1949

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HOUSE OF LORDS

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

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"transaction which forms the subject of the indictment and "that any departure from these matters should be strictly "confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that though they have been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended, they of course refrain from expressing any opinion as to the propriety of the actual decision in *Sims's* case (1). It is unnecessary, and therefore undesirable, that they should do so.

Solicitors for appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *Burchells.*

(1) [1946] K. B. 531.

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May 31;
June 1, 3, 4, 7, 8;
Dec. 9.

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MONARCH STEAMSHIP CO., LIMITED . APPELLANTS;

AND

KARLSHAMNS OLJEFABRIKER (A/B) . RESPONDENTS.

Shipping—Bill of lading—Unseaworthiness—Delay—Nominated discharging port not reached—Outbreak of war—Discharge at another port under Admiralty orders—Cost of forwarding to nominated discharging port—Damages for breach of bill of lading contract—Remoteness of damage.

A British vessel was chartered in April, 1939, by a British company and in May bills of lading signed on behalf of the owners were issued to the charterers in respect of a cargo of 8,200 tons of soya beans shipped in Manchuria in accordance with the terms of the charterparty setting out a range of North Sea and Baltic ports. In June, Karlshamn in Sweden was nominated by the charterers as the sole port of discharge but, owing to delay caused by the vessel's unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany in September, when the British Admiralty prohibited her from proceeding thither and ordered the cargo to be discharged at Glasgow which she reached on October 21. A Swedish company, who in April had purchased from the charterers 8,200 tons of soya beans to be shipped on board the vessel, became indorsees of the bills of lading on October 23; they required the beans

* *Present:* LORD PORTER, LORD WRIGHT, LORD UTHWATT, LORD DU PARCQ and LORD MORTON OF HENRYTON.

for manufacture and for replacement of beans borrowed from a Swedish Government pool and incurred expense in forwarding them, in neutral ships chartered for the purpose, to Karlshamn where no soya beans were then obtainable. A war risks clause in the charterparty exonerated the owners of the vessel in the event of compliance with any orders given by the government of the nation under whose flag she sailed, as to destination, delivery or otherwise.

Held that the effective cause which brought the Admiralty orders into operation was the delay in the voyage caused by the vessel's unseaworthiness and thus the delay in carrying out the contract of carriage was attributable to the owners' default, because, in view of the international situation, they should have foreseen that war might break out and cause loss or diversion of the vessel.

Held further, that the indorsees of the bills of lading were entitled to recover from the owners the costs of transhipment which were the direct and natural consequence of the owners' failure to deliver at Karlshamn. Neither the shippers nor the indorsees were bound to accept the cargo at some place where they did not want it and the only way of placing themselves in the same position as if the contract had been performed was to engage transport to carry it to Karlshamn.

Decision of the First Division of the Court of Session (sub nom. *Karlshamns Oljefabriker (A/B)* v. *Monarch Steamship Co., Ld.*) 1947 S. C. 179 affirmed.

APPEAL from the First Division of the Court of Session.

The facts, summarized from their Lordships' opinions, were as follows: The respondents (pursuers), hereinafter called "the purchasers," were a Swedish company carrying on a manufacturing business at Norrkoping, Sweden. The appellants (defenders) hereinafter called "the shipowners," were a limited company, the registered office being at Glasgow, and owners of the British steamship *British Monarch*. By a contract dated London, April 21, 1939, the purchasers, through their London agents, the Scandinavian Co-operative Wholesale Society purchased from Mitsui & Co., Ld., described as of London, hereinafter called "the charterers," under a c.i.f. contract, 8,200 tons of Manchurian soya beans "to be shipped "from . . . . Rashin . . . . per S.S. *British Monarch*." The price was 8*l*. 6*s*. 3*d*. a ton (or about 68,828*l*.). Presumably in anticipation of this contract, the charterers, by a voyage charterparty dated April 4, 1939, wherein they were described as "of London, merchants," chartered the shipowners' vessel. The charterparty provided "that the said vessel "shall, after completion of present voyage . . . . proceed

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"to Rashin . . . . and . . . . being tight, staunch, and "strong and in every way fitted for the voyage, shall . . . . "load . . . . a full and complete cargo of soya beans . . . . "not exceeding 8,610 gross tons . . . . . and . . . . shall ". . . . proceed with all possible speed under steam, via "Suez Canal, to Rotterdam, Hamburg, Hull, Esbjerg, Aarhus, "Copenhagen, Karlshamn, Stettin, one or two ports at "charterers' option." The charterparty contained the usual exceptions (but no exception of unseaworthiness) and there was annexed to it a war risks clause: "(1.) No bills of "lading to be signed for any blockaded port and if the "port of discharge be declared blockaded after bills of "lading have been signed, or if the port to which the ship "has been ordered to discharge either on signing bills of "lading or thereafter be one to which the ship is or shall "be prohibited from going by the government of the nation "under whose flag the ship sails or by any other government, "the owner shall discharge the cargo at any other port covered "by this charterparty as ordered by the charterers (provided "such other port is not a blockaded port as above-mentioned) "and shall be entitled to freight as if the ship had discharged "at the port or ports of discharge to which she was originally "ordered. (2.) 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 person "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 "or in compliance with any such orders or directions 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." With regard to this clause, it was stated in evidence by George Sheriff, assistant manager to the shipowners' chartering agents, that in April, 1939, "the international situation was considerably over-"clouded. The possibility of war was in the minds of my "company. There was a special war risks clause added to the "charter in a slip attached." The vessel sailed to Rashin in Manchuria in fulfilment of the charter and there loaded from

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Mitsui Busson Kaisha, Ld. of Dairen, as agents for the charterers, a full and complete cargo of soya beans. Sixteen bills of lading were signed at Rashin by the master in respect of the cargo, all of them dated May 6, 1939. The total quantity in the aggregate under the bills of lading was about 8,200 tons. The bills of lading covered the same range of discharging ports as the range provided for in the charterparty. They also contained the usual exceptions and a full negligence clause. They further provided that "all the above exceptions are "conditional on the vessel being seaworthy when she sails "on the voyage, but any latent defects in the hull and/or "machinery shall not be considered unseaworthiness, provided "the same do not result from want of due diligence of the "owners, or any of them, or of the ship's husband or manager." The beans were to be delivered to the charterers or their assigns, "they paying freight at the rate stipulated in charterparty "dated London, April 4, 1939, and all other terms, conditions "and exceptions to be as per said charterparty." The vessel sailed on May 12, 1939, and Karlshamn was nominated on June 7, 1939, as the sole port of discharge. The voyage should normally have taken about sixty days and the vessel should have been in European waters by about the middle of July but her speed was slow owing to the defective condition of the boilers. The evidence as to the cause of this condition was as follows: Before proceeding to Rashin the vessel had been on time charter to Yamashita Kisen Kaisha of Kobe under a charterparty dated October 11, 1938. By the terms of this document the charterers had to supply the bunker coal required and it appeared that the coal which they had furnished was of bad quality and affected the tubes of the vessel's boilers causing deterioration. The shipowners were aware that bad coal had been used and that there had been much trouble with the boiler tubes but they did not know that the evaporator and the main condenser were out of order. On March 26, 1939, the master had reported that he believed "there is little or nothing wrong with the steamer and that "it is the coal that is at fault" and that a surveyor at Singapore who had examined everything in the engine-room and stoke-hold could find nothing wrong. Accordingly, the shipowners hoped that a fresh supply of coal would prove sufficiently efficient. The Japanese coal supplied for the voyage from Rashin, with which the vessel was mainly bunkered, was likewise of poor quality but nothing better was procurable.

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Owing to the condition of the boilers, trouble occurred more than once, reducing speed from 9½ knots to about 5 knots, and, for her safety, the vessel was diverted to Colombo for repairs, in particular to choked and leaking boiler tubes. She arrived on June 29 and left on July 18. She reached Aden on August 4 and after completion of further boiler repairs left on August 16. She reached Port Said on August 30 and was again detained for further repairs until September 24. Meanwhile war between Great Britain and Germany had broken out on September 3. In consequence of the war the British Admiralty prohibited the vessel from proceeding to Karlshamn and ordered her to proceed to and discharge at Glasgow. On the last lap of the voyage her speed was not unreasonably slow and she reached Glasgow on October 21. On arrival at Glasgow the boilers were surveyed; renewal throughout was found necessary and was in fact carried out. The charterers paid the freight on October 23. On the same day the purchasers took up and paid for the bills of lading and thereby became the indorsees. The cargo was accordingly discharged and delivery was made to them. It was not until August 14, when the shipowners were informed by the purchasers' agents that they were the receivers of the goods, that they had learnt that anyone but the charterers was interested in them. The purchasers required the beans for their business intending to use them for the purposes of their factory. They had expected them to arrive at Karlshamn before the end of July and no other soya beans were procurable there. Accordingly, being short of supplies, they were obliged, for lack of them, to invoke the help of the Swedish Government, which gave them some beans on loan on the terms of being repaid an equivalent quantity on the vessel's arrival. The purchasers, therefore, now required some of the beans for this purpose and the rest to keep their factory at work. Accordingly, although the price at which the British Government would have requisitioned at Glasgow was 8*l.* 17*s.* 6*d.* a ton and it was not proved that more could have been obtained in the open market at Karlshamn, the purchasers, having been granted permission by the British Government, through the Ministry of Economic Warfare and the Ministry of Food, chartered three smaller Swedish vessels to proceed with the beans to Karlshamn, where they were eventually delivered. The cost of transhipment was 22,134*l.* 7*s.* 4*d.* and it was admitted that it could not have been arranged more economically.

