there is no reason for allowing them to evade the obligations which they have undertaken.

It will be seen that in the view I have expressed, my opinion is formed solely upon the terms of the contractual relations existing between the parties by reason of clause 8 of the charter-party. These are, I think, sufficient to impose a liability upon the charterers and it is not necessary to consider the alternative view taken by the Court of Appeal that the charterers by requesting the captain to sign the bills of lading under which the obligation of delivering cargo in good condition was imposed upon the ship, undertook to indemnify the shipowners against liability so incurred.

If I am right in so construing the charter-party the charterers are liable for sums paid by the shipowners in respect of damage to bill of lading holders, except to the extent to which they are protected by the provision that owners are to give charterers the benefit of the protection and indemnity of the club insurances so far as club rules allow.

This phraseology is somewhat obscure and might, I think, bear one of two meanings : (1) that the owners will assign to the charterers their right of action against the club for losses in respect of which the club have undertaken to indemnify them, or (2) that the owners being indemnified against such loss by their protection club would forgo their right to sue the charterers in respect of losses so recoverable for which the charterers would otherwise be liable.

Apart from the provision that these advantages are only to be given so far as club rules allow, I see no reason why the shipowner should not make a contract to either effect, whatever its legal result may be. But whichever view be taken of the true meaning of the clause, I think the club rules forbid the shipowner giving the benefit suggested. In the one case despite the obscurity of the expression "subrogation by a member of his cover with this Association," the provisions of rule 17 would appear to prevent the assignment suggested. Whatever "subrogation" may mean in this collocation, the rule in my view forbids the assignment, whether before or after loss, of the member's rights against the club. But if the meaning suggested under head 2 above is preferred then the giving of such benefit is prohibited by the words quoted above from rule 2 (i), "The Association shall be entitled to . . . recover for its own account from third parties any damages that may be provable by reason of such neglect." The use of the words "such neglect" gives rise to some difficulty. Strictly speaking the only negligence mentioned in the sub-rule is the negligence of the member's servants or agents. Obviously, however, third parties cannot be liable for the neglect of a member's servants or agents and I think that a reasonable construction may be put upon the words by reading "such neglect" as meaning the neglect of the servants or agents of the third party. If this be the true view, the sub-rule expressly provides for the retention of the club's right to recover against third parties who are liable for bad stowage or for other matters causing loss to the shipowner and forbids the shipowner from excusing the third party from the results of his negligence. Whichever view therefore be taken of the meaning of the phrase "owners to give time-charterers the benefit of their protection and indemnity club insurances so far as club rules allow," club rules in this case do not allow the granting of the benefit which the owners are suggested to have given.

For these reasons I think the judgment of the Court of Appeal was right and should be affirmed.

Appeal dismissed.

Solicitors for the appellants, *Middleton, Lewis* and *Clarke.*

Solicitors for the respondents, *Holman, Fenwick* and *Willan.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 17 *and* 18, 1940.

(Before SIR WILFRID GREENE, M.R., SCOTT and GODDARD, L.JJ.)

Imperial Smelting Corporation, Limited v. Joseph Constantine Steamship Line, Limited (a)

APPEAL FROM THE KING'S BENCH DIVISION.

[This decision was reversed by the House of Lords on 9th May, 1941.—Ed.]

Ship chartered—Explosion of donkey boiler—Shipowner unable to carry out contract of charter-party—Unknown how explosion caused—No right to claim by shipowner of frustration of contract—Shipowner bound to prove frustration occurred without his default.

A contract by a charter-party to provide a named ship at a named loading port; inability of the shipowner to carry out his contract because a donkey boiler exploded and caused serious damage to the ship; no exception in the charter-party covering those facts. The arbitrator was unable to say whether the cause of the accident was or was not the negligence of the donkeyman or other servant of the owner, but held that it was not impossible that it was so caused. On those facts the shipowners claimed that they came within the doctrine of frustration of the contract causing impossibility of its performance. The arbitrator held that they did not, but stated an interim case under the Arbitration Act, 1934. *Atkinson, J., held that the claim that there was frustration of the contract was well founded. The charterers appealed to this court.*

Held, that the arbitrator took the right view. A party prima facie guilty of a failure to perform his contract could not escape under the plea of frustration, unless he proved that the frustration occurred without his default. There could be no frustration in the legal sense unless the shipowner proved affirmatively that the cause was not brought into operation by his default.

(a) Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.

Decision of Atkinson, J. (*ante p.* 354; 162 *L. T. Rep.* 267), *reversed.*

APPEAL from the judgment of Atkinson, J. The facts appear from the headnote.

A. T. Miller, K.C., G. St. C. Pilcher, K.C., and *Charles Stevenson* for the appellants. *Sir Robert Aske, K.C.,* and *Patrick Devlin* (for *T. A. Mocatta* on war service) for the respondents.

Sir Wilfred Greene, Master of the Rolls.—We need not trouble you, Mr. Miller. Scott, L.J., will deliver judgment first.

Scott, L. J.—This is a very simple case, and these are the facts.

A contract by a charter-party to provide a named ship at a named loading port; inability of the owner to carry out his contract because a donkey boiler exploded and caused serious damage to the ship; no exception in the charter-party covering those facts. The arbitrator was unable to say whether the cause of the accident was or was not the negligence of the donkeyman or other servant of the owner, but held that it was not impossible that it was so caused. On those facts the owners contended that they came within the doctrine of frustration. Mr. Willink, the arbitrator, held that they did not, but stated an interim case under the Arbitration Act, 1934. Atkinson, J., held that the contention was well founded. The charterers appealed to this court.

We are of opinion that the appeal must be allowed on the ground that the arbitrator took the right view. A party prima facie guilty of a failure to perform his contract cannot escape under the plea of frustration, unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

I say nothing upon the point raised by Mr. Miller as to the onus of proof in a case of negligence under such facts as were proved in the case of *Scott* v. *London Dock Company* (3 H. & C. 596), where there was held to be a presumption of negligence. It is not necessary, for the decision of this case, to consider that presumption of law upon the findings of the learned arbitrator here, and, therefore, I do not deal with Sir Robert Aske's argument on that point and express no opinion as to whether his argument on that point is right or wrong.

It is unnecessary to discuss the numerous cases cited by the learned judge. The appeal will be allowed, with costs here and below, and judgment in accordance with the terms of the arbitrator's finding.

The Master of the Rolls.—I agree. The only word which I wish to add is that nothing can be more dangerous, when a question of burden of proof has to be considered, than to pick out the language of learned judges used in cases where neither they nor anybody else was thinking of the question of the burden of proof, because it was not a matter which was in issue. The language of many of the authorities examined and cited was used with reference to the full facts which were before the court there, and nobody, I think, would be more surprised than the learned judges themselves who used those expressions to find that those expressions were used and relied upon as affording some assistance on the question of onus of proof, which

was a matter which was not being dealt with in those judgments.

I agree with what Scott, L.J., has said, and that this appeal must be allowed.

Goddard, L. J.—I agree.

Appeal allowed.

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

Solicitors for the respondents, *Holman, Fenwick* and *Willan.*

House of Lords.

April 11, 15, 16 *and June* 24, 1940.

(Before LORDS MAUGHAM, ATKIN, WRIGHT, ROMER and PORTER.)

Smith Hogg and Company Limited v. Black Sea and Baltic General Insurance Company, Limited. (*a*)

Contract of carriage by sea—Exceptions clauses—Shipowner excused for neglect of master in navigation or management—Qualified exception of unseaworthiness—Unseaworthiness of ship on sailing—Failure of due diligence by shipowners to render ship seaworthy—Loss which could not have arisen but for that unseaworthiness—Other causes of the loss—Alleged negligent act of master—Liability of shipowner.

Per Lord Wright (*Viscount Maugham and Lord Atkin concurring*): *Where a shipowner is liable on his warranty of seaworthiness and the ship is unseaworthy when she commences her voyage, he remains liable for the loss of or damage to the cargo, however caused, provided that the loss of or damage to the cargo could not have arisen, but for that unseaworthiness. If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at common law or by express contract have contributed to cause the loss. There is no distinction between cases where the negligent conduct of the master is a cause and cases where any other cause such as a peril of the sea or fire is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case: Would the disaster not have happened if the ship had fulfilled the shipowner's obligation of seaworthiness even though the disaster would not have happened if there had not been also the specific peril or act? See* The Christel Vinnen (132 *L. T. Rep.* 337; (1924) *P.* 208).

Accordingly it being found in the present case that, from the failure of due diligence by the shipowners, the ship was not in a seaworthy condition when she commenced her voyage from Soroka, as 255,232 *of the* 703,111 *St. Petersburg standards of timber, which she carried were on deck, rendering the ship unstable and too tender for the voyage so that when she sailed she was listing about five degrees to port and had a small actual and so greater potential negative metacentric height, it was Held by Viscount Maugham and Lords Atkin and Wright that whether the subsequent acts of the master at Stornoway, where she called, in bunkering as he did and without discharging or reducing the deck cargo and in pumping out the forepeak were contributory causes of the disaster when the vessel fell on her beam ends with her masts broken or carried away, or whether such acts were or were not negligent (the shipowners being excused by the exceptions clause for loss or damage from the neglect of the master) the shipowners were liable for the damage. And it was Held by Lords Romer and Porter that in a seaworthy ship the acts of this master would have been safe. It was therefore, unnecessary to consider what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness or to determine whether the fact that the unseaworthiness was a substantial cause, even though some other matter relied on was a substantial cause also, would be enough to make the shipowners liable for failure to use due care to make the ship seaworthy.*

APPEAL from a judgment of the Court of Appeal.

The facts are fully stated in both judgments.

Sir Robert Aske, K.C., and *Cyril Miller* for the appellants.

G. St. C. Pilcher, K.C. and *Valentine Holmes* (for the *Hon. T. G. Roche* on war service.)

The House took time for consideration.

Viscount Maugham.—My Lords, I had prepared an opinion on this appeal, before I had the advantage of reading the opinions of my noble and learned friends, Lord Wright and Lord Porter. I find in those opinions all the remarks which I had proposed to address to your Lordships and in order to save your Lordships time, I merely say that I agree with those opinions and with the necessary conclusion that this appeal must be dismissed with costs.

Lord Wright.—My Lords, my noble and learned friend Lord Atkin requested me to say that he has read in print the opinion which I am about to deliver and agrees with it.

My Lords, the appellants, who are owners of the steamship *Lilburn*, claimed in the action a general average contribution from the respondents who for purposes of the case are treated as standing in the shoes of the charterers, Exportles Moscow, under a charter-party dated 24th July, 1935. The respondents resisted the claim on the ground that the *Lilburn* was unseaworthy on sailing from the loading port Soroka and that the appellants had not exercised due diligence to make her seaworthy and that the average act was occasioned by the unseaworthiness, as also was the loss of and damage to cargo for which they counterclaimed. Branson, J. who tried the case in the Commercial Court decided in favour of the appellants but his decision was reversed by the Court of Appeal.

Both courts decided that the steamship was unseaworthy on sailing and that the appellants had not exercised due diligence to make her seaworthy. But whereas Branson, J. held that the unseaworthi-

(*a*) Reported by C. G. MORAN, ESQ., Barrister-at-Law.

ness did not cause the loss, the Court of Appeal held that the cause of the disaster was the unstable and unseaworthy condition of the vessel, which was due to a failure to exercise due diligence.

There are thus concurrent findings on the fact of the unseaworthiness. This House is not debarred from re-opening, and, if so advised, reversing, concurrent findings of facts of the Courts below, though the House will always treat such findings with respect. In the present case I have, after carefully considering the evidence, come to the conclusion that there is no ground for differing from the findings of the courts below. I shall state very shortly why I agree with these findings. The charter-party provided for the loading at Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the vessel could reasonably stow and carry, to be delivered at Garston. Of the other conditions contained in the charter-party it is only necessary to refer to certain exceptions set out in clause 12, in particular that the shipowner should not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage arising from (amongst other things) act, neglect or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. General average if any, was to be settled in London according to the York-Antwerp Rules, 1924, in accordance with English Law.

The *Lilburn* loaded at Soroka 703,111 St. Petersburg standards of timber, of which 255,232 were on deck. The master shut out about 629 standards, because, as the judge found, instability had already manifested itself by the vessel listing about five degrees to port during the loading of the last few slings of cargo. The *Lilburn* sailed with that list. On sailing she had no appreciable metacentric height; indeed she had it seems a small negative metacentric height. The weather on the voyage was not exceptional, the highest force of wind being force 7 on two days. But as the voyage went on the port list increased to 8 or 9 degrees, and two days after that happened she went over to starboard with a list of 7 degrees, which increased to 12 degrees, then to 15 and then to 17 degrees, which was her condition when she put into Stornoway to replenish her bunkers, of which she had then only four tons left. She had started from Soroka with insufficient bunkers and was in that respect unseaworthy but no point has been made of this and I ignore it. On entering Stornoway to coal, the forepeak was pumped out, as she was considerably down by the head. That obviously would increase her tenderness. In order to bunker she was moored with her port side alongside a coal hulk. No deck cargo was removed before bunkering. When about 16 tons had been put into her bunkers, which was done as nearly as possible in the midship section of the ship, she started to come upright. She then went over to port and when the port list had reached about 25 degrees water poured into her and eventually she lay on her beam ends. Her crew had to leave her. She was put on the beach with the help of tugs, the deck cargo was discharged, portions were lost or damaged, but the balance was reshipped, and she was towed to Garston with the rest of her cargo, some of it being in a damaged condition.

There was some conflict of expert evidence, but it seems clear that the deck cargo rendered the vessel unstable and too tender for the voyage. It is true that she could not sink because the timber would keep her afloat, but she was liable to fall, as she did in fact, on her beam ends, and become a derelict. She was clearly unfit to carry and deliver the cargo safely and her condition endangered the lives of the crew. She was unseaworthy on any definition of the term. It was sought to say that the disaster at Stornoway was due to the act of the master in putting in the bunkers as he did, and in pumping out the forepeak. It was said that his action in these respects was negligent, and, also, it may be, that he began to bunker her without discharging or reducing the deck cargo. There is no clear finding that the master was negligent. But whether he was negligent or not what the master did could have done no harm if the *Lilburn* had not been unseaworthy. The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The overloading was the result of overt acts.

