4

Carriage by Sea

Contract of Affreightment

A contract for the carriage of goods by sea is called the "contract of affreightment". Ordinarily a carrier by sea is a common carrier, liable absolutely, like all others, for the loss of the goods subject only to a few exceptions. But carriage by sea, being a hazardous job, the carrier usually makes a special contract and, in order to emphasise this special nature of the contract, it is called, not the contract of carriage, but the contract of affreightment. Freight means the charges for which the carrier agrees to carry the goods.

A contract of affreightment may take one of the two forms, namely, it may take the form of a charter-party, or a bill of lading. In a charter-party the ship itself is hired and in a bill of lading the goods are delivered to the shipowner for carriage and he issues a bill of lading as a document of title for the goods.

Implied Undertakings

In every contract of affreightment, whether it be by charter-party or by bill of lading, certain undertakings on the part of the carrier are implied.

1. *Seaworthiness*

The first and the most important of such undertakings is that the ship shall be seaworthy. This means that the ship shall be fit for the journey and also fully equipped for the type of cargo that it contracts to carry.[1] The expression is thus explained by Viscount Cave in *Elder, Dempester & Co. Ltd.* v *Paterson Zochonis & Co. Ltd.*:[2]

> It is well-settled that a shipowner...who contracts to carry goods by sea thereby warrants not only that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word—that is to say, that she shall be light, staunch and strong, and reasonably fit to encounter whatever perils may be expected on the voyage—but also that both the ship and the furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea[3].... The rule as it applies to

1. There has to be an absolute warranty of seaworthiness. See *John Carter Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495.
2. [1924] All ER Rep 135 ; [1924] AC 522.
3. See at p. 139, where his Lordship pointed out that the rule as to warranty of seaworthiness for the cargo was formulated by Lord Ellen Borough in the year 1804 ; see *Lyon* v *Mells*, (1804)

equipment, is well illustrated by such cases as *The Maore King (Cargo Owners)* v *Hughes*,[4] where a ship with defective refrigerating machinery was held "unseaworthy" for a cargo of frozen meat, and *Queensland National Bank Ltd.* v *Peninsular and Oriental Steam Navigation Co.*,[5] where a ship with a bullion room not reasonably fit to resist thieves was held unseaworthy for consignment of bullion."

The facts of the case were :

> The consignment was of some casks of oil. It was towed on board the ship and, there being no deck above them, the other cargo, which consisted of a quantity of palm kernels, was placed on them. The casks were consequently crushed by the weight and much of the oil was lost.

The House of Lords held that the damage was due, not to unseaworthiness, but to improper stowage. The vessel was unquestionably fit to receive and carry the cargo in question. She was a well built and well found ship and lacked no equipment necessary for the carriage of palm oil and the damage arose because placed upon them was a weight which no casks could be expected to bear. There being an exception in the contract for loss due to bad stowage, the shipowner was held not liable. Thus unseaworthiness and bad stowage are two different things.[6]

Before the Carriage of Goods by Sea Act, 1925 came into force, the obligation of the shipowner to provide a seaworthy ship was considered to be an absolute one, that is, he was bound to assure a seaworthy ship and not merely that he made an honest effort to do so. Whether the contract was in the shape of a bill of lading or any other form there was a duty that "the ship shall be fit for its purpose." "The shipowner warranted the fitness of the ship when she sailed, and not merely that he had loyally, honestly and *bona fide* endeavoured to make her fit."[7] But now Rule 1 of Article III of the Act provides that the shipowner is bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy. The Act applies only to contracts of affreightment which are comprised in a bill of lading. It does not apply to charterparties and, therefore, in a charter-party the obligation to assure seaworthiness is still an absolute one. The practical difference is that in the case of an

5 East 428 : 1 Smith KB 478 : 41 Digest (Repl) 364 and was affirmed by the House of Lords in *Steel* v *State Line Steamship Co.*, (1877) 3 App Cas 72 and *Gilory, Sons & Co.* v *Price & Co.*, [1893] AC 56.

4. [1895] 2 QB 550.
5. [1898] 1 QB 567.
6. See, for example, *Thorsa, The*, [1916] p. 257 where SWINFEN EADY J observed that there is no rule that, if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy.
7. See Lord BLACKBURN J in *Steel* v *State Line Steamship Co.*, (1877) 3 App Cas 72 at p. 86, where the earlier authorities which considered this to be the duty are established cited. The authorities cited were : ABBOTT ON SHIPPING ; *Gibson* v *Small*, (1853) 4 HL Cases 353 : 21 LT (OS) 240 ; *Kopitaff* v *Wilson*, (1876) 1 QBD 377. The obligations of the shipowner as to seaworthiness under the Carriage of Goods by Sea Act where the voyage is divided into stages were explained in *Makendonia, The*, [1962] 2 All ER 614 : [1962] p. 190.

absolute obligation, if the ship is in fact unseaworthy, liability follows, even if the best care was taken to make it seaworthy. In the other case, if due diligence is taken, there would be no liability, even if the ship was still unseaworthy. The difference in effect can be illustrated by *Riverstone Meat Co.* v *Lancashire Shipping Co.*[8]

> The ship in question was repaired by a reputed firm, but their fitter secured certain covers so unevenly that the nuts became loose when the ship was encountering rough weather. The water entered and damaged the cargo.

The House of Lords felt that the defect was impossible of detection and although the shipowner had taken the care of getting the ship checked by the best firm, he was still liable for the unseaworthiness. Viscount SIMONDS pointed out that the Act makes a "difference of great importance, as it avoids responsibility for latent and undiscoverable defects". But even in case of charterparties the court may not hold the shipowner liable, for example, for material fatigue or where he appointed qualified staff but they turned out to be incompetent.[9]

Cargo worthiness.—Seaworthiness being a relative term, the obligation is to provide a ship fit both for the particular voyage and the particular cargo. For, seaworthiness also means cargoworthiness. A shipowner contracted to carry animals on the condition that he would not be liable for death or injury by disease. He did not disinfect the ship after a previous voyage and consequently the cattle were infected with mouth and foot disease. He was held liable. The infection was caused by uncargoworthiness which disentitled him from relying upon the exception clause.[10]

Another illustration of uncargoworthiness is *Ciampa* v *British India Steam Navigation Co.*[11]

> Lemons belonging to the plaintiff were loaded on the defendants steamship at Naples for carriage to London under a bill of lading which excepted "restraints of princes," and "any circumstances beyond the shipowner's control." The ship had come from Mombassa which was plague contaminated port and, therefore, in accordance with a decree of the French Government, when she touched a French port was subjected to a disinfecting process, called deratisation. The natural consequence of this was that the lemons arrived at the destination in a damaged condition.

The shipowner was held liable for the loss. The fact that the ship would be subjected to the process caused her to be not reasonably fit at Naples for the carriage of lemons and, she was, therefore, unseaworthy.

8. [1961] 1 All ER 495.
9. See for example, *Adamastos Shipping Co.* v *Anglo-Saxon Petroleum Co.*, [1959] AC 133 : [1958] 1 All ER 725 and *W. Anglis & Co.* v *Peninsular and Oriental Steam Navigation Co.*, [1927] 2 KB 456.
10. *Fattersal* v *National SS Co.*, (1884) 12 QBD 29.
11. [1915] 2 KB 774.

Competent crew and requisite equipment.—A ship is not seaworthy if it is not fitted with requisite loading and unloading equipments,[12] or if its crew is incompetent or inexperienced.[13]

Seaworthiness at commencement of each stage.—Where a voyage has to run through several stages, the ship should be seaworthy at the commencement of each stage. In "*The Vortigern*",[14]

> A ship from Philippines to Liverpool had to touch Colombo and Suez en route. It could not carry coal for the whole of the journey and had, therefore, to be replenished at different stages. At Colombo the engineer failed to point out to the master that the coal was running out. Consequently, the stock was not replenished. A lot of cargo had to be burnt to enable the ship to reach Suez. The shipowner had excluded liability for negligence of the staff.

But even so he was held liable. The court pointed out that the warranty of seaworthiness is a flexible one and has to be adjusted to the requirements of each voyage. This voyage was to be divided into stages for the purpose of refuelling. When the ship left Colombo without adequate supply of coal to reach Suez, it was not seaworthy from that stage. The loss having been caused by unseaworthiness, the exclusion clause could to be relied upon.

Exclusion clauses and unseaworthiness.—But the shipowner can rely upon an exclusion clause where the damage in question has not been caused or contributed by unseaworthiness, but only by the excepted peril operating independently. "*Europa*", *The*[15] is an illustration in point.

> A charter-party excluded liability for collision. The ship arrived with its cargo of bags of sugar safely at the port of discharge, but there she struck the dock wall. Water closet pipes were broken. Water entered into the tween decks and damaged the sugar-bags stowed there. The water would not have gone further down into the hold but for the fact that some holes there, were imperfectly plugged. This defect existed even at the commencement of the voyage and to that extent the ship was unseaworthy. Thus the sugar in 'tween decks was damaged by the collision and that in the hold by unseaworthiness.

The shipowner was held liable only for the damage caused by the unseaworthiness, and for the damage caused by the collision the exception clause protected him from liability.[16]

Liability for seaworthiness can be excluded by clear words. If the exception clause is not capable of bearing a definite meaning, it will operate against the shipowner. A chaterparty agreement provided that the shipowner would not be liable for any loss which was capable of being covered by insurance. The cargo

12. *Hang Fung Shipping & Trading Co. Ltd.* v *Mullion & Co. Ltd.: The Ardgroom*, [1966] 1 Lloyd's Rep 511, the ship not fitted with loading and unloading gear.
13. *Hongkong Fir Shipping Co. Ltd.* v *Kawasaki Kisen Kaisha*, [1962] 2 QB 26.
14. [1895-9] 1 All ER Rep 387 ; 80 LT 382 ; 15 TLR 39, CA.
15. [1904-7] All ER Rep 394 ; 98 LT 246 ; 24 TLR 15.
16. Following *Joseph Thorley Ltd.* v *Orchis Steamship Co. Ltd.*, [1907] 1 KB 660, CA.

of frozen meat was damaged by unseaworthiness because the ship was not fully equipped for such cargo. The shipowner was held liable.[17] The exclusion clause either meant everything or nothing. Lord LOREBURN LC said : "The law imposes on shipowners the duty of providing a seaworthy ship and of using reasonable care. They may contract themselves out of these duties, but, unless they prove such a contract, the duties remain; and such a contract is not proved by producing language which may mean that, and may mean something different. As Lord MACNAGHTEN said in *Elderslie Steamship Co.* v *Borthwick*,[18] "an ambiguous document is no protection."

Unseaworthiness not affecting other rights.—Unseaworthiness does not by itself take away the rights of the shipowner under the contract. The charterer can escape liability only by showing that the delay involved in making the ship seaworthy was so great as frustrated the commercial purpose of the venture.[19]

2. *Reasonable Despatch*

In all contracts by charter-party, where there is no express agreement as to time, it is an implied condition that there shall be no unreasonable delay in commencing the voyage. The voyage must be commenced within a reasonable time. This is so because in all seagoing business expedition is important, for, by delay, the whole object of the voyage may be defeated. This has been the principle since long and is evidenced by *M' Andrew* v *Adams*[20]. Here a ship, instead of sailing, as agreed, from Portsmouth to St. Michaels for loading a cargo of fruit for London, she went on an intermediate port and came to St. Michaels only after about a month from the date of sailing. The charterer was held entitled to sue for the breach of the implied warranty of reasonable despatch. Where there is a delay it is incumbent on the party to account for it. In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage. The intention of the parties is to be looked at with reference to the trade in which they are enaged.[21] Looking at the charter-party in this case, the court entertained no doubt as to the intention of the parties, that the voyage should be commenced with all reasonable expedition.

3. *No Deviation*

The third important implied warranty is that the ship should follow the agreed or the customary route. Any departure from such route is called deviation and this may operate as a breach of the contract making the shipowner absolutely liable like a common carrier and disentitling him from relying on the exception

17. *Nelson Line (Liverpool) Ltd.* v *James, Nelson & Sons*, [1904-7] All ER Rep 244.
18. [1905] AC 93 at 96.
19. *Hongkong Fir Shipping Co. Ltd.* v *Kawasaki Kisen Kaisha Ltd.*, [1962] 2 QB 26.
20. (1834) 1 Bing NC 29 ; 3 LJCP 236. TINDAL CJ observed in this case "that all the authorities concur in stating that the voyage must be commenced within a reasonable time ; and they all are cited in *Freeman* v *Taylor*, (1831) 8 Bing 124 : [1824-34] All ER Rep 688 : 1 LJCP 26 and *Mount* v *Larkins*, (1831) 8 Bing 108 : 1 LJCP 20. It that be the general rule, where there is any delay in a voyage, it is incumbent on the party to account for it."
21. Citing Abbot C. THE LAW OF MERCHANT SHIPS AND SEAMEN.

clauses, if any. "Unjustifiable deviation displaces the bill of lading contract and with it any exceptions included therein; accordingly shipowners are liable for damage which happens after deviation though not caused by it."[22]

Deviation to save life, permitted.—There are, however, cases in which deviation is justifiable. Common law permitted deviation to save life, but not, of course, to save property. COCKBURN CJ observed in *Scaramanga* v *Stamp*:[23]

> Deviation for the purpose of saving life is protected and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exceptions of the "perils of the sea". Deviation for the purpose of communicating with a ship in distress is allowable, in as much as the state of the vessel in distress may involve danger to life.... The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of the humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life from the fear, lest any disaster to ship or cargo, consequent on so doing, should fall on him.

But not to save property.—While this is so in reference to saving life, the common law does not allow deviation only for the sake of saving property.[24] In the case cited above :

> The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to Mediterranean, the usual perils of the sea excepted. While on her voyage she sighted and went to the assistance of a vessel in distress, and the master, in consideration of £ 1,000, agreed to tow her into the Texel, which was out of his direct course. While so doing the defendants' vessel was stranded, and, ultimately, with her cargo, was totally lost. The jury found that towing was not necessary to save the lives of those on board the vessel in distress, and was necessary only to save her and her cargo.

The defendants were accordingly held liable. Those whose cargo was thus lost were entitled to hold the shipowner liable. COCKBURN CJ pointed out that

22. Chorley and Tucker, LEADING CASES ON MERCANTILE LAW, 303 (4th ed. 1962) relying upon *Joseph Thorley Ltd.* v *Orchis SS Co.*, [1907] 1 KB 660, where on account of the deviation the shipowner was not permitted to rely on exception clauses. Lord WATSON in *Strang, Steel & Co.* v *A Scott & Co.*, (1889) 14 App Cas 601 observed that "it is the presence of the peril and not its causes" which justify the deviation and that it is, therefore, immaterial whether the unseaworthiness of the ship or her negligent navigation contributed directly to the peril or not.

23. (1880) 5 C P D 295 at p. 304.

24. But deviation to save property is permissible in the case of bills of ladging to which the Carriage of Goods by Sea Act, 1924 [English] applies : Sch., Article IV.

deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil. It would obviously be most unjust that the shipowner should be permitted to save property for consideration to himself and risk the property of the cargo owners.

"But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating."[25]

Statatory permission for deviation.—Where a contract of affreightment is in the form of a bill of lading and, therefore, the Carriage of Goods by Sea Act applies, Article IV (Rule 4) provides that "any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." Thus deviation is now allowed for saving both life and property and also where reasonably necessary.

Deviation for recognised purposes and unseaworthiness.—Deviation for these recognised purposes is justified even when the need for the deviation was created by unseaworthiness of the ship. It is the presence of the peril and not its causes which justify deviation. This was pointed out by the House of Lords in *Kish* v *Taylor Sons & Co.*[26]

> The charterers of a ship having failed to load a full cargo as required by the charter-party, the master, to minimise the loss, procured a cargo from the other sources and overloaded the deck to such an extent as to render the ship unseaworthy. In consequence of her unseaworthiness the ship was obliged to deviate from her course in order to put into a port of refuge for repairs, without which the life of the crew would have been in danger. After repairing, she completed the voyage in safety. The shipowner claimed under the contract "dead freight" and retained the cargo until payment. The charterer contended that on account of the deviation the contract was avoided and the shipowner should not have the advantage of its terms.

But the deviation was held to be justified. "Dead freight" is in reality a compensation for underloading. The contract of affreightment is not put to an end by a breach of the warranty of seaworthiness or by a deviation which is in fact necessary for the safety of the ship and crew but the necessity for which is caused by unseaworthiness.

Contract clauses for deviation.—Contracts of affreightment usually provide for the right of deviation, but such right should not be used so as to defeat the

25. (1880) 5 CPD 295 at p. 304.
26. [1912] AC 604 : [1911-13] All ER Rep 481.

very purpose of the contract. The Court of Appeal laid down this principle in *Leduce & Co.* v *Ward*[27].

> The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any port in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost with her cargo, off the mouth of the Clyde, by perils of the sea.

The shipowners were held liable. The bill of lading imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage ; Glasgow, being altogether out of the course of such voyage, was not such a port ; and the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from their liablity.[28]

Thus, though the goods were destroyed by an excepted peril, the shipowner was nevertheless liable, because the peril operated when the ship was out of its course. The liberty to call at any port does not mean that the ship can leave the named voyage. It only means that while confining itself to the contracted voyage, it may touch any ports which will be passed on the named voyage. Any departure from the contracted voyage is a breach which will disentitle the shipowner from the exception clauses. The House of Lords held in *Hain Steamship Co. Ltd.* v *Tate and Lyle Ltd.*,[29] that even where a shipowner delivers goods safely after a deviation, he will not be able to recover the freight for the voyage. Lord ATKIN considered deviation to be a serious matter.

> The true view is that the departure form the voyage contracted is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms.... The party who is affected by the breach has the right to say, I am not bound by the contract.... Once he elects to treat the contract as at an end he is not bound by the promise to pay the agreed freight. But, on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting.

Thus the cargo owner can, at his option, treat the contract as repudiated and, if he does so, the shipowner cannot insist upon his rights against him. Another case of the same kind is *James Morrison & Co. Ltd.* v *Shaw, Savill and Albion Co. Ltd.*[30], where a ship was bound to "steam from New Zealand to London"

27. (1888) 20 QBD 475 : 57 LJ QB 379 : 58 LT 908 CA. See ER Hardy Ivamy, CASE BOOK ON CARRIAGE BY SEA, 2nd ed 1971 where it is stated at p 10 that "this case has been selected for inclusion in this section because it is a good illustration of the rule to be applied to both types of contracts of affreightment.
28. *See* Lord ESHER MR at p. 481.
29. [1936] 2 All ER 597. The principle of this case applies to both types of contracts of affreightment.
30. [1916] 2 KB 783 : 115 LT 508. This rule is applicable to both types of contracts of affreightment.

with liberty on the way to call at any intermediate port or ports. On the way she picked up a parcel of frozen meat and deviated from direct route to London to deliver it at Havre and while nearing Havre, it was torpedoed by a German submarine and the cargo was totally lost. Although the contract excluded liability for hostile action, the shipowner was held liable. SWINFEN EADY LJ informed the carrier that "if they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they were breaking their contract. They are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not."

Similarly, where, under the bill of lading, the shipowner was exempted from liability for the negligence of the stevedores, they were held liable when the stevedores damaged the goods, because the ship had earlier deviated from its normal route.[31]

Statutory privilege of deviaition.—Article IV, Rule 4 of the Schedule to the Carriage of Goods by Sea Act now allows any "reasonable deviation". The effect of this was construed by the House of Lords in *Stag Line Ltd.* v *Foscolo, Mango & Co. Ltd.*[32]

> Two engineers were taken on board a vessel for a part of the voyage for the purpose of testing a superheater fitted in the vessel. After the tests were completed the ship was taken slightly off its course to land the engineers. After this the captain did not bring back the ship to the contract route by the shortest way, but followed a course along the coast thinking to join the route a little farther on. That proved to be mistaken. The ship stranded and both she and her cargo were lost.

The House of Lords held that the deviation for the purpose of landing the engineers was probably reasonable, but not joining the regular route by the shortest way was another deviation which was not reasonable and, therefore, the ship owners were liable notwithstanding the exception clauses. Lord ATKIN explained the effect of Rule 4 in the following words :

> I cannot think that Rule 4 was not intended to extend the permissible limits of deviation. This would have the effect of confining reasonable deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation in the joint interest of cargo owner and ship... or even to such a deviation as would be contemplated reasonably by both cargo owner and shipowner.... A deviation may, and often will be caused by fortuitous circumstances never contemplated by the original parties to the contract ; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither : as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance ; or where some person on board

31. *Joseph Thorley Ltd.* v *Orchis SS Co. Ltd.*, [1907] 1 KB 660.
32. [1932] AC 329.

> was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without the obligation to consider the interest of any one as conclusive.[33]

Applying this principle to the facts of the case before him, his Lordship noted that the coasting course directed by the master was not the correct course. The small extra risk of the original deviation was vastly increased by the subsequent course. It was not a mere error of navigation, but a failure to pursue the true course which in itself made the deviation cease to be reasonable.

4. Not to Load Goods Liable to Cause Danger or Delay to Ship

There is an obligation on the part of the shipper not to load the ship with dangerous goods or goods likely to cause delay to the ship. He should not ship goods likely to involve unusual danger or delay to the ship without communicating to the shipowner facts which are within his knowledge indicating that there is the risk, provided that the shipowner does not and could not reasonably know those facts. Thus where a shipper delivered casks of what he described as bleaching powder, but they in fact contained corrosive contents which, due to defective packing, escaped and caused damage, the shipper was held liable.[34] In another case, the goods were described as general cargo. They were packed in casks and consisted of a chemical known as "ferro silicon" which was always liable to be dangerous by giving off poisonous gases. The shipper knew what the goods were but did not know that they work dangerous and, therefore, gave no information to the shipowner. The goods gave off poisonous gases in consequences of which one man on board died and another suffered from serious illness. The defendants were held liable.[35]

Goods which are likely to cause delay or detention of the ship are also in the same category. This was pointed out in *Mitchell, Cotts & Co.* v *Steel Bros.*[36]

> The shippers of a cargo of rice upon a vessel they had chartered for a voyage to Piraeus knew that the rice could not be discharged there without the permission of the British Government, although they thought that they might obtain the permission. In fact they were unable to procure it and the ship was in consequence delayed. The shipowner did not or could not possibly have known that the permission was necessary.

It was held that the delay arose from a breach of the shippers' obligation. ATKIN J took occasion to lay down that "there can be no question but that the shipment of goods upon an illegal voyage, i.e., upon a voyage that cannot be performed

33. *See* at p. 343.
34. *Brass* v *Maitland*, (1856) 6 E & B 470 : 26 LJQB 49 : 119 ER 940.
35. *Bamfield* v *Goole and Sheffield Transport Co.*, [1910] 2 KB 94 : 79 LJ KB 1070 : 103 LT 201 CA.
36. [1916-17] All ER Rep 578 : [1916] 2 KB 610 : 85 LJ KB 1747 : 115 LT 606.

without violating the law of the flag of the country or the law of the place where the goods are to be carried to—a shipment of goods which would involve the ship in consequence either of forfeiture or delay—is precisely analogous to a shipment of dangerous goods which might cause the destruction of the ship. What is the full extent of the shipper's obligation)...? It amounts to this, that he stipulates that he will not ship goods which involve the risk of unusual danger or delay to the ship."[37]

CHARTERPARTIES

The contract of affreightment may be either in the form of a charter-party or bill of lading. A bill of lading is a pure and simple contract of carriage, whereas, a charter-party involves the hiring of the ship itself. Where a ship is booked to the exclusive use of one shipper either for a particular voyage or voyages or for a certain time, that is a charter-party.

Two kinds of charter

Charterparties themselves are of two kinds, namely, (1) voyage charter-party or (2) time charter-party. Time charter-party is also known as charter-party by demise because the ship is for the time being leased out to the charterer. Whether it is one or the other depends upon the intention of the parties as shown by their contract. One instance in point is *Sandeman* v *Scurr*.[38]

> A ship was chartered for a voyage from Oporto to the United Kingdom. It was to load a full cargo of wine from the charterer's agents and the captain was to sign the bill of lading for the same. The ship reached Oporto and was put up there as a general ship without any intimation that she was under charter. The wine was stowed by a stevedore whom the master paid. The wine leaked from improper stowage and the question of liability arose.

Where the Charter-party is by demise, the charterer becomes the owner for the time being not only of the ship but also of the crew and their negligence falls on him. The charterer becomes responsible for the consequences of bills of lading signed by the master. Where the master signed bills of lading without proper care and consequently the owner was not able to recover general average contribution from cargo-owners, the charterer was held liable to the owner under an "indemnity clause."[39] Where, on the other hand, it is an ordinary charter-

37. At p. 579.

38. (1866) LR 2 QB Cases 86 : 36 LJ QB 58 : 15 LT 608.