The purchasers raised an action against the shipowners to recover the sum of 22,134*l.* 7*s.* 4*d.*, as the loss naturally and directly resulting from the shipowners' breach of contract in respect of unseaworthiness. The deviations necessitated by the unseaworthiness alleged were not separately founded on. There was a considerable body of evidence and the proof lasted from November 20, 1945, to February 7, 1946. The Lord Ordinary (Lord Sorn) found that the vessel was unseaworthy on sailing from Rashin and by two interlocutors dated respectively May 6 and 14, 1946, decerned against the shipowners for payment of 21,634*l.* 7*s.* 8*d.* and found them liable in expenses. (One item of 500*l.* in the claim of the purchasers was disallowed by him as irrecoverable.) He held that notwithstanding that no breach of the bill of lading contract was committed by the shipowners in delivering at Glasgow, yet they remained liable for such loss to the purchasers as resulted from the unseaworthiness of the vessel. He further held that it should have been in the contemplation of the shipowners that a protracted voyage would lead to diversion on account of war and a costly transhipment to Sweden and that in the special circumstances of this case the cost of transhipment was not too remote to be recovered by the purchasers as damages for breach of the warranty of seaworthiness. Before the Inner House the shipowners admitted that the vessel was unseaworthy but claimed that only nominal damages were recoverable but the First Division of the Court of Session adhered to the interlocutors of the Lord Ordinary. The shipowners appealed to the House of Lords.

Sir William McNair K.C. and *Eustace Roskill* for the appellants (the shipowners). The purchasers are not entitled to recover the sum they claim or any sum or, if any damages are payable, they can be merely nominal. The contract was never an unqualified contract to go to Karlshamn. It provided for alternatives in certain events and the vessel was only obliged to go there if the British Government permitted. Delivery there was in fact prohibited by Admiralty orders, which the shipowners were bound to obey, and became illegal; in accordance with those orders, the vessel delivered the cargo at Glasgow. This was a proper delivery under the war risks clause incorporated in the bills of lading and the shipowners were, under the contract, entitled to comply. Performance in accordance with the agreed terms cannot be a breach of con-

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tract. The unseaworthiness does not displace the original contract nor disentitle the shipowners from relying on the terms of the contract as regulating the mode of performance. It was the initial unseaworthiness that was the reason for the deviation and a deviation to remedy unseaworthiness is not unjustifiable unless the vessel's condition was known to the shipowners before the sailing. The purchasers have not shown that there was such knowledge and the shipowners are not debarred by the mere fact of unseaworthiness from relying on the terms of the contract, since no physical loss resulted. On this point there are no authorities against the shipowners' contentions. See *The Europa* (1); *Kish* v. *Charles Taylor, Sons & Co.* (2), and Scrutton on Charterparties (11th ed.), p. 430; (15th ed.), p. 434. Moreover, it was not the unseaworthiness that caused the change of destination from Karlshamn to Glasgow, but the Admiralty orders, which may be regarded as coming within the exception restraint of princes. After the vessel had been repaired at Port Said her physical state would not have prevented her from reaching Karlshamn and unseaworthiness was no longer an active element in preventing her from doing so. The Admiralty orders were an independent executive act act applying to all ships, whether seaworthy or not. The unseaworthiness was only an indirect cause and therefore was causally irrelevant: see *The Malcolm Baxter Jr.* (3). The principles on which that case was decided are accurately stated and the facts are indistinguishable. *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (4) is distinguishable because in that case there were two concurrent physical causes of the loss, while, in the present case, unseaworthiness had ceased to operate and the Admiralty orders were the sole reason for the interruption of the voyage. Even on the hypothesis that the failure to deliver at Karlshamn was a legal consequence of the initial unseaworthiness the cost of the transhipment cannot be recovered as damages for that unseaworthiness. The breach of contract alleged is not failure to deliver at Karlshamn but initial unseaworthiness from which it is claimed the transhipment costs flow. But these costs did not flow naturally and directly from that unseaworthiness; they flowed from special circumstances peculiar to the purchasers which were not communicated to the

(1) [1908] P. 84.
(2) [1912] A. C. 604.
(3) (1928) 31 Ll. L. Rep. 200; 277 U. S. 323.
(4) [1940] A. C. 997.

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shipowners. The shipowners never accepted the contract on the basis of those special circumstances or on terms that they should be liable for damages of this sort, for these costs were only incurred by reason of the purchasers' decision to tranship the beans to keep their factory going and to replace those lent them from the Swedish Government pool. There was no evidence as to the extent of the purchasers' obligations to the Swedish Government or the penalties, if any, to which they would be exposed if they failed to replace the beans. The law as to the measure of damages is accurately stated in Anson on the Law of Contract (19th ed.), p. 361: see also *Liesbosch (Owners)* v. *Edison (Owners)* (1) where Lord Wright commented on *In re an Arbitration between Polemis and Furness Withy & Co., Ld.* (2). On the basis most favourable to the purchasers, the transhipment costs were incurred to minimize loss by delay. But this form of loss is irrecoverable, for damages for delay in delivery are not awarded in the case of carriage of goods by sea: see *The Parana* (3) and *Dunn* v. *Bucknall Bros.* (4). *Stroms Bruks Aktie Bolog* v. *Hutchinson* (5) is distinguishable. If this form of loss is itself irrecoverable, the alternative expenditure by way of mitigation of loss is also irrecoverable whether by the purchasers or by Mitsui. To award such damages would involve extraordinary and uncontemplated hardship on the shipowners. *Horne* v. *Midland Ry. Co.* (6) applies here; it is still the leading case on this subject and has never been adversely commented on. See also *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Co., Ld.* v. *Nettleship* (7). *James Finlay & Co., Ld.* v. *Kwick Hoo Tong Handel Maatschappji* (8) is distinguishable and deals with a different problem. The damages claimed do not come within the rules laid down in *Hadley* v. *Baxendale* (9), for neither of the two limbs of the proposition there propounded applies. (*a*) The damages did not arise "naturally," since several disconnected events had to occur to produce the result that followed: the outbreak of war and its consequences, diversion to this country, release of the goods by the Ministry of Food, the

(1) [1933] A. C. 449, 461.
(2) [1921] 3 K. B. 560.
(3) (1877) 2 P. D. 118.
(4) [1902] 2 K. B. 614.
(5) [1905] A. C. 515.
(6) (1872) L. R. 7 C. P. 583; (1873) L. R. 8 C. P. 131.
(7) (1868) L. R. 3 C. P. 499.
(8) [1928] 2 K. B. 604; [1929] 1 K. B. 400.
(9) (1854) 9 Ex. 341, 354.

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purchasers' decision to tranship them rather than sell them in Glasgow at a price above the contract price, a decision dictated by three factors (i.) the fact that the purchasers were manufacturers ; (ii.) the circumstance that they were short of beans, and (iii.) their having borrowed beans from the Swedish Government and being pledged to replace them. Each of these events had to occur in order to produce the result. The transhipment costs were not therefore the natural result of the unseaworthiness ; they did arise, not in the ordinary way, but out of special facts peculiar to the purchasers not communicated to the shipowners and they were not incurred in mitigation of a proved recoverable loss. (*b*) The consequences of the breach were not in the contemplation of both parties at the time of the contract, the charterparty of April 4, 1939. The contemplation of the parties must be fixed at the time the contract was made. In it, Mitsui, the charterers, were described as " of London, merchants." The commodity was beans, and ordinary articles of commerce. The charterparty named a wide range of ports, including Hull in the United Kingdom. It cannot be inferred, however, that a diversion from Sweden to the United Kingdom was contemplated as probable. (iii.) The further observations in *Hadley* v. *Baxendale* (1) do not apply because no notion of the special facts out of which the damages arose was given to the shipowners and a fortiori there was no agreement to accept the contract on the basis of those special facts. Moreover, the contract was made with the charterers and continued to be with them on the terms of the charterparty until the bills of lading were transferred to the purchasers two days after the vessel reached Glasgow. The shipowners, when they entered into the contract knew only the charterers. If the vessel failed to deliver at the nominated port the sole damage sustained by the charterers was such sum as they lost, which would normally be measured by the difference between the price obtainable for the goods at the named port and that receivable at the place where they were actually delivered. Here there was no loss because the price the British Government would have paid at Glasgow was more than the sale price and it was not established that more could have been obtained in the open market at Karlshamn. It was the purchasers' duty to minimize the damage or nullify it by selling elsewhere for the charterers could not increase the damages payable by transferring the bills of lading to the purchasers after the vessel

(1) 9 Ex. 341, 355.

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reached Glasgow. After the passing of the Bills of Lading Act, 1855, the holders of a bill of lading could transfer any right which they themselves possessed under it, but nothing more. The rights of an indorsee of a bill of lading to sue the shipowner are purely statutory, for before the Act the property in the goods could be transferred to them but not the benefit of the contract of carriage. Now under s. 1 of the Act the indorsee, takes over the right of suit of the original shipper, but that means no more than the rights as at the date of indorsement, viz., the indorser's rights, which are not to be ascertained by reference to any facts peculiar to the indorsee. The rights are not to be ascertained retrospectively as at the date of shipment, for, as a pure matter of construction, that would involve reading into the Act words which are not there so that s. 1 would contain the phrase "as if the contract contained in the "bill of lading had *at the time of shipment* been made with "himself," whereas the words in italics are not there. *Hain Steamship Co., Ld.* v. *Tate & Lyle, Ld.* (1) did not deal with the present question. As to the relevant principles see Scrutton on Charterparties (15th ed.), pp. 52, 54, 217, note (*x*), and 249 note (*b*) (see also 11th ed., p. 56). Applying these principles to the present case, as the charterers could recover no damages, the purchasers, their assignees, could recover none either. The rights of the parties were to be ascertained by reference to the position on October 23, 1939. Whichever way the matter be regarded the purchasers cannot succeed. If they take the bills of lading subject to the position at the time of the indorsement, then under the contract the proper destination is Glasgow If, on the other hand, they are deemed to be parties to the contract made at the date of shipment, even in the hands of the charterers this contract has become a contract for delivery at Glasgow. Moreover, the purchasers could not even obtain damages against the charterers who had fulfilled their c.i.f. contract by furnishing valid bills of lading, the contractual insurance policies and the appropriate invoices. Further, the contract was frustrated and accordingly, the claim for damages must fail: see *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-American Petroleum Products Co., Ld.* (2); *James Scott & Sons, Ld.* v. *Del Sel* (3) and *Heyman* v. *Darwins, Ld.* (4).