On these facts Branson, J. decided in favour of the appellants. Though he held that the vessel was unseaworthy and the warranty had been broken, the unseaworthiness did not in his opinion cause the loss. He held that the necessary *nexus* between the unseaworthiness and the disaster was absent because in his opinion the vessel could have been bunkered at Stornoway in such a manner as to bring her back to upright and enable her to proceed and deliver her cargo at Garston. He distinguished *Paterson Steamships, Limited* v. *Canadian Co-operative Wheat Producers, Limited* (18 Asp. Mar. Law Cas. 524; 151 L. T. Rep. 549) on the ground that there the defect could not have been remedied during the voyage. He held that the accident took place not by reason of the unseaworthiness of the ship but by reason of the acts of the master which were wrong in the circumstances and that the appellants were entitled to succeed by reason of the exception in clause 12, "act neglect or default of the master." He did not in terms find that the master was negligent; though perhaps that is implied. Earlier in his judgment, however, he had described the putting on board of the 16 tons as done "in a very ordinary way."

This decision obviously raised a very important question of mercantile law. It was reversed by the Court of Appeal. MacKinnon, L.J. in giving the leading judgment, agreed with the finding of Branson, J. on the issue of unseaworthiness. He held that the cause of the disaster was clearly due to the unstable condition of the vessel on sailing from Soroka, which had continued right up to the disaster and all that could be said about the master's conduct at Stornoway was that his act, or default conduced to the disaster either by his not doing something, or by his doing something which might have been done differently, to prevent the disaster, either in pumping out the forepeak or putting in the bunkers as he did. In his opinion the test to apply (following *Kopitoff* v. *Wilson* (1876), 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. D. 377), was "Although the disaster at Stornoway would not have happened but for the fact that coals were being loaded with the forepeak pumped out, yet it is to be considered as caused by the unfitness if the jury (or judge) think the vessel would not have capsized if she had sailed in a fit state from Soroka." He held accordingly that the appellants could not recover in respect of the general average loss and expense, but were liable on the counterclaim.

Du Parcq, L.J. concurred. But he doubted what the proper answer would have been if, there having been a clearly negligent act on the part of the master, coupled with unseaworthiness, the question was whether the loss was caused by the former or the latter, or by both. But he thought that the conduct of the master was perfectly excusable. Macnaghten, J. gave no separate judgment. I agree with MacKinnon, L.J.'s statement of the law but in view of the considered opinion of Branson, J., I feel it desirable to state in my own way how I regard this question of law, which is fundamental in regard to the sea carriage of goods. I do not, with respect, share du Parcq, L.J.'s doubts, which I think are really inconsistent with the reasoning of MacKinnon, L.J.

Sir Robert Aske has strenuously contended on behalf of the appellants, that the master's action, whether or not negligent, was *novus actus interveniens*, which broke the *nexus* or chain of causation, and reduced the unseaworthiness from *causa causans* to *causa sine quâ non*. I cannot help deprecating the use of Latin or so-called Latin phrases in this way. They only distract the mind from the true problem which is to apply the principles of English Law to the realities of the case. *Causa causans* is supposed to mean a cause which causes while *causa sine quâ non* means, I suppose, a cause which does not, in the sense material to the particular case, cause, but is merely an incident which precedes in the history or narrative of events, but as a cause is not in at the death, and hence is irrelevant. English Law can furnish in its own language expressions which will more fitly state the problem in any case of this type. Indeed the question what antecedent or subsequent event is a relevant or decisive cause varies with the particular case. If tort, which may in some respects have its own rules, is put aside and the enquiry is limited to contract, the selection of the relevant cause or causes will generally vary with the nature of the contract. I say "cause or causes" because as Lord Shaw pointed out in *Leyland Shipping Company* v. *Norwich Union Insurance Company* (14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350), causes may be regarded not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case. That this is the test of the significance of an event from the standpoint of causation is clearly illustrated by this very doctrine of seaworthiness and its relation to kindred questions of negligence as applied to the two maritime contracts, marine insurance and sea carriage of goods. In the former, seaworthiness is a condition precedent (at least in voyage policies) and if not complied with the insurance never attaches. In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss as was held in the *Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84) and in *Kish* v. *Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912), A. C. 604). Again, in marine insurance, negligence causing the loss does not in general affect the assured's right to recover. In carriage of goods by sea, the shipowner will in the absence of valid and sufficient exceptions be liable for a loss occasioned by negligence. Apart from express exceptions, the carrier's contract is to deliver the goods safely. But when the practice of having express exceptions limiting that obligation became common, it was laid down that there were fundamental obligations which were not affected by the specific exceptions, unless that was made clear by express words. Thus an exception of perils of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence (see the case of *Paterson Steamships, Limited*) (*sup.*). From the nature of contract the relevant cause of the loss is held to be the unseaworthiness or the negligence as the case may be, not the peril of the sea, where both the breach of the fundamental obligation and the objective peril are co-operating causes. The contractual exception of perils of the seas does not affect the fundamental obligation, unless the contract qualifies the latter in express terms.

To consider these rules, in relation to unseaworthiness, I think the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause. The law is, I think, correctly stated by the late Judge Carver in Carriage of Goods by Sea, sect. 17. I quote from the Fourth edition, published in 1905, which was the last edition revised by the learned author. The words of the section are: "And further the shipowner remains responsible for loss or damage to the goods, however, caused, if the ship was not in a seaworthy condition when she commenced her voyage and if the loss could not have arisen but for that unseaworthiness. . . . If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at common law or express contract have contributed to cause the loss." The author relied for that proposition not only on *Kopitoff* v. *Wilson* (*sup.*), cited by MacKinnon, L.J., but on *The Glenfruin* (5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. 769, 10 P. D. 103) and *Steel* v. *State Line* (3 Asp. Mar. Law Cas. 516; 1877, 37 L. T. Rep. 333; 3 App. Cas. 72). In truth, unseaworthiness, which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss. At least I have not thought of a case where it can be the sole cause. It must, I think, always be only one of several co-operating causes. The importance to my mind of Carver's statement is that it uses the indefinite article, "'a' cause," not the definite article, "'the' cause." In this connection I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire, is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case. It is, would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action? There is precise authority for this in the judgment of the Court of Appeal delivered by that great authority on mercantile law, Scrutton, L.J., with the concurrence of Bankes and Atkin, L.JJ. in *The Christel Vinnen* (*sup.*). Cargo in that case was damaged by leakage through a leaky rivet; the damage might have been checked but for the negligence of the master in not detecting the water in the hold and pumping it out. It was held (notwithstanding an exception of negligence) that the shipowners were responsible for the whole of the damage, not merely for such proportion as must have been incurred before the inflow of water could have been checked. No distinction was drawn between damage due to perils of the seas alone and that due to perils of the seas and to negligence combined. Scrutton, L.J. said: "The water which entered and did the damage entered through unsea-

worthiness ; its effects when in the ship might have been partially remedied by due diligence, which the shipowner's servant did not take. But in my view the cause of the resulting damage is still unseaworthiness. . . . Here the man who has by his original breach of contract caused the opportunity for damage has by the negligence of his servants increased it. He cannot show any exception to protect him and cannot show that the dominant cause of the damage was not the unseaworthiness which admitted the water into the ship." I think this can be as truly said of negligence in acting as in omitting to act. If I may, however, venture to criticise the language of the learned Lord Justice, I should prefer to avoid the word "dominant" which he takes from the marine insurance cases cited by him, in which it is necessary to find the *causa proxima* or dominant cause. This results by reason of the special character of that contract where the liability to pay depends, broadly speaking, on the casualty being caused directly by the happening which the contract stipulates to be the event on which the indemnity becomes exigible. There may be in marine insurance cases a competition of causes so that it is necessary to determine which event is the dominant cause. Negligence is not material, nor, in time policies, is unseaworthiness material, nor is it material, in one sense, in other classes of marine policies from the point of view of causation, since if the warranty is not complied with, the risk never attaches. In cases, however, of the sea carriage of goods the liability depends, in the words of the Lord Justice, on a "breach of contract," that is, to provide a seaworthy ship. The sole question, apart from express exception, must then be "Was that breach of contract 'a' cause of the damage." It may be preferred to describe it as an effective or real or actual cause though the adjectives in my opinion in fact add nothing. If the question is answered in the affirmative the shipowner is liable though there were other co-operating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not or a combination of both kinds of cause. I think this was also the view of Lord Atkinson in the curious case of *Standard Oil Company of New York* v. *Clan Line Steamers* (16 Asp. Mar. Law Cas. 273 ; 130 L. T. Rep. 481 ; (1924), A. C. 100), where the vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because the master, being uninstructed, made a manœuvre which caused her to capsize. He would not have done so if he had been instructed as he ought to have been. But Lord Atkinson said : "There is nothing to show that what actually occurred would not appear to a competent seaman properly instructed to be a thing which would most probably occur under the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse." Lord Atkinson went on to hold that all the same the shipowners were responsible. The loss resulted from the unseaworthiness. In that as in other cases, including the present case, the right to rely on the exception of negligence was conditional on due diligence on the part of the owners to make the ship seaworthy, which the owners had failed to exercise. I refer to this authority in support of the conclusion that "a" cause of the loss was the unseaworthiness, notwithstanding the intervening negligence of the master. In cases of the type now being considered, the negligence, if any, must almost inevitably occur in the course of the voyage and thus intervene between the commencement of the voyage when the duty to provide a seaworthy ship is broken, and the actual disaster. I doubt whether there could be any event which could supersede or override the effectiveness of the unseaworthiness if it was "a" cause.

This is clearly so in the facts of this case. The acts of the master in bunkering as he did, and in pumping out the forepeak, whether negligent or not, were indeed more proximate in time to the disaster, and may be said to have contributed to the disaster, but the disaster would not have arisen but for the unseaworthiness, and hence the shipowners are liable.

In my opinion the judgment of the Court of Appeal was correct and should be affirmed. The appeal should be dismissed with costs.

Lord Porter.—My Lords, I am authorised by my noble and learned friend, Lord Romer, to say that he concurs in the opinion which I am about to deliver.

My Lords, the appellants were at all material dates owners of the s.s. *Lilburn*. On the 24th July, 1935, they entered into a charter-party with Exportles of Moscow as charterers for the loading at Soroka in the White Sea of a timber cargo, to be loaded both under and on deck for carriage to Garston.

On the course of her voyage the ship and cargo incurred a loss for which her underwriters were responsible. The respondents are those underwriters and entered into an average guarantee on the 24th December, 1935, for payment of any contribution to general average and/or salvage and/or special charges on cargo which might be ascertained properly to be due in respect of the cargo. On that guarantee the appellants sued the respondents claiming a sum of 3325*l.* 2*s.* 1*d.*, and in that action by arrangement between the parties the respondents were admitted to counter-claim for loss of and damage to cargo said to amount to 1740*l.* 10*s.* 5*d.* In so counter-claiming the respondents were treated as standing in the position of the holders of the bills of lading. No question as to the amount recoverable is raised in the present appeal.

The charter-party provided for the loading at Soroka of a full and complete cargo of wood goods, including a deck load not exceeding what the ship could reasonably stow and carry. The exceptions clause [clause 12] provided that the shipowner should not be liable for loss or damage arising or resulting from unseaworthiness unless the cause be want of due diligence on the part of the shipowner to make his ship seaworthy, and, *inter alia*, that the shipowner should not be responsible for loss or damage arising from the act, neglect, or default of the master in the navigation or management of the ship or from perils, dangers and accidents of the sea. Under clause 13 the vessel had liberty to call at any ports in any order for fuel, and by clause 22 it was provided that general average if any should be settled in London according to York-Antwerp Rules, 1924, in accordance with English law.

The *Lilburn* loaded a cargo of 703,111 St. Petersburg standards of wood goods, of which 255,232 were carried on deck. The loading was completed and the ship sailed on the 5th September, but on the previous day the master shut out some 629 standards; his reason for so doing was found by the learned judge who tried the case to be due to the fact that the vessel was unstable and had by that time listed about five degrees to port. On sailing the *Lilburn*

had 154 tons of bunker coal on board and she was found by the learned judge even at that time to have had either no metacentric height or even a small negative metacentric height. The weather which she encountered on her voyage was not abnormal, it was, as the chief officer said, the type of weather you would expect on that voyage at that time of year.

Owing, however, to her original instability and the consumption of bunkers her list increased to eight or nine degrees to port until the 10th September when some of the deck cargo was re-stowed under deck in an endeavour to counteract the instability. Nevertheless on the 12th September she heeled over from port to starboard taking a list of seven degrees. By the 14th this list had increased to 12 degrees when the forepeak was pumped up to 15 feet in order to improve the situation and counteract the effect of the consumption of coal from the cross bunkers. In spite of these precautions the list increased to 15 and ultimately to 17 degrees.

As she had not enough coal on board to carry her to Garston she put into Stornoway intending to take on board an additional 50 tons of bunkers. At that time she had only some 4 tons left. On entering the harbour the forepeak tank was pumped out in order to improve her steering which had become difficult by reason of the fact that she was down by the head. She was then moored alongside a coal hulk, and in an attempt to counteract the list the coal which was being taken on board was directed, though perhaps not with complete success, to the port side. Whilst the coal was being taken on board, the ship gradually decreased her list to about nine degrees, until about 16 tons had been shipped. She then suddenly took a heavy list to port until she reached some, 25 degrees, when water came into the engine and bunker space, causing her to go on to her beam ends. In this condition she lay with her masts broken or carried away and her crew had to leave her. Thereafter she was beached and her deck cargo discharged. Finally she was towed to Garston with the rest of her cargo on board but partially damaged. The expenses so incurred were the subject of the general average claim and the damage to the cargo the subject of the counter-claim.

To test the question of liability an action was brought in the High Court of Justice and transferred to the Commercial List, where it was tried before Branson, J. It was admitted that if the loss was caused for any reason for which the shipowners were responsible the appellants were not entitled to recover any sum for general average, and were liable for the damage done. The respondents contended that when the *Lilburn* left Soroka she was unseaworthy and that that unseaworthiness was due to want of due diligence on the part of the appellants. In reply the appellants denied that the ship was unseaworthy and alleged that the loss was not caused by unseaworthiness but either by perils of the seas or else by the negligence of the appellants' servants. No point appears to have been taken in the Courts below nor was it contended in your Lordships' House that if the ship was unseaworthy that unseaworthiness was not caused by want of due diligence on the part of the appellants. It was accepted that the diligence required was that of the owner, his servants or agents. But it was strenuously contended that the vessel was not in fact unseaworthy. It was said that in a timber ship the absence of metacentric height or even the existence of negative metacentric height did not make the vessel unseaworthy; that owing to the presence of the deck cargo she would take a list appropriate to make that height either positive or at least not negative, and that the fact that her instability might make her list from side to side was a matter of no consequence.