39. *Milburn & Co.* v *Jamaica Fruit Importing and Trading Co. of London Ltd.*, (1900) 83 LT 321 : [1900] 2 QB 540 CA. The period of limitation under an indemnity clause runs from the time when a liability is incurred. *Bosnia* v *Larsen*, [1966] 1 Lloyd's Rep 22. As to the causal connection between the owner's loss and indemnity clause see *A/B Helsingfors Steamship Co. Ltd.* v *Rederiaktiebolaget Rex* : *The "White Rose"*, [1969] 2 Lloyd's Rep 52 and *Larringa Steamship Co. Ltd.* v *R*, [1945] 1 All ER 329, where it is emphasised that the shipowner has to show that there was a causal connection between the loss and his compliance with the charterer's instructions. DONALDSON J observed in the *A/B Helsingfow* case (cited above) that where one looks to the unsafe port cases or cases of damage to the ship resulting from the nature or condition of the cargo, the element of causation is all important; citing, *Portsmouth Steamship Co. Ltd.* v *Liverpool & Glasgow Salvage Assn.*, (1920) 34 Li L Rep 459 and *Royal Greek Govt.* v *Minister of Transport*, (1849) 83 Li L Rep 228. The judgment is reproduced in ER Hardy Ivamy,

party, the crew remain the employees of the shipowner and he is as much liable for their negligence. Holding the above to be an ordinary Charter-party, COCKBURN CJ said :

> In construing a Charter-party with reference to the liability of the owners of the chartered ship, it is necessary to look to the charter-party, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particulars vessel, and as subsidiary thereto, to have the use of the vessel and the services of the master and the crew. In the first case, the charterer becomes for the time being the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary rights of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. It appears to us clear that the charter-party in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues in the possession of the owners, the master and crew remaining their servants.

Charter-party by demise.—An illustration of a charter-party by demise is to be found in the decision of the House of Lords in *Baumwoll Manufactur Von Carl Scheibler* v *Furness*.[40]

> The owner of a ship let her by a charter-party for a term of four months. The charter-party provided that the captain, officer's and crew should be paid by the charterer, that the captain should be under the orders of the charterer as regards employment, agency or other arrangements ; that the charterer should indemnify the owners for all liabilities arising from the captain signing bills of lading. The only obligation on the owners was to maintain the ship and pay for its insurance. The charterer took possession and appointed the captain and other crew, but the chief engineer was appointed by the owners. The charterer sent the ship to New Orleans where cotton was loaded on it for which the bills of lading were signed by the captain. The ship foundered on the voyage owing, as was alleged, to the unseaworthiness of the ship. The cargo owner sued the shipowner also.

CASEBOOK ON CARRIAGE BY SEA, 22 (2nd ed 1971). The duty of the shipowner to obey the orders of the charterer "as regards employment" would include only orders as to the service of the ship and not as to handling of navigation. Thus the charterer was held not liable where the shipowner, observing the orders of the charterers' representative to leave, did so in bad weather and consequently the ship encountered a storm in which it stranded and sustained serious damage. See *Larringa Steamship Co. Ltd., Re*, [1945] 1 All ER 329 : [1945] AC 246 HL.

40. [1893] AC 8 : 62 LJ QB 201 : 68 LT 1.

The House of Lords held that the captain not being the servant of the owner, the owner was not liable. This is so because the owner who has parted with the possession and control of a ship under a charter-party is no longer the employer of the crew and is not liable for their acts. Lord WATSON emphasised that at the time when the bills of lading were signed and also at the time when the goods of the appellant suffered damage, the ship was in the possession and under the control of the charterers, who employed their own master and crew in her navigation.

Implied term against sale in time charter-party.—A time-charter-party carries an implied term that if the ship is sold by the owners it will not involve a change of flag. Thus where during the period of the charter-party a British ship was sold to a Greek, the owner was held liable in damages.[41]

Cancellation clause in voyage charter-party.—A voyage charter-party usually carries a cancellation clause which gives the charterer the right to cancel the charter if the ship is not at his disposal at the port of loading at the specified time. The charterer would have to fix a cancelling date before exercising this right. The right is in addition to the ordinary right of rescission. If the ship is not able to reach because of a supervening impossibility, both parties are relieved and neither can be sued for breach.[42]

Safe ports under time charter.—A time charterer can carry the ship only to a safe port, which is a question of fact in each case. In 1915 a ship was carried to Newcastle at a time when the German Government had, just two days before, threatened the destruction of all merchant ships in the waters round Great Britain. The Court of Appeal laid down that a safe port means a port which is safe physically as well as politically. An action either of nature or war may render a port unsafe, but held on the facts that Newcastle was a safe port at the time.[43]

Payment of Hire

Timely payment of hire of the ship is an essential requirement of a charter-party. The shipowner gets the right to withdraw the ship if there is no punctual payment. Where the payment falls due on a holiday or Sunday, it should be made a day before. Payment on the next working day would be too late. The shipowner would be justified in withdrawing the ship.[44] However, a charter-party can contain a clause known as "anti-technicality clause" requiring the shipowner to give at least a short notice before withdrawing the ship. Such notice must be given after payment has become due.[45]

41. *M. Issacs & Sons* v *William Mc Allum & Co.*, [1921] 3 KB 377.
42. *C. Czarnikow Ltd.* v *Koufos*, [1966] Lloyd's Rep 595, 610; *The Mihalis Angelos*, [1971] 1 QB 164.
43. *Palace Shipping Co.* v *Gans Steamship Line*, [1914-15] All ER Rep 912 : [1916] 1 KB 138 CA, citing *Ogden* v *Graham*, (1861) 1 B & S 773 : 31 LJ QB 26. *See* further *Leeds Shipping Co.* v *Societe Francaise Bunge*, [1958] 2 Lloyd's Rep 127 CA and *Reardon Smith Line* v *Australian Wheat Board*, [1956] AC 266 : [1956] 1 All ER 456 PC.
44. *The Laconia*, [1977] AC 850 : *Cf. The Nihalios Xilas*, (1979) 2 Lloyd's Rep 303 ; *The Chikuma*, (1981) 1 Lloyd's Rep 371. For criticism *see* Mann, (1981) 97 LQR 379.
45. *Avovos Shipping Co.* v *Pagnam, The Avovos*, [1983] 1 Lloyd's Rep 335 : [1983] 1 All ER 449: noted 1982 JBL 262.

It was pointed out in *The Lutetian*[46] that notice should not be given on Saturday, Sunday or public holiday. In this case payment was due on a Friday, a notice given on that day was held to be invalid because it would not come to the knowledge of the other party until Monday.

There is no prescribed form of notice. The only requirement, therefore, is that it must be clear and unambiguous. In *The Rio Sun*[47] (*No.* 2) payment was not made because the charterers claimed that the deductions to which they were entitled were more than the hire amount. The owners asked for details, demanded payment and withdrew the ship. It was held that there was no effective notice.[48]

Where a cheque has been accepted, the shipowner cannot then insist on cash unless he gives a resonable notice of his intention.[49] A clause in a time-charter-party provided that hire would not be payable if there were a "deficiency of men". The officers and crew refused to sail except in a convoy. The hire was held to be payable because there was no deficiency of men but only an unwillingness to work.[50] A clause in a time-charter-party that hire would not be payable if the "working of the vessel was hindered," was held to include a situation where the high-pressure engine broke down and the ship was carried to the port with the help of a tug.... The House of Lords held that hire was not payable during the period of such assistance but became payable after the ship made for the port and her wenches were capable of unloading her cargo.[51] Thus a partial interference was recognised as hinderance.

Payment of hire in Time charters and the off-hire clause

In *The Lutetian*,[52] the hire under the charter-party was due on July 18. On that date, the vessel was in dry dock and off-hire and likely to remain so until July 21/22. The charterers made payment on July 21. The owners withdrew the vessel for non-payment on due date. The contract contained an off-hire clause which provided that where time was lost for the stated reasons including dry docking, payment of hire would cease for the time thereby lost. It was held that because of the wording of the clause, the charterers were entitled to withhold payment until the vessel returned to service.[53]

46. [1982] 2 Lloyd's Rep 10. Noted 1983 JBL 262.
47. [1982] 3 All ER 273.
48. The court also rejected the argument that there was a waiver of notice. There can be waiver but on the facts of the case there was no waiver.
49. *A/S Tankerpress* v *Compagnie Financiere Belge des Petroles SA*, [1948] 2 All ER 939.
50. *Greek Govt.* v *Minister of Transport : The "Ilissos"*, [1949] 1 All ER 171.
51. *Hogarth* v *Miller, Brother & Co.*, (1891) 64 LT 205 : [1891] AC 48 : 7 TLR 120. The validity of a forfeiture has to be examined also in the light of balancing of interests between the owners and charterers. The court has the power to grant relief from hardship either way under its "inherent powers". *See* 1983 JBL 266-267.
52. [1982] 2 Lloyd's Rep 140.
53. The court was able to take this position because the earlier authorities dealt with only this point that payment has to be made in full at the commencement of the period. There was no authority on the effect of non-payment if the vessel was off-hire on the due date of payment. See *Tonneller* v *Smith*, (1897) 2 Com Cas 258 ; *A/S Tankerpress* v *Compagnie Financiere Belge des Petroles SA*, [1949] AC 76 : [1948] 2 All ER 939.

Effective payment in cash.—An effective *payment in cash* means that cash becomes available to the payee. The concept of payment in cash was considered by the House of Lords in *The Chikuma*[54].

> In this case hire was payable monthly in advance and in cash.[55] It was due on the 22nd day of each month. The charterers instructed their bank accordingly. The bank arranged the payment to be credited to the owners' account on January 22. But, payment being arranged through Italian bank, the law of that country permitted the payee to use the money only after four days. During those days neither interest was to accrue to them nor they could withdraw except on paying 0.1 per cent of interest. The owners did not receive the money on 22nd and, therefore, withdrew the ship.

"Their Lordships were unanimous in holding that payment by credit transfer or other acceptable means would only amount to "payment in cash" if the owner received the equivalent of cash; in other words, if he had immediate and unfettered use of the funds represented. Here this was clearly not the case."[56]

Anti-technicality clause

In order to overcome such hypertechnical matters charterparties sometimes carry "anti-technicality clause". This clause requires the owner to give a short notice, say, for example, 48 hours on hire becoming due, reminding the charterer of the fact that if payment is not received during the grace period, the ship would be withdrawn. Any such notice before the hire becomes due is of no effect.[57]

Port, berth or dock charter-party

A charter-party which simply states the port at which the ship shall be made available, is called "port charter-party". Where the ship is to be made available at the specified loading spot in a port or dock, it is called berth or dock charter-party. In such a case the obligation clearly is to bring the ship at the specified berth or dock. If that place is not in a position to receive the ship owing to congestion or some other cause, the waiting period would go to the shipowner's account.[58] The ship becomes an arrived ship if it reports at the customary place of anchorage within the port.[59]

54. [1981] 1 All ER 652.
55. The charter was under the New York Produce Exchange Form.
56. As summarised in 1982 Journal of Business Law 65. To the same effect is *Mardorf Peach & Co. Ltd.* v *Attika Sen Carriers Corpn. of Liberia : The Luconia*, [1977] AC 850 where payment was due on April 12, which turned out to be a Sunday and, therefore, it was made on Monday. The owner's right to withdraw the ship became effective. The court said that payment should have been arranged on the preceding working day, which was April 10.
57. *Avovos Shipping Co.* v *Pugnan : The Avovos*, [1983] 1 Lloyd's Rep 335.
58. *North River Freighters* v *President of India*, [1956] 1 QB 33 ; *Alderson Companie Martima S.A. Panama* v *Aussenhandel A.G. Zurich, The Darrah*, [1976] 3 WR 320 (berth charter-party) : *Davis* v *McVeagh*, (1879) 4 Ex D 265 (dock charter-party) ; *Tharsis Sulphur & Copper Co.* v *Morel Brs. & Co.*, [1891] 2 QB 647 (wharf charter-party).
59. *The Johanna Oldendroffe*, [1974] AC 479 , (anchored ship) and *Federal Commerce and Navigation Co. Ltd.* v *Trader Export*, [1978] AC 1, (ship not even anchored). The obligation is often mitigated by providing "berth or no berth" or "time lost waiting for a berth to count as laytime". *Compania Argentina de Navigation de Ultrasmar* v *Trader Export S.A.*, [1975] 1 Lloyd's Rep 252 ; *Dias Compania* v *Louis Dreyfus Corpn.*, [1978] 1 All ER 724.

In the case of a port charter-party, it is enough for the shipowner to bring the ship to the area of the port where ships usually wait for a berth and from where it can be put at the disposal of the charterer. Such area is designated as the commercial area of the port. The waiting period after the arrival of the ship in that area is at the account of the charterer.[60] There have been difficulties in identifying the commercial area of a port.[61] But beginning with the decision of the House of Lord in *The Hellow*[62] the emphasis has been not on distance from the loading place but upon the fact that the ship should be effectively at the disposal of the charterer. In the *Leonis* case the ship was regarded as an arrived ship when it was just only a few ships' length from the awaited berth. In the *Aello* case the ship was 22 miles away from the loading port, it was held to be not an arrived ship not because of the distance, but because it was not effectively at the disposal of the charterer. For this purpose the vessel has to be at least at the usual waiting place within the port. "Commercial area" is no longer the exclusive test. In *Johanna Oldendrofee*[63] Lord REID emphasised that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and her geographical position is of secondary importance.

> The ship in this case was at a distance of 17 miles from the loading area. She was within the legal environs of the port and was waiting for the charterer's nomination for a berth. The ship was at his disposal. The shipowner had fulfilled his responsibility. It was immaterial that it took 18 days for the charterer to secure a berth.

The principle of this case was again applied in *The Prometheus*[64] where the ship was 20 miles from her loading berth but was regarded as an arrived ship because she was at one of the usual waiting places within the legal limits of the port.

Usual clauses of charterparty

It is open to the parties to include in a charter-party or contract of affreightment any lawful terms. But many such terms have now become more or less stereotyped and are known as the usual clauses of a charter-party. Some of such terms operate as conditions and others as warranties.[65] Whether it is one or the other depends upon its relative importance. Only some of such terms may be noted here.

60. *Lenois S. S. Co.* v *Rank Ltd.*, [1908] 1 KB 499.
61. *Kokusai Kisen Kabushiki Kaisha* v *Flack*, (1922) 10 Ll L Rep 655 : *U.S. Shipping Board* v *Strick*, [1926] AC 545. *Cf. Roland-Linie Schiffahrt GmbH* v *Spillers*, [1957] 1 QB 109 ; *The Seafort*, [1962] 2 Lloyd's Rep 147.
62. *Sociedad Financiera des Bienes S.A.* v *Agrimpex Hungarian Trading Co. for Agr. Products*, [1906] 2 All ER 578.
63. [1973] 3 All ER 148.
64. *Venezelos NE of Athens* v *Societe Commercial de Cereals et Financere S.A. of Zurich*, [1974] 1 Lloyd's Rep 350.
65. See the judgment of DIPLOCK LJ in *Hong Kong Fir Shipping Co. Ltd.* v *Kawasaki Kisen Kaisha Ltd.*, [1962] 2 QB 26 : [1962] 1 All ER 474 CA as to whether the classification of the clauses in terms of conditions and warranties is to apply in all cases.

1. Ready to Load

A charter-party usually contains a statement as to the position of the ship. Such a statement may, in circumstances, become a condition of the contract any breach of which entitles the charterer to repudiate the contract. For example, in *Bentsen* v *Taylor Sons & Co.*:[66]

> A charter-party dated March 29, described the ship "as now sailed or about to sail to the United Kingdom," and that the ship, after discharging homeward cargo, shall proceed to load. But, in fact, she sailed to the United Kingdom on April 23. The parties then entered into correspondence. The ship arrived and the charterers refused to load.

It was held that the description of the ship as "now sailed or about to sail," was of the substance of the contract ; it was a condition precedent and not a mere warranty and the defendants were entitled to repudiate the contract. But their correspondence amounted to a waiver of such right to repudiate and they were liable for the freight subject to their right to recover such damages as they could prove that they had sustained by reason of the breach of the condition.

Where, on the other hand, the clause provided that the "ship is expected ready to load" at a given date, it was held that this did not mean that the ship must be in such a position. It only means that there must be an honest belief, founded on reasonable grounds, that she will be able to load at that date. In fact, the time at which such a representation was made, there was no reasonable ground for making it, and the ship was not ready to load until a long time afterwards, there was a breach of condition.[67]

Similarly, any statement as to the position of the ship may operate as a condition. For example, the words that the "ship was now in the port of Amsterdam," were held to be a warranty or condition precedent.[68] A statement by the owner that the ship is "expected ready to load under this charter about July 1, 1965" has been held to be a condition.[69] Lord DENNING felt confirmed in this view by the illustration given by Lord Justice SCRUTTON himself in all the editions of his work on CHARTER-PARTIES[70] "A ship was chartered 'expected to be at X about December 15... shall with all convenient speed sail to X." The ship was then on such a voyage that she could not complete it and be at X by December 15. It was held that the charterer was entitled to throw up the charter.[71]

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66. [1893] QB 274 : 63 LJQB 15 : 69 LT 487 CA.
67. *Sanday & Co.* v *Keghley, Maxeted & Co.; Sanday & Co.* v *Hillerns and Folwer*, (1922) 91 LJKB 624 : 127 LT 327 : 38 TLR 561 CA.
68. *Behn* v *Burness*, (1863) 3 B & S 751 : 32 LJQB 204 : 122 ER 281, Ex Ch. See further *Maredelanto Compania Naviera S.A.* v *Bergban-Handel* : *The "Mihalis Angelos."* [1970] 2 Lloyds Rep 43 ; reported, Ivamy, CASE BOOK ON CARRIAGE BY SEA, 29 (2nd ed. 1971).
69. *Maredelanto Compania Naviera S.A.* v *Bergban-Handel*, cited above.
70. 89 (10th ed. 1921).
71. Lord DENNING cited the following cases to the same effect from sale of goods transactions : *Samuel Sanday & Co.* v *Keghley Maxted & Co.*, (1922) 27 Com Cas 296 and *Frnish Govt. (Ministry of Food)* v *H. Ford & Co.*, [1921] 6 LiL Rep 188.

2. *Fit for the Voyage*

Charterparties usually provide that the ship shall be "tight, staunch and strong and every way fitted for the voyage". It has been admitted by the Court of Appeal in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*[72] that whether such a stipulation is a condition or a warranty is not easy to classify.

> A charter-party provided that the vessel was to be "in every way fitted for ordinary cargo service". The experience on the voyage was, however, otherwise as she kept breaking down from time to time. This was due to the incompetence and inadequacy of the engine-room staff, for which reason she was unseaworthy.

But even so it was held that the statement in the agreement as to seaworthiness was not a condition and the charterers were not entitled to repudiate the charter-party. DIPLOCK LJ described the stipulation as to seaworthiness to be one of complex nature.[73]

> The shipowners undertaking to tender a seaworthy ship has, a result for numerous decisions as to what can amount to 'unseaworthiness', become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.

Similarly, UPJOHN LJ asked : "Why is this apparently basic and underlying condition of seaworthiness not in fact, treated as a condition?" and then answered by saying :[74]

> It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted "in every way" of service. Thus, if a nail is missing form one of the timbers of a wooden vessel, or if proper medical supplies or two anchors are not on board at the time of sailing the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances, the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.... That matter is to be determined as a question of the proper interpretation of the contract.[75]

3. *Full and complete cargo*

"Full and complete cargo" clause means that the charterer undertakes to supply the agreed cargo lest the ship owner may suffer loss of freight. Where a charterer refused to load more than 2,673 tons, whereas a full and complete cargo would have been 2,950 tons, it was held that the charterer ought to have

72. [1962] 1 All ER 474.
73. At p. 483. The Lord learned Justice explained the difficulties of classification as were also noted by BOWEN LJ in *Bentsen* v *Taylor, Sons & Co.*, [1893] 2 QB 274 at 280.
74. *See* at p. 483.
75. See also *Efploia Shipping Corpn.* v *Canadian Transport Co.* : *The "Pantanassa"*, [1958] 2 Lloyd's Rep 449, ship with more than specified fuel, held breach of warranty.

loaded a full and complete cargo and freight was payable accordingly.[76] Similarly, where in a charter-party the defendant agreed to "load a full and complete cargo say, about "1,000 tons," it was held that the words "say about 1,100 tons," were words of contract and not of expectation only. The defendant was not bound to load a full cargo, but only such quantity as might reasonably be described as about 1,100 tons. The court fixed 3% as a reasonable margin either way. The ship being of 1,133 tons and the defendants, having loaded only 1080 tons, they were held liable to pay dead freight for fifty tons.[77] In another case, the charterer agreed to load not less than 6,500 tons, but not exceeding 7,000 tons. The court laid down that the words "not less than 6,500 tons," constituted a warranty by the shipowners to be charterers that the vessel could carry that quantity, and the words "not exceeding 7,000 tons," was a term binding the shipowners not to ask for more than 7,000 tons. The shipowner, however, demanded more and the charterer, under duress and protest, shipped a lager quantity. The shipowner was not allowed to recover the freight for that extra quantity.

The shipowner is also bound to provide space for full and complete cargo. Thus where the shipowner loaded a larger amount of bunker coal than was required for the chartered voyage with the result that the cargo had to be reduced, the shipowner was held liable for the expenses.[78]

A clause giving protection against failure to load will apply only when loading itself is prevented and not where the party is not able to bring the goods to the port. A clause protected the charterer against failure to load caused by strikes, frosts, or other unavoidable accidents preventing loading. The goods could not be brought to the docks owing to frost. The House of Lords held that the charterer was responsible for the delay in loading. The frost had not prevented the loading but the bringing of the goods to the docks.[79]

A charterer undertook to load full and complete cargo. The ship was described as of the burden of 261 tons or thereabouts. The charterers loaded 360 tons. The ship was capable of carrying 400 tons of the cargo of that kind. The shipowner was allowed to recover damages for dead freight to the extent to which the cargo was short of full and complete load.[80]

A marginal variation would be covered by the rule *de minimus non curat lex* which means that the law has always regarded a contract to deliver or load a specified quantity of goods as satisfied if that quantity has been delivered within the margin of error which is not commercially practicable to avoid. The rule is simple, though difficulties do arise in borderline cases on particular facts. One such case was where out of 12,600 tons which had to be loaded, the charterer

76. *Heathfield Co. Ltd.* v *Rodenacher*, (1896) 2 Com Cas 53 CA.
77. *Morris* v *Levison*, (1876) 1 CPD 155 : 45 LJQB 409 : 34 LJ 576 : 24 WR 517.
78. *Darling* v *Recburn*, [1907] 1 KB 846 : 76 LJ KB 570 : 96 LT 437, CA. To the same effect, *Efploia Shipping Corpn.* v *Canadian Transport Co. Ltd. : The "Pantanassa"*, [1958] 2 Lloyd's Rep 449.
79. *Grant & Co.* v *Coverdale, Todd & C.*, (1884) 51 LT 472.
80. *Hunter* v *Fry*, (1819) 2 B & Ald 421 : 41 Digest (Repl) 178.

delivered only 12,588 tons 4. cwt. The shortage was that of 11 tons and 16 cwt. It was held that the margin of error rule was not a defence in this case. On the facts of the case it was commercially practicable to get very much closer to the full and complete cargo of 12,600 tons.[81]

The obligation to load a full and complete cargo includes the obligation to fill up the left-over spaces, otherwise the charterer becomes liable for the wasted carrying capacity. ERLE CJ laid down this principle in an early case. He said :

> By the terms of the charter-party the charterer has the option of putting in the vessel any cargo he chooses [a full and complete cargo of sugar or any other lawful produce], but he is bound to fill up the vessel, and if he chooses to put into the vessel that kind of cargo which will leave room for broken stowage, there is an obligation on him to provide the vessel with so much broken stowage as may be necessary to complete a full cargo. The owner is bound to receive broken stowage, and there must be a correlative obligation on the part of the charterer to supply it when required to fill the ship.[82]

In another case, the charterer had the option to load wheat and (or) maize and (or) rye. Loading of wheat had commenced but the Argentine Government banned the export of wheat. The court said that in such a case the shipper must load a cargo in accordance with his contract, and if he cannot load wheat, must complete with maize or rye and he would be entitled to the benefit of reasonable time for changing over. If that time was not provided to him, he could not be sued for breach.[83]

It will be a matter of construction of the charter party as to whether the charterer is bound to load the alternative cargo. Where the contract gives him an unfettered discretion, he cannot be sued for breach if he does not provide the alternative. A charter-party provided for a full and complete cargo of wheat in bulk and/or barley in bulk and/or flour in sacks or a mixed cargo. The charterer began with loading of wheat but a strike prevented further loading. The other items were not affected by the strike. It was held by the House of Lords that the charterers were not obliged to load any alternative cargo. Viscount RADCLIFFE said :

> The primary obligation is to provide a cargo of wheat only, the exceptions clause covers delay in the shipping of wheat, and there is no obligation on the charterers to lose that protection by exercising their option to provide another kind of cargo that was not affected by the cause of delay. There is in this case no duty on the charterers to switch from wheat to barley or flour because their choice of loading barley or flour was unfettered one.[84]

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81. *Margaronis Navigation Agency Ltd.* v *Henry W. Peabody & Co. London Ltd.*, [1964] 2 Lloyd's Rep 153.
82. *Cole* v *Meek*, (1864) 33 LJCP 183 : 9 LT 653.
83. *H. A. Brightman & Co.* v *Bunge Y. Born Limitada Sociedad*, (1925) 132 LT 188 : [1924] 2 KB 619 : 93 LJ KB 1070.
84. *Reardon Smith Line Ltd.* v *Ministry of Agriculture*, [1963] 1 All ER 545 : [1963] AC 691.