Eustace Roskill following. Assuming that the indorsed bills of lading had a retrospective effect, nevertheless till October 23,

(1) (1936) 155 L. T. 177.
(2) [1916] 2 A. C. 397, 406.
(3) 1923 S. C. (H. L.) 37.
(4) [1942] A. C. 356.

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1939, they operated as receipts and no more. The contract of carriage was the voyage charterparty made with the charterers on April 4, 1939, and it did not contain an unconditional obligation to go to any of the range of ports named in it, nor was there an unconditional obligation after June 7 when Karlshamn was nominated as the port of discharge. The obligation was qualified by the shipowners being accorded different rights, including an alternative mode of performance, on the happening of any of the conditions subsequent for which the charterparty made provision. The bills of lading, even when operating only as receipts, incorporated all the terms of the charterparty. The condition subsequent relating to government orders operated before October 23, 1939, while the only contract was the charterparty. By then the charterparty had therefore taken effect as a contract of carriage to Glasgow and the charterers' only rights were delivery in Glasgow and nominal damages for unseaworthiness. The bills of lading incorporated all the terms of the charterparty and were subject to the same conditions subsequent. This view of the matter reconciles the obligations as to place of delivery and avoids imposing on the shipowners in that respect greater obligations than those imposed by the charterparty ; it does not give the indorsees of the bills of lading (the purchasers) greater rights against the shipowners than the indorsers (the charterers) had, and, therefore, it is consistent with the Bills of Lading Act, 1855, s. 1. The purchasers had the right to have the goods delivered at Glasgow. All pre-existing rights of the charterers were transferred to them by reason of the operation of the Act but they did not get any rights enabling them to maintain this action because they cannot complain of non-delivery at Karlshamn and their claim is not one which the charterers could have advanced.

L. Hill Watson and *George Reid* (both of the Scottish Bar) for the respondents (the purchasers). The shipowners' undertaking was to carry the cargo to one of a range of ports at the option of the charterers or of the persons to whom they might indorse the bills of lading. The option was exercised in favour of Karlshamn and at all material times this was a contract to deliver there. The shipowners should have delivered the cargo within a reasonable time and they failed to do so because of their breach of warranty of the vessel's seaworthiness. From her previous bad performance they knew when she left Rashin that she was not seaworthy. If the voyage had not been unduly

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long she would have reached Karlshamn long before war broke out and it would not have been necessary for the purchasers to hire additional ships, as they were entitled to do, to carry out the contract themselves. They were entitled to charge the shipowners with this additional expense and the charterers could have advanced a like claim. Being already in breach of the warranty of seaworthiness, as the result of which the goods did not reach Karlshamn before war broke out, the shipowners are not entitled to invoke the war risks clause in the charterparty and the bills of lading, a clause which is really an elaboration of the restraint of princes clause. They cannot rely on this clause because they have failed to use reasonable care and diligence: see *Thomas Wilson, Sons & Co.* v. *Xantho (Cargo Owners)* (1) and Scrutton on Charterparties (15th ed.), pp. 226, seq. All the exceptions are subject to the vessel's seaworthiness. Owing solely to the unseaworthiness the vessel was not at Karlshamn until after war had broken out and, being then in breach of their contract the shipowners were not excused by the war risks clause or relieved from liability for the costs of the consequent transhipment: see *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ld.* (2). The shipowners realized the danger of an outbreak of war, as shown by the inclusion of the war risks clause, and they cannot invoke that clause since it was brought into operation as a result of their breach of contract: see *Steel* v. *State Line Steamship Co.* (3). The delay resulting from the breach of contract to provide a seaworthy ship entailed consequences for which they are liable, whether or not they could reasonably have anticipated them: see *The Wilhelm* (4). The unseaworthiness was the direct cause of the damage and *The Malcolm Baxter, Jr.* (5) can be distinguished on the facts. Though, if the ship had reached Karlshamn in July, there could have been no claim against the shipowners in respect of unseaworthiness, because there would have been no loss, yet but for the unseaworthiness there would have been no damage now, even though another cause, Admiralty direction, was also present. The case of *Smith Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (6) shows that if there was unseaworthiness the mere fact that another cause concurred did not prevent an action

(1) (1887) 12 App. Cas. 503, 515.
(2) [1924] 1 K. B. 575.
(3) (1877) 3 App. Cas. 72.
(4) (1866) 14 L. T. 636.
(5) 31 Ll. L. Rep. 200; 277 U. S. 323.
(6) [1940] A. C. 997.

from lying, although on the concurring cause alone there would have been no cause of action. The principle of this decision is not limited to cases where there is physical damage: see *The Glenfruin* (1). The purchasers as indorsees can bring this action in respect of the loss sustained, by virtue of s. 1 of the Bills of Lading Act, 1855, as if the contract in the bills of lading had at the time of shipment been made with themselves: see Scrutton on Charterparties (15th ed.), pp. 52 and 189-90. The shipowners were informed on August 16, 1939, by the purchasers' agents that they were the receivers of the goods. As to damages, one must treat the position here as reasonable commercial men would do. The normal procedure when goods are not delivered at the place agreed is to tranship them and take them to the proper place but if similar goods can be bought at the place of destination for less, one should not tranship the cargo. The same principle applies if one can purchase such goods at some comparatively nearby place. When, however, shipowners contract to carry goods from A. to B., they must assume that the goods are wanted at B., and in a case where the purchasers tranship them in order to get them there it is for the shipowners to show that the transhipment is unreasonable. Here, as reasonable business men, the purchasers had no other source of beans. They are not claiming damages for a fall in the market price but for failure to deliver at the proper place. The value of the beans is not to be measured by the Glasgow price, for the value of the cargo should not be taken at a place where it is not required to be delivered. In measuring damages of this nature one is in the realm of fact. The principle underlying the whole object of damages for breach of contract is to place the pursuers in the same position as if the contract had been fulfilled, so far as money can do it: see *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (2) and *Ströms Bruks Aktie Bolog* v. *Hutchinson* (3).

Sir William McNair K.C. in reply. In this case there are striking similarities to *The Malcolm Baxter, Jr.* (4) the decision in which purports to be based on English cases. If it had been decided in the House of Lords it would be binding in this case on the facts. It is a decision of the Supreme Court of the United States and it is proper for this House to follow it unless it is plainly wrong because the courts of the world follow the

(1) (1885) 10 P. D. 103.
(2) (1883) 10 R. 824.
(3) [1905] A. C. 515.
(4) 31 Ll. L. Rep. 200; 277 U. S. 323.

decisions of the Supreme Court in shipping matters and it is important that the rulings of the supreme tribunals in all countries should be the same; otherwise a plaintiff could choose the jurisdiction of which the law suited him best. As to unseaworthiness, this is admitted but it is denied that the shipowners had actual knowledge of it. The law relating to the undertaking of seaworthiness is set out in Scrutton on Charter-parties (15th ed.), p. 93, seq., art. 29. The purchasers' main case against the shipowners was that they were under a contractual duty to deliver at Karlshamn about July. This is a wrong statement of the contractual obligation. The obligation was to provide a seaworthy ship and to proceed with reasonable dispatch and without deviation, but there is a difference between saying that if the ship had been seaworthy and had proceeded with reasonable dispatch she would have reached Karlshamn in July and saying that there was a contractual obligation to reach Karlshamn in July. The obligation as regards proceeding with reasonable dispatch is qualified by *Kish* v. *Charles Taylor, Sons & Co.* (1) and the obligation to go to Karlshamn was subject to the terms of the bills of lading. In this case the war risks clause was not displaced because there was no deviation as distinct from the unseaworthiness. There was no breach of the obligation to proceed without delay because this was a case where it was necessary to delay to remedy unseaworthiness. If this be regarded as a claim for damages for unseaworthiness, that was not the cause of the stopping of the voyage at Glasgow any more than in a case of delay due to unseaworthiness the fact that the ship is subsequently torpedoed can be said to be the result of the unseaworthiness. The obligation to proceed with dispatch and the obligation to proceed without deviation are different facets of the same obligation. There is no distinction between deviation in time (viz., going too slowly) and deviation in place. In *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2) the House of Lords was dealing merely with the physical causes of a physical disaster. Physical unseaworthiness existed up to the moment of that disaster and was a concurrent cause with another physical cause. No new law was laid down in that case which is distinguishable from the present. On the question of damages the purchasers' proposition is unsound. The normal measure of damages should apply, viz., what they would have got for the goods at

(1) [1912] A. C. 604. (2) [1940] A. C. 997.

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the port of destination less what they would have got at the port where the goods were in fact delivered; that would put them in the same position, so far as money can do so, as if there had been a proper delivery. The purchasers cannot recover more than the charterers could have done and the maximum they could have recovered would have been the difference in value just stated, because they were buying for re-sale. There was no evidence that it would have been fair and reasonable for them as merchants to spend 21,634*l.* 7*s.* 4*d.* in conveying the beans from Glasgow to some other port, nor is there any evidence that their value was greater at Karlshamn.

THE HOUSE took time for consideration.

Dec. 9. LORD PORTER. My Lords, under the terms of the charterparty the appellants were under contract to supply a seaworthy ship and this they failed to do. According to the finding of the Lord Ordinary, she was unseaworthy on sailing from Rashin and the appellants have accepted this finding and argued their case on that footing. It was suggested to your Lordships that not only was the vessel unseaworthy on sailing but that the owners knew of that unseaworthiness. I doubt whether this contention was open to the pursuers on the pleadings and there is no sign of its consideration in the opinion of the Lord Ordinary or the Inner House. But, even if it were open, I do not think it has been established. It is true that the appellants knew that there had been trouble with the boiler tubes and that their time charterers had been using bad coal, but they had been informed that the vessel had been surveyed and nothing found wrong and they always hoped that a fresh supply of coal would prove efficient or anyhow efficient enough. Moreover, actual knowledge of unseaworthiness must be shown, and mere imprudence or carelessness is not knowledge. The owners must therefore be absolved from the guilt of sending their ship to sea in an unseaworthy state with knowledge of that unseaworthiness. Nevertheless, the defects were there and entailed a considerable prolongation of the voyage.