No court has accepted this view and it appears to be common ground that in the condition in which she sailed and with the necessary consumption of bunkers her negative metacentric height must gradually increase and in fact did increase until it had reached four inches. Whatever may be the case where a timber carrying vessel sails with a list due to the fact that her cargo carried is heavier on one side than the other, I cannot take the view that a ship which has a large negative metacentric height and is therefore so unstable that the placing of a comparatively small additional weight either to port or starboard causes her to list suddenly and violently from one side to the other, is in a seaworthy state. In the present case the shipment of some 16 tons of coal at the bottom of the cross bunker, possibly near the centre of the ship and at worst on the port side, was enough to cause so violent a change. Less stability may well be called for in a ship carrying a timber cargo than in vessels engaged in other trades, but I cannot think that so great an absence of metacentric height actual or potential is justified.

For these reasons I am clearly of opinion that the ship was unseaworthy and that her unseaworthiness was due to the failure of the owners to take proper steps.

Nor can it be said that in bringing about this disaster the master was at fault. The appellants' own expert witness, Dr. Telfer, said in evidence :—

> "In our profession we find it rather difficult for the layman to visualise just why because a ship is listing this way it is not the correct thing to do to put weights on that side. Any layman can be forgiven for trying that side first. I am quite sure that even Naval architects who have experience of that particular problem would answer the wrong-way were they caught unawares."

But the appellants say that they are protected by the exception of perils of the sea and that even though the ship was unseaworthy the unseaworthiness did not cause the loss. To this argument the learned judge acceded but his view was reversed by the Court of Appeal. The argument was put thus :—That the ultimate cause of the loss was the act or acts of the master either in pumping out the tank or in shipping the coal on the port side or both.

No doubt those who are either defending themselves or putting forward a counter-claim based upon an allegation of unseaworthiness must prove that the loss was so caused.

But here the loss was, I think, uncontestably due to the inability of the ship to take in bunkers by a method which would have been both safe and usual in the case of a seaworthy ship. It was not the coaling that was at fault nor the method adopted: it was the fact that that coaling took place and that method was adopted in a tender ship. If a vessel is to proceed on her voyage, bunkers must be shipped and though in one sense the change of balance caused by taking in bunkers was responsible for the accident to the *Lilburn*, it was not the dominant cause even if it be necessary to show what the dominant cause was. The master merely acted in the usual way and indeed exercised what he thought was exceptional care in diverting the coal shipped towards the port bunker. In a seaworthy

ship his action would have been a safe one. It was the instability of the ship which caused the disaster.

In such circumstances it is unnecessary to decide what would be the result if the loss were attributable partly to the coaling and partly to the unseaworthiness, or to determine whether the fact that the unseaworthiness was a substantial cause even though some other matter relied upon were a substantial cause also, would be enough to make the owners liable for failure to use due care to make the vessel seaworthy.

I agree with all your Lordships in thinking the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Sinclair Roche* and *Temperley* for *Temperley Tilly* and *Hayward*, West Hartlepool.

Solicitors for the respondents: *Ince, Roscoe, Wilson* and *Glover*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, June 25, 1940.

(Before LUXMOORE and GODDARD, L.JJ.)

Keevil and Keevil Limited v. Boag. (a)

APPEAL FROM THE KING'S BENCH DIVISION

Insurance—Marine policy—Cargo insured for sea transit and from warehouse to warehouse—Cases of eggs on arrival found bad—On action on policy for damage underwriter refused order for ship's papers but given "liberty to apply for affidavit of ship's papers hereafter"—Discretion of judge rightly exercised—Rules of Supreme Court, Order XXXI, rule 12 *A.*

The plaintiffs brought this action on a Lloyds policy of marine insurance by which 1600 *cases of eggs delivered at Hull on the* 23*rd November,* 1939, *were insured on sea transit as also from warehouse to warehouse. On arrival a* 1000 *cases of the eggs were found to have gone bad from some decay in the egg known as "spot" and the plaintiffs sought to recover the loss. On the summons for directions the defendant underwriter applied for an order for ship's papers which was refused by Singleton, J. in chambers, but the judge inserted a clause stating "liberty to apply for affidavit of ship's papers hereafter if so advised." The defendant appealed. By sub-clause* (b) *of rule* 12 *A of Order XXXI of the rules of the Supreme Court a discretion was given to the court as to whether the order for an affidavit of ship's papers should be made or not made and by sub-clause* (c) *"In making an order under this rule the court or judge may impose such terms and conditions as to staying proceedings or otherwise as the court or judge in its or his absolute discretion shall think fit."*

Held, that the judge had rightly exercised his discretion, and this was a case which showed how fortunate it was the rule had been altered by the new rule 12 *A of Order XXXI made in* 1936. *There was no real ground for making the very stringent order for an affidavit of ship's papers in the present simple case in which the eggs either were bad when put into the warehouse or they went bad in the warehouse or during transit. It would be a great hardship if the plaintiffs who were not only the holders of the bills of lading but also interested under the policy had to comply with the order here sought to be obtained.*

Order of Singleton, J. affirmed.

APPEAL from the judgment of Singleton, J.

The material facts are stated in the headnote.

Patrick Devlin for the appellant.

A. J. Hodgson for the respondents.

Lord Luxmoore, L.J.,—Goddard, L.J. will deliver the judgment of the court.

Goddard, L.J.—In this action, which is brought to recover a loss on a marine policy, on the summons for directions coming before Singleton, J. in chambers, when he was in charge of the Commercial List, an application was made by the defendant underwriter for an order for ship's papers. The learned judge refused that order; but on that summons for directions he inserted a clause saying: "Liberty to apply for affidavit of ship's papers hereafter if so advised." It is against that part of the order on the summons for directions that this appeal is brought: and this court was invited to make an order for ship's papers in common form: but also, we have been asked alternatively to make the ordinary order for discovery before pleadings.

It appears that the action is brought upon a Lloyds policy under which 1600 cases of eggs were delivered on 23rd November, 1939, being shipped from the Plate to this country. I should say, as is so common nowadays, it is a policy which covers not only sea transit, but covers the goods from warehouse to warehouse: and, therefore, covers a certain amount of land transit as well. When the eggs arrived, it was discovered on inspection that 1,000 cases were found to have gone bad. They had gone bad through some decay in the egg known as "spot." It is not a case where they have been smashed, or perished by sea-water, or anything of the sort. They are perishable goods: and they have deteriorated through some natural cause. When I say "natural cause," I mean some cause in the egg itself, which may have been brought on or caused by dampness in the ship, or through a variety of other causes. However, there they were.

Before 1936, no doubt the defendant would have been entitled to an order for ship's papers; and this action would have been stayed under the practice which had grown up since the end of the eighteenth century, which often involved very great hardship to the assured, a hardship which would be particularly felt in present circumstances, because the order for ship's papers is an order of a most comprehensive description, and very often great difficulty was found in making proper compliance with the order, which used to lead to many applications and to constant delay in reaching a hearing of the case.

(a) Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.

In 1936 the rules relating to this matter were altered. By Order XXXI, rule 12 A, a discretion was given to the judge as to whether he would order an affidavit of ship's papers or not. By 12 A it is provided: "Where in any action arising on a marine insurance policy an application for discovery of documents is made by the insurer, the following provisions shall apply: (*a*) on the hearing of the application the court or judge may, subject as provided in the next paragraph, make an order in accordance with rule 12 or rule 14 of this Order." Rule 12 is the rule dealing with discovery and ordering an affidavit to be filed. Rule 14 relates to specific documents. It was then provided by sub-clause (*b*) of rule 12 A: "Where in any case the court or judge is satisfied, either on the original application or on a subsequent application, that it is necessary or expedient, having regard to the circumstances of the case, to make an order for the production of ship's papers, the court or judge may make such an order in the form No. 19 in Appendix K." That is the old form. So that a discretion is given to the court as to whether the order for an affidavit of ship's papers should go or not. Then it is provided by sub-clause (*c*): "In making an order under this rule the court or judge may impose such terms and conditions as to staying proceedings or otherwise as the court or judge in its or his absolute discretion shall think fit." Obviously, the effect of the rule is to put into the complete discretion of the judge whether he should make an order for an affidavit of ship's papers or not. It gives him power to do exactly as the learned judge has done in this case, to postpone the application, or to say, if at a later stage it can be shown that it is fair and right that the underwriters should have access to the ship's papers, which are not ordinarily in the possession of or power of the consignee of the goods, or shipper of the goods, as the case may be, an application can be made; and no doubt in a proper case it would be granted.

But this is a matter upon which, if the learned judge has exercised his discretion, this court would be very slow to interfere with it. The court can interfere where the judge has exercised a discretion which the court thinks has been wrongly exercised, as was recently laid down by the House of Lords. But that does not mean merely because this court, or any member of the court, might think they would exercise their discretion differently, that is a sufficient ground for interfering with the decision of the learned judge below.

In this case I will say for myself (and I think I may say for my Lord, too) that if we had been dealing with this case in the first instance, we should have exercised our discretion in exactly the same way. We cannot see any real ground for making the very stringent order for an affidavit of ship's papers in a case of the comparative simplicity of this case. Either these eggs were bad when they were put into the warehouse, or they went bad in the warehouse, or they went bad during transit. Further, we are told in this court something which was not mentioned to the learned judge. It is a matter which has a great bearing on the case; and I am sure that it would have had a great effect on Singleton, J. if it had been mentioned to him. It appears that there is a certificate of quality provided from the proper department of the Government of the Argentine Republic, saying that these goods were in a fit condition to be shipped. If that is so, as the document, as Mr. Hodgson says, is admissible in evidence under the Evidence Act, though it is not conclusive, it affords strong prima facie evidence, at any rate, that the eggs had deteriorated while on the ship. But I do not want to say anything which would in any way prejudice or pre-judge the trial of the action.

I think that this is eminently a case which shows how fortunate it is that the rule has been altered. There can be in this case no hardship or injustice on the underwriter in refusing the order for an affidavit of ship's papers. Indeed, it would be a great hardship if the plaintiffs, whom one must assume are not only the holders of the bills of lading but are interested under the policy, had to comply with the very stringent order that it is sought here to obtain.

Mr. Devlin has argued that even if this court does not think fit to reverse the learned judge and order that an affidavit of ship's papers be filed before the action proceeds, we ought to make an order for discovery before pleadings. In the first place, that is not asked for in the notice of appeal. Though I agree that that would not necessarily be fatal, I do not think it would be right, in a case of this sort, where this very stringent order has been sought, and where a limited order was made by the judge, in the sense that he has given them liberty to apply for this affidavit of ship's papers hereafter, if so advised, to accede to Mr. Devlin's application. It would be hardly fair on Mr. Hodgson's client to say: "You have got to meet a case for discovery at an unusually early stage in the proceedings." We think, not only owing to the fact that it was not asked for in the notice of appeal, but taking into consideration all the circumstances, that we ought not to entertain the application. We think on principle the same considerations which apply to an affidavit of ship's papers really apply to this other application. There are cases, no doubt, not only in the Commercial court, but in other courts as well, where in exceptional circumstances (and generally they have to be very exceptional circumstances) the court has ordered discovery before the pleadings are closed. We do not think that this is one of those cases. Therefore, this appeal fails and must be dismissed, the costs being the plaintiffs' costs in any event.

Appeal dismissed.

Solicitors for the appellant, *Ballantyne, Clifford* and *Co.*

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 22, 1940.

(Before SIR BOYD MERRIMAN, P.)

The Alwaki and other Ships (*a*)

Prize Court — Practice — Cargo — Contraband — Absence of claim — Right to condemn after lapse of time — Six months' rule — Prize Court Rules, 1939, *Order XV, r.* 9 — *General usage of nations.*

By Order XV. rule 1 *of the Prize Court Rules,*

(*a*) Reported by F. A. P. ROWE, ESQ., Barrister-at-Law.

1939: "*No ship or aircraft shall be condemned at the hearing in the absence of an appearance or claim until six months have elapsed from the service of the writ . . . unless there be on the ship papers or aircraft papers, and on the evidence, if any, of the witnesses from the captured ship or aircraft, sufficient proof that such ship or aircraft belongs to the enemy, or is otherwise liable to condemnation.*"

By Order I, rule 2 of the Prize Court Rules, 1939: "*Unless the contrary intention appears, the provisions of these Rules relative to ships and aircraft shall extend and apply,* mutatis mutandis, *to goods. . . .*"

In Prize cases the burden of proof is on the claimants and not on the Crown, and there are authorities for the proposition that by the general usage of nations enemy ownership may be presumed after a year and a day if no other claimant enters an appearance to establish a claim.

Sed quaere, *whether this presumption, applied in the case of the mere question of ownership, can be applied in all its implications to other grounds of condemnation, and whether it is possible by a mere municipal rule of procedure to substitute another period for one recognised by the general usage of nations.*

FIVE ACTIONS in which the Crown sought condemnation as prize of part cargoes seized from neutral vessels and shipped from South American ports under bills of lading "to order" Hamburg or "Rotterdam and/or Hamburg."

The Attorney-General (*Sir Donald Somervell, K.C.*) and *J. V. Nesbitt,* for the *Procurator-General.*

The facts and argument are set out in the headnote and, more fully, in the judgment.

Sir Boyd Merriman, P.—In this case the Crown seeks condemnation of parts of the cargo of five ships, the *Alwaki,* the *Alpherat,* the *Westland,* the *Helder* and the *Inger Elisabeth,* the first four being Dutch and the last a Norwegian ship. The shipments in all cases were made before the outbreak of war, and the cargoes which I am invited to condemn comprise at one end of the scale obvious contraband such as manganese ore, and at the other end of the scale such things as animal hair, weasands, and peas and beans.

With regard to the items which are said to be absolute contraband, I have had in each case an affidavit by a witness of authority explaining to me the use to which the goods alleged to be absolute contraband can be put in the terms of the Proclamation. I am not going to read those affidavits in detail; I propose to content myself by saying that in every case the evidence satisfies me that the goods are within the first part of the schedule to the Proclamation and are absolute contraband.

The goods with which I am thus dealing are 164 bags of bones and 7 bales of cattle tail hair in the *Alwaki*; 9 bales of animal hair and 593 bags of bones in the *Alpherat*; 35 empty iron drums in the *Westland*; 8 bales of dry sheep skins, a consignment of lingue timber and a consignment of laurel timber in the *Helder,* and 12 bags and 75 bags of beeswax, a consignment of hemp fibre and 3 large consignments of manganese ore in the same ship; and in the *Inger Elisabeth* a consignment of lambskins, a consignment of sheepskins and a consignment of 729 bales of mohair. With regard to most of those—I think I may say with regard to all of them except the large consignment of manganese ore—I should certainly have been unable to come to the conclusion that they were absolute contraband of my own knowledge, uninformed by the very clear affidavits which have been put before me. I mention that because I think it is of importance in connection with an argument which the Attorney-General has addressed to me and which I shall deal with separately.