4. "King's Enemies" and "Restraints of Princes"

Charterparties often provide that the shipowner would not be liable in certain events, for example, that no liability would arise if the goods are lost due to an "act of God" or of "national enemies". Such perils are then known as excepted perils.

The words "King's enemies" mean the enemies of the sovereign of the person who made the bill of lading and "restraints of princes and rulers" include all cases of restraint or interruption by lawful authority, leaving, of course, the case of pirates to be ranked with other dangers of the sea. Where it became probable that a ship passing through Turkey would be seized because of a war between Greece and Turkey and, therefore, the shipowner would not be able to perform his contract, a refusal by the charterer to load the ship was held to be justified,[85] and it made no difference that a portion of the cargo had already been loaded. In this case war had already been declared. But where there is no such declaration and there is a mere apprehension of seizure, that will not be sufficient to enable the shipowner or the charterer to repudiate the contract. There must be such a declaration of war as to cause an actual restraints of princess.[86] A voyage which involved the risk of the vessel being attacked and sunk by German submarines has been held to be one which would involve the risk of "seizure" or "capture."[87] Where the intervention of the restraint is due to the negligence of the shipowner himself, he cannot rely on the defence.[88]

Where on account of infection to animals the Government of the country of destination did not allow the livestock to be landed there, that was held to be restraint of princess.[89] Where a ship had to be diverted to Britain instead of going to a German port because of the war, that was within the exception.[90]

5. Perils of the Sea

Charterparties also contain exception in favour of "perils of the sea", namely, if the goods are lost on account of a peril of the sea the shipowner would not be liable. The term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter. It must be a peril "of" the sea. "These words do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."[91] In this case the damage to the cargo was due to the collision of the ship with another vessel and the

85. *Embricos* v *Reid (Sydney) & Co.*, [1914] 3 KB 45.
86. *Watts, Watts & Co.* v *Mitsui & Co.*, [1917] AC 227 ; See also *Becker, Gray & Co.* v *London Asurance Corpn.*, [1918] AC 101, where a voyage was abandoned to avoid risk of capture, that was held to be not justified.
87. *In re Tonnevold & Firm Frills*, [1916] 2 KB 551.
88. *Dunn* v *Bucknall Bros.*, [1902] 2 KB 614.
89. *Miller* v *Law Accident Ins. Co.*, [1903] 1 KB 712.
90. *British and Foreign Marine Ins. Co.* v *Sanday & Co.*, [1916] 1 AC 650.
91. Lord HERSCHELL in *Wilson Sons & Co.* v *Xantho*, (1887) 12 App Cas 503.

House of Lords held that the collision was a peril of the sea within the meaning of the exception. Another example is *Hamilton, Fraser & Co.* v *Pandorf & Co.*[1]

> Rice was shipped under a charter-party and bills of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby seawater escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants.

It was held that the damage was within the exception and the shipowners were not liable. It was suggested by the House of Lords that the idea of something fortuitous and unexpected is involved in both words "peril" or "accident"[2]. Developing the concept further, Lord WATSON said :[3]

> When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case, is wholly due to a risk not peculiar to sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a port-hole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim to say that, had ordinary precautions being taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

Where the ship foundered on account of a collision with another vessel, occurring without the fault of the shipowner carrying the cargo, it would be protected by "perils of the sea."[4] A loss from the ship's running foul of another by misfortune has been held to be within the exception.[5] A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident is not "a peril of the sea."[6] Damage done by rats has been held to be not within the exception and it was no defence to say that the master had kept cats on board,[7] or that he had taken all possible precaution to prevent it.[8] Where damage was done to a cargo by water escaping through the pipe of a steamer, in consequence of the pipe having been cracked by frost, this was held to be not an act of God but negligence in the captain in filling his boiler before the time for heating it, although it was the practice to fill overnight when the vessel started in the morning.[9]

1. (1887) 12 App Cas 518.
2. *See* the speech of Lord HALSBURY.
3. At p. 525.
4. *The Xantho*, (1887) 12 App Cas 503.
5. *Buller* v *Fisher*, (1799) 170 ER 540.
6. *Woodley* v *Michell*, (1883) 4 QBD 47 : 52 LJ QB 325, CA.
7. *Laveroni* v *Drury*, (1852) 8 Exch 166 : 22 LJ Ex 2 : 155 ER 1304.
8. *Kay* v *Wheeler*, (1867) LR 2 CP 302 : 36 LJ CP 180.
9. *Siordet* v *Hall*, (1828) 130 ER 902.

A bill of lading contained an exception that "loss or damage resulting from any of the following perils (whether arising from the negligence, default or error in judgment of the engineers or otherwise howsoever) or other perils of the seas, rivers, or navigation of whatever nature or kindsoever." The cargo of sugar was stored in a tank at the bottom of the ship. The engineer negligently let salt water into the tank. The shipowner was allowed to claim the protection of the clause. The court said : "In the present case there is what is called a negligence clause, and the shipowner is exempt from liability for loss occasioned by perils of the seas though caused by negligence. The shipowner is protected by the exception, although the loss was caused by the negligence of his servant."[10]

"The emphasis in all cases is placed on the fortuitous or accidental loss brought about by entry of water, measures taken in its prevention, or loss of the vessel by other forceful action of the wind and waves."[11] An accidental incursion of sea water causing loss or damage has been held to be a peril of the sea.[12] "The emphasis has always been on the terms 'fortuitous' and 'accidental'. Thus the entry of sea water owing to the weakness of the vessel's hull[13] or as a result of the ignorance or lack of skill of the crew,[14] has been held not to amount to peril of the sea."[15]

In *Canada Rice Mills* v *Union Marine & General Insurance Co.*,[16] Lord WRIGHT explained the position thus :

> Where there is an accidental intrusion of seawater into a vessel at a part of the vessel and in a manner where seawater into a vessel is not expected to enter in the ordinary course of things and there is a consequent damage to the thing insured, there is prima facie a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause ... or even without stress of weather by the vessel heeling over owing to some accident.

Whether shipowner released by happening of excepted peril.—Where a ship is damaged by an excepted peril, the shipowner remains bound by the contract and should continue the voyage after getting the ship repaired. It is not a discharge by itself. But he can show that it was impossible to go further or that

10. *Blackburn* v *Liverpool etc. Navigation Co.*, [1902] 1 KB 290.
11. 1982 Journal of Business Law 141.
12. *Canada Rice Mills* v *Union Marine & General Ins. Co.*, [1941] AC 55 ; *Thompson* v *Hoppen*, (1856) 6 E & B 172 ; *E.D. Sason & Co.* v *Western Ins. Co.*, [1912] AC 561.
13. *The Golden Fleece*, (1874) LR 9 QB 581.
14. *Tatham* v *Hodgson*, (1796) 6 Tenn Rep 656.
15. 1982 Journal of Business Law 141. Where, however, water is negligently let in, that may not take the case out of the concept of "peril of the sea". See *Blackburn* v *Liverpool etc. Co.*, [1902] 1 KB 290, noted above. See also *Case Existological Laboratories Ltd.* v *Foremost Ins. Co. et al.*, [1981] 116 DLR (3d) 199, noted 1982 Journal of Business Law 141 and *Hamilton* v *Pandorf*, (1887) 12 App Cas 518, where the contract of the shipowner was not only to carry the goods safely, subject to the excepted perils, but, further, to use all due care and diligence to deliver safely and, therefore, the exceptions relieved him from his absolute obligation, but not from the obligation to use due care and diligence.
16. Note 11 above.

it would be unreasonable to expect this form him.[17] Lord ESHER MR thus explained the position :[18]

"The charter-party is a contract between the shipowner and the charterer that the former will take the cargo offered by the latter, and will carry it as directed by the charterer to a safe port in the United Kingdom, unless prevented by the perils of the sea, which are excepted in the charter-party. It is an absolute contract by the shipowner to carry the goods to the port named by the charterer, which in this case was London, unless prevented by the excepted perils of the sea.... In applying this to the facts of the case, we have to see whether the shipowner, who never brought the ship to London, was prevented from so doing by the perils of the sea. The ship was stranded near Gibraltar. If she could not have been got off it is obvious that she would have been prevented from fulfilling the voyage by the perils of the sea. But she was got off. If she had been got off as a mere wreck, as explained by MAULE J in *Moss* v *Smith*[19] and could not have been repaired, either where she was or at any other place, so as to be able to complete the voyage within any time which could be considered a fulfilment of the contract, she would have been prevented by the perils of the sea from fulfilling that contract, though she might have been able to perform some other voyage. But, in fact, the ship was got off, and she was taken to Gibraltar where she could be repaired. What is the duty of the shipowner in such a case? His duty is to repair the ship, if it is possible for him to do so. That the ship in the present case could, in fact, be repaired cannot be denied. But as MAULE J said in the case to which I have referred, the possibility must be a business possibility. If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her. In the present case the ship was repaired at Gibraltar, and the cost consisted of the expenses of the salvage of the ship and of the repairs necessary to bring her to London. We know that she was repaired sufficiently to enable her to reach Liverpool by a voyage longer than that provided for by the charter-party, at a cost of £ 750 in addition to the expenses of salvage. Any reasonably sensible shipowner would have acted as these shipowners did up to the time when they went to law. The repairs were executed at a cost very far less than the value of the ship, and, that being so, no reasonable shipowner having regard to this own interests would have failed to do the repairs. The shipowners were prevented from performing the voyage, not by the perils of the sea, but by their own willful disregard of their contract, or, at any rate, by their misreading of it."

Clause "paramount".—If a charter-party contains a clause "paramount" it becomes bound by the provisions of the Carriage of Goods by Sea Act. These

17. *Assicurazioni* v *S.S. Bessie Morris Co.*, [1892] 1 QB 652.
18. At p. 657.
19. (1850) 9 CB 94 at pp. 102, 103.

provisions are designed for bills of lading, but the parties to a charter may also at their option invite their application by an express declaration to that effect.[20]

Lawful Trades and Safe Ports

The charterer has to use the ship for lawful trades and to carry the ship only to safe ports. The concept of a 'safe port' is that it is safely usable by the ship for arrival, departure and loading and unloading. The port should be safe from political and structural point of view and also weather conditions. Where a port did not warn the ship of tides, nor informed it that there was no such system there and the ship must use its own instruments, the port was held to be not safe entitling the shipowner to recover his loss form the charterer.[21]

The safety of a port has been a much problematic question.[22] But three cases decided in 1950s imparted some element of certainty. In one of them[23] SELLERS LJ summarised the position of law thus:

> If is were said that a port will not be safe unless, within the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law.[24]

Safety of the port has to be considered according to the circumstances of the time when the port is nominated and not according to any subsequent developments. The House of Lords laid down this rule in *Kodros Shipping Corpn.* v *Empresa Cubana de Fletes, the Evia (No. 2)*,[25] overruling some earlier authorities which insisted that the charterer must assure the safety of the port at least down up to the time of ships' departure. One such case was *The Mary Lou*[26] where the court said that "the charterer is liable for any resulting damage if the system breaks down while the ship is in port, notwithstanding that the port was safe at the moment of nomination." Similarly, in another case,[27] the court laid down that "the point of the warranty is that it speaks from the date of nomination, but it speaks about the anticipated state of the port when the vessels arrives." In these two cases the ship arrived at the nominated port in safety but was not able to sail out because the only outlet channel available for ships of that kind became silted up. A similar result followed where the port came under hostile gun fire after the arrival of the vessel.[28] In another case, the fact of a berth silting up after nomination was regarded as giving rise to the possibility that the charterer's duty had been broken.[29]

20. See *Adamstos Shipping Co. Ltd.* v *Anglo-Saxon Petroleum Co. Ltd.*, [1959] AC 133.
21. *Tage Berglund* v *Montoro Shipping Corpn., The Dagmar*, [1968] 2 Lloyd's Rep 563.
22. See, for example, Carver, CARRIAGE BY SEA, paras 976-988 (12th ed.).
23. *The Eastern City*, [1958] 2 Lloyd's Rep 127.
24. The two other cases of 1950s are : *The Stork*, [1955] 2 QB 68 ; *The Houston City*, [1956] AC 266.
25. [1982] 3 All ER 350 ; [1982] 2 Lloyd's Rep 307.
26. [1981] 2 Lloyd's Rep 272.
27. *The Harmine*, [1978] 2 Lloyd's Rep. 37.
28. *The Evoggelos T H*, [1971] 2 Lloyd's Rep 200.
29. *The Pendrecht*, [1980] 2 Lloyd's Rep 56.

The decision of the House of Lords in *The Evia*[30] case has changed this trend. The position now is that if the port satisfies the criteria of safety at the time of nomination, then the charterer is not liable for any subsequent alterations in the safety of the port.

> In this case the vessel was under a time charter-party. She was ordered to discharge at Basrah. There was congestion at the port. Discharge could be completed after a considerable delay. In the meantime the waterway leading back to the open sea was closed as a result of hostilities between Iraq and Iran. The vessel had to remain there for a long period. The charterer claimed frustration of the charter-party on account of indefinite detention and the owners claimed damages for carrying the ship to an unsafe port.

The House of Lords unanimously rejected the theory of continuing warranty. Lord ROSKILL stated their Lordships' view thus :

> The charterer's promise must, I think, relate to the characteristics of the port or place in question, and in my view, means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary and, in due course, leave. But if those charateristics are such as to make that port or place prospectively safe in this way, I cannot think that if, in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view should properly fall on the ship's insurers under the policies of insurance the affecting of which is the owner's responsibility.

Indemnity Clauses

Since the ship is at the disposal of the charterer and the master of the ship has to carry out his instructions, the charterer has to indemnify the shipowner against the consequences of his instructions being carried out. For all operational matters, however, the master is under the control of the shipowner.[31]

Cancellation Clauses

A clause in a charter-party entitling the charterer to cancel the contract is generally an absolute right and not subject to exception clauses. Explaining the effect of a clause like this in *Smith* v *Dart & Sons*[32], Lord COLERIDGE CJ said :[33]

"By the charter-party it was... agreed that should the steamer not be arrived at the first loading port free of pratique and ready to load on or before a day fixed, the charterer was to have the option of cancelling or confirming the charter-party. The fact was, that the vessel arrived two days before the day so

30. [1982] 3 All FR 350.
31. *Berkshire*, [1974] 1 Lloyd's Rep 185.
32. (1884) 52 LT 218 : 54 LJQB 121 : 1 TLR 99.
33. At p. 221.

fixed, but communication with the shore being impossible on account of the state of the sea and the weather, she was not, on the day fixed, free of pratique there, and in consequence of this the charterer exercised the option of cancelling the charter-party, which he understood that the clause in question gave him. It is with this that the [shipowner's]... contention has to do. There is, he points out, in the earlier part of the charter-party the usual clause excepting, amongst other things, all dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage, and he contends that, inasmuch as the vessel was off the port before the day fixed, and was only prevented from being free of pratique there on the day fixed by reason of the dangers of the seas excepted in the clause I have mentioned, the charterer's option to cancel the clause did not arise by reason of the operation of that clause. The question, therefore, for the decision of the Court is, whether the stipulation that the vessel should be at the port in question, free of pratique and ready to load, is an independent stipulation overriding the whole of the charter-party, or whether it is subject to the operation of the clause excepting the dangers of the seas. I have come to the conclusion that it is an independent stipulation, and that it overrides the whole of the charter-party, and that, as the steamer did not arrive in time to be at the port free of pratique on the day fixed, the charterer had the option of cancelling the charter-party."

There cannot be an anticipatory cancellation. A ship was to report at Calcutta by 6 p.m. on May 10, 1957. On 9th evening owners informed the charterers that she would be delivered on 10th morning. But owing to an inspector ordering fumigation, she was free to be delivered at midnight between 10th and 11th. At 8 a.m. on 10th, the charterers purported to cancel the contract. They were held guilty of breach. "In my judgment," said ROSKILL J "both as a matter of construction of the charter-party and as a matter of authority, it is clear law that there is no contractual right to rescind a charter-party under the cancelling clause unless and until the date specified in that clause has been reached. There is no anticipatory right to cancel under the clause." The court, however, conceded that the right of rescission was exercisable on the failure of the owners to keep the date of delivery.[34]

Frustration of charterparty

Frustration of a maritime adventure puts an end to the charter-party releasing both sides from further responsibility. Thus where a ship was not allowed to leave a Russian port on account of a war between Germany and Russia, it was held by the Court of Appeal that the delay was of indefinite nature ; the adventure was completely frustrated and the charterers were not liable for payment of

34. *Cheikh Boutros Selim El-Khoury* v *Ceylone Shipping Lines* : The "*Madeleine*", [1967] 2 Lloyd's Rep 224 at 244. The court agreed with the passage in the 17th edition of SCRUTTON ON CHARTERPARTIES as correctly stating the law. The passage is : "A charterer is not entitled to cancel (*semble* under the clause as distinct from any right he may have to cancel at common law) before the cancelling date even though it is clear that the owner will be unable to render the ship in time."

hire.[35] Where a ship was chartered to load a cargo but on the day before she could have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the scheduled time, the House of Lords held that frustration had, in fact, occurred in the circumstances.[36]

The same result followed where a ship ran aground.[37] The result would also be the same where the subject-matter of the contract though intact has ceased to be available to the parties. Thus, where a ship was chartered for twelve months to run from April to April and before it could be delivered, it was requisitioned and was released only in September, the House of Lords held that the charter-party had frustrated, for a September to September term was not contemplated by the parties.[38] Where the parties can still perform their main obligation despite the fact that the subject-matter has gone out of their hands, frustration may not follow. Thus, where a ship was chartered for five years and three years after that, it was requisitioned by the Government the latter paying more money than the freight agreed between the parties, it was held that contract was not frustrated. The charterer was bound to pay the freight and that he could still pay and, therefore, he was entitled to collect the money from the Government.[39]

Discharge

The charterer should nominate a safe port for discharge. In *Leeds Shipping Co. Ltd.* v *Societe Francaise Bunge*,[40] SELLERS LJ stated the principles about the safety of a port in these words :[41]

"The first question involves an appreciation of the factors, relevant to this case, which have to be considered in relation to the unsafety of a port. It is well established that the safety or unsafety of a port must be assessed in regard to the actual vessel which has been chartered to use the port. The period for consideration is at least the whole period of the vessel's use of the port and may take account of dangers likely to be incurred on the voyage to the port.... The safety of the port should be viewed in respect of a vessel properly manned and equipped, and navigated and handled without negligence and in accordance with good seamanship. This may include, where circumstances so require, and if available, the engagement of a pilot or the use of a tug or tugs or, especially if such assistance is not available, consultation with a harbourmaster or some other responsible person with knowledge and experience of the port.... If it were said that a port will not be safe unless, in the relevant period of time, the particular

35. *Admiral Shipping Co. Ltd.* v *Weidner, Hopkins & Co.*, (1917) 115 LT 812.
36. *Joseph Constantine Steamship Line Ltd.* v *Imperial Smelting Corpn.*, [1941] 2 All ER 165 : [1942] AC 154.
37. *Jackson* v *Union Marine Insurance Co. Ltd.*, (1874) LR 10 CP 125 : [1874-80] All ER Rep 317.
38. *Bank Line Ltd.* v *Arthur Capel & Co.*, [1919] AC 435 : [1918-19] All ER Rep 504, HL.
39. *Tamplin S. S. Co. Ltd.* v *Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 AC 397 : [1916-17] All ER Rep 104, HL.
40. [1958] 2 Lloyd's Rep 127, CA.
41. At p. 130.

ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship, it would probably meet all circumstances as a broad statement of the law. Most, if not all, navigable rivers, channels, ports, harbours and berths have some dangers from tides, currents, swells, banks, bars, or revetments. Such dangers are frequently minimised by lights, buoys, signals, warnings and other aids to navigation and can normally be met and overcome by proper navigation and handling of a vessel in accordance with good seamanship."

Proceeding on this line the court held a port to be unsafe where there was a lack of shelter and liability to a sudden onset of a high wind which could cause the anchor to drag. The port was also near rocks and shallows which permitted limited anchorage.

Where the contract specifies the port of discharge and adds "or so near thereto as she may safely get," it will be a question of fact whether the requirement has been satisfied. The ship could not get to the specified port and discharged at a port 250 miles away, it was held to be a sufficient compliance with the terms of the charter-party.[42]

If a charterer nominates an unsafe port he will be liable for any damage to the ship arising proximately from that cause. The charterer directed the ship to a port where the wind freshened and soon increased to a gale force. The ship was consequently severely damaged. The charterer was held to be liable.[43]

The expenses of discharge depend upon the terms of the contract. Where the term was that the discharge was to be free of expense to the vessel, ROSKILL J stated the principle thus :

"What is the reality of the position in the present case? The reality, as I see it, is this : the charterers were responsible for getting that cargo out of the ship and for paying for the necessary labour to get that cargo out of the ship. It is true that, under this form of charter, so long as the ship had that cargo on board, the ship was under a duty to take all proper care of the cargo (subject to the relevant exceptions in the charter-party), a duty which would no doubt include an obligation to protect the cargo against, for example, damage by rain. But that is not conclusive. The point is this: Is the operation, the cost of which the charterers seek to debit against the owners, either part of the cost of discharging the cargo, or so closely associated with the operation of discharging the cargo that it can properly, bearing in mind the way in which words such as "loading" and "discharging" have been construed by the Courts over the years, be treated for all practical purposes as part of that discharge so that the cost falls upon the charterers? In my judgment, the owner's contentions here are correct. When one

42. *The "Athamas" (owners) v Dig Vijay Cement Co. Ltd.*, [1963] 1 Lloyd's Rep 287.

43. *Reardon Smith Line Ltd. v Australian Wheat Board*, [1956] 1 All ER 456 : [1956] AC 266 : [1956] 2 WLR 403. The court cited from the judgment of DEVLIN J in *Compania Naviera Maropan S.A. v Bowaters Lloyd Pulp and Paper Mills Ltd.*, [1955] 2 QB 68 at 77 : [1954] 3 NIER 563 and 568.

looks at the whole of the circumstances and the facts found in the special case and those in the supplemental document, I think that the work was done and charged for as part of the operation of discharge. Therefore, in my judgment, the cost forms part of the cost of discharge, and clause 48 says that discharge is to be free of expense to the vessel."

BILL OF LADING

The Carriage of Goods by Sea Act, 1925 applies only when the contract of affreightment is evidenced by a bill of lading. The definition in Article 1 of a "contract of carriage", says that it applies only to contracts of carriage covered by a bill of lading or any similar document of title. The definition also includes any bill of lading or similar document issued under or pursuant to a charter-party from the moment at which it regulates the relations between the shipowner and the holder of the bill of lading.

The greater number of contracts of carriage of goods by sea are made in the form of bill of lading. This is so because the sender is either a merchant or a manufacturer who wants to have the goods transported and is not interested nor versed in the management of ships. Ships are usually hired or chartered by those carrying on the profession of carriers.

There is no definition in the Act of the document called "bill of lading." Neither is there any definition in the Bills of Lading Act, 1856. The (English) Admiralty Court Act, 1861, however, in Section 6 provides that a document whereby the receipt of goods is acknowledged for shipment on board a named ship, or on some other ship for carriage by sea and delivery to the shipper's order, the document being signed on behalf of the master, is a bill of lading for the purposes of the Bills of Lading Act, 1855. In Halsbury's LAWS OF ENGLAND[44] it is stated that a bill of lading is a document of title signed by the shipowner or by the master, or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship. It has been stated by the Courts in India that this definition has been generally accepted.[45]

Thus a bill of lading signifies a number of things.

Prima facie evidence of receipt of Goods

Article 3, Rule 4 provides that a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described.[46] Thus it operates

44. Para 314, p. 143, Vol. 5, 4th ed 1974.

45. *See*, for example, DAVIS JC in *Malabar Steamship Co.* v *Central Bank of India*, AIR 1939 Sind 225 at p. 229.

46. The date appearing on the bill constitutes evidence of the date of shipment, it is the responsibility of the person preparing the bill and getting it signed to see that the correct date of shipment is entered. Thus where loading was commenced on 22nd of a month and completed on 27th but the bill showed the date of shipment as 22nd and this resulted in overpayment because of the fall in prices between the two dates, responsibility came to those who prepared and got the bill signed from the master. *The Almak*, [1985] 1 Lloyd's Rep 557. See also *Kruger & Co. Ltd.* v

as a certificate that the goods have been received. This may constitute an estoppel against the shipowner in the sense that he may not afterwards be permitted to deny the truth of the matter. At any rate, the burden will lie upon him to show that no goods were received, and that the bill was obtained from him by fraud, or in connivance with his agents. The shipowner is liable for non-delivery or short delivery to the holder of a bill of lading, unless be can show that his agent signed the bill without the goods being put on the board. The whole burden of proof lies upon the shipowner.[47]

Conclusive evidence in reference to consignee or indorsee

Further, if the shipper has sent the bill to the consignee or has transferred it to an indorsee, Section 3 of the Bills of Lading Act, 1856 will come into operation and this section provides :

> **that every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board.**

Proviso

> **Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims.**

Thus the effect of a bill of lading as an acknowledgement of the receipt of the goods is two-fold. As against the shipper, it is only a *prima facie* evidence and, as against the consignee or indorsee, the bill is a conclusive evidence, so that if such person has suffered loss by reason of acting on the bill, he can hold the person signing the bill liable. *Malabar Steamship Co.* v *Central Bank of India*[48] involved a liability of this kind.