The cost of transhipment was 22,134*l.* 7*s.* 4*d.*, the sum sued for in the action, and, whatever the rights of the parties may be, it is not contended that this sum was an unreasonable amount to pay for the carriage on to Sweden at that time and in war conditions. This sum the respondents say they were entitled to recover as damages for the appellants' breach of

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contract. The argument runs as follows: the undertaking was to carry the beans to one of a range of ports at the option of Mitsui or of those to whom they transferred the bills of lading; the option was exercised in favour of Karlshamn; the appellants failed to carry out their obligation and accordingly the respondents had the right to fulfil the contract themselves and to charge the appellants with the cost of doing so; the appellants should have delivered the beans at Karlshamn within a reasonable time, they failed to do so because of their breach of contract to provide a seaworthy ship, and the additional expense of carrying out the contract must therefore fall on them. If they had not taken so unduly long a time the *British Monarch* would have arrived at Karlshamn long before the outbreak of war and the hire of the three additional ships would have been unnecessary.

In opposition to this argument the appellants maintain that the respondents are not entitled to recover this or any sum. They rely in the first place upon the provisions of the charterparty and the bills of lading which incorporate its terms, and in particular upon the war clause attached to it. Indeed, without the war clause they contend that they fulfilled their obligations, since after the outbreak of war the ship was under a duty to obey the orders of the British Admiralty and it became illegal for the owners to proceed to or to discharge at any port other than Glasgow. They accept the finding that the vessel was unseaworthy and deviated to Colombo, but say that the reason for the deviation was the initial unseaworthiness, and that deviation to remedy unseaworthiness is not unjustifiable unless the state of the vessel was known to her owners before she sailed. Such knowledge, they contend, has not been established and the mere existence of unseaworthiness does not prevent a shipowner from relying upon the terms of the charterparty or bill of lading unless physical loss is caused by the unseaworthiness itself. It is claimed that in the present case loss was not so occasioned and consequently the terms and exceptions contained in the documents remained in force until the termination of the voyage at Glasgow, which, in the events which happened and in accordance with the terms of the war clause, became her contractual port of discharge, and, indeed, the only port to which she could legally go. For this proposition reliance is placed upon *The Europa* (1) and *Kish* v. *Charles Taylor, Sons & Co.* (2).

(1) [1908] P. 84.

(2) [1912] A. C. 604.

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Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing. As indicated above, no such knowledge has been brought home to the appellants and therefore they continue to be entitled to rely upon the war clause. Nevertheless, it has to be considered whether the delay due to initial unseaworthiness was not the factor which brought that clause into operation, and so caused the diversion of the ship to Glasgow and her failure to reach Karlshamn. On behalf of the appellants, it is said that the unseaworthiness was not the cause of the change of destination. The immediate cause was the order of the British Admiralty. After repairs had been effected at Port Said there was nothing in the physical condition of the ship to prevent her from proceeding to or reaching Karlshamn. Admiralty orders, on this argument, were an independent executive act applying to all ships whether seaworthy or not and this vessel was never under an absolute obligation to go to Karlshamn; she need only go there provided the British Government permitted. As they did not, she must obey and go to Glasgow.

It cannot, of course, be denied that those orders were binding upon her, but that concession does not end the matter; it has still to be determined whether the effective cause which necessitated those orders and made obedience compulsory was not the delay in the voyage which was brought about by her unseaworthiness on sailing from Rashin. The appellants say that this was only an indirect cause, and therefore historically true but causally irrelevant, and in support of this part of their argument rely upon the principles enunciated in the American case of *The Malcolm Baxter, Jr.* (1). The unseaworthiness, they say, had come to an end or at any rate was not, after Port Said, an active element in preventing the ship reaching Karlshamn. The case was not like *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2), where there were two concurrent physical causes of the loss. Here the unseaworthiness had ceased to operate and the sole reason preventing the continuance of the voyage to Sweden was the control of the British Government. Speaking for

(1) (1927) 28 Ll. L. Rep. 290; (1928) 31 Ll. L. Rep. 200; 277 U. S. 323.

(2) [1940] A. C. 997.

myself, I am unable to distinguish the principles adopted in the American case from those which must be applied in this, save on one matter, viz.: whether before the ship sailed her diversion by government orders could reasonably have been foreseen. If the American case is applicable and rightly decided the appellants should, I think, succeed. It is therefore necessary to analyse that decision and consider whether it is right and whether it correctly represents the law of England.

The facts are, indeed, very much like those existing in the present case. The *Malcolm Baxter*, which was a sailing vessel, was unseaworthy on sailing but not unseaworthy to the knowlege of her owners. The result of her unseaworthiness was, however, that she had to deviate in order to effect repairs at Havana, and whilst those repairs were being effected the United States Government levied an embargo which prevented any sailing vessel from clearing for a voyage to Bordeaux, which was her port of destination, or for any port within the war zone. The vessel thereupon sailed for New York and delivered her cargo there, relying on the exception of the "restraint of "princes, rulers, and people" contained in the bills of lading and also on the illegality of proceeding on her original voyage. It was argued in that, as in this, case that the unseaworthiness was known to the owners, or at any rate that they were negligent in failing to discover it before she sailed. Knowledge by the owners was negatived by the court and negligence without knowledge was held, as it would be held in this country, not to be material as an element in depriving the owners of the protection of the terms of the bills of lading. As to the delay caused by the embargo, it was held that the bill of lading holders could not recover, because the change of destination was within the exceptions of the bills of lading and because, exception or no exception, whilst the embargo continued it would have been illegal to proceed with the voyage. It was urged, however, that it was the delay caused by her unseaworthiness which brought the vessel within the excepted peril. This argument was rejected on the ground that the delay was the occasion and not the cause of the operation of the embargo. It was, so the court held, no more its cause than delay which caused goods to be brought within the path of a flood would be the cause of their destruction. To one other circumstance existing in that case attention must be called, viz.: the statement in the judgment of Stone J., where he

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says (1): "There is no finding, nor is it suggested, that at the "time when the contract of affreightment was entered into, "or when the vessel broke ground, the embargo could "reasonably have been foreseen, or that there were any special "circumstances charging petitioners with the knowledge or "expectation that the unseaworthiness or consequent delay "would bring the vessel within its operation."

My Lords, in my view the overriding fact which led to the decision in that case is to be found in the words just quoted. Whether the same result would have been arrived at if there had been reason for the owners to apprehend a state of affairs in which delay would bring the war clause into operation is left undetermined. It was upon this differentiation of fact that Lord President Normand founded his decision in the present case. In his view the appellants should reasonably have foreseen the likelihood of the imposition of an embargo. In forming this opinion he relied upon the insertion of the war clause in the charterparty, coupled with the evidence of Mr. George Sheriff, assistant manager to the appellants' chartering agents, who stated that, at the date of the charter, the international situation was considerably overclouded and the possibility of war was in the minds of his company. My Lords, both these facts are true, but it still has to be determined whether they are enough to establish that at that time the embargo could reasonably have been foreseen. It is true that, when the bills of lading were issued, Czechoslovakia had been seized and an undertaking given to protect Poland, but no treaty had yet been made between Germany and Russia. These circumstances have to be balanced one against the other, and I am not sure that, without the advantage of your Lordships' opinions, I should have come to the conclusion that a shipowner ought to have foreseen that within the course of the contemplated voyage, if protracted, a war would be likely to occur or, if it did, that the carriage of goods to the stipulated range of ports, and in particular to Karlshamn, would be prohibited. But your Lordships think that such an event should have been anticipated and I am not prepared to differ. On this finding, whilst in my opinion *The Malcolm Baxter Jr.* (2) was rightly decided according to the law of this country, it can be distinguished and its principles do not govern the case which your Lordships are considering. In reaching this

(1) 31 Ll. L. Rep. 200, 202; 277 U. S. 323, 334.

(2) 31 Ll. L. Rep. 200; 277 U. S. 323.

conclusion I take into account the distinction drawn by the Lord President between such a case and that of a vessel struck by lightning or running into a typhoon which she would have avoided had she sailed with reasonable dispatch. Either may happen as much at one place or time as another, whereas delay, at a time when war is likely to occur, gives more opportunity for its incidence than a speedy and proper dispatch would give. Where, however, the basis of liability is delay, it is, as I think, the reasonable anticipation which matters and, but for the finding that the appellants ought to have foreseen the likelihood of war breaking out, I should have thought that your Lordships' decision would rightly have been given in favour of the appellants.

It was contended, indeed, on behalf of the respondents that the delay was the result of the appellants' breach of contract in providing an unseaworthy ship and that for the consequences of that breach of contract they are liable, whether they could have anticipated them or not, and in support of this argument *The Wilhelm* (1) was cited. In that case a ship was chartered to proceed to Archangel and there load a part cargo of tar. After she was loaded and ought to have had her provisions on board she had an opportunity of sailing, but owing to the negligence of the master in not having provisions on board she missed that opportunity and then was frozen in. In these circumstances Dr. Lushington, sitting in the Court of Admiralty held the shipowners liable for their breach of contract in failing to convey the cargo to its port of delivery with all expedition and to make good to the owners of the cargo the damage which accrued. If this decision is to be given its fullest significance, the respondents' contention would be established, but I think it must be qualified to some extent and is only justified upon the ground that the shipowner ought reasonably to have contemplated that at the relevant time, viz., October 8, the vessel was in danger of being frozen in, unless she sailed promptly. On the other hand, in *Associated Portland Cement Manufacturers* (1900), *Ld.* v. *Houlder Brothers & Co., Ld.* (2), where a ship was to be at Northfleet on May 25, but was still on a voyage from Hull on May 26 and on that date was torpedoed, Atkin J., as he then was, held the charterers entitled to recover any expenses resulting from her non-arrival on May 25 and 26, but that thereafter the loss of the ship rendered performance of the contract impossible and the shipowners

(1) 14 L. T. 636.
(2) (1917) 86 L. J. (K. B.) 1495.