Then with regard to the rest of the cargoes in the summary, namely, a large cargo of maize in the *Alwaki*; some beef casings and meat extract in the same ship; a small parcel of delicatessen, which is shown to consist in the main of such things as ham, beef and milk products, in the *Alpherat*; two large consignments of maize in the same ship; some weasands and meat in the *Westland*; peas and beans in the *Helder,* and a large consignment of bran in the *Inger Elisabeth,* all of which are said to be conditional contraband, there is the clearest possible evidence of German Decrees which, to put it quite shortly, impose Government control on all these articles and prescribe that they are automatically seized at the moment of crossing the frontier, or, to put it more accurately, at the moment of coming into the customs house.

That being so, the Attorney-General invoked the passage in Lord Parker's judgment in *The Hakan* (117 L. T. Rep. 619; (1918) A. C. 148), one sentence only of which I propose to read. After saying that the port of destination of the goods, which in that case was Lübeck, was undoubtedly used largely for the importation into Germany of goods from Norway and Sweden, but that it did not appear whether it was used exclusively or at all as a base of naval or military equipment, Lord Parker said this: "On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German Government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war." Lower down he concludes: "Under these circumstances the inference is almost irresistible that the goods were intended to be applied to warlike purposes; and this being so, their Lordships are of opinion that the goods were rightly condemned." The evidence of the Decrees in force during the present war seem to make these words apply *a fortiori* to the circumstances of this particular case. I have no doubt at all, therefore, on the evidence before me that all these goods are condemnable as good and lawful prize, and I so decide.

But the Attorney-General has asked me to go further and to say that, it being the case that the writ in respect of all these cargoes was issued more than six months ago and there being no claim in respect of any of them—or, it would be more accurate to say, there being now no claim in respect of any of them, because in respect of one case a claim was tentatively put forward and then withdrawn—the Crown is entitled to invite the court, and the court is entitled to condemn on the lapse of time. It is suggested that after the lapse of six months the Crown is entitled to ask for condemnation, and the court is entitled to condemn by virtue of Order XV, rule 9, which reads as follows: "No ship or aircraft shall be condemned

at the hearing in the absence of an appearance or claim until six months have elapsed from the service of the writ, which shall be verified by an affidavit of service unless there be on the ship papers or aircraft papers, and on the evidence, if any, of the witnesses from the captured ship or aircraft, sufficient proof that such ship or aircraft belongs to the enemy, or is otherwise liable to condemnation."

Now there is no doubt that under the law of nations, as it is described in the American case, *The Harrison*, enemy ownership, at any rate, might be presumed after the lapse of a year and a day if no other claimant came forward. The Attorney-General is on sure ground when he invokes the principle that in prize cases the onus is upon the claimant to put forward and establish a claim; it is not for the Crown, as a matter of pleading, to plead and particularise an affirmative case: the capture may be presumed to be in order until some claimant comes forward and establishes his claim. Undoubtedly, there are passages in Pratt's edition of Story which emphasise the presumption that after the lapse of a year and a day enemy ownership may be presumed. I am quoting at the moment from the judgment of Story, J., in *The Harrison* ((1816) 1 Wheaton 298): "Whenever a prize is brought to adjudication in the Admiralty, if, upon the hearing of the cause upon the ship's papers, and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person having title, to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed to a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy and default of the supposed owner."

Now it is quite clear, in that judgment, that the whole stress is upon the ownership of the property. It will be remembered that the rule which I have read deals with sufficient proof either that such ship or aircraft belongs to the enemy or that it is otherwise liable to condemnation. I think it is well, without going into too much detail about this, to remember that these citations from Story, J., and from the well-known letter which is quoted in Pratt's edition of Story's Law of Prize, were all pronounced and written at a time before even such complications as were introduced into prize law by the Declaration of Paris had come into existence, and still more so before some of the more difficult problems which arose during the last war. While it is very easy to see how this presumption can be applied without difficulty in the case of the question of ownership simply, it is, as the argument seems to me to have shown, a little more difficult to apply it in all its implications to other grounds of condemnation. However that may be, I am not to be taken to be throwing any doubt whatever upon the full extent of the rule, whatever it was, which enabled the Crown to ask for condemnation, under what Story, J., calls the general usage of nations, after a year and a day. But I am asked to say that for that period of a year and a day there has been substituted a period of six months by virtue of Order XV, r. 9. I doubt whether it is possible, by what is merely a municipal rule of procedure, to substitute for a period recognised by the usage of nations some period which depends solely upon such a rule, and I have asked in vain for anything which suggests that other countries during the last war accepted as authoritative this reduction in the period. However, the Attorney-General has satisfied me that, at first I think coupling it with a pronouncement that there was ample positive evidence in the particular case, but later relying solely on the rule, Sir Samuel Evans did treat the rule as being of itself sufficient ground for condemnation in the absence of a claim within the six months. I think probably the clearest expression which justifies that contention, but it is not the only one, is in *The Antilla* ((1918) 7 Ll. P. C. 402), where Sir Samuel said this (at p. 408): "As the Crown asks me to do so, and is, I think, within its legal rights, there being no claimants before the court, and six months having elapsed since the writ, I condemn these goods as good and lawful prize in accordance with Order XV, rule 7." That was in terms identical with the wording of the present rule.

Now if the matter had stood there, though I might have felt a little doubt about it, I should have felt obliged to follow it. I think it would be an unfortunate result, because, as far as I can see it would mean that the Crown would be obliged to do nothing more than this, to put the writ before the court, the affidavit of service and of ship's papers, and no other evidence of any kind whatever.

But the matter is not really left there. In *The Frogner* ((1919) P.127) to which the Attorney-General called my attention, there occurs in the judgment of Lord Sterndale this passage: "Does infection, as it is called, affect the 800 tierces by reason of their being the property at the date of seizure, of the same person as the 200 tierces? That depends upon whether the 200 tierces"—that is one-fifth of the cargo—"are contraband or not. It does not follow, in my opinion, because there is no claimant to the goods that therefore they must be condemned. One of the Prize Court Rules (Order XV, r. 7) provides that goods cannot be condemned for want of an appearance unless six months have elapsed. No doubt that suggests, by way of implication, that they may be condemned if six months have elapsed, but I do not know that there is any doctrine which makes condemnation necessary, if nothing else has occurred except seizure and want of claim for over six months. If there are other facts which emerge in the case, it does not seem to me that the court is obliged to find that the goods were contraband, and to condemn them."

In putting forward his submission upon the so-called "six months' rule," the Attorney-General suggested this qualification. He said that supposing the evidence showed affirmatively that the goods were not contraband, he would not suggest that the default rule should apply; but that in other cases the rule justifies condemnation although if the onus were, as it is not, on the Crown, there might be an element of doubt. Now, I have said already that I throw no doubt whatever upon the well-established principle that the onus of proof does not lie upon the Crown but upon the claimant. It is upon the first part of that suggested qualification that my difficulty arises. As I have said, the application of a default rule seems to me to be perfectly simple where you are merely dealing with the question of ownership, but it is in connection with the class of case with which I am dealing that it seems to me the difficulty arises. Take, for example, one of the items (and there are several

to which this applies) which I have been asked to condemn, and am prepared to condemn, as absolute contraband, namely, seven bales of cattle tail hair. If this rule applies, all that would be necessary, as I see it, is to show that seven bales of cattle tail hair were the subject of a writ, that that writ was served and that there has been no claim. I see no room for the qualification as to whether the evidence showed affirmatively that the goods were not contraband. It may very well be that the documents in the ship's papers would show affirmatively that the goods were not such that they could be contraband—that is one thing—but there could be, and there need be, no evidence about the nature of the goods themselves. They would remain what they appear to be, seven bales of cattle tail hair. Either it is necessary to produce evidence to show that these goods are contraband, because of their applicability or suitability to one or other of the uses in the Proclamation, or it is not. If this "six months' rule" applies, and is of universal application, I cannot myself see what room there is for evidence about the matter at all. Putting it the other way round, if evidence is required, then it seems to me that the six months' rule cannot be an absolute rule.

With regard to this case I can only repeat what I have said, that there were several parcels here which, unenlightened, I should never have dreamed were absolute contraband but which on the evidence I am convinced are such. I propose to decide this case upon the evidence, and it may be that a day will come when I shall have to decide, or somebody else will have to decide, whether the pronouncements of Sir Samuel Evans on this matter which suggest that there is an absolute rule, or the observations of Lord Sterndale which I have quoted, which appear to show there is no such absolute rule, are right. If I were to decide it in this case, my decision would be worth nothing because it would be *obiter*. I have decided the case on other grounds. I can myself see no half-way house between the pronouncement that there is an absolute rule entitling the Crown to ask for condemnation, and the judgment of Lord Sterndale, which must have been given after argument, because the Attorney-General appeared in the case, and Sir Samuel Evans had made these various pronouncements long before his judgment was given. I can see no half-way house between the two. Sooner or later it may be necessary to resolve this doubt. I propose to say no more about it in this case, except that I am not convinced that Lord Sterndale's judgment was wrong.

The cargoes or their proceeds will be condemned.

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

Judicial Committee of the Privy Council.

July 23, 24, 25, 29, *and September* 24, 1940.

(Before LORDS MAUGHAM, RUSSELL OF KILLOWEN, WRIGHT AND PORTER.)

Canada Rice Mills Limited v. Union Marine and General Insurance Company Limited (*a*)

Canada (*British Columbia*)—*Insurance* (*Marine*)—*Cargo of rice—Ventilation necessary to prevent fermentation—Heavy seas from high winds necessitate closing of ventilators—Proximate cause of damage to rice—Loss due to peril of sea against which cargo insured.*

A cargo of rice was insured by the appellants against perils of the sea and all other perils losses and misfortunes to the damage of the subject matter of the insurance. The cargo was loaded at Rangoon in a tramp motor vessel of 4414 *tons gross and the bags of rice shipped weighed* 5080 *tons valued at* $191,922. *The cargo was for carriage to the Fraser River, British Columbia, and on the voyage, which took a month, after two weeks' steaming the vessel encountered for two days heavy winds and high seas, during which the cowl ventilators to the cargo had to be closed. There were specially constructed ventilators made necessary to prevent the rice heating and fermenting. The result of the heavy winds and high seas causing the closing of the ventilators was that the cargo of rice was severely damaged.*

Held, that having regard to the meaning given to the words "perils of the sea" used in policies of marine insurance in the case of Wilson, Sons and Company and The Xantho (6 *Asp. Mar. Law Cas.* 207; 57 *L. T. Rep.* 701; 12 *App. Cas.* 503), *namely that where damage is caused by a storm, even though its incidence and force was not exceptional, a finding of loss by perils of the sea was justified, the jury rightly found that there was a peril of the sea. The loss was also within the general words of the policy.* Butler *v.* Wildman ((1820) 3 *B. & Ald.* 398) *and* The Knight of St. Michael (8 *Asp. Mar. Law Cas.* 360; 78 *L. T. Rep.* 90; (1898) *P.*30) *approved and applied.*

Causa proxima *in insurance law did not necessarily mean the cause last in time, but what was in substance the cause:* Leyland Shipping Company *v.* Norwich Union Fire Insurance Society (14 *Asp. Mar. Law Cas.* 258; 118 *L. T. Rep.* 120; (1918) *A. C.* 350): Samuel and Company *v.* Dumas (16 *Asp. Mar. Law Cas.* 305; 130 *L. T. Rep.* 771; (1924) *A. C.* 431).

The decision of the House of Lords in the Scottish appeal in McGovern *v.* James Nimmo and Company (159 *L. T. Rep.* 193) *could not in view of Order LVIII, r.* 4 *of the Rules of the*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

Supreme Court of England and the same rule of the Rules of the Court of British Columbia be applicable to English or British Columbia appeals, as no corresponding rule existed in the Scottish courts.

Though the damage was caused not by the incursion of sea water but by action taken to prevent the incursion, the loss was due to a peril of the sea and was recoverable as such, as, where the weather conditions so required, the closing of the ventilators was not to be regarded as a separate or independent cause, interposed between the peril of the sea and the damage, but as being routine seamanship necessitated by the peril, so that the damage could be regarded as the direct result of the peril.

Decision of Court of Appeal for British Columbia reversed.

APPEAL from the judgment of the Court of Appeal of British Columbia. The facts material are set out in the headnote.

Valentine Holmes for the appellants.

H. W. Willink, K.C., and *Cyril Miller* for the respondents.

The arguments sufficiently appear from the judgment of the Judicial Committee delivered by Lord Wright.

Lord Wright.—The appellants claimed in this action as assured under a floating policy of marine insurance dated the 19th December, 1929, upon shipments of rice imported by the appellants to their rice mills in British Columbia, as from time to time declared under the policy. The policy covered (among other risks) perils of the seas, and also, under what are often described as the general words, all other perils losses and misfortunes that have or shall come to the hurt or damage of the subject matter of the insurance. The goods were warranted free of particular average under 3 per cent. on each package. The seaworthiness of the ship as between the assured and the assurers was admitted. Under this policy the appellants duly declared a full cargo of 50,600 bags of rice weighing 5080 tons shipped on or about the 23rd April, 1936, in the motor vessel *Segundo* at Rangoon for their dock on the Fraser River. The bags were valued in all at $191,922. Included in the shipment so declared were 7500 bags of brown rice valued at $30,798 marked 163 and 102. The shippers were Blackwood Ralli and Company of Rangoon. The claim is made in respect of the rice declared under these two marks which are compendiously referred to as 163. No claim is made in respect of the other marks shipped, which bore respectively the marks K.G., A.L.Z., and N.L.Z. The respondents issued a certificate of insurance in respect of the whole shipment.

The *Segundo* was a motor vessel of 4414 tons gross and 2668 tons net, registered at Oslo. She had five holds. The bags of the marks 163 and 102 were stowed, partly in No. 2 hold, which was forward of the engine and boiler space, and partly in No. 3 hold, which was aft of that space. The cargo throughout was well dunnaged and was stowed with adequate air spaces. There were also vertical wooden trunk ventilators and ordinary wooden rice ventilators in each hold. The system of ventilators throughout consisted of cowl ventilators with in addition Samson post ventilators at each hold. These latter were always open, but it was necessary that the cowl ventilators should be also open to ensure a through current of air in the holds. There is no complaint of the sufficiency of the ventilation system.

The *Segundo* arrived at Fraser River on the 28th May, 1936. It was then found that all the rice had heated, but by reason of the franchise of 3 per cent. in the case of particular average and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents as insurers should be limited to these marks.