> Certain bags of food-stuffs were put in a lighter for transhipment to a ship which was expected to arrive the next day. The ship did not arrive as expected and, in anticipation of her arrival, the shipper obtained from the manager of the shipping company bills of lading duly filled in. The shipper pledged the bills with a bank, and obtained Rs. 5,000 and disappeared. The seller of the foodstuff had not yet been paid and, therefore, he had the goods seized. The ship sailed away without the consignment.

Moel Tryvan Ship Co. Ltd., 1907 AC 272, 281 where it is also emphasised that subsequent transfers cannot change the original transaction of shipment under which bills of lading were issued.

47. *Bennet and Young* v *John Bacon Ltd.*, (1897) 13 TLR 204, CA. The shipowner will have to prove not merely that the goods may not have been loaded but that they were not in fact loaded. It cannot be made to depend on balance of probabilities. See *Smith & Co.* v *Bedouin Steam Navigation Co.*, [1896] AC 70, 79 as noted by the Madras High Court in *Madras Port Trust* v *Annamalai*, AIR 1968 Mad 42, 46 where out of 1000 bales of jute stated in the bill, 12 were short on delivery, the shipowner was held liable. *Syndicate Bank* v *Africans Co.*, AIR 1977 Ker 103 where the court said that the indorsee gets the rights of the indorser except that as against him the carrier cannot say that the goods were not received.

48. AIR 1939 Sind 225.

The banker sued the shipping company. The banker being an indorsee of the bill, the shipping company was held to be bound by an estoppel and liable to the banker for his loss. DAVIS CJ had no hesitation in holding that :

> The company are bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition. They were however not received on board at all. The bank in consequence acted to their detriment in advancing money to the shipper and we think that there can be no doubt that the shipping company must compensate the bank for loss suffered by their action.[49]

Where the bill of lading states "weight and quantity unknown", burden lies upon the shipper to prove his contention as to weight or quantity. It has been laid down that the words "weight unknown" have the effect of a statement by the shipowners' agent that he has received a quantity of ore which the shippers' representative says weights 937 tons but which he does not accept as being of that weight, the weight being unknown to him, and that he does not accept that weight except for the purpose of calculating freight and for that purpose only.[50]

General remarks superseded by specific entries

General remarks of this kind become superseded where there are specific entries in the bill of lading. In a case before the Kerala High Court :[51]

> The bill of lading stated : "Shipped at Dar-Es-Salaam in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown." The bill of lading, however, showed the number of packages to be 8,750 and the weight 6,89,640 Kg gross.

It was held that the carrier would not be allowed to say that he did not know the weight of the goods or the quantity of the packages. The court distinguished the case from its own earlier decision[52] where it was observed that even though the bills of lading mentioned the quantity of sugar, it was subject to the further condition that the carrier had not accepted it because the endorsement on the bills of lading was "weight declared by the shipper but not checked." The court said that a printed form is for general use ; and what is applicable to the particular case is to be found in what is type written or incorporated by the rubber-stamp. The court cited the following passage from *Corpus Juris Secondum*.[53]

> A printed paper pasted on a bill of lading has been held to be a part of the bill binding on the consignee... and so stipulations stamped on the face of the bill, before its delivery to the shipper and by express terms included therein, become a part of the contract, Typewritten recitals in the bill will prevail over inconsistent printed recitals, as, for example, a typewritten

49. At p. 227.
50. *New Chinese Antimony Co. Ltd.* v *Ocean Steamship Co.*, [1917] 2 KB 664 CA.
51. *New India Assurance Co.* v *Sanjose Maritime Ltd.*, (1985) 57 Comp Cas 606 Ker.
52. *Hajee K. Assainar* v *Malabar Steamship Co. Ltd.*, [1974] Ker LT 675 : AIR 1975 Ker 114, 117.
53. 910, Vol. 80, para 113.

> statement giving the weight of the goods received as against a printed recital that the weight is unknown.

The court said that the burden of proving that the contents of the bill of lading were not true was, therefore, on the carrier. The court cited the decisions in *R. & W. Paul Ltd.* v *Pauline*[54] and *Attorney General of Ceylone* v *Sindia Steam Navigation Co. Ltd. (India)*.[55] In the latter case it was observed :

> .... though the statements in the bills of lading as to the number bags of shipped did not constitute conclusive evidence as against the respondent, they formed strong prima facie evidence that the stated number of bags was shipped unless there was some provision in the bills of lading which precluded that result, or very satisfactory rebutting evidence was produced by the respondent. 'Weight, contents and value when shipped unknown' was not a disclaimer as to the number of bags, and the appellant was not disentitled by the conditions in the bills of lading from relying on the admission that the bags to the numbers stated in the bills of lading were taken on the board and the respondent was accordingly under an obligation to deliver the full number of bags.

Estoppel of shipowner

"Explaining this in *Silver* v *Ocean Steamship Co. Ltd.*,[56] SCRUTTON LJ observed : "It has been decided in *Compania Naviera Vasconsada* v *Churchill and Sim*[57] and affirmed by the Court of Appeal in *Brandt* v *Liverpool, Brazil, and River Plate Steam Navigation Co.*,[58] that the statement with regard to "apparent good order and condition" estops — as against the person taking the bill of lading for value — the shipowner from proving that the goods were not in apparent good order and condition when shipped and, therefore, from alleging that there were, at shipment, external defects in them which were apparent to reasonable examination. Article III, Rule 4[59] which says that the bill shall be *prima facie* evidence — not *prima facie* evidence only, liable to be contradicted — can hardly have been meant to render the above decision inapplicable."

Statutory duty in preparing bill and clean bill of lading.—The statutory duties of the shipowner in preparing the bill are prescribed by Rule 3 of the Article. One of them is that he should state in the bill the apparent order and condition of the goods. Where the contents indicate no defect in the goods or their packing, that is known as a clean bill of lading. If the goods were not really clean, the shipowner would be liable to those for their loss, if any, who have been dealing with it as a clean bill. In a case before the Madras High Court certain drums consigned with a ship were described as "reused" and then this

54. [1920] Lloyd's LR 221.
55. [1961] 3 WLR 936 : [1962] AC 60 PC. As to evidence, see also *William D. Branson* v *Furness (Canada)*, [1955] 2 Lloyd's Rep 179.
56. [1929] All ER Rep 611.
57. [1906] 1 KB 237.
58. [1924] 1 KB 575 : [1923] All ER Rep 656 CA.
59. Of the Sch. to the Carriage of Goods by Sea Act, 1924 (English).

word was deleted at the request of the shipper and in consequence the bill became a clean bill. This enabled the shipper to secure credit which he would not have been able to get if the word "reused" was there. The drums were in fact "reused". The shipowner was held liable.[60] RAMACHANDRA IYER J emphasised that having regard to the nature of the document and its importance in international commerce, the shipowner would have an obvious duty to describe correctly the condition of the goods received by him.[61] The goods being on sea, the concerned persons, *i.e.*, bankers, traders, insurers etc., who deal with the bill, will have to depend only on the statements contained in the bill. The decision was upheld by the Supreme Court.[62] Justice SUBBA RAO adopted the following passages as to the meaning of a clean bill of lading :[63]

> A clean bill of lading is defined in Halsbury's LAWS OF ENGLAND[64] as one "which does not contain any reservation as to the apparent and good order and condition of the goods or the packing." Carver in his book BRITISH SHIPPING LAWS[65] explains the expression "good order and condition" thus : The general statement in the bill of lading that the goods have been shipped "in good order and condition" amounts (if it is unqualified) to an admission by the shipowner that, so far he and his agents had the opportunity of judging, the goods were so shipped. If there is no clause or notation in the bill of lading modifying or qualifying the statement that the goods were 'shipped in good order and condition' the bill is known as a clean bill of lading.'

The remark should be about the condition and quality of the goods or about their packing or about something which is usually not apparent at all events to an unskilled person.[66] The words like "quality and measure unknown",[67] "weight, contents and value unknown",[68] "weight, quality, condition and measure unknown",[69] have been held to be not qualifying words.

Ordinarily, remarks about packing, if the packing is fit for its purpose, should not matter. But where a particular quality of packing is a part of the contract, as it was in the case before the Supreme Court, that packing should be of "new fibre drums" and the drums were in fact used ones, the deletion of the word "reused" amounted to misrepresentation making the shipowner liable. In *The Tromp*,[70] potatoes, to the knowledge of the master, were shipped in wet bags and in a damaged condition, but the bill described them to be in good order and

60. CCC Appeal No. 61 of 1957.
61. At p. 449.
62. *Ellerman and Bucknall Steamship Co.* v *Sha Misrimal Banerjee*, 1966 Supp SCR 92 : AIR 1966 SC 892
63. At p. 100.
64. 3rd ed. (Vol. 2), p. 218.
65. Vol. 2 Part I, para 82.
66. See *Compania Naviera Vasconzada* v *Churchil & Sim*, LR [1906] 1 KB 237.
67. *Ibid.*
68. *The Peter dar Grosse*, LR [1876] 1, p. 414.
69. *The Tromp*, [1921] 337.
70. *Ibid.*

condition, the shipowner was held liable. In *Silver* v *Ocean Steamship Co.*[71] damage was caused to frozen eggs as the can wherein they were packed were gashed, perforated or punctured and the eggs were insufficiently packed, but the shipowner gave a clean bill of lading, he became liable. Similarly, where some of the barrels containing orange juice were old, frail and leaking, the shipowner was held liable for giving a clean bill.[72] A statement in the bill of lading that the master has entered the particulars in accordance with the figures given to him by the shipper or consignor, those particulars would not be binding on the shipowner. It will be for the shipper to prove that the consignment actually loaded was of the same weight, nature and figure as noted in the bill.[73]

A bill of lading contained the words "signed under guarantee to produce ship's clean receipt" and the ship's receipt stated that "many bags [of sugar] stained, torn and re-sewn". It was held by the Judicial Committee of the Privy Council that the language of the bill did not create any estoppel and the shipowner was entitled to prove the actual condition in which the goods were received.[74]

Master's authority as to statements.—A master does not have authority to say anything about the quality of the goods. Lord ESHER MR observed in *Cox, Patterson & Co.* v *Bruce & Co:*[75]

> "That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true ; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading so as to bind his owners the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

Estoppels under the Act.—The carriers are not, subject to the provisions of Carriage of Goods by Sea Act, 1925, estopped from denying the truth of statements concerning the quantity,[76] quality and leading marks of the goods.[77]

71. [1930] 1 KB 416 : [1920] All ER Rep 611.
72. *Brown Jenkinson & Co.* v *Percy Dalton (London) Ltd.*, [1957] 2 QB 621. See further *Golodetz & Co.* v *Czarnikow. The Galatia*, [1980] 1 Lloyd's Rep 453.
73. *T. S. Co. Ltd. Bombay* v *Food Corpn. of India*, AIR 1983 Mad 105. The same court in its subsequent decision in *Nippon Yeesen Kaisha Ltd.* v *Union of India*, AIR 1987 Mad 12 did not allow a claim because of dearth of evidence as to actual loading. Also see *Hajee K. Assainar* v *Malabar Steamship Co.*, AIR 1975 Ker 114.
74. *Canada and Dominion Sugar Co.* v *Canadian National (West Indies) Steamship Ltd.*, [1947] AC 46. See further *Parsons* v *New Zealand Shipping Co.*, [1901] 1 KB 548 where it was held that the Bills of Lading Act, 1855 does not prevent the shipowner from proving that the goods were given wrong marks.
75. (1886) 18 QBD 147 at 152.
76. *Grant* v *Norway*, (1851) 20 LJC p. 93.
77. *Cox* v *Bruce*, (1886) 18 QBD 147 ; *Parsons* v *New Zealand Shipping Co. Ltd.*, [1901] 1 KB

But they are estopped from denying the truth of the statements relating to the apparent order and condition of the goods.[78] These estoppels come into operation against the shipowner only when the bill of lading has been signed by him or his authorised agent, generally the master of the ship. Can the charterer of a ship be also regarded as the authorised agent for this purpose? This question arose in *The Nea Tyhi*.[79] The vessel was time-chartered on terms which gave the charterers and their agents authority to sign bills of lading on behalf of the owners, and which made them liable to indemnify the owners for the results of so doing. The bill of lading was signed by an agent of the charterers. It described the cargo of plywood as being "shipped on board" and "shipped under deck". The plywood was in fact stowed on the deck and was extensively damaged by rainwater. The charterers were insolvent. The owners were sued. They contended that the charterers had no authority to issue a bill of lading with contents which were apparently against an open fact. They relied upon *Grant* v *Norway*[80] where it was held that the owners were not estopped from questioning the quantity of the goods shipped. This was an extended version of the rule that a master has no authority to sign a bill as against goods which were never put on the board.[81]

Mate's receipt.—Bill of lading should be distinguished from mate's receipt. When goods are put on board a ship, a receipt is issued acknowledging receipt of the goods and on production of this receipt the bill of lading is issued. If there is any defect in the goods, it is mentioned on the receipt, otherwise it is a clean receipt. Mate's receipt is not a negotiable instrument, but even so in the interest of safety, the master should issue the bill only when the receipt is surrendered. A local custom making the mate's receipt negotiable would not bind the goods elsewhere.[82] The effect of a mate's receipt is thus stated by Lord WRIGHT in *Nipon Yusen Kaisha* v *Ramjiban Serowgee*.[83]

> The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as to statements in a bill of lading. It is, however, *prima facie* evidence of the quantity and condition of the goods received, and *prima facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him.

If the mate's receipt is produced by any person other than the actual shipper, the master would be entitled as also bound to issue the bill to only the actual

548.

78. *Silver* v *Ocean S. S. Co. Ltd.*, [1930] 1 KB 416 and *Compania Naviera Vascondada* v *Churchil*, LR [1906] 1 KB 237.
79. [1982] 1 Lloyd's Rep 606.
80. (1851) LJCH at p. 93, noted above.
81. See *V/O Rasnoimport* v *Guthric & Co. Ltd.*, [1966] 1 Lloyd's Rep 1, where it was held that an agent signing without authority for excess quantity would be personally liable for breach of warranty of authority.
82. *Hathesing* v *Laing*, (1873) 17 Eq 92 : 43 LJ Ch. 233.
83. [1938] 2 All ER 285 at p. 292.

shipper. So it was held by BACON VC in *Hathesing* v *Laing*.[84] It was stated that the indorsement of the mate's receipt did not transfer a property which overrode that given by the indorsement of the bill of lading, which had been issued without production of the mate's receipt.

Bill of Lading as evidence of Contract of Affreightment

The bill of lading is not the contract of affreightment in itself, but it is the evidence of the contract. The terms of the contract of carriage are no doubt to be found in the bill, but since the bill is only an evidence of the contract, and not the contract by itself, there can be other terms also. For example, in *The Ardennes* v *The Ardennes*[85] :

> The bill of lading gave liberty to the shipowner to proceed to any route, though the ship was bound for London. Instead of proceeding to London it went first to Antwerp, with the result that it arrived in London so out of time that higher import duty had to be paid. In order to recover this loss, the shipper sought to prove that the shipowner had promised that the ship would go directly to London, and only then the bill of lading was issued.

If the bill of lading is a contract by itself, such a promise as that could not have been proved. But since it is only evidence of the terms it contains, other terms can be proved by other evidence. So the shipper was allowed to prove the promise of direct despatch though it was not embodied in the bill.[86] Lord GODDARD said :[87]

> The contract has come into existence before the bill is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt, if the shipper finds that it contains terms with which he is not content or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed, and that it was different from that which is found in the document or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it."

Bill of lading in terms of charter-party.—Where a bill of lading is issued in terms of the charter-party under which the ship is hired and expressly incorporates those terms, they become the terms of the bill of lading also and the shipowner is entitled to their protection against holders of the bill of lading.[88] The position, however, becomes complicated where the bill of lading does not expressly incorporate the terms of the charter-party, but says only generally that the bill of lading is subject to all other conditions and exceptions as per the charter-party. In such cases, the courts in the beginning held that this would not

84. Note 81, *supra*.
85. [1950] 2 All ER 517 : [1951] 1 KB 55 : 94 Sol Jo 458.
86. See *Sewell* v *Burdick*, (1884) 10 App Cas 74 ; *Crooks* v *Allan*, (1879) 5 QBD 38.
87. At p. 519.
88. The position is explained in Carver, CARRIAGE BY SEA, 420 (12th ed.).

have the effect of incorporating the specific terms of the charter-party into the bill of lading.[89]

There is, however, now a wind of change. An example of the new trend is the decision in *Emmanuel Colocotronis* (No. 2)[90] :

> Here the charter-party contained an arbitration clause and also provided that a bill of lading issued must provide for disputes to be submitted to arbitration. But the bill of lading which was subsequently issued contained no such clause, but it did say : "All other conditions, exceptions, demurrage, general average, and for disbursement as per the charter-party". A claim as to demurrage arose. The shipowner wanted to refer it to arbitration, but the cargo owner contended that there was no arbitration clause in the bill of lading.

The court rejected this contention and held that where a bill of lading requires one to look at the charter-party and the charter-party clearly and specifically provides that arbitration is one of the conditions incorporated, the conclusion is that the arbitration clause became incorporated in the bill of lading.

The decision has been criticised on the ground that a bill of lading being transferable, it would be too much to compel every subsequent transferee to make himself aware of the underlying charter-party. The judge, however, remarked that the real consideration for the prevailing trend was the difficulties of arbitration in a foreign country. STAUGHTON J therefore justified the decision thus :

> Times change, and so do trading conditions. In 1911[91] it was no doubt a strong and even a harsh measure to require a merchant to arbitrate in a foreign country. The merchants of today, having connections by telex, airmail and air travel, are less impressed by the difficulties of going to arbitration in a distant place.[92]

3. Bill of Lading as Document of Title

A bill of lading is a document of title ; it is a symbol of the goods; it represents the goods themselves. It is a symbol of the right to property in the goods specified in the bill. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolic delivery of the goods themselves has by mercantile usage the same effect as an actual delivery.[93] The

89. *See*, for example, *Gardner* v *Trechman*, (1884) 15 QBD 154 ; *Hamilton & Co.* v *Mackie & Sons*, (1889) 5 TLR 677 : *Serraino & Sons* v *Campbell*, [1891] 1 QB 283 ; *Diederichsen* v *Faquarson Bros.*, [1898] 1 QB 150 ; *Northumbria, The*, [1906] P 292 ; *T. W. Thomas & Co. Ltd.* v *Portsea Steamship Co. Ltd.*, [1912] AC 1 and *Annfield, The*, [1971] P 168 ; *General Tradors Ltd.* v *Pierce Leslie (India) Ltd.*, AIR 1987 Ker 62 at p. 69.

90. [1982] 1 All ER 823.

91. The year in which *T. W. Thomas & Co. Ltd.* v *Portsea Steamship Co.*, [1912] AC 1, was decided.

92. [1982] 1 Lloyd's Rep 287.

93. *See* Halsbury's LAWS OF ENGLAND, Vol. 26, pp. 146-147, as cited by Davis JC at p. 229 in the case cited in note 44 above. *See also* SUBBA RAO J in note 61 above at p. 97 where the learned Judge says that a bill of lading serves three purposes : (1) it is receipt for the goods shipped containing the terms on which they have been received ; (2) it is evidence of the contract of

High Court of Delhi held in a case[94] before it that property in the goods, i.e., the two dumpers, passed to the defendants. The defendants neither paid the price nor returned the bill of lading. They were therefore liable to pay the price of these two dumpers.

Delivery of bill to buyer is delivery of goods

One effect of the bill of lading being regarded as a symbol of property or as document of title is that when the bill is delivered to the buyer of the goods, for example, in a c. i. f., contract, it is considered to be equivalent to the delivery of the goods and the buyer has to pay in the same way as if the goods themselves have been delivered to him. In a case where under a c.i.f. contract the bill was tendered to the buyer and he refused to pay until the arrival of the goods, he was held to be wrong.[95] EARL LOREBURN LC[96] proceeded on the ground that under the Sale of Goods Act the buyer has to pay the price against delivery and the delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves. It is wrong to say that the seller must defer the tender of the bill of lading until the ship has arrived; and it is still more wrong to say that he must defer the tender of the bill until after the goods have been landed, inspected and accepted.

Negotiability of bill of lading

The second important effect of the bill of lading being a document of title is that though it is not a negotiable instrument, it has this characteristic of a negotiable instrument that property in the goods represented by the bill passes to the person to whom it is transferred. In the case of a negotiable instrument a *bona fide* transferee is not affected by any defect in the title of his transferor, but a bill of lading passes property subject to all previous defects in title. This principle is now incorporated in Section 1 of the Indian Bills of Lading Act, 1856. The heading of the section is that "rights under bills of lading to vest in consignee or indorsee." The section then says :

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carriage of goods and ; (3) it is a document of title for the goods stated in it. See *Maurice Desgagnes*, [1977] 1 Lloyd's Rep 453 where it was held that a bill of lading not signed by anybody is not a bill in the legal sense.

94. *Rudnap Export-Import* v *Eastern Associates Co.*, AIR 1984 Del 30. But a transfer of bill of lading does not pass any other kind of lability which may exist between the carrier and port authority. *Board of Trustee, Bombay* v *Sriyansh Knitters*, AIR 1983 Bom 88. Property in the goods shipped does not pass where the bill of lading is sent by the shipper to his own agent to be delivered to the buyer on payment. *Great India Trading Co. P Ltd.* v *Nowrangrai Ramniwas*, AIR 1983 Cal 237. Another example of bills of lading as documents of title is *Jayanti Shipping Co. Ltd.* v *J.C.P. of India*, AIR 1979 Ker 187.

95. *E. Clemens Horst Co.* v *Biddel Bros.*, [1912] AC 18. His remedy is to sue the insurer if the goods are lost or destroyed en route. Where the goods were loaded on the ship whose bill of lading was sent under insurance cover and were loaded subsequently on another ship which destroyed them, the buyer was not able to sue the insurer or the carrier. He had his remedy only against the insolvent seller who had already received the price. *Kallis (George) (Mfrs) Ltd.* v *Success Ins Ltd.*, [1985] 2 Lloyd's Rep 8, following *Simon Isreal & Co. Sedgwick*, [1983] 1 QB 303.

96. At p. 22.

Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement shall have transferred to or vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Under the common law, upon the transfer of a bill of lading, only the property in the goods passed, but not the contract of carriage. The contract still remained to be with the shipper and he alone was liable under it. Under this provision, however, if the indorsement has the effect of passing property to the indorsee, then the indorsee will become liable under the contract to the same extent as if the contract of affreightment had been made with him. But this effect will follow only if the indorsement has the effect of passing property. *Sewell* v *Burdick*,[97] illustrates this.

> Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived and been warehoused, the shipper indorsed the bills of lading in blank to a banker and deposited them with him as security for a loan. Neither the banker nor the shipper took possession of or dealt with the goods. Consequently they were sold by the customs authorities and did not realise more than the customs duty and charges. The shipowner sued the banker for the freight, he being the indorsee of the bill of lading.

It was held by the House of Lords that the banker was not liable. EARL SELBORNE pointed out that every indorsement does not operate as passing of property. The Act seems to provide for those cases only in which property passes so as to make it just and convenient that all rights of suit under the contract contained in the bill should be "transferred to" the indorsee, and should not any longer "continue in the original shipper or owner." The true intent and operation of the indorsement has to be ascertained so as to see whether the shipper still retains any proprietary right in the goods. If he does, the statute can hardly be intended to take from him those rights, and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to shipper's liabilities. It is very difficult to conceive that when the goods are still *in transitu*, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and to transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. It may be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under this title as indorsee of the bill of lading be obtained delivery of the goods to himself), that he should take with it the corresponding burden, *quoad* the shipowner.

97. (1884) 12 App Cas 74 : 54 LJ QB 156 : 52 LT 445.

The type of effect contemplated by the section occurred in *Brandt* v *Liverpool, Brazil and River Plate Steam Navigation Co.*[1]

> A number of bags of zinc ashes were shipped on board a vessel at Buenos Aires for carriage to Liverpool. Some of the bags had been wetted by rain before shipment and the upper layer of bags in one of the holds became heated. The shipowners gave a bill of lading stating that the bags were shipped in apparent good order and condition. The master of the vessel fearing damage to the ship and other cargo discharged most of the bags. They were booked after reconditioning with another vessel at a cost of £ 748 and arrived three months late. In the meanwhile the value of zinc ashes had fallen. The bill of lading, which was clean, had been indorsed to the pledgees, who, on the faith of it, made an advance. On arrival the pledgees paid the freight, received the goods and also paid under protest the freight of £ 748. Subsequently they sued the shipowner for the refund of the extra freight and also for damages for delay.