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liable for no further loss. These two cases can, I think, only be made consistent on the ground that in the first the shipowners ought reasonably to have foreseen the likelihood of the ship being frozen in if she delayed, whereas in the second there was no more reason to anticipate her loss by torpedo at one moment rather than at another, and the same principle seems to me to lie at the back of that class of decision which says that delay does not expose goods to any greater risk of being carried away by a flood or struck by lightning than if they had been carried with dispatch. I conclude therefore that the diversion to Glasgow, brought about through the delay in carrying out the contract of carriage in the present case, is attributable to the default of the owners of the ship, because in the conditions existing in April, 1939, they ought to have foreseen that war might shortly break out and that any prolongation of the voyage might cause the loss of or diversion of the ship.

Even, however, if the present case is distinguishable on its facts from *The Malcolm Baxter Jr.* (1) and the appellants are liable for such loss as is legally recoverable, it yet has to be determined whether the respondents are entitled to recover the damages claimed, or indeed any damages, as a result of the appellants' breach of contract. In other words, did the transhipment costs naturally and directly flow from the initial unseaworthiness? The appellants contend that those costs were neither directly nor naturally caused by the unseaworthiness of the vessel, but were the result of circumstances peculiar to the pursuers and not communicated to the appellants, who never undertook the contract on the terms that they should be liable for damages of that kind. If the claim had been for loss of profit in the respondents' business, I should think the appellants' contention sound. *Hadley* v. *Baxendale* (2), *Horne* v. *Midland Ry. Co.* (3) and *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co., Ld.* v. *Nettleship* (4), would apply and the damages would be too remote. But the claim is not for such damages but for transhipment costs, and the argument turned on the right of a shipper to recover such costs in a case where he was left to complete the contract of carriage at his own expense.

On behalf of the appellants it was said that the contract was made with Mitsui and continued to be with them, upon the

(1) 31 Ll. L. Rep. 200; 277 U. S. 323.
(2) 9 Ex. 341.
(3) L. R. 8 C. P. 131.
(4) L. R. 3 C. P. 499.

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terms of the contract contained in the charterparty, until the bills of lading were transferred to the pursuers two days after the ship's arrival at Glasgow. The appellants, when they entered into the contract of carriage, knew only Mitsui, who were merchants buying for re-sale and delivery at one of a range of ports. If the carrying ship failed to deliver at the nominated port, the only damages sustained by the merchants were such sum as they lost, which would normally be measured by the difference between the price obtainable for the goods at the named port and that receivable at the place where they were actually delivered. In the present case there was no loss, since the price at which the British Government would have requisitioned at Glasgow was *8l. 17s. 6d.* a ton, i.e., *11s. 3d.* more than the sale price; and it had not been proved that more could have been obtained in the open market at Karlshamn. Mitsui, it was said, could not increase those damages by transferring the bills of lading to the respondents after the ship's arrival at Glasgow. It was pointed out further that before the Bills of Lading Act, 1855, Mitsui could have transferred the property in the goods, but not the benefit of the contract of carriage. After the passing of that Act it was said that they could transfer any right which they themselves possessed under it but nothing more, and, as they could recover no damages, no more could their assignees. Moreover, the assignees themselves could not even obtain damages against Mitsui, who had fulfilled their c.i.f. contract by furnishing valid bills of lading, the contractual insurance policies and the appropriate invoices. For the purpose of testing this argument it must, of course, be assumed that the appellants had broken their contract by failing to deliver the goods at Karlshamn, and it must then be asked whether Mitsui or the respondents were obliged to accept the beans in some other quarter of the globe, where they did not want them, without any right to recover damages, provided they could sell them there at a price as high as they could obtain at the contractual port. I cannot think that they were obliged to accept any such substituted performance. They appear to me to have had the right to require the goods to be delivered at the place stipulated, and if the shipowner failed to carry out his bargain to deliver there, the direct and natural consequence is that the merchant should arrange for the carriage forward and charge the shipowner with the reasonable cost of doing so. Nor do I think it improves the appellants' position to say that it is the respondents' duty

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to minimize or nullify his damages by selling elsewhere. He is entitled to have his contract fulfilled in the manner stipulated and is under no obligation to accept some undesired method of performance. Some support is given to this view by the decision in *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (1), though in that case the extra cost of purchasing at the port of delivery in fact exceeded the expense of transhipment. If this view be right, the respondents were entitled to recover the expense of forwarding the goods in fulfilment of their contract, whether that contract was contained in the charter-party or in the bills of lading and, under the Bills of Lading Act, could transfer that right to the assignee of the latter documents.

Having regard to this view it is unnecessary to discuss the other consideration put forward in the course of argument that whatever the exact legal position between Mitsui and the respondents, the latter were under no obligation to stand on their exact legal rights, but as honourable merchants were entitled to fulfil their contract and to be indemnified by shipowners who had not fulfilled theirs. It will be observed that in this conclusion I am accepting the position maintained by the appellants that the indorser of a bill of lading cannot give his indorsee more rights than he himself possesses, and treating the matter as if Mitsui, by assigning the bills of lading to the respondents, had only transferred such rights as they themselves possessed to the respondents. To some extent this attitude involves acceptance of the view that the taking of a bill of lading by the charterer of a ship confers no immediate rights upon him under the bill of lading, but gives him an incohate right, by indorsing the bill of lading to a third party, to make it an effective document from the beginning of the voyage so as to enable the indorsee to sue upon it for any breaches of contract committed during the voyage but before its transfer to him: "As if," it was put in the course of argument, "the contract "contained in the bill of lading had at the time of shipment "been made with himself." If this be the true view it does not matter that, at the time the bill of lading was transferred to the respondents, carriage to and delivery at Karlshamn by the chartered ship had become illegal. If they took over the contract of carriage as from the date of shipment they had a right to have the goods shipped to Karlshamn, and it was immaterial that at a later date delivery there became impossible provided, of course, that that inability was caused by the

(1) 10 R. 824.

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appellants' breach of contract. But it is said to give such damages either to Mitsui or to the respondents is to give damages for delay in delivery—a remedy which is not given in the case of carriage of goods by sea. No doubt expressions of opinions to that effect are to be found, perhaps more frequently in the days of sailing ships when prolonged delay was to be expected, but it never was a rule of law—merely a working practice answering to the circumstances of the time and subject to the consideration that the contract must be reasonably performed. In the present case the result of the delay was to deprive the shipper and his indorsee of the goods at Karlshamn. Of course, if they could replace them by buying other goods there, it was their duty to diminish the damages by doing so. But they could not do so since no soya beans were procurable at Karlshamn and, in default, the only way of placing themselves in the same position as if the contract had been performed was to engage transport to carry the beans to that port. Accepting then the view that the appellants ought to have foreseen the likelihood of war occurring and of an embargo being imposed, I should find them liable to pay the damages claimed and would dismiss the appeal.

LORD WRIGHT. My Lords, the cargo shipped at Rashin consisted of 8,200 tons of beans. The shippers, Mitsui, sold these beans under a c.i.f. contract dated London April 21, 1939, the buyers being the Scandinavian Co-operative Wholesale Society, who acted as agents for the respondents. The bills of lading were not indorsed to it until October 23, 1939, when they took up the bills of lading and paid the price. Thereupon the respondents acquired the property in the goods and the rights under the contract contained in the bills of lading in virtue of the Bills of Lading Act, 1855. They bring this action accordingly.

The voyage was extraordinarily protracted owing to the unseaworthiness of the vessel. The fact of unseaworthiness was established after an elaborate and prolonged trial before Lord Sorn, the Lord Ordinary, and was admitted before the Inner House and is now admitted before your Lordships. It was not suggested that the unseaworthiness was latent or excused by any term of the contract. Lord Sorn found (1) that, "considering the whole evidence it is impossible, to my "mind, to resist the inference that by the time the *British*

(1) (1946) 79 Ll. L. Rep. 385, 388.

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"*Monarch* had got to Rashin her boiler tubes were so worn "and deteriorated that she was in no fit state to enter on the "contemplated voyage." Later in his judgment, he said (1): "I am satisfied that by the time the vessel reached Rashin "her tubes as a whole were in a defective condition and that, "in addition, the flaw which permitted sea water to find its "way into the boilers was then in existence and that, in "consequence of these defects, the ship was unseaworthy." There were also questions about the Japanese coal with which the vessel was mainly bunkered when she left Rashin. The appellants were fully aware of the risk connected with the boilers, because there had been a great deal of trouble under the previous charter. No doubt the risk was appreciated, but it was hoped by the appellants that it would not materialize.

At the conclusion of the arguments Sir William McNair admitted that the appellants had broken their contract, but claimed that the damages were only nominal. I agree, however, with the unanimous decision of all the judges below that the claim for the damages is justified. It in truth gives effect to the broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach. In that respect this case is singularly clear, because the contract entitled the respondents to have the beans delivered at Karlshamn and the damages claimed and awarded represent simply the sum necessary to effect that result, namely the cost of transhipment from Glasgow to Karlshamn. The respondents were fortunate in being neutrals, and in being able to charter neutral tonnage and obtaining from the British Government permits to carry the beans from this country to Sweden. What the respondents wanted was the consignment of beans; their value either in Glasgow or Sweden where no beans were on the market, would have been a poor consolation. But as transhipment could be effected, the extra cost incurred for transhipment was the proper subject of monetary compensation. The respondents have made no claim for interference with their business. The damages awarded are not special or remote but are the damages naturally and directly resulting from the appellants' breach of contract within the rules of *Hadley* v. *Baxendale* (2). Alderson B. giving the judgment of the court said: "We think the proper rule in such a case as

(1) 79 Ll. L. Rep. 385, 390.
(2) 9 Ex. 341, 354.