A primary issue in the action was what was the condition of the rice on shipment, since it was contended that the damaged condition of the rice was not due to perils insured against but to the inherent vice of the goods when shipped. On that issue a commission to take evidence went to Rangoon, where a large number of witnesses gave evidence. At the trial, which took place in the Supreme Court of British Columbia before Robertson, J., and a special jury and lasted for seven days, the jury, as will appear later, found that the rice was in good and sound condition when shipped. No complaint has been made of the summing-up. There was abundant evidence to justify the jury's finding on that issue, which was accordingly concluded in the appellants' favour. The question therefore remained whether the appellants had established that the damage was due to perils insured against. The appellants' case was that the damage was due to interference with the ventilation consequent on bad weather during the voyage, which caused the closing of the cowl ventilators which it was necessary to keep open to ensure through ventilation. The evidence was that rice is a commodity very liable to heat if not fully ventilated while being carried in the ship's hold. It has a considerable moisture content, and has a capacity of absorbing further moisture. If this moisture is not carried off by ventilation a process of fermentation sets in and damages the grain. The heating thus caused when the ventilation was shut off, would tend to develop even after full ventilation was restored. The ventilators have to be closed when water would get to the cargo if they are not closed. When the ventilators are again opened the cooler air circulating through them also sets up a condensation in the hot, moist and humid atmosphere of the hold, and precipitates moisture on the rice. If a process of fermentation is thus started it may go on for the rest of the voyage even though the ventilators are not again closed.

In a case of damage to cargo such as the present, the evidence from those in the ship of what happened during the voyage is vital and is generally given by the ship's officers. But in this case, a translation of the ship's log was accepted as the sole evidence from the ship. It is necessarily very brief in its narrative, and might well have called for explanation on many points. But, such as it was, it was put to the jury as the material for their decision on this aspect of the case. They were called upon to make such findings or draw such inferences of fact from the log as seemed to them to be right with the aid of such expert evidence as was laid before them.

The log shows that from the 24th April, 1936, the day on which the *Segundo* sailed from Rangoon, until the 27th April, 1936, when she was in the Straits of Malacca, the ventilators were not closed. On that day for some short period the ventilators were covered "on account of unsettled weather," and later in the day they were again covered on

account of rain, until the next day. Then for a few hours on the night of the 30th April, 1936, they were again covered on account of rain and yet again covered on account of heavy showers for a few hours on the 1st May, 1936. Thereafter there is no entry of any moment until the 8th May, 1936.

The learned judge, in summing up, told the jury that the case of the appellants, which was that the damage was caused by the closing of the cowl ventilators and hatches during the voyage, really came down to the question of the period from the 8th to the 13th May. The 13th it is clear should read as the 11th. Either the judge made a momentary slip or he was misreported. It is therefore necessary particularly to examine the log entries from the 8th to the 11th May. The vessel was on the 8th driving against heavy head seas, with much pitching. At 19.30 (or 7.30 p.m.) the covers were put on the ventilators owing to rain. On the 9th, the log records heavy head seas, pitching and spray over decks and hatches and similar entries throughout the day with half a gale or a fresh gale. On the 10th there are similar entries, continuous heavy head seas, spray over foredeck, and later in the day the entry was that she was shipping some seas over the forepart of vessel. About midday the wind became a strong gale with hurricane-like squalls at times. The vessel was driving into a head wind and sea, with pitching and rolling, at times described as tremendous. At 1 a.m. on the 11th the covers were removed from the hatches. It is this period in particular, the 9th and 10th May, which the appellants rely on as involving a long continuous interruption of ventilation and as causing the heating and fermentation which was eventually discovered at the end of the voyage. Captain Brown Watson, an expert called on behalf of the respondents, agreed that on the 9th and 10th there was reason for closing the ventilators at least on the forward end to prevent damage to cargo, that is, to prevent the cargo getting wet. He did seem disposed to draw a distinction between the forward end and the after end of the ship, but no attempt was made to distinguish different parts of the damaged rice, and the jury with the material they had before them were entitled to find, if so minded, that the ventilators were properly closed on the 9th and 10th for the safety of the cargo and to reject the distinction between the different holds suggested by Captain Brown Watson. On the 15th there is an entry that covers were put on the ventilators owing to humidity or fog, but only for a few hours, and similarly for a few hours on the 16th and on the 17th. Later on that day the vessel ran into bad weather, and shipped some spray over the decks, but the wind was a following wind and the ventilators were not closed, except for a brief period on the 18th, when there was a heavy sea and a gale, that again was a case of a following sea and gale. On the 25th and 26th for about 21 hours the ventilators were closed on account of rain. On the 28th the vessel arrived at Fraser River. It thus appeared that for about 50 odd hours on the 9th and 10th there was a continuous closing of the ventilators and evidence on which the jury might find that it was due to conditions of wind and sea, and that it was the cause of the damage. The closing of the ventilators on account of rain was for brief periods. Rain is not a peril of the sea, but at most a peril on the sea. But there is now no real issue that the damage was due to rain.

At the conclusion of the case after lengthy arguments, the jury were required to give a special verdict on specific questions. Question 3 dealt with the condition of the rice on shipment. It was answered in favour of the appellants as already stated. Questions and answers 6 to 10 should be set out in full: "6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage? Answer: Yes. 7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage? Answer: Yes. 8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea? Answer: Yes. 9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and the sea? Answer: Heavy winds from 8th to 11th May, with high seas; from 11th to 17th, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to 20th; variable seas and weather after that date. 10. Did the plaintiff thereby suffer loss exceeding 3 per cent. on each package? Answer: No, only on 163."

Some discussion took place both in the courts of British Columbia and before their Lordships on the form of questions 7 and 8, in particular in regard to the word "proximate" in 7, and in regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilators and hatches. On this latter point their Lordships would feel justified, if it were necessary, to act upon Order LVIII, r. 4 of the Rules of Court of British Columbia. That rule is identical with Order LVIII, r. 4 of the Rules of the Supreme Court in England, which gives the Court of Appeal power (*inter alia*) to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided, and applies even in cases tried with a jury. In the present case the jury have found that there were perils of the seas during the period while the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the seas caused the closing. The connection is so obvious that if necessary the court is entitled to draw an inference of fact that the closing was so caused. Their Lordships were referred to a decision of the Supreme Court of Canada, *McPhee* v. *Esquimault and Nanaimo Railway Company* (49 S. C. R. 43), in which the rule was discussed. The English rule has frequently been discussed in English courts, for instance in *Paquin Limited* v. *Beauclerk* (94 L. T. Rep. 350; (1906) A. C. 148), *Mechanical and General Inventions Company and Lehwess* v. *Austin Motor Company* (153 L. T. Rep. 153; (1935) A. C. 346). In the present case the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in *McGovern* v. *James Nimmo and Company* (159 L. T. Rep. 193), where Lord Atkin said that the court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scotch courts, where there is no rule corresponding to Order LVIII, r. 4, and where the appellate court has only the record and verdict before it. In their Lordships' judgment, the decision in *McGovern's* case (*sup.*) cannot in view of Order LVIII, r. 4, be applied to English or British Columbia appeals. But in truth their Lordships are of opinion that the difficulty can be more simply dealt with. The jury answered the specific questions put to them. Why there was no

express question directed to the causal relationship between the closing of ventilation and the perils of the sea is not material. The judge is responsible for the questions put, and the jury have only these questions before them. It may be that all concerned thought the connection too obvious to call for a special question. No doubt some confusion has been introduced by the form of question 7, was the closing of ventilation the proximate cause of the damage? But if the questions and answers are construed fairly and construed as a whole it is in their Lordships' judgment clear that what was meant by proximate was "last in time." The judge in summing up directed the jury's special attention by putting question 8, to the fact that the policy insured the plaintiff against damage to the rice arising from perils of the seas. Thus the idea of causal nexus was brought to their minds. Question 9, or perhaps the answer, is somewhat difficult to understand, but the answer at least deals specifically with the crucial period from the 8th to 11th May, describing it as a period of heavy winds and high seas. The period of the voyage up to the 8th is not treated as material, and the subsequent part of the voyage may be disregarded.

On these findings, supplemented by further findings as to the amount of damage, the judge entered judgment for the appellants. The Court of Appeal by a majority set aside that judgment mainly as it seems on grounds of law. There it was held no evidence of perils of the seas. The conclusion appears to have been based on a view as to the meaning of perils of the seas. It was held, however, that even if there were perils of the seas, they did not constitute the *causa proxima* for purposes of insurance law, because the *causa proxima* was the deliberate act of the master in closing the ventilation. These points are fully developed in the judgment of Sloan, J.A., Martin, C.J., in agreeing with the reasons of Sloan, J.A., rather emphasised the purely verbal aspect of the jury's finding as to the proximate cause, and thought that so far from finding that the peril of the seas was the proximate cause of the loss, they had come to the conclusion that the loss was due to something else, namely, the closing of the ventilators. On this matter their Lordships have already expressed their opinion. Their Lordships are unable with all respect to agree with the reasoning of Sloan, J.A., in his careful opinion, and in the arguments advanced before them in support of it.

The two main questions must be discussed separately. The first question, whether on the evidence the jury were justified in finding that there was a peril of the sea, depends on the meaning to be attached to those words in a policy of marine insurance. The trial judge directed the jury that the words referred to fortuitous accident or casualty of the seas, but did not include the ordinary action of the wind and wave. In British Columbia the law of marine insurance is now to be found in the Marine Insurance Act, R. S. B. C., 1936, ch. 134, which is for all practical purposes the same as the English Marine Insurance Act, 1906, which was a codifying Act. Authorities under the latter Act are properly cited as authorities in respect of the former. The judge in his direction to the jury was quoting rule 7 in the First Schedule to the Act. In considering the material questions it is helpful in the first instance to assume that the ventilation was not closed, but that the sea or spray had actually wetted the rice and caused the damage. The other question, that of the *causa proxima*, can then be considered separately. The view of Sloan, J.A., seems to be that there was no peril of the sea, because in his opinion the weather encountered was normal and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the House of Lords, in *Wilson, Sons and Company* v. *Owners of Cargo per the Xantho* (6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 503), which was a bill of lading case but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser and Company* v. *Pandorf and Company* (6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas.) Lord Herschell said: "The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the seas." In *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser and Company* (6 Asp. Mar. Law Cas. 200; 57 L. T. Rep. 695), Lord Macnaghten said that it was impossible to frame a definition of the words. In *Hamilton, Fraser and Company* v. *Pandorf* (*sup.*), where a rat had gnawed a hole in a pipe, whereby sea water entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm, and in the opinion of Lord Halsbury in the case last cited any accident that should do damage by letting in sea into the vessel should be one of the risks contemplated.

Where there is an accidental incursion of sea water into a vessel at a part of the vessel, and in a manner where sea water is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of sea water. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the sea water is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent sea water coming into the hold and sea water does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which but for the covering of the ventilators would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send

seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5,000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. Their Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the incursion of the sea it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain* v. *Whittle* (15 Asp. Mar. Law Cas. 255; 125 L. T. Rep. 193; (1921) 1 A. C. 615), where a house-boat, the seams of which above the water-line had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed, and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a wave," said Lord Sumner, "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." In the same way storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas, a ship may escape them and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen. In their Lordships' judgment it cannot be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils may not be justified.

There remains the second question whether the damage which was caused not by the incursion of sea water, but by action taken to prevent the incursion is recoverable as a loss by perils of the sea. It is curious that, so far as their Lordships know, there is no express decision on this point under a policy of marine insurance. But in their Lordships' judgment the question should be answered in the affirmative, as they think the jury did. The answer may be based on the view that where the weather conditions so require, the closing of the ventilators is not to be regarded as a separate or independent cause, interposed between the peril of the sea and the damage, but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct result of the peril. In *The Thrunscoe* (8 Asp. Mar. Law Cas. 313; 77 L. T. Rep. 407; (1897) P. 301), where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, it was held that the damage was caused by perils of the sea. The severity of the weather (there referred to as exceptional, though the adjective is immaterial) was described by Jeune, P., as the proximate cause of the damage because the closing of the ventilators was due to that cause, and Gorell Barnes, J., described it as the direct cause. It is true that the case dealt with the exceptions in the bill of lading, to which the doctrine of *causa proxima* does not apply in the same way as in insurance law. But it is now established by such authorities as *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society* (14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350) and many others that *causa proxima* in insurance law does not necessarily mean the cause last in time, but what is "in substance" the cause (per Lord Finlay), or the cause "to be determined by commonsense principles" (per Lord Dunedin). The same rule has been reiterated by the House of Lords several times since then, most strikingly perhaps in *Samuel and Company* v. *Dumas* (16 Asp. Mar. Law Cas. 305; 130 L. T. Rep. 771; (1924) A. C. 431), where it was held by a majority of the Lords that where a ship insured by the mortgagee was lost by being scuttled by the deliberate act or procurement of the mortgagor, it was not in insurance law to be deemed a loss by perils of the seas. The proximate cause was the intentional and fraudulent act which let in the sea water and sank the vessel. In cases of fire insurance it has been said that loss caused from an apparently necessary and *bona fide* attempt to put out a fire, by spoiling goods by water, and in other ways, is within the policy (per Kelly, C.B., in *Stanley* v. *Western Insurance Company* (17 L. T. Rep. 513 at p. 515; L. R. 3 Ex. 71 at p. 74)). Their Lordships agree with this expression of opinion and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to the peril of the sea and is recoverable as such.

The same result may be reached by a somewhat different approach. It may be held that though such a loss is not strictly recoverable as a loss by perils of the seas, it is within the general words "all other perils losses and misfortunes, etc." which are contained in the policy and have been quoted above. It is true that these general words have to be construed as restricted to cases akin to or resembling or of the same kind as those specially mentioned (per Lord Macnaghten in *Thames and Mersey Marine Insurance Company* v. *Hamilton Fraser and Company* (*sup.*), where they were held not to cover the loss claimed, but subject to that limitation they may be used to give some extension to the specific perils, such as perils of the seas. Thus in *Butler* v. *Wildman* ((1820) 3 B. and Ald. 398) a master of a ship in order to prevent a quantity of dollars falling into the hands of the enemy by whom he was about to be attacked, threw them into the sea and was immediately afterwards captured. It was held that the loss came within the general words of the policy, if it did not fall strictly within the specific words, "jettison" or "enemies." The general words had the effect of "including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies" (per Best, J., at p. 407). The same principle was applied by Gorell Barnes, J., in *The Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30), where a cargo of coal had become so heated that the vessel was compelled to put into a port of refuge and a large portion of the cargo was discharged and sold, entailing a loss of freight. No fire had actually broken out. Gorell Barnes, J., held that the loss was recoverable if not as a loss by fire, as a loss *ejusdem generis* and covered by the general words.