It was held that though Section 1 of the Bills of Lading Act did not apply, yet from the acts of the presentation of the bill of lading, payment of the freight, and delivery and acceptance of goods specified in the bill of lading, a contract ought to be inferred to deliver the goods in accordance with the terms of the bill. The shipowner being guilty of misrepresentation in giving a clear bill, he was liable for the delay and also bound to refund the additional freight.[2]

The rights of an indorsee of a bill of lading were considered by the Kerala High Court in *New India Assurance Co. Ltd.* v *Sanjose Maritime Ltd.*[3]

> The contract was for carriage of 8,750 bags of Tanzanian raw cashew nuts from Dar-Es-Salaam to Cochin. It was found on arrival that 1,115 bags were torn and in mouth-burst condition and the shortage was that of 26,442 Kgs. The loss was due to the negligence of the carrier. The goods were imported by the Cashew Corporation of India and they had indorsed the bill of lading in blank to the claimant. The question was of the indorsee's right to sue.

The court held that the indorsee had the right to sue. The corporation had allotted the goods to him and handed them under the bill of lading and under their blank indorsement. This had the effect of passing the property to him. The right of suit quite naturally accrued to him.[4] The court cited the following passage from a judgment of the Court of Queen's Bench :

> The courts have gone even to the extent of holding that there was no rule of law that the right to sue in tort in respect of damaged goods belonged

1. [1924] 1 KB 575 : 93 LJ KB 646. A clean bill of lading constitutes an estoppel. *Canadian Sugar* v *Canadian Steamships*, [1947] AC 46.
2. This was found to be clearly established by the following authorities. *Stindt* v *Roberts*, (1848) 5 Dow & L 460 ; *Young* v *Moeller*, (1883) 11 QBD 782 ; *Allen* v *Coltart*, (1855) 5 E & B 755.
3. (1985) 57 Comp Cas 606 Ker : AIR 1983 Ker 98.
4. The Court cited Section 1 of the Indian of Bills of Lading Act, 1856 and SCRUTTON ON CHARTERPARTIES, Section 6, Articles 91 and 92, p. 181 (18th ed.).

only to the owner of the goods at the time they were damaged, and since the defendants ought reasonably to have contemplated that any carelessness by them in carrying the goods would cause damage to the person, the c.i.f. buyer, at whose risk the goods were at the time in question, they *prima facie* owed that person a duty of care.[5]

Where the consignee sold the goods comprised in a bill of lading and property also passed to the buyer, but retained the bill of lading with himself, it was held that he still remained liable under the contract of affreightment.[6]

Bill of lading is not typical negotiable instrument.—A bill of lading is not negotiable like a bill of exchange so as to enable the indorsee to maintain an action upon it in his own name ; the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself.[7] The bill carries with it the previous equities and, therefore, the transferee will be affected by any defect in the transferor's title. The transferee will get a good title only if the transferor had the right to transfer. Section 2 of the Bills of Lading Act also provides that the transfer will not affect the unpaid seller's right of stoppage in transit or of the shipowner for the freight. Under the Sale of Goods Act, however, the unpaid seller's right of stoppage in transit is defeated if the buyer, having received the documents of title, has sold the goods by transferring the documents to a *bona fide* transferee for value. For example, a bill of lading was obtained from the seller by fraud and was indorsed and delivered for value to a purchaser of the goods who had no notice of the fraud. While the goods were still in transit, the original buyer became insolvent and the unpaid seller attempted to stop the goods in transit, it was held that the right to stop was gone as the transfer was *bona fide* and for a valuable consideration, in ignorance of the fraud.[8]

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5. *Schiffahrt & Kohlen G m b H* v *Chelsea Maritime Ltd.*, [1982] 2 WLR 422 (QB). See further Richard Kidner, *Economic Loss and Bills of Lading*, (1985) 48 Mod LR 1352 considering *Leish and Sullivan* v *Alaikmon Shipping Co.*, [1985] 2 WLR 289, as to the consignee's right to sue on a bill of lading. The Kerala High Court also allowed in *General Traders Ltd.* v *Pierce Ledie (India) Ltd.*, AIR 1987 Ker 62 the assignee of the consignee (the insurer in this case) to sue the carrier.
6. *Fowler* v *Knoop*, (1878) 4 QBD 299 : 48 LJQB 333, CA.
7. *Thompson* v *Dominy*, (1854) 14 LJ Ex 320. In *Scruttons Ltd.* v *Midland Silicones Ltd.*, [1962] 1 All ER 1 : [1962] AC 446 : [1962] 2 WLR 186, stevedores were not allowed the protection of the clauses in the bill of lading under which the shipowner was protected. They were not parties to the contract. They were liable for the consequences of their negligence. Following the law enunciated by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v *Selfridge & Co. Ltd.*, [1915] AC 847 at p. 853 : [1914-15] All ER Rep 333. A shopbroker is entitled to enforce his claim against charterers for commission under a charterparty, although he is not a party to it. This is so because charterers, as trustees for the ship broker, can enforce the commission clause against the shipowner. *Les Affreteurs Reunis Société Anonyme* v *Leopold Walford (London) Ltd.*, (1991) 121 LT 393 : [1919] AC 801 : 88 LJKB 861. Relying upon *Robertson* v *Wait*, (1853) 8 Exch 299 : 22 LJ Ex 209.
8. See also *Lickbarrow* v *Mason*, (1793) 1 Sm LC 13th ed. 703, 731.

Bills of lading in sets

Sometimes bills of lading are made in sets of three or more. One or two of them are sent to the consignee and the rest are kept by the consignor himself so that he can protect his interest in case it becomes necessary. This practice sometimes gives rise to difficulties. A type of such difficulty was experienced in *Glyn, Mills & Co.* v *East and West India Dock Co.*[9]

> Goods were consigned to C & Co. The shipmaster signed a set of three bills of lading marked "first", "second" and "third", respectively, and stating that when one of the bills is used in obtaining delivery, the others would stand void. The first bill was pledged by C. & Co. with a bank and with the second they obtained delivery of the goods and sold them to diverse customers. The pledgee sued for his loss.

It was held that the delivery was made *bona fide* and without knowledge or notice of the pledge and hence the bank should sue the party who committed fraud on them and not the warehouse-keeper.

Pledgees should insist upon delivery of whole set

Pledgees of documents of title should safeguard themselves against such risks by insisting on obtaining the complete set of bills. But in the case of the consignee it has been held that he cannot insist that all sets should be tendered to him. The case was *Sanders Bros.* v *Maclean & Co.*[10]

> The cargo was that of iron rails. The buyer refused to pay for it because only two out of a set of three bills of lading were tendered to him.

The Court of Appeal held that the tender of only one would have been sufficient and the buyer was wrong in not accepting the two. BRETT MR explained the position like this :[11]

> The question is whether, where by the terms of an ordinary contract of sale relating to goods shipped payment is to be made against bills of lading, it is a part of that contract that all the existing copies of the bill of lading must be offered in order to entitle the sender of the goods to payment? If only one copy of a bill of lading has been indorsed, it is plain and known law that the delivery of that copy so indorsed, with an intention to pass the property in the goods, passes the property, and will entitle him to demand possession or indorse it to some one else and if that copy is the first which is indorsed, it passes the property so that no subsequent indorsement of any of the other copies will have any effect upon property in the goods.

BOWEN LJ was equally forthright.[12]

9. (1882) 7 App Cas 591 ; 52 LJ QB 146, HL.
10. (1883) 11 QBD 327, CA.
11. At p. 334.
12. At p. 341. Delivery of goods without production of the bill of lading is at the shipowner's risk. *Sze Hai Tong Bank Ltd.* v *Rambler Cycle Co.*, [1959] AC 576.

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. The above effect and power belong to any one of the sets of original bills of lading which is first dealt with by the shipper. If, indeed, the absent original had been misused so as to defeat the title of the indorsees of the tendered residue of the set, the tender would have been bad. But the vendee was not entitled to reject the tender of the only effective documents on a bare chance that a third effective bill of lading might possibly have been dealt with when in fact it had not.

Purchaser's claim under Law of Tort

A purchaser of goods in transit who has neither become the holder of the bill of lading nor the owner of the goods at the time of loss, has obviously no right of action against the carrier under the contract or carriage. Dose he have the right to sue in tort if the goods are lost due to negligence. Tort actions have also been considered untenable because the buyer is neither the owner of the goods nor he has any contractual relationship with the carrier.[13] The fear of the courts was that if non-contracting parties were permitted to sue carriers for any breach of duty, it would open a flood-gate of litigation against carriers by anyone who might suffer some economic loss by reason of the breach. But while care has to be taken to protect carriers from such catastrophe, the interest of c.i.f. (cost, insurance and freight), purchaser to whom risk passes but not ownership, also deserves consideration. LLOYD J recognised such need in his decision in *Trene's Success, The*[14]:

In this case the buyers purchased a full cargo of coking coal on c.i.f. terms. Though the risk of loss had passed to them, neither the bill of lading

13. *See Wear Breaze, The*, [1967] 3 All ER 775 and *Elafi, The*, [1982] 1 All ER 208. In the former case ROSKILL J expressly pointed out that the plaintiff must be the owner of the goods and that this has not been affected by the two famous decisions of the House of Lords : *Donoghue* v *Stevenson*, [1932] AC 562 ; *Hedley Byrne* v *Heller & Partner*, [1964] AC 465.

14. [1982] 1 All ER 218.

was transferred to them, nor the property in the cargo had passed to them at the time of its loss during the voyage by sea-water.

Buyer's tort action against the carrier was allowed. LLOYD J[15] explained how the loss was within the rule of proximity:

> Every carrier by sea knows that the goods he carries are liable to be bought and sold in the course of carriage under a form of contract known universally as a c. i. f. contract. Every carrier knows or ought to know that in the classic c. i. f. contract the risk passes to the buyer on shipment, even though the seller may retain the right of disposal, or *jus dispodendi*, until he has been paid. In those circumstances it seems to me to be almost self-evident that the person at whose risk the goods are is likely to suffer loss if the goods are damaged by the carrier's negligence.[16]

Delivery of Goods

Delivery of goods can be refused to a person who does not produce documents of title, namely, the bill of lading. In such circumstances the shipowner is not merely justified but is also under a duty to refuse delivery. "According to English law and the English mode of conducting business, a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading. The shipowner must take the consequences of having delivered these goods to the consignee without the production of either of two parts of which the bill of lading consisted." The consignor in this case had sent a copy of the bill of lading to his agent to enable him to deliver it to the consignee against payment. But the shipowner delivered the goods without the production of the bill of lading and consequently was held liable for the consignor's loss.[17]

Place of Delivery

The normal obligation of the shipowner is to deliver goods over the ship's side. Where the consignee provided lighters at the ship's side but not sufficient men to work them, he was held liable for the consequential delay in unloading.[18] Lord ESHER MR proceeded as follows :[19]

15. Following the extended version of the concepts of promity and neighbourhood as explained by Lord WILBERFORCE in *Anns* v *London Borough of Merton*, [1978] AC 728.
16. For appreciation and criticism *see* 1982 Journal of Business Law 334 where it is pointed out that a tort claimant would be better off under this rule than a claimant under a bill of lading because the latter would be bound by Hague-Visby rules. Further the Hague and Hague-Visby rules cover the carrier's entire liability in respect of the cargo and The Himalayan clause also covers all disputes arising out of the contract of carriage. Hence there is no need for opening a new front of liability which would disturb the existence of liability based on bill of lading. See the approach of the Privy Council in *Eurymedon, The*, [1974] 1 All ER 1015 and the *New York Star*, [1979] 1 Lloyd's Rep 298. See also *Godina* v *Patrick Operations*, [1984] 1 Lloyd's Rep 333 where the effect of the Himalyan clause is considered and also that the contract of carriage does not end on just unloading of goods. It may remain operative up to delivery and, therefore, stevedores may also claim the protection of clauses in the bill of lading.
17. *Stettin, The*, (1889) 14 PD 142 : 58 LJ P 81 : 61 LT 200 : 5 TLR 581.
18. *Peterson* v *Freebody & Co.*, [1895] 2 QB 294, CA.
19. At p. 297.

"Whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery—where ? Each to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship ; if into a barge or lighter, on that barge or lighter ; if onto the quay, on the quay. Wherever the delivery is to be, the shipowner, on the other hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery: that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship ; but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them ; but the moment the goods are put within the reach of the consignee he must take part in the operation..... The delivery, under the charter-party, was to be a delivery in the ordinary way by a joint operation in which each was to take his part. The lay days were exceeded because the consignees had not sufficient men on the lighters to perform their part in that operation. The ship was not in default ; and, therefore, the shipowner is entitled to demurrage."

Unless there is a custom or agreement to the contrary, goods must be delivered to the consignee or his agents. Certain goods were to be delivered to the shipper or his agent. The ship arrived but the consignees were not aware of its arrival. Consequently they were not present at the wharf to take delivery. The goods were discharged at the wharf. Within 24 hours they were lost in an accidental fire. The shipowner was held liable for the loss. Reasonable time must be given to the consignee to come for the goods.[20]

Carriage of Goods by Sea Act, 1925

The Act applies only to contracts of carriage of goods by sea which are in the form of a bill of lading or any other similar document of title. The contract should contemplate the issue of the bill of lading. If this is so the Act applies even although no bill was for the time being issued. Where, for example, the goods were damaged in the very process of loading and the bill was to be issued only after, the shipowner claimed protection of the clauses which could have been contained in the bill under the Act.[21] Devlin J made the position clear when he said :

The Act applies only to contracts of carriage covered by a bill of lading. The use of the word "covered" recognises the fact that the contract of

20. *Bourne* v *Gatliffe*, (1844) 7 Man & G 850, HL.
21. *Pyrene Co. Ltd.* v *Scindia Navigation Co. Ltd.*, [1954] 2 All ER 158.

> carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it they enter into on those terms which they know, or expect, the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. In my judgment, whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its creation covered by a bill of lading and is, therefore, from its inception a contract of carriage within the meaning of the rules and to which the rules apply.

This principle was applied by the Bombay High Court to a case in which the ship sailed away and also sank *en route* without the bill having been issued, even then it was held that the Act applied. The case before the court was *Indian Shipping Industry Ltd.* v *Dominion of India.*[22]

> The plaintiff, the carrier, entered into contract with the Textile Corporation for carriage of bales of cloth by a country craft form Bombay to ports like Cochin and Alleppey. A sum of rupees one lakh was deposited for the due performance of this contract. The vessel by which the goods were being carried was not seaworthy. Water entered into it and the goods sank with it. Although no bill of lading was issued, the carrier claimed the protection of the Act.

The question was whether it was a contract of affreightment by a charter-party or by a bill of lading. The court did not find any indicia of a charter-party, but neither was there any agreement as to a bill of lading nor a bill was issued. TENDOLKAR J found on evidence of the manager of the corporation that it was orally agreed that on delivery of the goods, the carrier would issue bills of lading. "Therefore" he said, "the true construction of the words 'covered by a bill of lading' is not that the contract actually is covered by such a bill. It is sufficient if the parties intend that the shipper should be entitled to claim at or after shipping a bill of lading.[23]

Deck Cargo [Article 1, Rule (c)]

In giving the definition of "goods" for the purposes of the Act, deck cargo has been excluded. The definition says :

> **"Goods" include goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.**

Thus the Act does not apply to cargo which is stated in the contract as being carried on deck and is so carried. In the words of the Court of Appeal in *Cairn Line of Steamship Ltd.* v *Trinity House Corpn.*[24] "deck cargo" is to be understood

22. AIR 1953 Bom 396. Sections 2 and 4.
23. At p. 399.
24. [1908] 1 KB 528, CA, *per* Lord ALVERSTONE CJ at p. 532. See also 35 HALSBURY'S LAWS OF ENGLAND (3rd edn.) 394-5.

as including anything carried on deck in some space not already included in the measurement of the ship's cargo-carrying capacity". It is a cargo carried in any uncovered space upon deck, or in any covered space not included in the cubicle contents forming the ship's registered tonnage. The Act stands excluded not when the cargo is carried on deck, but only when the contract so provides and it is also in fact so carried. The Bombay High Court has laid down in *Scindia Stemp Navigation Co.* v *Ismain Lohmed*[25] that burden is on the carrier to prove that the goods were in fact carried on deck. GOKHALE J said : "A mere statement in the contract of carriage that the goods are on deck would not be sufficient to exclude such cargo from the definition of the term "goods". It would be necessary for the steamship company also to prove that the cargo in question was in fact carried on the deck of the ship."[26] In the case of such cargo the carrier can make any contract, *e.g.*, he may exclude liability for negligence and in that case he will not be liable if the goods or some part of them are lost due to his negligence.[27]

Rules relating to Bills of Lading [Schedule]

The bill of lading has to contain an express statement that it is to have effect subject to the provisions of the Hague rules as applied by this Act.[28] Such statement is called paramount clause. It is so called because then the rules become paramount to all other clauses in the contract. Where there is no such statement the bill does not become invalid. The only difference that it makes is that the Act will not apply.[29]

Particulars of Bills of Lading [Article III, Rule 3]

After receiving the goods into his charge, the carrier has to issue, on demand by the shipper, a bill of lading which should show among other things the following particulars :

1. The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before loading his goods, provided that the shipper has stamped such marks on the goods themselves if they are uncovered or on cases or coverings in such a manner as should remain legible until the end of the voyage.
2. Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

25. AIR 1960 Bom 416.
26. At p. 418.
27. *British India Steam Navigation Co. Ltd.* v *Sokala*, AIR 1953 Mad 3 : 1953 ILR 3 Mad 396. For an English authority see *Svenska Traktor, Atiebolaget* v *Maritime Agencies (Southampton) Ltd.*, [1953] 1 All ER 570.
28. Section 4. *Province of Madras* v *I S & C Machado*, AIR 1955 Mad 519 : [1955] 2 Mad LJ 240.
29. *Muhammadi Steamship Co.* v *Vallabdas*, AIR 1957 Trav-Co 133 : ILR 1956 Trav-Co 348, DB. For example, in *Far Eastern Steamship Co.* v *Roika Trading Co.*, AIR 1978 AP 433 : [1978] 2 Andh LT 17 : [1978] 2 Andh WR 192 DB, the bill of lading did not expressly stipulate the application of the Act and, therefore, the court held that the ordinary period of limitation provided in Article 10 of the Limitation Act, 1963 was applicable and not the special period as provided in Article III, Rule 6 of the Carriage of Goods by Sea Act.

3. The apparent order and condition of the goods.

The carrier, however, will not be bound to show any such marks, number, quantity or weight, if he has a reasonable ground for suspecting that they do not accurately represent the goods, or if he has no reasonable means of checking. However, the shipper is deemed to guarantee the accuracy of his statements and is bound to compensate the shipowner for any loss caused by any inaccuracy in such particulars. The carrier is not bound to state both quantity and weight. If the quantity is stated, it may be stated that the weight is unknown and this will have full force.[30] This is known as disclaimer as to weight. Thus though the shipowner is not bound to state both the quantity and weight, but if he does state both he is accountable for both. In a Calcutta case,[31] the bill of lading acknowledged receipt of 499 paper bags of Indian polythelene weighing 12735 kgs. The weight was noted under the heading: "said to weigh". There was shortage in terms of weight at the port of delivery, and the question arose whether the statement as to weight was binding. It was held that the words "said to weigh" were not a specific disclaimer as to the weight shown and the shipowner was liable.[32] But where, in a case before the Kerala High Court,[33] the bill of lading after stating weight, added "weight declared by the shippers, but not checked," it was held that the shipowner was not liable for any shortage in terms of weight unless the shipper proved what weight was loaded. In still another Kerala decision, the court observed as follows :[34]

> The carrier must show in the bill of lading not only the lading marks but also the number of packages or pieces or the quantity or weight. This means that if the number is shown he is not bound to account for the weight provided he has so indicated in the bill of lading. Words such as "weight and quantity unknown" are common in bills of lading. Their effect is that the bill of lading is not even *prima facie* evidence of the weight or quantity shipped.[35]

Acting on these principles and provisions, in *Mogu Liner Ltd.* v *Manipal Printers and Publishers (P) Ltd.*[36], the Kerala High Court held that the carrier was not liable in damages on the basis of shortage of weight or difference in quality

30. See *Oricon Waren-Handels Gesellschaft MBH* v *Intergraan*, [1967] 2 Lloyd's Rep 82.
31. *Union Carbide India Ltd.* v *Jayanti Shipping Co. P. Ltd.*, (1970) 74 Cal WN 5. See further *Ladhubhai Maneckchand & Sons* v *New Dholera Steamship Ltd.*, AIR 1952 Sau 104 ; *Canada & Dominion Co. Ltd.* v *Canadian National (West Indies) Steamship Ltd.*, AIR 1947 PC 40.
32. See also *Pannalal Krishnalal* v *O. S. Kaisha*, (1966) 70 Cal WN 307.
33. *K. Assainar* v *Malabar Steamship Co.*, AIR 1975 Ker 114. ILR [1974] 1 Ker 569. For another Kerala decision of the same kind see *Jayanti Shipping Co. Ltd.* v *F.C.I.*, AIR 1979 Ker 187, where on the fact, however, the court observed that in the absence of any evidence to show that the indorsee had any reason to think that the statement in the bill that the goods were in goods order and condition was not true and the indorsee did not act on the basis of that stipulation, the carrier was liable to him for damage or short delivery.
34. *Collis Line P Ltd.* v *New India Assurance Co. Ltd.*, AIR 1982 Ker 127 at 130 and as cited in *Mogu Liner Ltd.* v *Manipal Printers and Publishers P Ltd.*, AIR 1991 Ker 183 at 194.
35. Citing Carver, CARRIAGE BY SEA, Para 210, Vol 1, 12th ed. ; Scrutton on CHATERPARTIES, 426 (18th ed. 1974).
36. AIR 1991 Ker 183 at 194-195.

where the bill of lading expressly stated that the weight, measure, brand, contents and quality were not known. The cargo in this case was that of 38 reels of glazed newsprint of which 5 were delivered to the consignee with proper marks and 33 without marks. These reels turned out to be ordinary and not glazed newsprint and were also in damaged state, and, by reason of the remarks in the bill of lading no liability came to the carrier.

Responsibilities and Liabilities [Article III, Rule 1]

Apart from the responsibility of issuing a bill of lading, Rule 1 of Article III provides that the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(*a*) make the ship seaworthy ;

(*b*) properly man, equip and supply the ship ;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

It is the responsibility of the shipowner to exercise "due diligence" to assure a seaworthy ship. Where the shipowner got his ship repaired from a competent and reputed firm of repairers, but a fitter of the firm negligently misplaced some inspection covers, which caused water to enter and damage the cargo, the shipowner was held liable.[37] The House of Lords pointed out that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.[38] Lord HODSON made use of the opportunity to advise the shipowners that although ships have become more and more complicated since the days of sail and complications have, no doubt, multiplied since the passing of the Act of 1924, but this does not justify a more lenient construction being put on the Act in favour of shipowners. "The obligation in Article III is not subject to any qualification, and it is generally recognised that the Act was not passed for the relief of shipowners but to standardise within certain limits the rights of the holder of every bill of lading against the shipowner. The position of the holders of bills of lading would be much worsened if the [shipowners] were right in their contention that, given the right conditions, a shipowner can perform his obligation by putting out repair work to competent experts and shelter behind them if the work is negligently done."[39]

The obligation is to use due diligence to provide seaworthy ship "before and at the beginning of the voyage". The meaning of these words was noted by the Privy Council in *Maxine Footwear Co. Ltd. v Canadian Govt. Merchant Marine Ltd.*[40]

The vessel was seaworthy when the cargo was loaded on board, and then she was lost in a fire. The fire started due to the negligence of an

37. *Riverstone Meat Co. Ltd.* v *Lancashire Shipping Co. Ltd.*, [1961] 1 All ER 495, HL.
38. *See* Viscount SIMONDS at p. 504.
39. At p. 527.
40. [1959] 2 All ER 740, PC.

employee of an independent contractor who, on the instructions of the master was there to check the pipes meant to carry off water from deck. Thus the ship was seaworthy before loading and also before the commencement of the voyage. The shipowner sought to defend himself on this ground.

But he was held liable. "In their Lordships" opinion "before and at the beginning of the voyage" means the period from at least the beginning of the loading until the vessel starts on her voyage. On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage.' [41]

The word "voyage" means contractual voyage, that is, as stated in the contract of carriage. Even if the voyage has to pass through successive stages, it remains one voyage and the obligation to provide seaworthy ship is for that single voyage. At every stage, therefore, due diligence has to be exercised at the start of each stage. Where the ship was seaworthy and had proper supply of bunkers at the first stage and due arrangement had been made for adequate supply of bunkers at every stage, but at the third stage the fuel supplied was contaminated with sea water and it being unburnable the ship broke, it was held that the shipowners had exercised the diligence to ensure sufficient and proper bunkers at each stage of the voyage.[42] The court pointed out that "voyage" means the contractual voyage from the port of loading to the port of discharge as declared in the bill of lading. The obligation on the shipowner was to use diligence before and at the beginning of sailing from the loading port, to have the vessel adequately bunkered for the first stage and to arrange for adequate bunkers of a proper kind at other selected intermediate ports on the voyage so that the contractual voyage might be performed.