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"the present is this: where two parties have made a contract "which one of them has broken, the damages which the other "party ought to receive in respect of such breach of contract "should be such as may fairly and reasonably be considered "either arising naturally, i.e., according to the usual course of "things, from such breach of contract itself, or such as may "reasonably be supposed to have been in the contemplation "of both parties, at the time they made the contract, as the "probable result of the breach of it." Alderson B. then pointed out (1) that if the special circumstances of the particular case were wholly unknown to the other party, he could at most be only supposed to contemplate the amount of injury which would arise generally, and in the great number of cases not affected by any special circumstances. This passage is quoted in full by Viscount Sankey L.C., in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (2): Viscount Sankey added (3) a clear and useful statement by Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (4): "Where any injury is to be com-"pensated by damages, in settling the sum of money to be "given for reparation of damages you should as nearly as "possible get at that sum of money which will put the party "who has been injured, or who has suffered, in the same "position as he would have been in if he had not sustained "the wrong for which he is now getting his compensation or "reparation." The ruling of Alderson B. has consistently been followed: the only difficulty, as Viscount Sankey observes (3) has been in applying it. The distinction there drawn is between damages arising naturally (which means in the normal course of things), and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the latter event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages; the latter are such that if they are not communicated it would not be fair or reasonable to hold the defendant responsible for losses which he could not be taken to contemplate as likely to result from his breach of contract. I am not here concerned to examine the differences or similarities between this rule and the corresponding rules which are adopted in claims in tort. To apply this to the facts of the present

(1) 9 Ex. 341, 355.
(2) [1932] A. C. 452, 474.
(3) Ibid. 475.
(4) (1880) 5 App. Cas. 25, 39.

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case, it appears that if the respondents had been claiming special and peculiar loss due to interference with their business, such damages might prima facie be too remote and not proper to be recovered in the absence of notice when the contract was entered into. The court will, however, assume that the parties as business men have all reasonable acquaintance with the ordinary course of business. But, as the respondents are claiming only for their loss directly due to the failure of the appellants to fulfil their promise to deliver the beans at Karlshamn, their claim is not based on any extraordinary or peculiar matter, but is only what might be claimed by any party which suffered a similar injury in the general circumstances of that business and at that time and place. There was indeed in 1939 the general fear that there might be war. Munich, the Sudetenland, the invasion by Germany of Czechoslovakia, the difficulty about the Polish Corridor, were matters of common knowledge. Indeed, Mr. Sheriff, the responsible assistant manager of the appellants' chartering agents, in his evidence, said that in April, 1939 (that is, when the charter was negotiated) the possibility of war was in their minds, and he added that there was a special war risks clause added to the charter in a slip attached. If the possibility of war was in the thoughts of the appellants, as it must have been, because shipowners have to keep in mind the international situation, the same must be true of the respondents, a concern dealing in large international purchases of raw material. The possibility must have been in the minds of both parties, even apart from the war clause, which is a printed form in frequent use during unsettled times: there was no need for one party to say to the other: "Be careful to hurry on the voyage as "much as possible, because, if war breaks out before the vessel "gets to Karlshamn, the British Government will almost "certainly direct her under the war clause: the Channel, the "North Sea, or the Baltic will of course not be healthy places "for a British vessel." Business is not conducted in that way. Experienced business men would know what the contract provided and what the actual risks were. It was not likely that the appellants' representatives would say: "We have "been having trouble with her boilers but we will hope for the "best and in any case there is an ample margin of time." But all I am at the moment emphasizing is that risks consequent on the prolongation of the voyage must have been in contemplation both by the shipowners and the shippers. The

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question whether damage is remote or "natural" and direct, can in general only be decided on a review of the circumstances of each special case. Remoteness of damage is in truth a question of fact, as Viscount Haldane L.C. describes it in the *British Westinghouse Electric & Manufacturing Co., Ld.* v. *Underground Electric Rys. Company of London, Ld.* (1). He says with reference to questions as to damages: "In some "of the cases there are expressions as to the principles govern- "ing the measure of general damages which at first sight seem "difficult to harmonize. The apparent discrepancies are, "however, mainly due to the varying nature of the particular "questions submitted for decision. The quantum of damage "is a question of fact, and the only guidance the law can give is "to lay down general principles which afford at times but "scanty assistance in dealing with particular cases. The "judges who give guidance to juries in these cases have "necessarily to look at their special character, and to mould, "for the purposes of different kinds of claim, the expression "of the general principles which apply to them, and this is "apt to give rise to an appearance of ambiguity." He then states the broad principle of compensation to which I have already referred and adds a reference to the ancillary duty of minimizing damage. It is I, imagine, with language like that of Viscount Haldane L.C. in his view that Lord Atkin (then Atkin L.J.) in *The Susquehanna* (2) says: "This is one of "those cases dealing with damages which, in my experience' "I have found to be a branch of the law on which one is less "guided by authority laying down definite principles than on "almost any other matter that one can consider." Viscount Haldane L.C. in the passage just cited, had to deal with a case where, as he said (3), it was necessary "to balance loss and "gain," and no simple solution was possible. Again, in *Liesbosch (Owners)* v. *Edison (Owners)* (4), this House made some observations on the measure of damages, which are of general import. The case was one of tort. The question there was what was the proper sum to award by way of compensation for the loss of a dredger. It was said (5): "Many, varied and "complex are the types of vessels and the modes of employ- "ment in which their owners may use them. Hence the "difficulties constantly felt in defining rules as to the measure

(1) [1912] A. C. 673, 688, 689.
(2) [1925] P. 196, 210.
(3) [1912] A. C. 673, 691.
(4) [1933] A. C. 449.
(5) Ibid. 464, 465.

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"of damages. I think it impossible to lay down any universal "formula." Earlier in the judgment it was said (1): "The "dominant rule of law is the principle of restitutio in integrum, "and subsidiary rules can only be justified if they give effect "to that rule." In *Liesbosch (Owners)* v. *Edison (Owners)* (2) it was held that loss due to the party's impecuniosity was too remote and therefore to be neglected in the calculation of damages: it was special loss due to his financial position. A different conclusion was arrived at in *Muhammad Issa el Sheikh Ahwad* v. *Ali* (3), where damages consequent on impecuniosity were held not too remote, because, as I understand, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken (see the judgment of the Judicial Committee delivered by Lord Uthwatt (4).) The difference in result did not depend on the differences (if any) between contract and tort in this connexion. The "reasonable "contemplation" as to damages is what the court attributes to the parties. The breach itself is, of course, objective. The constant necessity of picking out from a plurality of items that which is material is also remarked upon in the judgment in *Liesbosch (Owners)* v. *Edison (Owners)* (2).

These general statements could be multiplied but the question in a case like the present must always be what reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken. As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication. The future possibility of a breach must be both contingent and hypothetical and may take unexpected forms. Thus, in the *Banco de Portugal* case (5) the breach of contract was of a type not reasonably to be anticipated and the consequences were complex and indirect, at least in the sense that they naturally involved action by other parties, but they were unanimously held by the House to be subjects of monetary compensation to make good the loss. I cannot find that any point was raised as to the necessity of communicating any special circumstances. Both parties were tacitly taken to be acquainted sufficiently with the general

(1) [1933] A. C. 449, 463.
(2) Ibid. 449.
(3) [1947] A. C. 414.
(4) Ibid. 427.
(5) [1932] A. C. 452.

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business position. The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them. It would not be helpful to cite the familiar authorities which are numerous but depend primarily upon the facts of each case. Even in the very simple case of breach by a buyer of his contract to accept and pay for goods, the Sale of Goods Act, 1893, s. 50, sub-s. 2, is content to enact that : "The "measure of damages is the estimated loss directly and "naturally resulting, in the ordinary course of events, from "the buyer's breach of contract." When in sub-s. 3 it gives a more specific rule, it qualifies it by the words "prima facie." But in the present case the compensation claimed is what is the most obvious and natural. The cost of transhipment is the most natural form of reparation. It cannot be said to involve extraordinary or uncontemplated hardship as the damages claimed were said to do in cases like *British Columbia and Vancouver Island Spar, Lumber and Saw-Mills Co., Ld.* v. *Nettleship* (1) and *Horne* v. *Midland Ry. Co.* (2), which were relied upon by counsel for the appellants. I may refer to the authority of the Scotch case of *Connal, Cotton & Co.* v. *Fisher Renwick & Co.* (3), where the cost of transhipment was allowed as the proper measure of damages for failure to deliver under a contract of sea carriage at the agreed destination.

But a question of remoteness in another connexion and in another sense has been raised. That is in reference to remoteness in the sense of causal connexion. The claim here is for damages for unseaworthiness, which, it is said, caused delay on the voyage, and the delay exposed the vessel to being diverted by order of the Admiralty. This, it was said, may properly be regarded as coming within the exception of restraints of princes, though, indeed, it was for the benefit of the appellants, because, if it could be invoked by the appellants, it gave them a right to the bill of lading freight in full as on performance of the contract by a delivery short of the bill of lading destination. In my opinion, this objection, which would treat restraints of princes as the immediate or dominant cause of the delay, fails. The Lord President relied on the decision of this House in *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic*

(1) L. R. 3 C. P. 499.
(2) L. R. 8 C. P. 131.
(3) 10 R. 824.