It is obvious that in these two cases there was no question of turning away to avoid a future peril. If there had been, the loss might properly have been held to be due not to the peril, but to deliberate action to avoid coming into the area of the peril, as in *Becker Gray and Company* v. *London Assurance Corporation* (14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101) and similar cases. But in *Butler* v. *Wildman* (*sup.*) and *The Knight of St. Michael* (*sup.*) the subject of the insurance was actually in the grip of the peril, enemies in the one

case, fire in the other. The correctness of these authorities has not been doubted, and their Lordships think they were rightly decided. Indeed in *Becker Gray and Company's* case, Lord Sumner expressly cites with approval *The Knight of St. Michael* as a decision on the general words in the policy, and distinguishes it from the case then before him. Similarly in the present case there was an actually operating peril of the sea. There was accordingly a loss either by perils of the seas or a loss within the general words.

In their Lordships' judgment no ground has been shown for setting aside the verdict of the jury, and the appeal should be allowed and the judgment of the Supreme Court restored. The respondents will pay to the appellants their costs of this appeal and in the courts below.

They will humbly so advise His Majesty.

Appeal allowed.

Solicitors for the appellants, *Charles Russell* and *Co.*, agents for *Walsh, Bull, Howsser, Tupper, Ray* and *Carroll.*

Solicitors for the respondents, *Gard, Lyell* and *Co.*, agents for *Bourne* and *Desbrisay.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

November 20, 1940.

(Before Lord Caldecote, C.J.)

F. H. Renton and Co. Ltd. v. Black Sea and Baltic General Insurance Co. Ltd. (a)

Marine insurance—Timber Trade Federation Insurance Clauses—Goods insured on voyage until they reached final destination—Cargo put on quayside and piled in shed by port authority—Part of cargo lost after piling, but before delivery to consignees—Meaning of "final destination."

By a policy of marine insurance goods were insured on a voyage from a Baltic port to London, The policy contained the following clause :— "Including risks of non-delivery . . . until discharged at port of destination and while in transit by land and/or water to final destination . . ."—On the arrival of the ship at the Port of London the goods were unloaded on to the quayside and were there received by the Port of London Authority, whose servants removed them to a shed where they were stacked in piles. The whole of the goods had been unloaded from the ship, but when the consignees came to take delivery it was found that part of them was missing from the piles.

Held, that the goods had reached their "final destination" when they had been unloaded on to the quayside, and that the subsequent loss was not covered by the policy.

(a) Reported by V. R. Aronson, Esq., Barrister-at-Law.

Action on a policy of marine insurance. The facts are summarized in the head note and are more fully set out in the judgment.

Sir Robert Aske, K.C., and *Cyril Miller* for the plaintiffs.

A. T. Miller, K.C., and *H. L. Parker* for the defendants.

Lord Caldecote, C.J. :—This is a claim by the plaintiffs, who are timber importers, against the underwriters of a part cargo of sawn goods which was loaded on the steamship *Dayrose* for carriage from Igarka to London. A short, but not altogether easy, question on the construction of a policy of marine insurance is involved.

The claim concerns a parcel of 12 standards of which the value is 200*l.* 16*s.* The bill of lading was for carriage to London, Surrey Commercial Docks. The steamer had sailed at the date of the policy. She berthed on 23rd September, 1938, when the discharge began, and the discharge took place in accordance with the Port of London usage.

The facts, so far as they are known, are not in dispute. The practice of the Port of London is well known. In accordance with it on this occasion private stevedores were engaged by the ship, and paid by the ship, to do the discharge. The timber was put out on to the quay alongside, close up to the ship. It was tallied by the ship and the cargo superintendent out of the ship. It was put into what was called a stack or bulk when it was discharged from the ship, and was subsequently sorted by the Port of London Authority. The sorting took place in connection with the cargo from the ship according to the sizes and marks of the timber. The Port of London Authority employed deal porters to take the timber away and put it in the shed in another place, sorted as I have described. In explanation of the phrase that the deal porters take the timber away, I may refer to an answer given in evidence that a 3ft. alley-way separates the stack from the place where the timber is piled. In fact, the alley-way is what one witness conceded might be described as a tunnel; and the process of sorting all takes place under cover of a large shed which stretches almost up to the water line.

The discharge was finished on 12th October, but meanwhile the piling had begun on 26th September, and was finished on 7th November, I was informed that the Port of London Authority fairly frequently begin piling while the cargo is coming over the side of the ship, and that is what happened in this case. The counting of the timber in the pile, or piles, began on 7th November; that is to say, on the same day on which the piling was finished. The counting took some days and was only completed a day or two before 30th November, which was, I think, the date of the landing returns.

The consignees, according to the usage of the Port of London, are not allowed, save in very exceptional cases, to put their hands on the timber until it has been piled—that is to say, sorted, and the landing returns have been sent out.

The material terms of the policy are contained in the body of the policy and in a slip attached to the policy called the Timber Trade Federation Insurance Clauses. The body of the policy is in the well known form. The insurance is to be on the goods and merchandise from the loading thereof aboard the said ship, as above, and shall so continue and endure, and so on, until the said ship shall be arrived at as above, that is, London, until the same be there discharged and safely landed. Up to this

point the insurance is an insurance against perils of the sea, but by the slip attached to the policy it becomes for all practical purposes in this case an all-risk policy, and the cover given by the policy extends beyond that which is given by the body of the policy.

The question which arises concerns clause 2 of the Timber Trade Federation Insurance Clauses, which states: "Including risks of theft, pilferage and non-delivery, irrespective of percentage"—then I omit some words—"whilst on board the ocean-going vessel until discharged at port of destination." Then these words follow: "And whilst in transit by land and/or water to final destination there or in the interior." The question is: When did the risk end? I am asked by the plaintiffs to say that the risk continued to apply to these goods until they had reached the piles, or until the piles had been completed, or, alternatively, until the consignees were allowed to put their hands on the cargo and remove it.

The question of construction which has to be decided, as applied to the facts, is whether the goods were "in transit by land and/or water to final destination there or in the interior." Sir Robert Aske, on behalf of the plaintiffs, contends that the stack, or what one witness said is generally called the bulk, is not the final destination, because the goods had to be sorted and piled, since the receivers did not handle the goods until this was done. I find it impossible to think that the final destination can be determined by reference to the permission or the right which the receivers got from the Port of London Authority in due course to handle and remove the cargo. The final destination is a question of fact. Clause 2 is a clause of the Timber Trade Federation and is intended to apply, no doubt, to cargoes and ships other than those which are loaded or discharged in the Port of London. As I suggested in argument, it is not difficult to imagine cases to which the words of the clause to which I have referred apply easily without raising any question of interpretation. The goods are insured whilst in transit by land or water to final destination there or in the interior. If when the ship, completing her obligation, puts the goods over the side of the ship on to the quay, and then the goods have to go to another part of the dock or port, either by land or by water, there is not much difficulty in seeing that the risk continues while they are in transit to the place to which they have to go. The consignees may, themselves, have a place of business, a shed, in the dock, or at the dockside, or, as the clause says, in the interior, and in such a case there would not be much difficulty in arriving at the conclusion that the goods were covered while they were going there—in other words, while they were in transit to the place where the consignees carried on their business and where they required the goods to be sent.

The question which arises on the facts of the case is whether the final destination was the place at which the goods arrived when they were bulked or stacked, or whether the final destination had not then been reached. In the view which I have formed the facts do not justify a conclusion that the goods were still in transit for the purposes of this clause after they had reached the quayside or the shed in which they were placed in bulk. If the contention of the plaintiffs is right, the final destination of the cargo which might in exceptional circumstances be taken from the pile, but before the piling was completed and before the counting was completed, would be different from the final destination in the case of goods which had to wait until the final piling and counting had been finished.

Certain authorities have been cited, but I cannot say that I find very much guidance in the interpretation and application of this clause from the case which Mr. Miller referred me to of *Brown* v. *Carstairs* (3 Camp. 161). The words of this clause are quite different from the words in that case. Nor do I find much assistance from *Westminster Fire Office* v. *Reliance Marine Insurance Company* (19 Times L. Rep. 668) in which the Court of Appeal were dealing with the following very different clause: "Including all risk of craft to wharf or export vessel at port of discharge, and, in the event of the goods being temporarily placed upon the quay, it is agreed to hold the same covered while there until delivered to the export vessel or at any wharf or warehouse within the limits of the port."

The point there taken was that, as the consignee had not made up his mind to put the goods into an export vessel, or into a wharf or warehouse within the limits of the port, the transit of the goods was at an end. The Court of Appeal rejected that argument. But that is a very different case from the present case where a particular terminus *ad quem* is not mentioned as it was in that case—namely, an export vessel or a warehouse within the port, but where the simple words are "final destination," leaving it to be decided in each case where the final destination is.

I think that the final destination for the purposes of this case and this particular parcel of goods was the shed or the space to which the goods were delivered, and the mere fact that they had been moved to another part of that shed and piled according to their marks seems to me to make no difference at all. It is quite conceivable that the goods might have been put under their marks and sizes as they were delivered from the ship, but according to the usage of the port the goods are bulked without regard to their marks and sizes, and the fact that they were moved to another part of the shed does not, in my view, prevent the shed (if that be its proper name) from being the place where the goods had reached their final destination.

Having come to that conclusion, I find it unnecessary to say anything about the further point which Mr. Miller took on the policy that the final destination was the pile. It was said that the plaintiffs had not given any proof of non-delivery to the piles so as to bring themselves within the policy, because the missing goods might have reached the piles, in which case the risk would have terminated because they had reached their final destination. I think that, in the absence of any evidence that any other destination was intended for these goods except this place at the quayside, they had reached their final destination when they were taken from the ship by the Port of London Authority, even although the task of sorting and piling the goods had still to be completed before the consignees took the goods away.

I therefore, find that the plaintiffs have failed to bring themselves within the terms of the policy, and the action must be dismissed, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Wm. A. Crump* and *Son.*

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

COURT OF APPEAL.

November, 4, 5, 6, 7, 8, 25, 1940.

(Before SCOTT, MACKINNON and LUXMOORE, L.JJ.)

Forestal Land, Timber and Railway Company, Ltd. v. Rickards; Middows, Ltd. v. Robertson; W. W. Howard Bros. & Co. v. Kahn (*a*)

[This decision was affirmed by the House of Lords on 29th July, 1941.—Ed.]

Insurance—Marine—British owned goods—Policy covers perils of War—Frustration clause—Goods in German owned ships on outbreak of war—German Government gives directions to masters—Ships deviate to neutral ports—Two ships scuttled—One reaches Germany—Constructive total loss—Liability of underwriters—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), s. 60.

In each of these three cases the plaintiffs were the British owners of goods shipped on the Minden *the* Wangoni *and the* Halle *respectively, being German owned vessels. The goods were insured under Lloyds Marine and War Risks policies by the defendants. The insured perils included "Men of war, enemies, surprisals, takings at sea, arrests, restraints and detainments of all Kings, Princes and People . . . and all other perils, losses and misfortunes that have or shall come to the hurt, detriment and damage of the said goods and merchandises." The policies were enlarged by the incorporation of the Institute War Clauses which provided: "This policy covers . . . (b) loss of or damage to the property hereby insured caused by:—(1) hostilities, warlike operations . . . (2) mines, torpedoes, bombs or other engines of war." The policies also included a clause known as the frustration clause in the following terms: "This policy is warranted free of any claims based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of Kings, Princes, Peoples, Usurpers or persons attempting to usurp power." The policies were all in substantially the same form, with some variations. In the case of the* Minden *the risks insured against included "non-delivery . . . and/or short delivery." In the case of the* Wangoni *there was no insurance against non-delivery but the policy included the Institute F.P.A. Clauses for insurance "against all and every risk of loss and/or damage from any cause whatsoever." In the case of the* Halle *the policy included non-delivery as an insured peril and included the Timber Trade Federation Insurance Clauses against "all risks."*

The claims against the underwriters were made in the following circumstances: The German master of each ship received from his own government a fortnight before the 3rd September, 1939, orders to take refuge with the ship in a neutral port and, if possible, to return to Germany with its cargo or as a last resort to scuttle his vessel.

These orders were carried out by the masters of these three ships. In each case the ship deviated from her course and took refuge in a neutral port. In the case of two of the ships, on leaving the neutral port they were intercepted by enemy cruisers and scuttled themselves. The third ship left the neutral port and succeeded in reaching Germany.

The plaintiffs claimed under their respective policies of insurance as for a total loss of the insured goods through the scuttling of the ships or alternatively as for a constructive total loss. The insurers denied any total or constructive loss or any loss proximately caused by the perils insured against. They relied on the frustration clause.

Hilbery, J., gave judgment in the three cases for the defendants, holding that the loss was brought about by the frustration of the adventure, a peril of which the policy was warranted free. Further, that the loss did not occur while the policy was in operation. Further, in endeavouring to return to Germany through the blockade the ships were engaged in a war-like operation not covered by the policy. The plaintiffs appealed.

Held, in each case when the ship was diverted in obedience to the directions of the German government from its normal contractual course towards a port of refuge, the German government, through the master, received actual possession of the British-owned goods, and thereafter retained it. When, pursuant to these orders, the ship left its neutral port, if not before, the German government was guilty, applying a metaphor from English common law, of converting the goods to its own use. When that happened the result was for the plaintiff cargo owners a loss not merely of the voyage or adventure, but of the goods themselves. To that loss was attached the attributes of a constructive total loss within sect. 60 *of the Marine Insurance Act*, 1906, *provided the loss was proximately caused by a peril within the policy. The loss was caused by a peril within the policy. The claims were not barred by the frustration clause.*

If there was a constructive total loss of the goods themselves within sect. 60, *the mere fact that there was also a loss of the voyage could not exclude the right of recovery. It was only where no claim could be put forward except for the loss of the venture that the frustration clause had any application. The contention that in the English law of marine insurance there is no such conception as a constructive total loss of the goods themselves, but the subject-matter of every policy on goods is the venture is untenable.*

Appeal allowed.

APPEALS from Hilbery, J.

The plaintiffs in these three actions were all British subjects. They were the owners of goods

(*a*) Reported by Miss B. A. BICKNELL, Barrister-at-Law.

shipped on the three steamships the *Minden*, the *Wangoni* and the *Halle*, each steamship being German owned. The goods shipped were insured by the defendants and other underwriters under Lloyds Marine and War Risks Policy. The plaintiffs claimed under their respective policies as for a total loss of the insured goods or alternatively as for a constructive total loss.