This is the statutory warranty of seaworthiness. The Act excludes the common law absolute warranty of seaworthiness. Section 3 declares that "there shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier... to provide a seaworthy ship".

Modification of Responsibilities and Liabilities [Article III, Rule 8]

Rule 8 of the third article provides :

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

Thus clauses contrary to the responsibilities and liabilities stated in the third article become "void clauses". For example, the Act provides in Rule 6 of

41. Lord SOMERVELL OF HARROW at p. 744.
42. *The "Makedonia"*, [1962] 2 All ER 614.

Article III that the carrier will be discharged from liability unless the suit is brought within one year. Any clause in the bill of lading reducing such time shall be void.[43] An illustration in point is the decision of the Kerala High Court in *Goverdhandas* v *New Dholera Steamships Ltd.*[44] The Act provides in Rule 2 of Article III that "subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried". One of clauses in the bill of lading in this case provided that the company's liability was to absolutely cease when the goods would be free of steamer's tackle and thereupon they would be at the shipper's risk. The goods were lost from a warehouse where they had been kept after discharge from the ship. It was held that the bill of lading remains in force up to the time that the goods are delivered to the party entitled and, therefore, the above clause being contrary to the obligation to deliver goods to the consignee, was void.

A clause enabling the shipowner to unload at the port of loading would not be void. In *G. H. Renton & Co. Ltd.* v *Palmyra Trading Corpn. of Panama*,[45] a cargo of timber was loaded at a Canadian port for delivery at London. The bill of lading incorporated Hague Rules and provided that if unloading was not possible at the port of discharge because of strike, the master may discharge at the port of loading or any other safe or convenient port. The port of London was strike bound at the material time. The ship was carried to Hamburg and the timber was discharged there. The House of Lords held that the clause was valid. There was nothing in the clause against the responsibility of the shipowner imposed by the Rules. The responsibility to discharge at proper port cannot mean that the goods cannot be discharged at any port other than the port of destination under any circumstances whatsoever.[46]

Loading and Discharge, a joint operation

The obligation of the carrier at the stage of loading was discussed by the Kerala High Court in *New India Assurance Co.* v. *Splosna Plovba*.[47]

> The bill of lading provided that the carrier shall not be liable for loss of or damage to the goods during the period before loading into and after discharge from the vessel howsoever such loss or damage arises and that loading commences when the tackle is hooked on the cargo and discharge ends when cargo is taken off ship's tackle.
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> The cargo to be loaded consisted of 23 distinct logs of timber. They were loaded on to a boat and the boat was towed by a tug to the ship and

43. *See*, for example, *Damodar Savailal* v *Bombay Steam Navigation Co.*, AIR 1953 Sau 32, where a clause limiting the time to 14 days was held to be inoperative.
44. AIR 1956 Ker 51. See also *Rosa S, The*, [1989] 1 All ER 489 QBD, as to limitation of liability, meaning of "gold value figure" for liability purposes.
45. [1956] 3 All ER 957 : [1957] AC 149 : [1957] 2 WLR 45 : [1956] 2 Lloyd's Rep 379 HL.
46. The opinion of WRIGHT J in *Gosse Millard Ltd.* v *Canadian Govt. Merchant Marine Ltd.*, [1927] 2 KB 432 at 434 and *W. Angliss & Co. (Australia) Proprietary* v *Peninsular and Oriental Steam Navigation Co.*, [1927] 2 KB 456 at 460, 461 was cited and also SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING (12th ed).
47. AIR 1986 Ker 176.

tied along with it. Two logs were loaded on to the ship. Before the third one could be loaded, the boat sank into the sea. The goods were fully insured. The insurer paid the claim and then sought to recover from the carrier.

The carrier was held not liable. The liability was to commence after loading and the goods were lost before actual loading. The court refused to accept the contention that the actual transfer of two logs to the ship amounted to commencement of loading so as to charge the carrier with liability for the whole consignment.

The court said that the provisions in the bill of lading have to be understood in the background of the general concept of "loading" in maritime law.[48] The court cited EARL OF SELBORNE LC in *Grant & Co.* v *Coverdale Todd & Co.*[49] who posed the question : "what is the meaning of loading? and answered it in the following words :

> There are two things to be done. The operation of loading is the particular operation in which both parties have to concur... No doubt, for the purpose of loading, the charterer must also do his part ; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *since quibus non* of that operation — everything before that is the charterer's part only.

The court further said that as with loading, so with discharge, the corresponding obligation at the culmination of the voyage. The discharge or the delivery from the ship takes place at that juncture. This too is a joint operation. The jointness of the operations was discused by Lord ESHER MR in *Petersen* v *Freebody & Co.*[50] The court noted that it is open to the parties to regulate their relations within the framework of the rules stated in the Carriage of Goods by Sea Act. In this case the parties had done so by means of their bill of lading, which, though issued only for two logs, and not for the rest, had nevertheless become a part of the parties' contract. The court cited DEVLIN J:[51]

> In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of that contract, it is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply.[52]

48. MENON and SUKUMARAN JJ at p. 181.
49. (1883-84) 9 App Cas 470.
50. (1895) 2 QB 294 at p. 297.
51. *Pyrene Co.* v *Scindia Navigation Co. Ltd.*, [1954] 2 QB 402.
52. The court considered the following authorities on the subject : *G H. Renton & Co.* v *Palmyra Trading Corpn. of Panama*, [1957] AC 149 and SCRUTTON ON CHARTERPARTIES AND BILLS OF

The courts have also to see the nature of the port in examining whether the goods have been discharged so as to absolve the carrier of any further liability. In a case before the Kerala High Court:[53]

> A consignment of cashew nuts reached the port of Calicut. This was not a roadstead port. There was some distance between the piers and the place nearest therefrom where the ship could reach. Hence barges were used to carry the goods from the ship to the piers. In the course of the lightering process, a number of bags were jettisoned from the barges and few others bags fell into the sea during unloading the goods on the piers. A clause in the bill of lading provided that the carrier was not to be liable for anything happening after discharge of the goods.

The court held that the goods had not been discharged at the time of their loss. Discharge from the vessel is intended to deliver the goods to the consignee and until the consignee is in a position to take delivery of the goods, the discharge from the vessel is not complete. Discharge of the goods from the tackels of the vessel may be sufficient in cases where the ports of disembarkation are provided with wharfing facilities or ports where anchorage is possible in roadstead. In ports like Calicut where transhipment of the cargo from the vessel to the piers is inevitable, lightering of goods is the course normally resorted to for unloading the cargo on the short. In such circumstances the words "discharge from the vessel" must be given a pragmatic interpretation to mean that the goods are to be discharged from the vessel in such a condition as the consignee can take effective delivery of the goods.[54]

The effect of the authorities and statutory provisions is thus stated by the Kerala High Court in *Mogu Liners Ltd.* v *Manipal Printers and Publishers P Ltd.*[55]

> In a case where the carrier states in the bill of lading that the weight is unknown and the bill of lading mentions the number of packages the carrier is no longer responsible for the shortage in weight if there is delivery of the number of packages shown in the bill of lading. It is open to the carrier to limit his liability in terms of Article VII of the Schedule to the Indian Carriage of Goods by Sea Act and such limitation can be incorporated in

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LADING (12th edn.) where it is observed : "Loading and discharge... This is the crucial Article (Art. II) applying the rights and liabilities in the subsequent articles to the operations it enumerates. Article II, Rule 2 provides that, subject to the rights and immunities of Article IV, the carrier shall properly and carefully, *inter alia* load and discharge the goods. Before the decision of the House of Lords in *Renton* v *Palmyra Trading Corpn. of Panama*, it was doubtful how these two provisions were to be interpreted in their application to the operations of loading and discharging. Since the approval by the House of Lords in the above case of the opinion of DEVLIN J in *Pyrene & Co.* case it may be taken as clear that the object of the Rules is to define not the scope of the contracted service but the terms on which that service is to be performed.

53. *General Traders Ltd.* v *Pierce Leslie (India) Ltd.*, AIR 1987 Ker 62 FB.

54. The court cited passages from Lord DENNING'S speech in *Tong Bank* v *Rawpler Cycle Co.*, [1959] 3 All ER 182 and from ABBOTT'S LAW OF MERCHANT SHIPS AND SEAMEN as cited in Halsbury, para 659 (Vol. 43, 4th ed).

55. AIR 1991 Ker 183 at 196.

the bill of lading. The responsibility of the carrier comes to an end when the goods are discharged and delivery is given to the consignee or to the port authorities and a receipt is taken.

In this case the cargo was that of 38 reels of glazed newsprint. Five reels were so marked and were taken delivery by the consignee. The rest were not so marked and on delivery taken turned out to be ordinary newsprint and also in damaged state. The ship sailed away after discharging. The liability became transferred to the port authority. The shipowner was held not liable in damages on the ground of deficiency in quality or quantity of the cargo after the discharge. The consignee had refused to take delivery of the 33 unmarked reels and when he ultimately came round to accept them, they were in a damaged state. The court relied upon the decision of the Allahabad High Court in *Niranjan Lal* v *Union of India*[56] where the court observed as follows:[57]

> The consignee has to take delivery of the goods in the condition in which they are found after giving notice to the railway authorities in regard to the condition of the goods and the shortage etc. and then to sue the railway administration for shortage or damage as the case may be. The consignee should take delivery within reasonable time which normally would be the free time allowed for demurrage and wharfage by railways.

Care of Cargo [Article III, Rule 2]

Rule 2 has been cited above. It requires the carrier to take proper care of the cargo. The amount of care depends to a certain extent upon the nature of the goods. In a Calcutta case:[58]

> More than 3,500 tobacco bags were stacked in one place going right up to the ceiling of the hold with a slight gap. They were stacked in 12 or 14 layers deep so that it was beyond all doubt a deep stowage. The cargo on arrival at the destination appeared as a charred mass and, in fact, steaming. This was due partly to the heat generated by the pressure of deep stowage and partly due to placing the bags against engine room.

The carrier was held liable. He failed to take the type of care which could be described as "proper" in reference to the nature of the goods.

Similarly, where a ship suffered damage during a voyage and had to go into a dock for repairs, where latches were left open to enable workmen to go in and out of the ship more easily, consequently rainwater entered and damaged the cargo of tinplates, the shipowner was held liable.[59]

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56. AIR 1973 All 303.
57. AT 305.
58. *A. S. Navigation Co.* v *Jethalal*, AIR 1959 Cal 479.
59. *Gosse Millard Ltd.* v *Canadian Govt. Merchant Marine Ltd.*, [1928] All ER Rep 97 : [1929] AC 223. Following *Hourani* v *Harrison*, (1927) 32 Com Cas 305 and *The Glenochil*, [1896] P. 10 where the position earlier to the Act is considered and the effect of the Act.

Limitation of Liability under Merchant Shipping Act

Where the extent of liability is sought to be limited under Section 503 of the Merchant Shipping Act, 1894 (English) [Indian Merchant Shipping Act, 1958] on the ground that the loss had occurred without the owner's actual fault or privity, the burden of proving that fact lies on the owner.[60] A shipowner claiming the protection of this section has also to observe the conduct of the ordinary reasonable shipowner in the management and control of a vessel or a fleet of vessels. A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires safe navigation. Excessive speed in fog is a grave breach of duty, and shipowners should use all their influence to prevent it. In so far as high speed is encouraged by radar the installation of radar requires particular vigilance of owners. The standard of care would be the same whether they are owners of the ship as professional carriers or only for the purpose of carrying and distributing their own produce. This statement of law occurs in a case in which a firm of brewers maintained a vessel for their own purposes. A collision occurred due to the master's failure to use radar in a fog. They were not allowed to limit their liability under the section because they failed to show that the collision had occurred without their actual fault or privity.[61]

An owner of a vessel who is acting as its master is also entitled to limit his liability under the [English] Merchant Shipping (Liability of Shipowners and Others) Act, 1958.[62]

Time for Filing Claims [Article III, Rule 6]

Rules relating to bringing of claims are stated in Rule 6. They are as follows :

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

The rule stated in the first para creates only a *prima facie* evidence, where goods have been removed without objection, or where their condition was not apparent, and no objection was made within three days, that the goods were in accordance with the bill of lading. But this is only a *prima facie* evidence and

60. *Northrn Fishing Co. (Hull) Ltd.* v *Eddom : The Norman*, [1960] 1 Lloyd's Rep 1.

61. *The Lady Gwendolen : Arthur Guinness Son & Co. Dublin Ltd.* v *Owners of Freshfield*, [1965] P 312 : [1965] 2 All ER 283 : [1965] 3 WLR 91.

62. *Coldwell-Horsfall* v *West Country Yacht Charters Ltd. : The Annie Hay*, [1968] 1 Lloyd's Rep 141 : [1968] 1 All ER 657 : [1968] 2 WLR 353.

it can be rebutted by showing that no delivery in fact had been made.[63] The meaning and effect of some of the rules have been explained by the Supreme Court in *East and West Steamship Co.* v *S. K. Ramalingam.*[64]

> Ninety bundles of brass circles were consigned from Bombay to Madras. The ship arrived in Madras on August 1, 1948. Seventy eight bundles were delivered on August 25, 1948. Five more bundles were delivered a month later on September 25, 1948. Then commenced correspondence for the undelivered seven bundles, the company finally repudiating the claim on March 24, 1950. An action was then commenced on June 27, 1950. The question was whether the action was commenced within one year after the delivery of the goods or the date when the goods should have been delivered.

Thus the case involved ascertainment of the meaning of the term "loss", the date when the goods should have been delivered and the time within which the claim should have been brought. DAS GUPTA J first noted that the Act has been the result of an international concern for standardisation of rights and liabilities in connection with sea carriage where bills of lading are issued. "This international character of the provisions of law as incorporated in the articles to the schedule to the Act makes it incumbent upon us to pay more than usual attention to the normal grammatical sense of the words and to guard ourselves against being influenced by similar words in other Acts of our Legislature."[65] The learned judge then cited Lord ATKIN in *Stag Line Ltd.* v *Foscoid*[66] where his Lordship emphasised the importance of giving words in these rules their plain meaning and for the purposes of uniformity the courts should apply themselves to the consideration only of the words used without any predilection for the former law.

Meaning of "loss or damage".—Referring to the words "loss or damage" as used in paragraph 6, the learned judge said that this should mean loss or damage resulting from the carrier not performing some or all of the duties imposed upon him by the Act. One of such duties is to discharge the goods carried in accordance with the bill of lading and a failure to do so is a loss to the owner. It is not necessary that the goods should have been actually or physically lost or destroyed. Any failure to deliver is a loss to the cargo owner.[67] Where the goods are in existence but cannot be delivered because they have been mixed up with the cargo of the other owners, that is also a "loss' within the meaning of the rules.[68]

63. *Textile and Yarn (P) Ltd.* v *Indian National Steamship Co.*, AIR 1964 Cal 362.
64. AIR 1960 SC 1058 : (1960) 3 SCR 820.
65. At p. 1062.
66. [1932] AC 328.
67. At p. 1068.
68. At pp. 1064-1065, where the learned judge considered : *Spens* v *Union Marine Ins. Co.*, 3 Common Pleas 427 and *Sandeman & Sons* v *Tyzack and Branfoot Steamship Co.*, [1913] AC 680, Lord MOULTON at p. 697.

Whether one year period is for limitation of time or extinction of right.—The next question that the court had to consider was whether the one year period is prescribed as a rule of limitation only or whether its expiry operates as an extinction of all the rights under the bill of lading. It would make a difference in some cases. For example, if it is only a period of limitation, any acknowledgement after the expiry of the period, such as a correspondence, will have the effect of extending the period. But if the expiry operates as extinction, question of acknowledgement will never arise. The Act says that on the expiry of time the carrier will be "discharged from liability." The learned judge expressed the opinion that "rules of limitation are likely to vary from country to country. Provisions for extension of periods prescribed for limitation would similarly vary. We should be slow therefore to put on the words "discharged form liability" an interpretation which would produce results varying in different countries, and thus keeping the position uncertain for both the shipper and the shipowner. Quite apart from this consideration, however, we think that the ordinary grammatical sense of "discharged from liability" does not connote "free from the remedy as regards liability" but are more apt to mean a total extinction of the liability following upon an extinction of the right."[69]

'When the goods should have been delivered'.—Another question that the court had to face was how the date "when the goods should have been delivered" was to be ascertained. In this connection, the learned judge laid down that before the ship actually leaves the port of destination it is not possible to say that the time when delivery should be made has expired. Once, however, the vessel has left the port it cannot but be common ground between the carrier and the consignee that the time when delivery should have been made is over. "It is this point of time, viz., the time when the ship leaves the port, which in our opinion should be taken as the time when the delivery should have been made. The fact that after this point of time correspondence started between the carrier and the consignee as regards the failure to deliver and at a later point of time the carrier communicates his inability to deliver cannot affect the question. Nor can ultimate repudiation of any claim that may be made by the shipper or the consignee affect the ascertainment of the date when the goods should have been delivered. The arrival at the port of the vessel by which the goods have been contracted to be carried being known and departure being equally an ascer-

69. At p. 1065. To the same effect is the decision of the Calcutta High Court in *Konsumex* v *Anand & Co.*, AIR 1981 Cal 298 where the consignment was found to be contaminated, the action was not allowed because of the gap of one year between delivery and the suit. The court could not be convinced that the carrier had waived the bar of 12 months. Once the right is extinguished a new right has to be created by a new agreement. The court relied upon the decision of the Supreme Court in *East & West Steamship Co.* v *S. K. Ramalinga*, AIR 1960 SC 1058.

It has been held in *Compania Columbiana de Seguvas* v *Pacific Steam Navigation Co.*, [1963] 2 Lloyd's Rep 479, that the suit must be instituted within one year in a court of proper jurisdiction and not "anywhere". In this case the suit filed in a court of New York was held to be without jurisdiction and by the time that it was filed in England before a court of proper jurisdiction one year had passed and the suit was held to be statute-barred. As to jurisdiction see *Union Transport Group* v *Continental Lines*, [1992] 1 All ER 161 HL. *Cia Portorafti Commerciale SA* v *Ultramar Panama Inc.*, [1989] 2 All ER 54 QBD; the one-year limit not applicable to misdelivery.

tainable thing and the duty of the carrier being necessary to complete the delivery before leaving the port, the date by which the delivery should have been made is already a fixed point of time and later correspondence, claims or repudiation thereof can in no way change it.[70]

In a case before the Calcutta High Court :[71]

> The plaintiff despatched 160 bags from Italy for India. The goods were sent by a ship having the flag of Yugoslavia. The ship arrived at Calcutta Port on June 19, 1979. The goods delivered against the bill of lading were short by 80 bags. A short delivery certificate was issued on September 29, 1979. On October 25, 1979, the plaintiff lodged a claim with the carrier, who promised to look into the matter. The plaintiff reminded him on three occasions. After a long time he informed the plaintiff that his bags had been traced but they were found to be not the plaintiffs goods. The parties sat down on June 2, 1980 for the final settlement. The carrier refused to pay. The plaintiff filed his case on April 16, 1981.

The court noted that India having adopted the Hague Rules[72] the statutory provision would apply to outward carriage of goods from any port in India and not to carriage of goods from any port outside India to any port in India. If Indian law was applicable the action would have been within time because the cause arose in 1979 and there was acknowledgement up to 1980 and from the date of last acknowledgement the action was within one year. The defendants were not able to give any evidence of what the Yugoslavian laws were and, therefore, Indian laws became applicable. The court also said that time began to run when the shortage was certified. The second part of the rule that time begins to run from the date when the goods should have been delivered was not applicable because the shortage having been certified, there was no chance of delivery at a future date. "The second clause would apply only in case of non-delivery either of the whole or in part and the parties yet acting on an understanding that goods are still likely to be delivered."[73] The court did not accept the argument of the counsel which was built on two Supreme Court decisions[74] that the date of ship's departure from Calcutta must be ascertained because only then it could be said that the provision "when the goods ought to have been delivered", would cease to be applicable. In those cases also there was short delivery and because there was no acknowledgment time began to run from the date of certificate of short delivery.

70. At p. 1067.
71. AIR 1985 Cal 193 : 89 CWN 9 : (1984) 2 Cal HN 194 DB.
72. Hague-Visby Rules on which the Articles and Rules of the Act are based and about which it has been observed that "whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any interested person (Article X), carriers cannot contract out of Hague-Visby Rules (Article III Rule 8)" CHARLESWORTH'S MERCANTILE LAW, 577 (14th ed by Schmitthoff and Sarre 1984) citing *Hollandia, The* (also reported as *Marviken, The*), [1983] 1 Lloyd's Rep 1, where it was held that the Hague-Visby Rules could not be contracted out by adopting a foreign law which gave the cargo-owner a lower measure of compensation.
73. At p. 196.
74. *East and West Steamship Co.* v *S. K. Ramlingam*, AIR 1960 SC 1058 and *A.E.I. Lines Inc.* v *J. Lopez*, AIR 1972 SC 1405.

Provisions reducing the period null and void.—A stipulation in the bill of lading that a claim should be made within one month from the date of the arrival of the ship was held to be null and void being contrary to Rule 8.

Suit to be within time in proper jurisdiction.—Another decision in support of this interpretation is *Compania Colombiana de Seguros* v *Pacific Steam Navigation Co.*[75], where it was pointed out that because of the international character of the Hague Rules, purely domestic standards of construction should not be applied.

> A cargo of electric cables was from Liverpool to Buenaventura, Columbia. It was delivered in a damaged condition on December 12, 1954. The insurance company paid the claim to the cargo owner and brought an action within one year, but in New York. This action was dismissed because the New York court had no jurisdiction. This took about eleven months and ultimately in the thirteenth month an action was brought in England in a proper court.

This action was also dismissed because it was now out of time. The words "unless suit is brought within one year" were taken to mean that suit should be brought within one year in the appropriate court and not anywhere. The fact, that a suit was brought in New York was immaterial.

Arbitration proceedings.—Where a bill of lading provided for arbitration within twelve months, and arbitration proceedings were not so commenced and instead an action was brought within twelve months, which was stayed, it was held that the arbitration was effective and binding and proceedings having not been started in twelve months, all rights under the bill were lost. Thus the word suit includes arbitration proceedings also.[76] In another case the clause was that in case of dispute each party should appoint an arbitrator within three months of final discharge. Discharge took place on December 15, 1963. The shippers nominated their arbitrator on January 27. That was within time. But they did not inform the arbitrator until July 24. That was held to be out of time and the claim was consequently barred.[77] The House of Lords laid down that three things are necessary in order to make an effective appointment of an arbitrator : first of all, the arbitrator must be communicated with and asked if he is willing to act in the matter in arbitration ; secondly, he must express his willingness and be clothed with authority to act, and thirdly, as is apparent from the case of *Tew* v *Harris*,[78] in order to perfect the appointment the other side must be notified of the name of the arbitrator. These steps may be taken by letter, or telephone or telex. If the arbitrator has already expressed his willingness in advance then all that is necessary is to appoint him and inform the other party.

75. [1963] 2 Lloyd's Rep 479 ; reported, E. R. Hardy Evamy, CASE BOOK ON CARRIAGE BY SEA, 72 (2nd ed. 1971).
76. *The "Merak"*, [1965] 1 All ER 230.
77. *Tradax Export S.A.* v *Volkswagen Werk A.G.*, [1970] 1 Lloyd's Rep 62 : [1970] 1 QB 537 : [1970] 1 All ER 420 : [1970] 2 WLR 399.
78. (1847) 11 QB 7.

Where the goods are lost so that they were never discharged, the time of appointing an arbitrator which was to run from the date of discharge would not be applicable. The ordinary period of limitation would be available.[79]

Measure of Damages

Damages are assessed generally in accordance with rules enshrined in *Hadley* v *Baxendale*[80] and Sections 73 and 74 of the Indian Contract Act. One of those rules was considered by the House of Lords in *C. Czarnikow* v *Koufos*[81], where there was a delay in carrying goods. The shipowner was required to pay damages according to the difference between the market value at the time when the goods ought to have been delivered and the time of actual delivery.

> A vessel was chartered to proceed to Constanza, there to load a cargo of three thousand tons of sugar; and to carry it to Basrah, or, at the charterers' option, to Jeddah. The vessel left in time. A reasonably accurate prediction of the length of the voyage was twenty days.
>
> But the vessel in breach of contract made deviation which caused a delay of nine days. If the vessel had arrived in time, the charterer would have obtained roughly £ 1 more per ton than what he actually obtained. The shipowner knew that there was a market for sugar at Basrah, but did not know that the charterer wanted to sell the sugar promptly on arrival. The shipowner also knew that sugar prices were apt to fluctuate from day to day, but had no reason to suppose that fluctuation would be downwards rather than upwards. He was sued for the loss due to fall in market price.

The umpire allowed this loss. But the trial judge allowed as damages only the interest on the value of the cargo during the period of delay. The Court of Appeal reversed this order and restored the award of the umpire and the House of Lords unanimously affirmed the decision of the Court of Appeal.