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General Insurance Co., Ld. (1), in which case the loss of a vessel which occurred through the negligence of the master operating on conditions of unseaworthiness existing since the commencement of the voyage, was held to be caused by breach of the warranty of seaworthiness and recoverable accordingly. There was an exception of negligence: negligence could be regarded as a co-operating cause, no different in principle from any physical and tangible cause. As this House, however, said (2), no distinction can be drawn between cases where the negligent conduct of the master is a cause and cases where any other cause such as perils of the sea 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." What was being there emphasized was that a voluntary act (negligent or not) of a human agent is not generally an independent or new cause for this purpose which breaks the chain of causation, as it is called, so as to exclude from consideration the causal effect of the unseaworthiness. It is well established that unseaworthiness, if it is to be a relevant factor of liability, must be "a cause" of the damage or loss. That is necessary because unseaworthiness might take many different forms in the same vessel, so that before any one form can be relied upon, it must be a cause of damage; for instance, the failure to carry a proper medical chest, if it is a breach of the warranty, might have no relevance to the loss of a vessel by perils of the seas. But a different result follows if the breach is a cause of the loss. Thus, in *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (1), the unseaworthiness created in the vessel instability which, combined with negligence of the master, caused the loss. There was no new law laid down in that case. From one point of view, unseaworthiness must generally, perhaps always, in a sense be a "remote" cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty if it is to be a cause of the casualty, and from its very nature it must always, or almost always, operate by means of and along with the specific and immediate peril. That is because the essence of unseaworthiness as a cause of loss or damage is that the unseaworthy ship is unfit to meet the peril. In other words, the vessel would not have suffered the loss or injury if she had been seaworthy. A ship may be lost not simply by a peril of

(1) [1940] A. C. 997. (2) Ibid. 1005.

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the sea but also by and because of the failure to fulfil the warranty. Thus, for instance, in the *Standard Oil Company of New York* v. *Clan Line Steamers, Ld.* (1), the vessel capsized because the master, not being instructed by his owners as to the peculiarities of a turret ship, so handled her that she capsized. That loss was immediately due to perils of the sea which overwhelmed her when she capsized, liability for which was excepted, but the dominant cause was her unseaworthiness in that her master, though otherwise efficient, was inefficient in not being aware of the special danger. In general, all the authorities are in agreement in this respect and embody the same rule. The shipowner, of course, under the familiar general rule, is debarred by his breach of duty from relying on the specific exception. Though he would not be liable for the consequences caused by the specific excepted peril or the accident alone if he were not in default, and though the unseaworthiness existing at the commencemet of the voyage might not be operative or known until the time when the accident occurs, yet then the breach of the warranty operates directly as a cause and, indeed, a dominant cause. Causation in law does not depend on remoteness or immediacy in time. So it was held in *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (2). But unseaworthiness as a cause, operates immediately whenever it comes into effect ; it has until then only been dormant. The maxim causa proxima non remota spectatur is either meaningless or misleading until " remota " and " proxima " are defined. Thus unseaworthiness as a cause cannot from its very nature operate by itself ; it needs the " peril " in order to evince that the vessel or some part or quality of it, is less fit than it should have been and would have been if it had been seaworthy, and hence the casualty ensues. A fitter ship would have passed through the peril unscathed. In this way unseaworthiness is a decisive cause or as it is called a dominant cause. If it is not expressly excepted, the shipowner cannot excuse himself by any specific exception for a loss for which he is himself responsible, because he is responsible for unseaworthiness.

There is, however, in this case a contention of a more general nature, which is that the delay which resulted from the defective boilers did not in any legal sense cause the diversion of the vessel. It is said that the relation of cause and effect cannot be postulated here between the unseaworthiness and the restraints

(1) [1924] A. C. 100. (2) [1918] A. C. 350.

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of princes or the delay. As to such a contention it may be said at once that all the judges below have rejected it. As I have pointed out, if the vessel had arrived at Karlshamn in July she could not have been exposed to the risk of the restraint of princes, but she did not arrive until October, and thereby (in the historic phrase) " missed the bus." If a man is too late to catch a train, because his car broke down on the way to the station, we should all naturally say, that he lost the train because of the car breaking down. We recognize that the two things or events are causally connected. Causation is a mental concept, generally based on inference or induction from uniformity of sequence as between two events that there is a causal connexion between them. This is the customary result of an education which starts with our earliest experience: the burnt child dreads the fire. I am not entering upon or discussing any theory of causation. Those interested in philosophy will find modern philosophic views on causation explained in Russell's History of Western Philosophy in the chapter on Hume, Book 3, ch. xvii. The common law however is not concerned with philosophic speculation, but is only concerned with ordinary everyday life and thoughts and expressions, and would not hesitate to think and say that, because it caused the delay, unseaworthiness caused the Admiralty order diverting the vessel. I think the common law would be right in picking out unseaworthiness from the whole complex of circumstances as the dominant cause. I have assumed that the bills of lading and charterparty exceptions which are expressed to be conditional on the vessel being seaworthy, use " seaworthy " in the sense that the breach of warranty was a breach which caused the loss. This is assumed in *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (1), in respect of a similar provision in the Water Carriage of Canada Act, and in other cases.

Before I leave the various problems or difficulties argued or suggested in the appeal, I should notice some others: (1.) It is suggested that *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2) only refers to physical causes and physical defects and physical damage. I can see no ground for this in principle or authority or in the facts of this case. The bad state of the boilers was a physical cause which reduced the vessel's speed from 9 to 5 knots, and necessitated the deviations, and I think as a matter of law that a vessel

(1) [1934] A. C. 539. (2) [1940] A. C. 997.

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may be unseaworthy in particular circumstances without any structural or mechanical defect, for instance, if she is carrying contraband or false papers without the consent of the shippers, and may, quoad hoc, be subject to delay or even condemnation without any physical interference except such as the restraint implies. The principle of *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (1) is wide enough to cover such a case. *Dunn* v. *Bucknall Brothers* (2) was an illustration of that character, and in principle supports this view. (2.) It is said that the respondents, when they became assignees of the bills of lading, got only such rights as were then alive, and the only rights then alive were for delivery at Glasgow. I think it enough to refer to the Bills of Lading Act and the long-established practice of dealing with the bills of lading of seaborne cargoes. The rights transferred under the bills of lading were all such as might flow from the contract ab initio and the various supervening events. (3.) There is also the contention that the action must fail because the contract was frustrated and that the claim for damages must therefore fail. There are, in my judgment, many fatal objections to this contention. I think it is enough to point out that the Admiralty order (which is the frustrating event) is a restraint of princes expressly dealt with by the contractual exception, which sufficiently provides for the peril and further does not help the appellants, because it is excluded by the breach of warranty which brings it into operation. Thus, the frustration was caused by matters for which the appellants were responsible. In Lord Sumner's words, "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." So the principle was stated in *Bank Line, Ld.* v. *Arthur Capel & Co.* (3). The principle was applied in *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.* (4). I think it is enough to say that it applies here. (4.) I think a similar course of reasoning disposes of the contention that the appellants can escape the consequences of their breach of contract by saying that it would have been illegal for them to proceed to Karlshamn after the Admiralty order. It would certainly not have been possible and it would certainly not have been allowed by the Admiralty. The appellants would rather have welcomed than resisted the order.

(1) [1940] A. C. 997.
(2) [1902] 2 K. B. 614.
(3) [1919] A. C. 435, 452.
(4) [1935] A. C. 524.

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But I think the same answer applies here according to English law as in regard to the contention of frustration. I mean that the illegality was due to the appellants' own act and is not available as a defence to the injured party's claim. (5.) I agree with the court below that nothing done at Glasgow by the respondents constituted a waiver of their right to claim damages for the breaking of the contract.

I might, however, notice, before I conclude, the arguments based upon the authority in the United States Supreme Court cited by the appellants. The case is *The Malcolm Baxter Jr.* (1), entitled in the Supreme Court the *Republic of France* v. *French overseas Corporation.* The Lord President, in his outstanding judgment, has put his finger on one decisive difference from the present case, namely, that there the law forbidding United States sailing ships from sailing across the Atlantic was something new, unprecedented and not capable of prevision as a possible consequence of the delay consequent on the breach of warranty. That is certainly a sufficient distinction, but the complex of facts in that case was so completely dissimilar from those in the present case as to prevent the authority from being any guide to me. The United States case is noted by Williston in his encyclopædic work on Contracts (revised edition), ss. 1096, 1938 and 1951, but the learned author does not comment on it in any detail. He cites it in his sections on illegality, and also in connexion with the liabilities of carriers by land, where their delay has brought the goods into the scope of an Act of God, such as floods, tempests and the like, which could not be foreseen as likely to operate on the adventure, as a consequence of delay. The Lord President has dealt with this aspect and I do not wish to add to what he has said. The other peculiarity of the decision is that, as I understand, the court held that when eventually at Havana the vessel was made seaworthy and the general law prohibited her from crossing the Atlantic, the whole position could be considered without reference to what happened before that stage, and it could be said that the only cause, why she could not then proceed was the United States law and not the unseaworthiness. I can only regard that as a particular conclusion based on all the special facts of the case. I cannot, therefore, find any guidance for the decision in this appeal. Decisions of the United States courts, even the Supreme Court are not of coercive but only

(1) 31 Ll. L. Rep. 200; 277 U. S. 323.

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of persuasive force in the courts of this country. It is certainly desirable that as far as possible there should be uniformity between the law merchant as administered in the United States and in Britain. The origin and foundation of the law in both countries are the same. But as time goes on and cases arise, individual differences emerge and accumulate. Even the general principles of the law of carriage by sea do not receive identical expression or development in the courts of the two countries. That same phenomenon may be observed even in comparing the laws of the different States and the federal courts. Instances must be familiar to lawyers. There is a further difficulty in that the British lawyer cannot be familiar with the American decisions. He has not access to the reports; and, indeed, the American reports have reached such dimensions that they are quite beyond the capacity of a British lawyer. Even the American lawyer has to avail himself of the extraordinarily efficient and comprehensive system of indexing and reference which has been developed. It is the great development of case law on the other side of the Atlantic, coupled with a similar though lesser development on this side, which has discouraged the practice, at best rare, followed up to the middle decades of last century by British judges to cite American cases. I am not disparaging or discouraging the fullest possible interchange and reciprocity between American and British lawyers, but I cannot help recognizing how difficult and perhaps dangerous it may be to ask a British judge to rely on a particular United States decision torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts.