The facts and the terms of the respective policies are sufficiently stated in the head note and the respective judgments.

The Marine Insurance Act, 1906, s. 60 provides:

"(1) Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss:—

(1) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered;

* * *"

Hilbery, J. dismissed the three actions. The plaintiffs appealed.

Sir Robert Aske, K.C., M.P. and *Cyril Miller* for the appellants.

G. St. Clair Pilcher, K.C. and *A. J. Hodgson* for the respondents.

Cur. adv. vult.

Scott, L.J.—The decision in all three appeals, which we heard together, turns on the same main point of law, and it will, therefore, be convenient to summarise the common position. The claims are by British cargo owners against Lloyds Underwriters on voyage policies, said to be in what is called (but not proved to be) "standard form," with various clauses attached and incorporated in the policy. Each policy covers war risks, as well as marine risks, and each policy also contains the now common form of the so-called "frustration clause," which was invented to exempt underwriters of voyage policies from the kind of liability which was authoritatively established by the House of Lords' decision in *Sanday* v. *British and Foreign Marine Insurance Company, Limited* (114 L. T. Rep. 521; (1916) 1 A. C. 650). In that case two British ships carrying goods under bills of lading with German destinations were, upon the outbreak of war in August, 1914, diverted in the English Channel, one by a French cruiser and the other by British orders, to British ports, where they delivered their cargoes intact to the insured British owners at those ports. The assured gave notice of abandonment and issued writs claiming for a constructive total loss. The House, affirming Bailhache, J. and a majority of the Court of Appeal, held that though the goods were intact the adventure had been lost; that the "subject matter" of the policy was the safe arrival of the goods at the end of the voyage—that is the adventure; that in English law the loss of the voyage entitled the assured on goods, after giving due notice of abandonment, to recover for a constructive total loss; and that the Marine Insurance Act, 1906, had not altered that well-recognised rule of law.

The clause then first introduced into Lloyds "standard" form of voyage policy is as follows: "Warranted free of all claims based upon loss of, or frustration of the insured voyage or adventure caused by arrests, restraints or detainments of Kings, Princes, Peoples, Usurpers or persons attempting to usurp power." The defendant underwriters pleaded the clause as a bar to all three actions, and the learned judge held that it was a good defence. We were informed that the outbreak of the present war had led to many insurance claims, and that the three cases before us had been selected by agreement between underwriters and the representatives of claimants, as typical, and that the underwriters had agreed to pay all costs in any event up to and including the House of Lords. Naturally, the underwriters wanted to get as much legal enlightenment as they could for their money. The pleadings, we were told, were with that object settled by opposing counsel in consultation; the material facts were all agreed, and, although no notices of abandonment were given, the underwriters agreed, in view of the late dates at which the assured obtained sufficient information to give such notices, to waive the absence of notice, and accordingly conceded that each of the three cases was to be argued on the assumption that due notice had been given at the proper time. The result was that many questions of law were argued below on both sides, which were only contingently or even remotely relevant, including some which turned on obscure or possibly conflicting provisions contained in the congeries of attached clauses. The learned judge with reluctance dealt with several of these secondary contentions of both sides, although some of them were rendered irrelevant by his decision that the actions were defeated by the frustration clause; but in the view which I take, namely, that that clause affords no defence in these actions, nearly the whole of those secondary issues cease to have any materiality at all.

Agreed statements of facts were before the court below in each case, with one or two minor amendments, together with the waiver and admission by underwriters as to notice of abandonment, which I have already mentioned. Each of the three original statements appears *in extenso* in the learned judge's judgment and it is not necessary to repeat them. The dominant fact was that the German master of each German ship received from his own government at least a fortnight before the 3rd September, 1939, the day when war was declared, orders in furtherance of German war policy "to take refuge" with his ship "in a neutral port and, if possible, to return to Germany with its cargo, or as a last resort to scuttle his vessel." These orders were duly carried out by each of the three masters.

The *Minden* sailed from Buenos Ayres on the 16th August on a voyage to Durban, where the plaintiffs' goods, Quebracho wood extract (used in tanning), were to be trans-shipped to Hong-Kong, option Shanghai. The vessel's course was due east, but on the 24th she arrived at Santos, having left her course and turned north-west. She left Santos the same day and arrived at Rio on the 26th. She stayed there till the 6th September—that is three days after the outbreak of war, and then sailed, evidently in order to return to Germany. On the 29th September she was intercepted by a British cruiser off the Faroe Islands, and still acting in obedience to his orders, the master then scuttled her.

The *Halle*, with a parcel of Jarrah boards, was bound from Bunbury, Australia, to London, *via* the

Cape, called at Durban on the 16th August, and passed Cape Town on the 18th. On the 6th September she took refuge at the neutral port of Bissao in Portuguese Guinea, and stayed there till the 13th October. Three days later the master, in the presence of a French cruiser, scuttled her.

The *Wangoni* with a parcel of Bristolite boards, the property in which had passed to the plaintiffs, was bound from Bremen to South Africa, the bill of lading date being the 16th August. Cape Town was her first port of call. On the 29th August she put into Las Palmas, but the same day sailed back on her tracks, and on the 1st September took refuge at Vigo. There she stayed till the 10th February, 1940, when she sailed and succeeded in reaching Hamburg on the 5th March.

From these facts the inference is, to my mind, irresistible. In each case the master was acting, as no doubt was his bounden duty in German law, in strict obedience to the orders he had received. The departure from the direct route of the bill of lading voyage was in each case made in order to take the British-owned cargo as well as the German-owned ship to a port of refuge. The stay in that port was in pursuance of the plan of the German government. The departure from that port was equally the act of the German government, through its agent, as was also, in the *Minden* and *Halle* cases, the act of scuttling, and, in the *Wangoni* case, the act of bringing the ship and cargo to Hamburg and there holding it to the order of the German government. In each case when the ship was diverted from its normal contractual course towards a port of refuge the German government, through the master, received actual possession of the British-owned goods and thereafter retained it. When pursuant to those orders the ship left its neutral port, if not before, that government was guilty, if I may apply a metaphor from English common law, of converting the goods to its own use. When that happened, if not before, the result was for the plaintiff cargo-owners under each policy a loss not merely of the voyage or adventure but of the goods themselves, and that loss was one to which there attached the requisite attributes of a constructive total loss as laid down in sect. 60 of the Marine Insurance Act, 1906; provided always that the loss was proximately caused by a peril within the policy. If it was so caused, it is one in respect of which the assured are, in my opinion, entitled to recover, wholly apart from any considerations of the loss of the voyage.

It only remains, therefore, to consider the list of perils, to see if that loss was covered. As the policies differ, each must be considered separately. In the case of the *Minden* the policy itself (that is, apart from its attached clauses, and the frustration clause in italics) was, so far as the black ink part of the printed form goes, in the same form as that in the Schedule to the Act of 1906; it contained the word "Enemies," and the general words. There had been in the printed and attached set of "Clauses for Shipments from South America" (No. 17A) an f.c. and s. clause, but it was deleted. No. 1 of the printed Institute War Clauses, also attached, contained two sub-clauses, (*a*) and (*b*), which, I think, ought to have been struck out as superfluous, in view of the absence from the policy itself of any f.c. and s. warranty, and of the deletion from the "S. American clauses" to which I have just referred. Both (*a*) and (*b*), however, were left in. I do not think they have any effect at all; but it was argued alternatively for the appellants that the sub-clauses introduced perils not covered by the word "enemies"; that if the facts did not disclose a loss by "enemies," the words in sub-clause (1) which purported to make the policy cover all the individual perils named in (*a*)—and inflated or extended the f.c. and s. clause, entitled the appellants to recover. I do not think that is a legitimate construction of sub-clause (*a*); because the clause only purports to bring back into the policy perils already in the policy but excluded by the f.c. and s. warranty. Sub-clause (*b*) clearly adds nothing to the word "enemies" already in the "standard" form. Nothing else in the Institute War Clauses deserves even mention in the present context; and in the Institute Strike Clauses, and in the typed clause there is nothing which has any relevance whatever. So far as concerns the question of insured perils, the policies in the other two cases are not less favourable to the assured than the *Minden* policy, for they are professedly on "All Risks."

Mr. Pilcher's argument for the respondent underwriters was that all three claims were "based upon loss of the insured voyage," and therefore barred by the frustration clause. On being asked by the court whether he meant that they were claims which (1) were capable of being based on loss of voyage; or (2) were in fact based on loss of voyage; or (3) could only be based on loss of voyage, he at first said that he relied on (3), or in the alternative on (1); but on further reflection he submitted that (2) was the true proposition. I am satisfied that contention (1) is erroneous in law. If there is a constructive total loss of the goods themselves within sect. 60 of the Marine Insurance Act, 1906, the mere fact that there is also a loss of the voyage cannot exclude the right of recovery for the former; and I know of no justification in any judicial opinion expressed in any case, whether as the ground of decision, or merely obiter, for such a contention. In my opinion it is only where, on the facts, no claim can be put forward except for the loss of the venture that the frustration clause has any application. In the present case no claim was put forward for loss of the venture; the claim made, and rightly made, in respect of what I have called the conversion of the goods by the German government, was a claim for the loss of the goods themselves. There was, when each ship sailed from its port of refuge for Germany, in my opinion at that moment such deprivation of the goods without likelihood of recovery as to constitute a constructive total loss within sect. 60. Whether it amounted to an irretrievable deprivation so as to constitute an actual total loss within sect. 57, it is unnecessary to decide or even to consider.

An argument was addressed to Hilbery, J. and to some extent to us, on behalf of the underwriters, that there is in the English law of marine insurance no such conception as a constructive total loss of the goods themselves, but that the "subject matter" of every policy on goods is the venture only, and that in every case where a constructive total loss of goods happens, it is through the non-arrival of the goods at their destination, or in other words, through loss of market. The cases of loss of venture such as *Rodocanachi* v. *Elliott* (2 Asp. Mar. Law Cas. 399; 31 L. T. Rep. 239; L. R. 8 C. P. 649), or *Miller* v. *Law Accident Insurance Company* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370), or *Sanday's* case (*sup.*), to which we were referred, are all cases where the goods remained in the possession of the bailors through their bailees, the carriers, and the only loss suffered by the insured bailors was the loss of market or of voyage. No judge, so far as I

know, has ever countenanced the proposition that in insurance on goods the only constructive total loss recognised in law, either before or since the passing of the Act, is loss of the venture. In the case of certain perils enumerated in the ordinary Lloyd's policy scheduled to the Act, it can hardly be doubted that a constructive total loss of the goods themselves may arise when they are taken wholly out of the possession of the assured and his bailee—for example, pirates, rovers or thieves. If there can be an actual total loss in such cases through "irretrievable deprivation" under sect. 57, I can see no reason why the law should not recognise a constructive total loss under sect. 60 (1) where the goods are "reasonably abandoned on account of their actual loss appearing unavoidable," or under subsect. (2) "where it is unlikely that the assured can recover the goods" or "the cost of recovering them would exceed their value when recovered." For these reasons, I think that the above argument that the only constructive total loss of goods known to the law is where the loss of the venture takes place is untenable, and that the appellants are entitled to succeed. I have not drawn attention to the assumption, implicit in what I have already said, that the policy was in each case still in force at the moment when the ship left its neutral port of refuge. As far as I can gather, that assumption was hardly challenged below, or before us, but I ought perhaps to deal with the point. As the three policies differ in the relevant wording, I will discuss them separately.

In the case of the Minden, No. II of the "Rules of Bill of Lading" gave the ship ". . . liberty to call at any ports in or out of the customary or advertised route in any rotation and for any purpose." That clause, but its last words especially, I think, authorised the deviation to Rio. Clause 10 of the "Clauses for shipments from South America," attached to the policy, included bill of lading liberties, and cl. 13 repeated the liberty, adding "for all purposes whether necessary or otherwise." Clause 18 made cll. 10 and 12 paramount. Down to the outbreak of war on Sept. 3, 1939, the deviation of the Minden was thus covered by both the bill of lading and the policy. In the case of the Halle, a war clause attached to the bill of lading provided that, in addition to other liberties, the carrier might ". . . in the event of the imminence . . . of war . . . between any nations [or] in consequence of measures taken by any government in consequence of or in connection with the above matters . . ." The clause does not say in terms what the carrier might do, for it is not completed grammatically, but the next sentence says ". . . anything done by reason of or in compliance with the clause is within the contract voyage."

The deviation towards Bissao is thus covered, but, as the ship did not reach Bissao till Sept. 6, it is necessary to consider the position between Sept. 3 and Sept. 6. As after Sept. 3 there was nothing which the British cargo-owner could do to cause the master of the Halle to alter the course of his ship or to prevent him from going on to Bissao, I think that the ship must be regarded as still within the bill of lading liberty, and, as cl. 2 of the "Timber Trade Federation clauses" attached to the policy included all "bill of lading liberties," it follows that the policy was still in force, and that the insurance position was thus the same as in the case of the Minden. In the case of the Wangoni, a clause attached to the bill of lading contained this provision: "If one of the following incidents or one of the following measures occurs or threatens to occur, that is to say war between any peoples; civil war; prohibitions, restrictions or control by any government of traffic, trade or by any other means, with any country from which or to which the ship normally sails; control or disposal by any government or authority of the use or movement of the ship (or) of insulated or other holds of the ship, the shipowner (or his representative) is entitled, if he considers that the ship, her master, officers, crew, passengers or cargo are subject either wholly or in part, as a result of the incidents or measures referred to above, to loss, damage, contravention or detention, or to suffer delay, to alter the journey either before or after its commencement, or to vary the anticipated, agreed or usual voyage, or to detain the ship or to delay the voyage."

There was no general inclusion in the policy of bill of lading liberties, but they were "held covered at a premium to be arranged." If the assured had to rely on that clause alone, a suitable premium would have to be fixed for the extra risk, if any, of returning to Vigo. Except for this difference, the position in regard to the Wangoni is the same as that in regard to the other two ships.

I have discussed the policy voyage in each case, but in truth I do not think that the appellants' rights of recovery depend on provisions as to deviation. Apart from deviation liberties, at the start of the deviations the cargoes were, under the orders of the German government, merely under restraint of princes, and the deprivation was merely contingent, but, if those orders compelled the masters at any time finally to abandon the commercial voyages, it is, I think, a necessary inference from the facts that the German government then *ipso facto* took absolute, and not conditional, possession of the goods, and thereafter deprived the appellants of their possession continuously until, in two cases, they went to the bottom, and, in the third, the cargo reached the hands of the German government in Hamburg. If the assured had given notice of abandonment on Sept. 3, there would then have been a constructive total loss of the goods, and we are to decide the appeals as if that had been done. Upon the other issues discussed here or below as alternative contentions raised by one side or the other I say nothing, as they are rendered immaterial by the above decisions.