Lord REID emphasised that the rule (or rules) laid down in *Hadley* v *Baxendale* and which for over a century have been used for determining remoteness of damage should not be subjected to an interpretation which would result in a contrary decision of that case. His Lordship laid particular emphasis upon the fact that in that case the loss of profits was caused by the delay, but even so the defendant was held not liable not because the loss was not foreseeable but because, as ALDERSON B put it, "it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred...." He was not distinguishing between results which were foreseeable or unforeseeable, but between results which were merely likely because they would happen in the great majority of cases, and results which were unlikely because they would only happen in a small minority of cases. He clearly meant that a result which will happen in the great majority of cases should fairly and

79. *Denny, Mott and Dickson Ltd.* v *Lymn Shipping Co. Ltd.*, [1963] 1 Lloyd's Rep 339.
80. (1854) 9 Exch. 341 : [1843-60] All ER Rep 461.
81. [1967] 2 Lloyd's Rep 457 : [1969] 1 AC 350 : [1967] 3 WLR 1491 : [1967] 3 All ER 686.

reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would happen only in a small minority of cases should not be regarded as having been in their contemplation. Applying this test to the facts, his Lordship concluded that having regard to the knowledge available to the shipowner when he made the contract, any reasonable person in his position would have realised that such loss was sufficiently likely to result form the breach of contract thus making it proper to hold that the loss followed naturally from the breach or that the loss of that kind would have been within his contemplation.

In an earlier case Lord ESHER MR[82] observed the rule as to measure of damages in cases of non-delivery is the difference between the position of the shipper if the goods had been safely delivered and his position if the goods are lost. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them, e.g., freight. If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market the value would be the value when the goods ought to have arrived.

His Lordship continued :[83]

"I think that the rule as to measure of damages in a case of this kind must be this : the measure is the difference between the position of a [shipper] if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them be must pay the freight in respect of which there is a lien on them. If there were no lien, he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value ; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the [shipper]. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the [seller] and the [buyer], as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the [shippers] had sold the goods for more than the market value before their arrival, they could not recover or the basis of that price, but would

82. *Rodoconachi, Sons & Co.* v *Milburn Bros.*, (1886) 18 QBD 67.
83. At p. 76.

be confined to the market price, because the circumstances that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners ; but it is said that; as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in *Mayne on Damges,* which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages."

Where unseaworthiness caused delay and intervention of war compelled unloading midway, the shipper was allowed to recover compensation for carrying the goods to destination.

> In April, 1939, M. Co. chartered a steamship belonging to a British Co. to carry a cargo of soyabeans to a port Karlmshamns in Sweden. The ship was unseaworthy and consequently much delay was caused on account of deviation from the prescribed route for repairs. The result was that the voyage which should have been complete in about two months had not yet been completed and war broke out on September 3, 1939. British Admiralty, therefore, ordered the ship to proceed to Glasgow and deliver its cargo there. The M. Co. had therefore, to tranship the cargo from Glasgow to Karlmshamns and incurred an expense of over £ 2,000 in doing so. They claimed this amount as damages on account of breach of contract by the shipping company.

The shipping company relied on the War Risk Clause which gave the liberty to the shipping company to comply with the orders of the Admiralty in case of war and they contended that delivery of cargo at Glasgow was sufficient performance of the contract and in any case the damage resulted directly on account of the order of the Admiralty and not on account of any breach of contract by the company, so the latter were not bound to pay.

The House of Lords held that the possibility of war must have been in the contemplation of the parties at the time of the contract, that the delay was responsible for the damage because if the voyage had been completed within the normal time, the cargo would have reached Karlmshamns long before the war started.[84]

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84. *Monarch Steamship Co. Ltd.* v *A. B. Karlmshamns Oliefabriker*, [1949] AC 196. Sea also *Blower* v *Great Western Ry Co.*, (1872) LR 7 CP 655 ; *London and North Western Ry Co.* v *Richard Hudson & Sons Ltd.*, [1920] AC 324 HL ; *M' Manus* v *Lancashire and Yorkshire Ry Co.*, (1859) 4 H & N 327 : [1843-60] All ER Rep 725. Thus the intervention of his negligence or that of others would prevent him from taking advantage of any excepted peril or defences like act of God. *Oakley* v *Portsmouth and Ryde Steam Packet Co.*, (1856) 11 Exch 618 ; *Briddon* v *Great Northern Ry Co.*, (1858) 28 LJ Ex 51.

Rights and Immunities [Article IV]

Conditions of Liability and Burden of Proof [Article IV, Rule 1]

Rule 1 of the 4th Article lays down the conditions of liability and a provision about burden of proof. It says :

> **Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of Paragraph 1 of Article III.**
>
> **Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.**

In a case already noted[85] where the cargo of tobacco was virtually reduced to ashes, PB MUKHERJI J observed as to burden of proof that if the shipper proves that the goods have not been delivered or that they have been damaged after shipment during the voyage, the onus shifts on to the carrier to bring the cause of damage within the exceptions and if the shipper then wants to defeat that defence onus lies on him to prove negligence.

Excepted Perils [Article IV, Rule 2]

Rule 2 of Article IV specifies cases in which the shipowner incurs no liability. They are perils excepted by the Act itself and against which the shipowner would not be held liable. The rule says :

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) act, neglect, or default of the master, mariner , pilot, or the servants of the carrier in the navigation or in the management of the ship ;
> (b) fire, unless caused by the actual fault or privity of the carrier ;
> (c) perils, dangers, and accidents of the sea or other navigable waters ;
> (d) act of God ;
> (e) act of War ;
> (f) act of public enemies ;
> (g) arrest or restraint of princes, rulers of people, or seizure under legal process ;
> (h) quarantine restriction ;
> (i) act or omission of the shipper or owner of the goods, his agent or representative ;
> (j) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general ;
> (k) riots and civil commotions ;
> (l) saving or attempting to save life or property at sea ;
> (m) wastage in bulk or weight or any other loss or damage arising form inherent defect, quality or vice of the goods ;
> (n) insufficiency of packing ;
> (o) insufficiency or inadequacy of marks ;
> (p) latent defects not discoverable by due diligence ;

85. *A. S. Navigation Co.* v *Jethalal*, AIR 1959 Cal 479.

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Wastage in bulk, weight, inherent vice etc. [*Clause* (*m*)]

In a Calcutta case already noted,[86] where bags of tobacco were reduced to ashes by excessive heat, one of the questions was whether the loss in question was within the meaning of clause (*m*) due to inherent defect, or quality or vice of the goods, P B MUKHARJI J explained that the carrier can avail of this defence when he eliminates all charges of ill-treatment of the goods. "When all other causes during the voyage have been eliminated, so far as the acts of the carrier are concerned, it is then and then alone that an inference of inherent vice can be attributed to the goods."[87] The learned judge cited *Bradely & Sons Ltd.* v *Federal Steam Navigation Co. Ltd.*[88], where it was proved that all possible steps were taken by the carrier and every possible attention was given by the carriers to the cargo of apples, but even so they deteriorated. The court said that the damage was caused to the apples not because of the ship or of the sea but because they were apples which were not fit to make their voyage in the ordinary way. Another illustration is *Jahn (Trading as C. F. Otto Weber* v *Turnbull, Scott Shipping Co. and Nigerian National Line Ltd. The "Flowergate"*,[89] where a cargo of cocoa was damaged by moisture and the question was whether this was due to the moisture content of the cargo itself or due to external causes. The answer becomes obvious from the following passage in the judgment of ROSKILL J:

> The defendants have shown on a balance of probabilities that the source of the water which damaged the cocoa in No. 5 lower hold was that cocoa itself. They have shown that the voyage was an ordinary voyage on which nothing untoward happened save bad weather, clearly a normal hazard of an autumn voyage. They have shown that the vessel was both seaworthy and cargo worthy. They have shown that her officers were both competent and careful. They have shown that dunnage and matting were sufficient. They have shown that the system of ventilation adopted was proper. In addition, they have shown that cocoa in No. 5 lower hold was a potential source of moisture which could damage the cargo and in the end they have convinced me that it did.[90]

Similarly, where a consignment of wet salted fish was, on arrival at the destination, found to be in a damaged condition due to reddening, which was due to a bacterial contamination rendering the goods to be unmerchantable, the damage was held to be due to inherent vice.[91]

86. *Ibid* 84.
87. AIR 1959 Cal 479 at p. 487.
88. [1927] 137 LT 266.
89. [1967] 1 Lloyd's Rep 1.
90. At p. 45.
91. *Albacora S. R. L.* v *Westcott and Laurance Line Ltd.*, [1966] 2 Lloyds' Rep 53, HL : 110 Sol

Theft by Stevedores [*Clause (q)*].—Where the cases containing the goods were broken into and pilfered by labourers employed by the stevedores, the shipowners could not claim the protection of the last clause, because, though it was not due to their actual fault, the clause also covers the fault of their agents or servants.[92] But where at a mid port the stevedores stole a storm value cover plate during loading and unloading and that caused damage by sea water, the shipowner was held not liable as the removal of the cover plate was in no way incidental to loading and unloading.[93] SELLERS LJ pointed out that the shipowner could not have escaped liability if the stevedores' men in the performance of the work in hand had damaged or stolen the cargo they had to handle. But the men involved did not damage the cargo which they were handling and did not steal any of it. They took the opportunity to remove a very small part of the ship itself in order to steal it and in so doing so damaged the ship that sea water could enter. The removal was not ship's work. It was not in the ship's interest and did not purport to be. It was in no way incidental to or a hazard of the process of discharge and loading. If a complete stranger had entered the hold unobserved and removed the plate, para (*q*) would apply if the shipowner could prove that it was a stranger who removed the cover, and reasonable care had been taken to prevent strangers getting on board the ship and due diligence generally had been exercised. In the present case the act of the thief ought to be regarded as the act of a stranger. The thief in interfering with the ship and making her unseaworthy was performing no duty for the shipowners at all, neither negligently nor deliberately nor dishonestly. He was not in fact their servant.

Barratry [*Clauses (a) and (j)*]

Paras (*a*) and (*j*) refer to one of the commonly excepted perils which goes by the name "barratry", and which means any intentional or fraudulent breach of duty on the part of the crew to the prejudice of the shipowner or cargo owner.

In a case before the Kerala High Court,[94] the cargo was discharged (12934 bags of chemicals) mid-stream into lighters hired for the purpose by the consignees. Discharge of the bags was effected by means of the ship's derricks. During the discharge 92 bags fell overboard because the sling struck against the gunwale of the ship. The rest of the cargo was duly delivered into the lighters. Some other bags suffered damage and loss of weight.

Under the Act, discharge of the cargo is part of the carriage of goods as defined in Article 1 and responsibilities and liabilities of the carrier continue till discharge. It was contended from the side of the carriers that they were protected

Jo 525, H. L. Digest Cont. Vol B 650. See also *Makeddonia, The*, [1962] 2 All ER 614 : [1962] 3 WLR 343 where the ship broke down in mid-Atlantic because the fuel oil had become contaminated with sea water and it was held to be entitled to the benefit of the exemption under Article IV, Rule 2(*a*) of the Hague Rules.

92. *Brown & Co. Ltd.* v *Harrison*, [1927] All ER Rep 195 : (1927) LJ KB 1025 : 43 TLR 633.

93. *Leesh River Tea Co. Ltd.* v *British Indian Steam Navigation Co. Ltd. : The "Chyebassa"*, [1966] 2 Lloyd's Rep 193 : [1967] 2 QB 250. See also *Heyn* v *Ocean S. S. Ltd.*, (1927) 43 TLR 358, where cloth was stolen probably by stevedores' men.

94. *Collis Lines P. Ltd.* v *New India Assurance Co. Ltd.*, AIR 1982 Ker 127.

by clauses (*a*) and (*c*). The court did not agree. Referring to clause (*a*) the court said :

> Courts have held that the immunity mentioned under Article IV, Rule 2(*a*) is confined to navigation or management of the vessel and is not applicable to the primary responsibility of the carrier to perform the contract of carriage which includes delivery of cargo. Neglect of duty owed to the cargo owners is not a neglect or default in the navigation or management of the vessel. Negligence in the management of hatches or operation of derricks or cranes or other apparatus of the ship meant for the carriage or protection of cargo is not negligence in the management of the ship within the meaning of the exception under Article IV, Rule 2(*a*). This exception or immunity is applicable only to the care of the ship as distinct from the care of the cargo. Negligent discharge of the cargo is not negligent management of the ship. This immunity has no application where the carrier was himself at fault. He is protected only if the loss or damage arose without his actual fault or privity but on account of the negligence of his agents or servants in the navigation or management of the ship. In the instant case there is no evidence whatever to suggest that the loss arose from negligence in the navigation on or management of the ship.[95]

Regarding the immunity under Article IV, Rule 2(*c*), the court said :

> The words mean perils, dangers and accidents peculiar to sea or other navigable waters which could not have been reasonably foreseen and guarded against by ordinary skill and prudence by the carrier, his agents or servants.... These are casualties arising from the violent action of the elements as distinguished from their silent, natural and gradual action. Any damage arising from such peril during the course of the carriage which begins at the loading point and ends at the discharging point will protect the shipowner.[96]

The court then noted that the burden of proving that the loss was due to such happenings as confer immunity upon the carrier is on him. But in this case he did nothing to show any further cause than what was mentioned in the certificate of loss and that was not sufficient to attract immunity.

The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.[97] The word was originally introduced by the Italians, who were the

95. The court cited : *Gosse Millard Ltd.* v *Canadian Govt. Merchant Marine Ltd.*, [1929] AC 233 HL ; *C. H. Smith & Sons* v *Peninsular & Oriental Steam Navigation*, [1838-60] LI LR 419 ; *The Farrandoc*, [1967] 2 Lloyd's Rep 276 ; *The Glendarroach*, [1894] Probate 226 ; *Loui's H. May* v *Hamburg Amerikaniache P.A.*, (1933) 290 US 333 ; *Albacora S RL* v *Wescoti & Laurance Line Ltd.*, [1966] 2 Lloyd's Rep 53 HL. *Glenochil The*, [1896] p 10, the operation of management is not restricted to the period during which the ship is on voyage, it also covers the period of loading and unloading.

96. The court cited : *Stranna (The)*, 1938 Probate 69 ; STORY ON BAILMENTS, para 512(*a*) (9th ed 1978).

97. Marine Insurance Act, 1906 (English). For an illustration of "act of God" see *Province of Madras* v *I. S. & C. Machado*, AIR 1955 Mad 519.

first great traders of the modern world. In the Italian dictionary the word "Barratnare" means to cheat, and whatsoever is by the master a cheat, a fraud, a cozening or a trick is barratry in him.[1] The shipowner is usually not liable. In *Compania Naviera Bachi* v *Henry Hosegoo & Co. Ltd.*[2] barratry was an excepted peril under the bill of lading, the crew went on strike and refused to unload unless their wages were paid. Consequently the consignees were put to extra expense in getting the goods unloaded. The shipowner was held not liable for this extra expense. One of the best statements is that of HAMILTON J in *Mentz, Decker & Co.* v *Maritime Insurance Co.*:[3] "The authorities prior to the Act [Marine Insurance Act, 1906, (English)] show that where a captain is engaged in doing that which as an ordinary man of a common sense he must know to be a serious breach of his duties to the owners, and is engaged in doing that for his own benefit, then he is acting barratrously."

Fire [*Clause* (*b*)]

Para (*b*) refers to fire and says that the shipowner will not be liable unless the fire was caused by his actual fault or privity. Where a fire was caused by unseaworthiness of the ship even there the shipowner was allowed to rely upon this exemption. The facts were[4] that the ship was sent to sea with bad bunker coal. The coal caught fire. A part of the cargo was damaged before the fire could be controlled at a port of refuge. The Court of Appeal had already considered a case of this kind with a unanimous conclusion that under the statute, liability for fire would not arise even if it was due to unseaworthiness. The House of Lord did not disturb the position taken by the Court of Appeal because not only the decisions were right but also they had ruled the conduct of shipping for seventeen years.[5]

If the carrier is a shipping company, the exemption would be available only on showing that the fire was not due to the conduct of any person who could be regarded as the "directing mind" of the company. In *Lennard's Carrying Co.* v *Asiatic Petroleum Co.* :[6]

> The ship was unseaworthy. It staranded and the cargo of petroleum was destroyed by fire. The shipowner was a company of which Lennard was a director. He was taking active part in the management of the ship.

1. Lord MANSFIELD CJ in *Vallejo* v *Wheeler*, (1774) 1 Comp 143 : 98 ER 1012.
2. [1938] 2 All ER 189.
3. (1909) 15 Com Cas 17 at p. 24.
4. *Louis Dreyfus & Co. Ltd.* v *Tempus Shipping Co. Ltd.*, [1931] All ER Rep 577 : [1931] AC 726, HL.
5. The decisions of the Court of Appeal were : *Virginia Carolina Chemical Co.* v *Norfolk and North American Steam Shipping Co.*, [1912] 1 KB 229 and *Ingram and Royle Ltd.* v *Services Maritimes du Treport Ltd.*, [1914] 1 KB 541. Before the Act the position taken by the courts under bills of lading was that the exception of fire was not a defence where it was due to unseaworthiness.
6. [1914-15] All ER Rep 280 : 1915 AC 705.

The company was held liable. The director was at fault and his fault was the fault of the company. He was the alter ago of the company and not a mere servant.

Arrest, restraint or seizure [*Clause* (*g*)]

The expression in clause (*g*) "arrest or restraint of princes" was explained in *Nobel's Explosives Co.* v *Jenkins*.[7] A ship enroute form England to Japan was at Hongkong when war broke out between Japan and China. The captain unloaded at Hongkong such part of the cargo as was contraband. If those goods had been carried on any further course it would have exposed the ship to a real danger of seizure. The restraint of princes was held to be a good defence for the failure to deliver those goods in Japan. MATHEW J said :

> The main ground of defence was the exception in the bill of lading. A large body of evidence was laid before me to show that if the vessel sailed with the goods on board, she would in all probability be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. If the master had continued the voyage with the goods on board, he would have been acting recklessly. It was argued for the [consignees] that the clause 1 did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v *Smith*[8] and *Rodoconachi* v *Elliott*.[9] The goods were as effectively stopped at Hongkong as if there had been an express order from the Chinese Government that the contraband of war should be landed. The war ships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war a matter of great danger, though she might have got away safely. The restraint was not temporary. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception.

Act of God [*Clause* (*d*)]

Para (*d*) refers to "act to God". The scope of the expression was considered by a Full Bench of the Kerala High Court in *General Traders Ltd.* v *Pierce Leslie (India) Ltd.*[10] THOMAS J explained the meaning of the expression in reference to the facts of the case in the following words :[11]

7. [1896] 2 QB 326.
8. (1872) LR 7 QB 404.
9. (1874) LR 9 CP 518.
10. AIR 1987 Ker 62.
11. At p. 66.

"The case law thus supports the principle that mere erratic peculiarities of the sea or even a gale or tornado resulting from the fury of the sea may not by itself amount to act of God unless the fury is of such a degree or dimension that no human foresight can provide against and of which human prudence is not bound to recognise the possibility.

It is not enough for the defendants merely to state in the written statement that the jettisoning of cargo was a consequence of act of God. Defendants have not shown that the tempest or gale in the sea was so heavy or so unprecedented that the sailors could not have taken precautionary measures with reasonable foresight."

Any other cause [*Article IV, Clause (q) and Rule 3*]

Rule 3 provides that the shipper shall not be responsible for loss or damage sustained by the carrier or by the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants. Where the goods were stolen by the men employed by stevedores, the shipowner was held liable because stevedores are engaged by the shipowner to fulfil his responsibility of discharging the goods. They were, therefore, his agents or servants.[12] He may not be held liable for an act of stevedores if he can show that they were independent contractors.[13] This should be contrasted with case in which a consignment of tea was booked with the ship *The Chyebassa* from Calcutta to Roterdam. The bill of lading incorporated the Hague Rules. The cargo was stowed with other goods in the hold of the ship. When the other cargo was taken out at an intermediate port, the stevedores stole the cover plate of a storm valve. Consequently, in the course of the further voyage, sea water damaged the tea. There was no negligence on the part of the officers and the crew in supervising the stevedoring operations. This was held to be an example of a damage brought about by "any other cause" without the actual fault of the shipowner or his servants. The theft by stevedores was outside the authority granted to them as the shipowner's agents.[14]

Deviation [Article IV Rule 4]

Rule 4 deals with deviation and provides that deviation for the purpose of saving life or property shall not operate as a breach of the contract. This has already been noted in connection with the implied warranties of the contract of affreightment. The deviation has to be reasonable and reasonableness depends upon circumstances. In *Stag Line, Ltd.* v *Foscolo, Mango & Co. Ltd.*[15] the vessel deviated from the contractual route in order to enable some engineers to alight who had been testing her fuel-saving apparatus. While coming back to the contractual route it struck a rock and was lost. The House of Lords held that

12. *Heyn* v *Ocean SS Co. Ltd.*, (1927) 43 TLR 358.
13. *Scruttons Ltd.* v *Midland Silicones Ltd.*, [1962] AC 446 : [1962] 2 All ER 1 HL.
14. *Leesh River Tea Co. Ltd.* v *British India Steam Navigation Co. Ltd.*, [1967] 2 QB 250 : [1966] 2 Lloyd's Rep 193.
15. [1931] All ER Rep 666 : 1932 AC 328.

the deviation was not reasonable within the meaning of Article 4, Rule 4. Lord ATKIN stated the general principle :

> A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract, and may be reasonable though it is made solely in the interests of the ship, or solely in the interests of the cargo, or, indeed, in the direct interest of neither, as, for instance, where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance, or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.... I desire to refrain from expressing an opinion on whether the question whether a deviation is reasonable is a question of law or of fact.[16]

Lord MACMILLAN dealt with the statute :

> Was the deviation to St. Ives a "reasonable" one ? The statute does not supply any criterion of reasonableness, and I doubt if it would have been possible to formulate a criterion of universal applicability, for the contingencies and emergencies which arise in maritime transport are as infinite in their variety as the vagaries of the sea itself. An undefined standard of reasonableness may sometimes be difficult to apply, but the task is one which judges and juries have had daily to perform from time immemorial.... This at least has been laid down for our guidance that the reasonableness of an act must be judged in relation to the circumstances existing at the time of its commission and not by any abstract standard. The act, too, must be considered as a whole, in the light of all the attendant circumstances. A conclusion so reached that a particular act was reasonable or unreasonable is in general a conclusion of fact; it is an inference of fact from a given set of facts.[17]

Declaration of nature and value of cargo [Article IV, Rule 5]

According to Rule 5 the carrier is not liable beyond £ 100 unless the nature and value of the goods was declared before shipment and inserted in the bill of lading. Any such declaration embodied in the bill of lading shall only operate as a *prima facie* evidence but shall not be binding or conclusive on the carrier. The carrier can show that the goods were not as they were declared to be. The above figure of maximum liability can be increased by a contract but cannot be reduced. The carrier would be totally free of all liability if the nature and value of the goods has been knowingly misstated by the shipper in the bill of lading.

16. At p. 673.
17. At p. 676.

Where a clause of the contract limited the claim to the invoice value of the goods, the Exchequer Court of Canada held that the clause was repugnant to the Hague Rules, Article III, Rule 8 and therefore, void.[18] SIDNEY SMITH J said :[19]

"Looking at clause 9 of our bill of lading, I find it impossible to say that this clause is not directed to liability, and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this bill of lading declared that the arrived sound market value was to be taken at £ 900, that would govern, even though I might conclude that the real market value was £ 1,000. However, this clause 9 does not say anything like that. It purports to substitute for the arrived market value something entirely different ; in other words, an entirely new measure of damages for the common law measure. In this case, that measure lessens the carrier's liability, and so, in my view, the clause cannot be given effect to. Rule 5 of Article IV of the Schedule seems to have no bearing here, since the plaintiff is not claiming £ 100 for any package. If the declared value had been less than £ 100 and the arrived market value more than that sum, a nice question might have arisen."

A shipper has to declare the value of the goods in order to enable him to get over this limitation clause. "The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement." This observation occurs in a case in which a truck was shipped. Its actual value was 4,222 Canadian dollars, but the shipper did not inform the carrier of the actual value. Under the Hague rules which were applicable the liability for loss was limited to 500 dollars unless declared. The shipper contended that in any case the shipowner knew that the truck was of greater value than 500. The Supreme Court of Canada held that it was immaterial that the nature of the article shipped was known to the carrier. The shipper has to make a specific declaration of the value.[20]

Inflammable, explosive or dangerous goods [Article IV, Rule 6]

According to Rule 6, if the goods are of inflammable, explosive or dangerous nature which the carrier has not consented to carry, the carrier may at any time before discharge land them, or destroy them or render them innocuous without any compensation to the shipper. On the contrary, the shipper shall be liable to compensate the carrier for damages and expenses directly or indirectly arising out of or resulting from such shipment.

18. *Nabob Foods Ltd.* v *Cape Corso*, [1954] 2 Lloyd's Rep 40.
19. At p. 43.
20. *Anticosti Shipping Co.* v *Viateur St. Amand*, [1950] 1 Lloyd's Rep 352.

Waiver of privilege by carrier and increasing liability [Article V]

Article V permits the carrier to surrender or waive the rights, privileges and immunities conferred on him by the Act or to increase in any way his responsibilities and liabilities.