I would dismiss the appeal.

LORD UTHWATT. My Lords, I have had the advantage of reading in print and considering the opinions of the noble and learned Lord on the woolsack and of my noble and learned friend LORD WRIGHT. I agree with their conclusion and I intervene only to say that I do not share the doubt expressed by the noble and learned Lord on the woolsack on the question whether the appellants, on April 4, 1939, should reasonably have foreseen the likelihood of the imposition of an embargo affecting the carriage of goods to the range of ports specified in the charterparty. To my mind, the situation in Europe at that date was such that a reasonable shipowner contemplating

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a voyage from Rashin to that range of ports would regard the chance of war, not as a possibility of academic interest to the venture, but as furnishing matter which commercially ought to be taken into account. If war happened, the embargo to which I have referred would, in his view, be an almost inevitable consequence. I would dismiss the appeal.

LORD DU PARCQ. My Lords, it is unnecessary for me to address your Lordships on all the points which were argued at the Bar, and I will confine myself to the question of damages. I may be taken to concur in the opinion of my noble and learned friend on the woolsack on all those matters with which I do not specifically deal.

I do not doubt the wisdom of the judges who, in *Hadley* v. *Baxendale* (1) and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend Lord Wright, and Lord Haldane in the passage cited by him, have emphasized, that in the end what has to be decided is a question of fact, and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them. It is interesting to find a judge of the experience of Wilde B., six years after *Hadley* v. *Baxendale* (1) was decided, expressing a doubt which may well have been widely shared. "For my own part," he said, "I think that, "although an excellent attempt was made in *Hadley* v. "*Baxendale* (1) to lay down a rule on the subject, it will be "found that the rule is not capable of meeting all cases; "and when the matter comes to be further considered, it will "probably turn out that there is no such thing as a rule, "as to the legal measure of damages, applicable in all cases." See *Gee* v. *Lancashire and Yorkshire Ry. Co.* (2). The obser-

(1) 9 Ex. 341. (2) (1860) 6 H. & N. 211, 221.

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vations of Lord Haldane to which reference has been made show the wisdom of this forecast.

My Lords, what I have said is not, I think, without relevance to the matter in hand. If Sir William McNair's argument were right, a judge would have had to direct a jury in the present case that they must award no more than nominal damages. Any jury of business men would, I believe, have received such a direction with dismay, and acted upon it with reluctance. It would, indeed, as it seems to me, result in manifest injustice. I may express my own opinion by saying that if a jury, directed in the terms in which the Lord President's opinion shows us that he would have directed them, had awarded the respondents the sum of 21,634*l.* as damages, there would have been no ground for setting aside or varying the verdict. It was pointed out by Blackburn J. in *Cory* v. *Thames Ironworks & Ship-building Co., Ld.* (1), that the rule which Alderson B. stated to be "the proper rule in such a case as the present" in *Hadley* v. *Baxendale* (2) consists of two alternatives. In my opinion the damages which have been awarded to the respondents come within the former of these alternatives, inasmuch as they are "such as may fairly and reasonably be considered as "arising . . . . according to the usual course of things, from "such breach of contract itself." Damage arises "according "to the usual course of things" if, in the circumstances existing at the date of the contract, both parties to it, supposing them to have considered the probable effects of a breach of the contract, with due regard to events which might reasonably be expected to occur, must be assumed as reasonable men to have foreseen such damage as at least a serious possibility. Unseaworthiness in itself may, if fortune is kind, occasion no damage to anybody, but, apart from other obvious dangers, it is very likely to cause delay. Delay may produce damage of many kinds, some of it predictable. If it be once granted that there was a real, and known, danger of war at the date of the contract, I understand that all your Lordships who heard the argument are agreed that the diversion of the ship which caused such grave loss to the respondents followed in the usual course of things from the delay and the unseaworthiness which caused it.

In order that the respondents might succeed in establishing their case, it was not necessary, in my opinion, that the parties to the contract should be shown to have contemplated the

(1) (1868) L. R. 3 Q. B. 181, 188. (2) 9 Ex. 341, 354.

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outbreak of war as something certain and unavoidable. They are not to be supposed to have had the gift of prophecy. It is enough if they may reasonably be assumed to have contemplated a war, and the likelihood that it would lead to such an embargo as was in fact imposed, as a real danger which must be taken into account. I agree with my noble and learned friend Lord Wright that Mr. Sheriff's evidence, and the addition to the charter of the war risks clause, support the view that this assumption may fairly be made. I also agree that there was at the material date a general fear of war. Your Lordships are entitled, as were the Scottish courts, to take judicial notice of the facts of history, whether past or contemporaneous with ourselves. The Prime Minister's announcement on March 31, 1939, of the guarantee given to Poland was a definite landmark in the history of the world. It had been preceded on March 17 by the speech at Birmingham in which the Prime Minister had asked rhetorically whether the attack on Czechoslovakia was to be followed by another. It was natural to see in this question a reference to Poland, and the assurance which so swiftly followed that His Majesty's Government would "lend the Polish Government all support in their power" in the event of any action which clearly threatened Polish independence justified, and I think aroused, a general apprehension of war. Certainly men engaged in commerce, who are rightly sensitive even to hints of danger when their business interests are affected, can hardly have failed to be alive to the risk of war. Speaking of the guarantee to Poland, Mr. Winston Churchill has written: "No one who understood "the situation could doubt that it meant in all human "probability a major war in which we should be involved." (The Second World War, vol. I., p. 270.) I am not entitled to ask your Lordships to rely on this statement for its evidential value. I quote it as a comment which, speaking for myself, I would endorse, though with the qualification, that those who had to rely for their information on sources available to the general public at least had reasonable grounds for the belief that such a war was a serious possibility.

In my opinion the Lord Ordinary and the Inner House arrived at a proper conclusion and this appeal ought to be dismissed.

LORD MORTON OF HENRYTON. My Lords, I agree with the reasoning of the noble and learned Lord on the woolsack, and I only desire to say a few words on the matter as to which

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he expressed some doubt. Prior to the date of the charterparty, April 4, 1939, Germany had overrun Czechoslovakia. It was apparent then, if not before, that Hitler's pledged word was worthless and that he did not shrink from violence to achieve his ends. I think that any shipowner who was then contemplating a voyage from Rashin to one of a range of ports in Europe would feel that there was a grave risk of war breaking out in Europe, and an embargo being imposed, before the vessel reached her destination. In my view, the damage which was in fact suffered by the respondents was within the reasonable contemplation of the parties, and the appellants are liable to pay the damages claimed. I would dismiss the appeal.

Eustace Roskill for the appellants, submitted that they ought not to be ordered to pay the whole of the costs of printing the appendix to the case. In part I about 433 out of 528 pages related solely to the question of unseaworthiness, which was admitted before the House of Lords, and, in an opinion by the appellants' counsel, communicated to the respondents' solicitors, these pages were specified as proper to be omitted from the record. In a letter dated June 26, 1947, from the appellants' solicitors to the respondents' solicitors, it was stated: "We shall at the proper time protest against the "extra expense that will be incurred in printing such of the "evidence as the appellants' counsel have indicated as being "in their view unnecessary, owing to the fact that the question "of seaworthiness will not be argued before the House."

Donaldson for the respondents submitted that in a case in which there were engaged Scottish counsel who had to travel long distances to appear before the House of Lords, the hearing before the appellate committee would have been the proper time to raise the point or, if it were not then raised, some further intimation beyond the letter referred to should have been given that the matter was going to be raised subsequently.

THE HOUSE ordered that the appeal be dismissed and that the appellants do pay to the respondents the costs incurred by them other than those incurred by them by the inclusion in the appendix of oral evidence or documents relating solely to the issues of (1.) unseaworthiness or (2.) knowledge on the part of the respondents of such unseaworthiness and that the

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respondents do pay to the appellants the costs incurred by them by the inclusion in the appendix of such documents or evidence as aforesaid.

Appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Beveridge, Sutherland & Smith W.S., Leith, and Montgomerie, Flemings, Fyfe, Maclean & Co., Glasgow.*

Solicitors for respondents: *Thomas Cooper & Co., for Boyd, Jameson & Young, W.S., Leith.*

J. C.*

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Feb. 14.

[PRIVY COUNCIL]

OIVIND LORENTZEN, AS DIRECTOR OF SHIPPING AND CURATOR OF THE ROYAL NORWEGIAN GOVERNMENT . APPELLANT;

AND

THE ALCOA RAMBLER (ALCOA STEAMSHIP COMPANY INC., OWNERS) . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Shipping—Collision—Harbour—Vessel, with curving course constantly changing under port helm, on starboard side of approaching vessel—Knowledge of situation not ascribable to approaching vessel—Not crossing vessels—Articles 19 *and* 21 *of Regulations for Preventing Collisions at Sea inapplicable—Issues of navigation and seamanship.*

Two steam vessels, the *R.* and the *N.*, each set out from their respective anchorages in a harbour crowded with shipping at about 9 a.m., *R.* from her position in the north-west of the harbour heading about S.S.E. magnetic for the harbour entrance, *N.*, according to the evidence of her pilot, was making a "curved "course" from her anchorage to the south on the west side to a point slightly north of east on the east side of the harbour. Both vessels were proceeding at about six knots, and the weather was fine and clear, with little or no wind. When the vessels first sighted each other through intervening shipping at about 9.14 a.m. at a distance of about 1,800 to 2,000 feet *R.*, a vessel carrying ammunition, which had *N.* on her starboard side, put

* *Present:* VISCOUNT SIMON, LORD WRIGHT, LORD ROCHE, LORD PORTER and LORD DU PARCQ, with CAPTAIN W. E. CRUMPLIN and CAPTAIN D. DUNN as NAUTICAL ASSESSORS.

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