It follows that in all three cases the appellants are entitled to recover, and that all three appeals must be allowed and judgment entered in each action for the appropriate sum of money. In view of the respondents' agreement to pay all costs, there will be no order, except for taxation of all the appellants' costs here and below. There will be leave to appeal to the House of Lords.

MacKinnon, L.J.—I have written three separate judgments in each of these cases. As to the case of the Minden, it is a claim to recover an alleged loss under a policy of marine insurance. All actions normally involve questions of fact and questions as to the law applicable to those facts. In this case, there is no dispute as to the facts. Very sensibly, they have been set out in an agreed statement.

As to the law, the only questions involved are as to the proper construction of the contract sued upon. There are two massive volumes of "Arnould on Marine Insurance," and they now contain over 1,800 pages, and the Marine Insurance Act, 1906, is entitled: "An Act to codify the law relating to marine insurance." The truth is that this law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy, and such additions as are from time to time annexed to it. The ancient form dates back at least to the sixteenth century, and it is a document which

Sir Frederick Pollock characterised, with justifiable asperity, as " clumsy, imperfect, and obscure."

Many of the imperfections and obscurities had to be resolved by Lord Mansfield, C.J., with the assistance of his famous special jurymen. A striking example of his task in that respect is *Lewis* v. *Rucker* (2 Burr. 1167). The question arose as to the proper method of assessing a particular average loss of goods. The obvious thing would have been to see what the contract of the parties provided, but it provided nothing whatever. The assured put forward one method of assessment, and the underwriters put forward another. Lord Mansfield, C.J., decided for the latter, saying, at p. 1169: " The special jury (amongst whom there were many knowing and considerable merchants,) found the defendant's rule of estimation, to be right and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present." The rule so settled is now embodied in the Marine Insurance Act, 1906, s. 71, but in truth it is an implied term in the old form of policy, added to its imperfect expression by the practice of assured and underwriters, as found by the knowing and considerable merchants in 1761.

Innumerable clauses have from time to time been devised to supplement the ancient form. Unhappily, tradition seems to have caused them also in very many cases to be " clumsy, imperfect, and obscure," and the fact that " Arnould on Marine Insurance " now covers 1,800 pages is largely the result of that tradition. Oddly enough, the tradition has even infected the legislature with a microbe of inaccuracy. In 1746, an Act was passed which made re-insurance illegal, except in the case where " the assurer shall be insolvent, become bankrupt, or die." It is inconceivable that an insolvent underwriter should desire to re-insure, and obviously the evil aimed at was double insurance by the assured. " Re-insurance," however, had then its present well-known meaning, and the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity. I hope this irrelevant exordium is venial. I only wish to emphasize that, when the facts in this case are agreed, the sole question is whether, upon the true construction of their contract, the assured can claim to be paid a certain sum by the underwriter.

The material terms of their contract are these. The insured perils include " Men of war, enemies, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people . . . and all other perils losses and misfortunes that have or shall come to the hurt detriment and damage of the said goods and merchandises." This list of perils in the ancient form is possibly enlarged by the Institute War Clauses, cl. 1, which provides as follows : " This policy covers . . . loss of or damage to the property hereby insured caused by : (1) hostilities, warlike operations. . . . (2) mines, torpedoes, bombs or other engines of war." Lastly, there is the clause upon which most of the argument before us has turned : " This policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power." Counsel have called this the frustration clause, and I will use that name to refer to it hereafter.

As a matter of the construction of this contract, my conclusion, upon the agreed facts, is as follows. If the good were still covered by the policy, there was a constructive total loss when the German captain at Rio determined to obey the instructions of his government, hold the goods as the subject and servant of that government (thereby ceasing to hold them as the bailee of the assured), and carry them, if he could, to a German port, or sink them by scuttling his ship if intercepted by a British or allied vessel. It is possible that the moment of that constructive total loss was not when the master determined in his mind so to obey and act, but when he acted upon such determination by weighing anchor at Rio to sail, if he could, to Germany. However, this is an immaterial distinction. Hilbery J., seems to agree with me in this conclusion, for in his judgment he says : " When he [the captain] actually sailed for Germany, however, we have an overt act from which we can draw certain inferences. In thus acting, he was restraining or detaining the plaintiffs' goods. He was taking them and holding them under and to the orders of the German government. The orders of the German government and his acts done thereunder were, in the circumstances, a restraint of princes or people."

I think this is right. The result would seem to be that, if the policy was still in force, there should be a right of the assured to claim for a constructive total loss. However, the judge has decided in favour of the defendant, and he has done so because of his view as to the effect of the frustration clause. That view, I think, is entirely erroneous. The frustration clause is obviously designed to counteract the effect of *British & Foreign Marine Insurance Co., Ltd.* v. *Sanday* (*Samuel*) *& Co.* ([1915] 2 K.B. 781), in which case the insured goods were safely in the possession of the assured, but they were held entitled to recover for a constructive total loss because the insured voyage had been put an end to by an insured peril. The clause frees the underwriters " from any claim based upon loss of the insured voyage." The assured in the present case makes no claim based on such a loss. He makes a simple claim for the loss of his goods by his being deprived of them. The truth is that the argument for the defendant requires one to read the clause as meaning " free of any claim which on the facts might be based on loss of the insured voyage." I am satisfied, however, that its proper meaning must be " free of any claim which is in fact based, and can only be based, upon loss of the insured voyage."

The judge, however, has held that the claim is barred by this clause. He does so acting upon the idea that, to establish any claim on a policy upon goods, the assured must always allege a loss of the insured voyage as well as loss of, or damage to, the goods. Elementary considerations, I think, must demonstrate the error of that idea. If, on an ordinary policy on goods, without any added clause, the goods arrive at their insured destination but on the voyage have been damaged by sea perils, so that their damaged arrived value is half the sound value of like goods, the assured obviously has a claim for half the insured value. Hilbery, J., however, would apparently give him nothing, because the goods have all arrived, and he cannot assert any loss of the insured voyage. The radical error appears in the judgment of Hilbery, J., when he says : " The policy being a marine insurance policy, the subject-matter of the insurance is of the adventure of the goods on the voyage. The goods are not insured apart from the voyage. It is the voyaging with the goods or the goods upon the voyage which is the subject-matter of the contract." The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils, but, even if the goods are not so lost or damaged, there is an additional insurance against the loss of their voyage. The judge considers this to be not an additional risk, but an essential part of it in every case, whereas both of the two quotations

from Bray, J., and from Lord Reading, L.C.J., which he cites just afterwards, make it clear that this is only an additional risk. Bray, J., says, ([1915] 2 K.B. at p. 832): "It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured." Almost identical words are used by Lord Reading, L.C.J.

I think that it is unnecessary to discuss further elementary misconception as to the nature of a policy upon goods. I would only add that, if the view of the judge were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, upon the judge's reasoning, would, in every case of such deprivation which I can imagine, make that promise absolutely nugatory.

I said earlier that there was a constructive total loss of the goods at Rio, if the policy was still effective. If the insured voyage were simply from the River Plate to Shanghai or Hong Kong, *via* Durban, there would have been a deviation when the master turned back from his easterly course to make for Santos, and there would have been a change of voyage when he weighed anchor to go from Rio to Germany, or as near thereto as he could safely get. Under this policy, there is no question of either this deviation or the change of voyage discharging the underwriter (under sect. 46 or sect. 45 of the Act) from liability, for the attached clauses twice over provide that the assured shall be held covered in case of deviation or change of voyage at a premium to be arranged. The only question, therefore, is whether the defendant is entitled, on his counterclaim, to an extra premium for either the deviation or the change of voyage, or for both.

Deviation is a departure from that *via* which is expressly or impliedly specified or permitted by the policy. The *via* specified in this policy is (*a*) at and from any place in South America to Hong Kong or Shanghai, direct or indirect, and (*b*) including all liberties as per contract of affreightment. As the latter words (in the Clauses for shipments from South America) permit a variation of the specified voyage, pursuant to liberties in the contract of affreightment, without any extra premium, they appear to conflict with, but must override, the clause in the Institute War Clauses which provides: "Held covered at a premium to be arranged in case of deviation . . . by reason of the exercise of any liberty granted to the shipowner by the contract of affreightment."

The lengthy war clause attached to the bill of lading, I think, clearly gave the ship-owner liberty to go to Santos. Upon this state of the contract in the policy, I think that the going to Santos was a permitted deviation, and, therefore, excused under sect. 49 (1) (*a*) of the Act, but, quite apart from that, I think that it is also excused under sect. 49 (1) (*b*) as being "caused by circumstances beyond the control of the master"—namely, by the orders of his own government. In the result, I think that no extra premium can be claimed for the deviation. Change of voyage is defined in sect. 45 (1). This no doubt reproduces the effect of decided cases. I asked counsel if they knew of any case which answered the question: "Whose is the *voluntas* referred to in the words, voluntarily changed'? Is it that of the assured or that of the captain?" They knew of none. I do not think that I need pursue the inquiry, for, whether the words refer to the assured or to the captain, the act of leaving Rio for Germany was not a "voluntary change" from the voyage to Shanghai. It was one made under compulsion. Therefore, I think that no extra premium is due for change of voyage.

Lastly, I said that this was a constructive total loss. Normally there cannot be a claim for that type of loss unless notice of abandonment has been given. The defendant does not seek to rely on the absence of such notice, and manifestly he could not, for it is agreed that the assured knew nothing of the fate of their goods until after the vessel was scuttled off the Faroe Islands. Therefore, pursuant to sect. 62 (3), (7), of the Act, the lack of notice would be excused, even if sect. 62 (8) did not apply. In the result, I think that this appeal succeeds, and judgment should be entered for the plaintiffs for £197 1*s.* 3*d.*, with interest from the date of the writ. I understand that there is an agreement between the parties as to costs, and no order about them is desired.

In the case of the Wangoni, Hilbery, J., decided in favour of the defendant upon his view of the effect of the frustration clause. For the reasons I gave in the case of the Minden, I think that he was wrong. That which I ventured to call the elementary misconception as to the nature of a policy on goods seems to be even more disastrously asserted in this case, in the following passage in the judgment: "For the reasons which I gave in the case of the Minden, the adventure the subject-matter of the insurance being frustrated when the master sailed from Vigo, the subject-matter of the policy was gone, and the underwriters were no longer at risk. . . ." If this were correct, it becomes even more manifest that, when the assured paid his premium, he was receiving in return a policy which in no event could be worth more than the paper on which it was written. If the goods arrived at the insured destination damaged on the way by insured perils, he could recover nothing, since he could not assert any loss of "the adventure the subject-matter of the insurance." If they were lost on the voyage by reason of insured perils, he could recover nothing, by reason of the operation of the frustration clause. In no conceivable event could he ever recover a penny. The construction of a commercial contract leading to such a result seems unlikely to be correct, except in a community consisting of fools and knaves.

The principles which I discussed in the case of the Minden seem to me to apply equally in this case, and to have the same result. There is, however, one factor in this case which does not arise in the case of the Minden or in the remaining case of the Halle. That arises from the communications sent by the shipowners, through neutral agents, offering the release of the goods upon certain suggested terms. It was argued that, having regard to those communications, the assured could not assert a constructive total loss. He could assert that he was for the time being "deprived of the possession of his goods by a peril insured against," but he could not further establish, within the provisions of sect. 60 (2) (i) of the Act, that: ". . . it was unlikely that he could recover the goods, or that the cost of recovering the goods would exceed their value when recovered."

One factor in estimating the chances of such recovery, or its expense, is, I think, not to be disregarded. The assured wrote their letter of Oct. 11, 1939, to the insurance brokers, and the brokers showed it to the underwriters. The policy, of course, contained the waiver clause: "And it is especially agreed that no acts of the insurer . . . in recovering the property insured . . . shall be considered as . . . an acceptance of abandonment." The underwriters, as I cannot doubt, with all the

organisation of the corporation of Lloyds and its agents at their command, must have been at least as able to recover the goods, if that was commercially practicable, as Middows, Ltd., if not more able. It is not without significance that, on being shown the letter of Oct. 11, the underwriters merely indorsed upon it : " Act as if uninsured." This fact is not included in the agreed statement, but was told us by counsel.

I do not think that it is necessary to examine the facts and correspondence in detail. The conclusion to which I come is that it was at all material times certain that the cost of recovering these goods (of which the insured value was only £24) would exceed their value when recovered. In the result, I think that the plaintiffs were entitled to claim a constructive total loss. As to notice of abandonment, the defendant takes no point. Probably the communication to the underwriters of the letter of Oct. 11 would suffice as such notice, under sect. 62 (2) of the Act. As to extra premium for deviation or change of voyage, what I said in the case of the Minden is sufficient. In the result, I think that this appeal should be allowed, and judgment entered for the plaintiffs for 6*s.* 8*d.*, with interest from the date of the writ.

In the case of the Halle, the facts are very similar to those in the first case about the Minden, though, of course, the ports and places are different. The policy is not in precisely the same terms, but I do not think that there is any part of it which raises different considerations. The frustration clause is identical. The judge was of opinion that there was a constructive total loss when the master of the Halle sailed from Bissao. I agree with him. However, he has gone on to hold that the claim for such loss is barred by the frustration clause, for the reasons expounded by him in the case of the Minden. In my judgment in the case of the Minden and in that of the Wangoni, I have explained why I cannot agree with this part of his judgment. The absence of notice of abandonment was not relied upon by the defendant. As to extra premium for deviation or change of voyage, I think that what I said in the case of the Minden applies here also. In the result, I think that this appeal should also be allowed and judgment entered for the plaintiffs for £3 7*s.* 9*d.*, with interest from the date of the writ.

Luxmoore, L.J.—I have had the opportunity of reading and considering the judgments which have just been read by Scott and MacKinnon, L.JJ., and I find myself in complete agreement with the conclusions at which they have arrived and the reasons for those decisions. In the circumstances, I do not think that any useful purpose would be served if I were to deliver a separate judgment. I therefore content myself with saying that I agree that the three appeals should be allowed for the reasons stated by Scott and MacKinnon, L.JJ.

Appeals allowed. No order as to costs. Leave to appeal to the House of Lords.

Solicitors for the appellants in the first appeal, *Slaughter & May.*

Solicitors for the appellants in the second and third appeals, *William A. Crump & Son.*

Solicitors for all the respondents, *Ince, Roscoe, Wilson & Glover.*