Scope for special contracts [Article VI]

Article VI permits special contracts to be made but not in respect of ordinary commercial shipments made in the ordinary course of trade and only where the character and condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special contract.

MISCELLANEOUS

Jettison and General Average

A ship has sometimes to face in the course of its voyage such dangers that a part of the cargo has to be sacrificed by throwing over-board or jettisoned, as it is usually called, to save the ship and the rest of the cargo from the danger. The party whose cargo is so sacrificed is entitled to recover from those whose cargo is thereby saved an average contribution to recoup his loss. "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations".[21] *Johnson* v *Chapman*,[22] *The 'Shooting Star'* is an early and instructive illustration:

> The ship "Shooting Star" sailed with a cargo of timber, namely, deals and staves. She was broken adrift in consequence of stormy weather. This impeded the navigation and safety of the vessel. A part of the cargo was jettisoned to lighten the ship and to save the adventure.

It was held that the cargo owner whose cargo was thus lost was entitled to claim general average for his loss as against the shipowner whose ship was thereby saved. WILLES J explained the requisites of this right :

> In order to make jettison the subject of a general average contribution two conditions must be fulfilled. First of all there must be common danger. It must be a maritime peril and it must be common to the whole adventure which would exclude the case of a subject-matter that had within itself the elements of destruction which developed themselves during the storm; secondly, there must be a sacrifice in the sense of intentional sacrifice.

In this case there was only one cargo on the ship and the only property saved was the ship itself and the right inured against the shipowner.[23] If there had been some other cargo which had thereby been saved, all the owners of such cargo would have to make a general contribution.[24]

21. ABBOT CJ in *Simonds* v *White*, (1824) 2 B & C 805 : 2 LJ (OS KB) 159 : 107 ER 582.
22. (1865) 19 CB (NS) 563 : 35 LJ CP 23 : 15 LT 17.
23. See also *Greenshields, Cowie & Co.* v *Stephens & Sons*, [1908] 1 AC 431 where also the ship was saved at the cost of the only cargo of coal which had caught fire.
24. *Dreyfus (Louis) & Co.* v *Tempus Shipping Co.*, [1931] All ER Rep 577 : [1931] AC 726, general average.

Danger to be real and not merely imagined.—There must be a real danger and not merely one imagined or thought to exist. In one of the cases, under a mistaken assumption of fire the captain of a ship caused steam to be turned into the hold to extinguish the supposed fire and so damaged the plaintiffs' goods. On a claim by them for a general average loss against defendants, it was held that the "peril" being in fact non-existent, there was no general average loss.[25] Extra-fuelling of the engine for the purpose of accelerating speed has been held as not constituting a general average act.[26]

In the above noted *Shooting Star* case the cargo was carried on deck and ordinarily general average cannot be claimed by the owner of a deck cargo. But in that case that was the only cargo and, therefore, his right was secured. In another case of deck cargo:[27]

> Plaintiff shipped certain cattle as a deck cargo on board defendant's vessel : during the voyage a storm arose and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendant's vessel.

The plaintiff was not allowed to recover from the defendants a general average contribution for the loss of the cattle.

Sacrifice to be real.—The second condition is that there must be real sacrifice. Where the property jettisoned has already become a wreck before it is thrown overboard, it is no real sacrifice. In an old case:[28]

> A vessel met with a storm, which caused parts of the rigging to give way : the mainmast in consequence began to lurch violently and was cast away by the captain's orders ; if the mast had not been cast away, it would, in all probability have fallen overboard in a few minutes and in so doing might have torn up the decks and caused the vessel to fonder. The vessel outlived the storm, was repaired and carried the cargo in safety to destination.

The shipowner's action against the cargo owner for general average contribution was lost. He had made no real sacrifice, the mast having already become a wreck and valueless before it was cast away. COTTON LJ proceeded to explain the position thus :[29]

> Where a part of a common adventure is abandoned to save the rest, then all those whose property is saved must contribute to compensate those whose goods have been sacrificed, and the various portions of the ship must be considered as the goods of the master if they are sacrificed to save the cargo; there is no reason why he should bear the loss, and the question to

25. *Watson (Joseph) & Son Ltd.* v *Firemen's Fund Ins. Co.*, [1922] 2 KB 355 : 92 LJ KB 31 : (1922) 127 LT 754.
26. *Société Nouvelle d'Armement* v *Spillers and Bakers Ltd.*, [1917] 1 KB 865.
27. *Wright* v *Marwood*, (1881) 7 QBD 62, *Sub nom, Gordon* v *Marwood*, 50 LJ QB 643 : 45 LT 297, CA.
28. *Shepherd* v *Kottgen*, (1877) 37 LT 618 : (1877) 2 CPD 585 : 47 LJ QB 67, CA.
29. At p. 620.

be considered in estimating the value of his loss is what the value of his property would have been had it not been abandoned. But, where the thing abandoned was in such a condition that it must have been lost anyhow, the hastening of its destruction cannot be sufficient ground for contribution. The loss was not caused by the act of the master, but by the peculiar peril of the thing itself.

On the other hand, it has been held in *The Bona*[30] that if in endeavouring to refloat a steamship stranded in a position of peril, the engines are intentionally worked, at the risk of damage, for the common safety, the damage so caused to the engines is a general average loss, and the value of the coal consumed in working the engine is also the subject of general average contribution. The case, therefore, admittedly depends upon whether the use of the engines is a normal or ordinary mode of using them, or whether the engines were used, not only under unusual circumstances, but in an unusual and abnormal manner.[31]

No right in favour of party in default.—A party whose fault has brought about the loss cannot claim general average contribution. Where the shipowner did not take care to make the ship seaworthy, his claim for general average was allowed to be met with a set off with the counter-claim for damages.[32] But where the fire was caused by the general unseaworthiness of the ship, but without the actual fault or privity of the shipowner, his claim for general average against the cargo was allowed.[33] "In the American case of *Wordsworth*,[34] water was coming in at the forepeak, and the captain put back into port to remedy this. There was peril, for water was coming into the ship, though not in the manner supposed by the captain, and nobody knew what would be the result. The words of the Marine Insurance Act, 1906 do not justify me in holding that there is a peril whenever it looks like as if there was a peril. I do not think, therefore, that this was a general average loss."[35] But where the shipowner had exempted himself from liability for the negligence of the crew and the ship having been endangered by such negligence, the shipowner was put to expense in saving the ship and cargo, he was allowed to insist upon his right to contribution.[36] Their right to contribution was not affected by the negligence of the servants for which they were not responsible.

Uniform rules adopted at York and Antwerp Conference.—At a conference of traders and shipowners held in York and Antwerp certain uniform rules have been adopted on this subject and, while no country has passed them into law, they are invariably adopted in bills of lading. The rules more or less correspond to the common law, with only this difference that at common law the danger

30. (1895) P 125 : 64 LJ p 62 : 71 LT 870, CA.
31. Lord ESHER MR. But see *Corrie* v *Coulthard*, (1877) 3 Asp MLC 546, n., where the sacrifice of a Roose mast was held to be a general average loss.
32. *Goulandris Bros. Ltd.* v *G. Goldman & Sons*, [1957] 3 All ER 100 : [1958] 1 QB 74.
33. *Dreyfus (Louis) & Co.* v *Tempus Shipping Co.*, [1931] All ER Rep 577 : [1931] AC 726.
34. (1898) 88 Fed Rep 313.
35. ROWLATT J in *Watson*, note 28 above.
36. *The Carron Park*, (1890) 63 LT 356.

must be immediate, while under the rules it is sufficient that if the step were not taken an immediate danger would result. Deciding a case under the Rules,[37] ROCHE J said :

> It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from the danger. It would be very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act. It is sufficient to say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary, that it must be substantial and not merely slight or nugatory.

Yet another condition is that a contribution can be claimed only from that particular cargo owner whose property has been saved, and not from him whose property has been totally lost. The journey of a ship is taken as one adventure in which the property of all the participants is at equal stake. The one whose property has been saved at the cost of the other must contribute, but not one whose property has been sacrificed. But the person whose property has been sacrificed will not get the full value of it. He will get an amount minus the contribution that his interest in the adventure, if saved, would have required him to contribute.

Shipowner's lien over goods saved.—For the purpose of enforcing liability on behalf of all those who are entitled to a contribution, the shipowners enjoys the privilege of exercising lien over the goods which have been saved by the sacrifice. If he fails to exercise his lien, he would open himself up to personal liability to give the contrubution.[38]

Demurrage and Lay Days

"Lay days" means the time allowed to the cargo-owner to remove the goods after arrival of the ship at the port of destination, after which, if he does not do so, he would have to pay rent, called "demurrage" for the space his goods occupied during the extra days. Lay days are described in charterparties in various different ways and may also be stipulated and calculated in various different manners. They may be called "working days" and such days are different for different ports of the same country as also of so many different countries. In order, however, to obviate difficulties about the meaning of days, the term "running days" has been introduced. "That is a nautical term, and it can be at once seen what it means. What is the run of a ship? One speaks of the number of days it will take a ship to "run" from the Indies to England, and

37. *Vdassopoulos* v *British and Foreign Marine Ins. Co. Ltd.*, [1929] 1 KB 187 at 199. See further *Australian Coastal Shipping Commission* v *Green*, [1970] 1 Lloyd's Rep 209 and *Anglo-Argentine Live Stock and Produce Agency* v *Temperley Shipping*, [1899] 2 QB 403 ; *Anderson, Tritton & Co.* v *Ocean Steamship Co.*, (1884) 10 App Cas 107 ; *Anglo-Algenlina Live Stock and Produce Agency* v *Temperley Shipping Co.*, [1899] 2 QB 403 ; *Anglo Grevian Steam Trading Co. Ltd.* v *T Beynon & Co.*, (1926) 24 Li L Rep 122, all on the chain of causation.

38. *Crooks* v *Allan*, (1879) 5 QBD 38.

"running days" ware those days one which a ship is running. What are those? Why, all day and every day, day and night."[39]

Another expression sometimes used is "weather working days." "A correct definition of a "weather working day" is a day on which the weather permits the relevant work to be done, whether or not any person avails himself of that permission. In other words, so far as the weather is concerned it is a working day.... The status of a day as being a weather working day, wholly or in part or not at all, is determined solely by its own weather, and not by extraneous factors, such as the actions, intentions and plans of any person." This statement occurs in a case in which the weather permitted work in between stormy days, but no work was done, it was held that such days would count.[40] Where the weather is bad only for a fraction of the day, the whole day would not be written off, but only that fraction.[41]

When lay days begin to run.—Lay days begin to run after the arrival of the ship and its availability for loading or unloading. When the ship is to be deemed available for this purpose depends on the terms of the agreement in each case.[42] Where only a port is mentioned, the arrival of the ship in the port area is sufficient even if no berth is available,[43] and where the agreement insists upon berth, lay days will run only when the ship takes its berth.[44] Where the charterer has to arrange for a berthing permit, any delay on his part will make him liable.[45] But he will not be liable to pay demurrage if he is not able to make use of the arrival of the ship on account of, for example a strike.[46] A charter-party provided that the vessel was to be discharged with "customary steamship despatch." There was proof that this phrase meant five days. But because of the crowded state of the dock unloading was not possible within that time. The House of Lords held that the shipowner was not entitled to demurrage. Their Lordships stated categori-

39. *See* Lord ESHER MR in *Nielsen* v *Wait*, (1885) 54 LT 344.
40. *Compania Naviera Azuero S. A.* v *British Oil and Cake Mills, Ltd.*, [1957] 2 All ER 241. See PEARSON J at p. 248.
41. See *Reardon Smith Line Ltd.* v *Ministry of Agriculture, Fisheries and Food*, [1963] 1 All ER 545 : 1963 AC 691 : [1963] 2 WLR 439.
42. The terms of the contract also usually provide the rate of demurrage. It falls in the category of liquidated damges and generally no higher amount is permitted to be recovered than that so specified. See *Suisse Atlantique Societe D' Armement SA* v *NV Rotterdamsche Kolen Centrale*, [1966] 2 All ER 61 HL : 1967 AC 561. The currency in which demurrage is payable is also usually regulated by the terms of the charter-party and the courts order payment in that currency whatever to be the country in which litigation occurs. *Federal Commerce and Navigation Co. Ltd.* v *Trader Export SA : The Maratha Envoy*, [1977] QB 324.
43. See *Sociedad Financiera de Bienes Racies S. A.* v *Agrimpex Hungarian Trading Co. for Agricultural Products*, [1960] 2 All ER 578. See also *Leonis Steamship Co. Ltd.* v *Rank Ltd.*, [1908] 1 KB 499. Here the ship arrived at the specified port which was crowded and permitted her berth after about five weeks. She remained anchored for that period in the river which was regarded as being within the commercial area of the port. It was held that she was an arrived ship ; *Vargottis* v *William Cory & Sons Ltd.*, [1926] 2 KB 344.
44. *Stag Line Ltd.* v *Board of Trade*, [1950] 1 All ER 1105.
45. Foot-note 46, above.
46. The name of the case is given in note 44 above, [1961] 2 All ER 577 on appeal : 1963 AC 691 and *Budgett* v *Bennington*, [1892] 1 QB 35.

Lordships stated categorically that "where no specific time is mentioned, it is to be measured by the legal test — namely, what is reasonable under the circumstances of the case."[47]

Where Bill of lading silent about time.—Where a bill of lading is silent as to the time within which the consignee is to discharge ship's cargo, his obligation is to discharge within reasonable time. That obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him. For example, in *Hick* v *Raymond and Reid*:[48]

> A cargo was shipped for the port of London under bills of lading which did not specify the time within which the consignees were to take discharge of it. Upon arrival of the ship the consignees began to unload, but it was interrupted for several days by a strike of the dock labourers.

The consignees were held not liable to the shipowner for the delay. But where, in another case, delay in discharging took place because of the shortage of labour, the cargo owner was held liable. No one can be blamed for the shortage of labour.[49] The House of Lords affirmed the rule already well established that if a charterer has agreed to load or unload within a fixed period of time, he is liable notwithstanding any impediments, unless they are covered by exceptions in the charter-party or arise through the fault of the shipowner. "He is responsible for all the various vicissitudes that may prevent him from doing so."[50] It is the charterer's duty to arrange proper and sufficient means on the arrival of the ship at the destination. "If, by the terms of the charter-party, he has agreed to discharge [the ship] within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it."[51] To avoid the application of this prescription of law either (1) the contract of the parties must be absolutely clear or; (2) it must be established that the failure of the charterer's duty arose from the fault of the shipowners or those for whom they are responsible.

Joint operation.—Where a part of the cargo had been loaded and the shipowner removed the ship to another place at which she was adapted only to receive bunker coal, and not cargo, he could not claim demurrage for the delay.[52] "In order that demurrage may be claimed by the owners they must at least do

47. Lord HALSBURY LC in *Hulthen* v *Steward & Co.*, (1903) 88 LT 702 at 704, [1703] AC 389.
48. [1893] AC 22, HL.
49. *William Alexander & Sons* v *Aktieselshabet Dampskibet Hansa*, [1920] AC 88, HL.
50. Lord SHAW OF DUNFERMLINE at p. 97 citing Lord ELLENBORUOUGH in *Randall* v *Lynch*, (1809) 2 Camp 352 : [1803-13] All ER Rep 197.
51. Lord SELBORNE in *Posttethwaite* v *Freeland*, (1880) 5 App Cas 599 at p. 608. The shipowner should notify the charterer of his readiness to discharge. *Pieroti Compania* v *National Coal Board*, [1958] 1 QB 469.
52. *In re Ropner Shipping Co. Ltd. and Cleeves Western Valleys Anthracite Collieries Ltd.*, [1927] 1 KB 879.

nothing to prevent the vessel being available and at the disposal of the charterer for the purposes of completing the loading of the cargo."[53] The task of loading is a joint operation. Each party must do what is reasonable to enable the other to do his part. Loading is not complete until the cargo is so placed in the ship that the ship can proceed on her voyage in safety. Where the cargo of wheat was poured in the ship at a great speed, forming large mounds in the 'tween decks and the ship could not sail until the grain was bagged, it was held that loading was not completed by merely pouring in. The time taken for bagging was part of loading because without it the ship could not sail and that time being more than the lay days, the shipper was liable to pay demurrage.[54]

Completion of loading before time.—Where loading is completed before the expiry of lay days, the charterer should present bills of lading immediately and enable the ship to proceed. The departure should not be delayed only to complete lay days. The charterer would be responsible for the delay.[55] The charterer is entitled to detain the ship up to the expiry of lay days. He cannot be held liable for using the whole time only by showing that he could have conveniently completed the loading earlier.[56] However, if the charter-party so provides the charterer would be entitled to a rebate, known as "despatch money" if he loads or unloads the ship earlier than the time to which he is entitled under the charter-party.

Causes of delay occurring after expiry of lay time.—When the lay time expires the ship is on demurrage and thereafter the intervention of any cause, even if excepted, will not put off the demurrage. This has been so held by the House of Lords in *Compania Naviera Acolus S. A.* v *Union of India.*[57]

> A charter-party provided that demurrage would not be payable during the continuance of a strike. The lay time expired without the discharge being completed, an then a strike intervened which prevented further unloading.

The charterers were held liable to pay demurrage even for the period covered by the strike. Lord REID quoted from the work of SCRUTTON LJ[58] that when once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect. "If a strike occurs before the end of the lay time neither party can be blamed in any way. But if it occurs after demurrage has begun to accrue the owner might well say : true, your breach of contract in detaining my ship after the end of the lay time did not cause a strike, but if you had fulfilled your contract the strike would have caused no loss because my ship would have been on the high seas before it began."[59]

53. SARGANT LJ at p. 888.
54. *Argonant Navigation Co.* v *Ministry of Food*, [1949] 1 All ER 160.
55. *Nolisement* v *Bunge & Born*, [1916-17] All ER Rep 734 : [1917] 1 KB 160.
56. *Margarorris Navigation Agency Ltd.* v *Henry etc. Co. Ltd.*, [1964] 1 Lloyd's Rep 173 : [1965] 1 QB 300.
57. [1962] 3 All ER 670, HL.
58. ON CHARTERPARTIES, 17th ed. 1964, p. 308.
59. At p. 674.

A strike would include a sympathetic strike also.[60]

Lien for demurrage

Where the liability for paying demurrage falls on the consignor and not on the consignee, even then the shipowner would have lien on the cargo for demurrage against the consignee's demand for delivery.[61]

Freight

Freight is the reward which the law gives for carrying goods; it arises on a contract for the conveyance of merchandise; it is said to be in its nature an entire contract; so that, as a general rule, subject to some exceptions and to special agreement, until the contract is completed by the delivery of the goods at the place of destination, nothing can be demanded for freight.[62] An example in point is *Hunter* v *Prinsep*.[63]

> Under a charter-party freight was to be paid on a right and true delivery of the homeward bound cargo from Honduras Bay to London. The ship and the cargo, after capture and recapture, were wrecked, at St. Kitts, into which they were carried by the recaptors, and there the whole thing was sold. The shipowner retained the sale proceeds in exercise of his lien for the freight.

But he was not allowed to do so. Lord ELLENBOROUGH observed :

> The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight, but it is only in that event, viz., of their delivery at the place of destination, that he, the freighter engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination, but he has no right to any freight if they be not so forwarded. If the shipowner will not forward them, the freighter is entitled to them without paying anything.[64]

But where the carrier carries the goods, freight is recoverable even if the goods be damaged. Following three principles were laid down in *Dakin* v *Oxley*[65] :

60. *J. Vermas' Scheepvaartbedriff N. V.* v *Assocation Technique de L'Importation Charbonniere : The "Large"*, [1966] 1 Lloyd's Rep 582, stevedores resorted to strike to help French miners. and *Williams Bros. (Hull) Ltd.* v *Naamlooze etc.*, (1915) 21 Com Cas 253, refusal of crew to go to a dangerous side.
61. *Fidelitus Shipping Co. Ltd.* v *V/o Exportchleb*, [1963] 2 Lloyds' Rep 113 ; *Overseas Transportation Co.* v *Mineral Import export : The Sinoe*, [1972] 1 Lloyd's Rep 201.
62. *See* Lord LANGDALE MR in *Langton* v *Horton*, (1842) 5 Beav 9 : 11 LJ Ch 233 : 49 ER 479.
63. (1808) 10 East 378 : 103 ER 818.
64. See also *Duthie* v *Hilton*, (1868) 4 CP 138 where the cargo of cement was wasted in an effort to save the ship from fire, freight was not recoverable.
65. (1864) 15 CB NS 646 : 143 ER 938.

1. It is no answer to an action by a shipowner against the charterer to recover freight that, by the fault of the master and crew and their negligent and unskilful navigation of the vessel, the cargo of coal was so damaged as upon arrival at the port of discharge to be then and there of less value than the freight and that the charterer abandoned it to the shipowner.

2. The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed.

3. If the shipowner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carries part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried, unless the charterp-arty makes the carriage of the whole a condition precedent to the earning of any freight.

If the goods are safely delivered, freight will be earned, and the charterer was not permitted, to refuse to pay only on the ground that the ship was overloaded in violation of the statutory restrictions.[66]

Where, on the other hand, the carrier has not merely damaged the goods but has altered their character itself, then the contract is not performed and freight is not earned. A leading authority is *Asfar & Co.* v *Blundell.*[67]

> A vessel, on which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the course of the voyage, and subsequently raised. On arrival at the port of discharge it was found that although the dates still retained the appearance of dates, and although they were of considerable value for the purpose of distillation into spirit, they were so impregnated with sewage and in such a condition of fermentation as to be no longer fit for human consumption and merchantable as dates. The shipowner claimed freight. But it was held that no freight was payable in respect of them. Lord ESHER MR explained the difference between damage and total loss in the following words :
>
> The first point taken in that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists but not to businessmen. We are dealing with dates as a subject-matter of commerce ; and it is contended that, although these dates were under water for two days and when brought up were simply a mess of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a perfectly well-known test which has for many years been applied to such cases as the present — that test is whether, as a matter of business, the nature of the thing has been altered.

66. *St. John Shipping Corporation* v *Joseph Bank Ltd.*, [1956] 3 All ER 683 : [1957] 1 QB 267 : [1956] 3 WLR 870.
67. [1896] 1 QB 123 : 65 LJ QB 138 : 73 LT 648 : 12 TLR 29.

Lump Freight

Where freight is payable not according to quantity or weight of the goods, but as one fixed sum, it is called lump freight. The whole of the amount so agreed becomes payable if a part of the goods are delivered at the port of destination though the rest of them have been lost due to excepted perils. The House of Lords laid down this principle in *Thomas (William) & Sons* v *Harrowing S. S. Co.*[68]

> Plaintiff chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum as freight, payable on right delivery of the goods. The charter-party contained the usual exception of perils of the sea. The ship arrived with her cargo on board outside the port of discharge, when owing to heavy weather, she was driven ashore and became a total loss. Part of the cargo was washed ashore and was afterwards collected on the beach by the directions of the master and deposited on the dock premises, the residue being lost by the perils of the seas.

In an action to recover payment of the lump sum freight, it was held that the plaintiffs having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract and earned their freight, notwithstanding that the ship had not completed her voyage and that the portion of the cargo delivered had been so delivered otherwise than by the ship stipulated for.

In another case of the kind[69], a lump sum freight of £ 5,000 was payable on delivery of the cargo from Colombo to London, fire and other dangers of the sea excepted, the shipowner was allowed to recover the whole lump sum, although a part of the cargo was lost by fire, without any fault of the master or crew, and the remainder was delivered in London.

The shipowner is entitled to recover the agreed lump sum even if the charterer has shipped less cargo than stated in the bill of lading.[70] The shipowner puts the ship at the disposal of the freighter to load with a full cargo if the freighter pleases, but whether he pleases or not he is bound to pay the lump sum.[71]

Advance Freight

Where there is an agreement that the party who is to be entitled to freight shall be paid the whole or any part of it in advance, that is, before the completion of the voyage, that is called "advance freight".[72] Where freight is paid in advance it cannot be recovered back even if the goods are lost. For example, in *De Silvale*

68. [1915] AC 58 : 83 LJ KB 1662.
69. *Merchant Shipping Co.* v *Armitage*, (1873) LR 9 QB 99.
70. *Blanchet* v *Powell's Llantivit Collieries Co. Ltd.*, (1874) LR 9 Exch 74 : 43 LJ Ex 50 : 30 LT 28.
71. *Robinson* v *Knights*, (1873) LR 8 CP 465 : 42 LJ CP 211 : 28 LT 820.
72. See *Allison* v *Bristol, Marine Ins. Co.*, (1876) 1 App Cas 209, HL.

v *Kendall*,[73] a part of the freight was paid in advance, but the ship was prevented from reaching destination having been captured, yet the freight was held to be not refundable. Where fire brokeout before the goods were fully loaded and the goods actually loaded were also lost, it was held that the amount of freight which was payable in advance was recoverable for goods against which bills of lading had been signed.[74] Where payment of freight is linked with signatures on bills of lading, the charterer has to present bills for signature within reasonable time and he would have to do so even if the goods have been lost after being shipped.[75]

Pro rata Freight

Where the shipowner is not able to perform the whole of the voyage but he has performed a part of it and if the circumstances are such that he is entitled to recover an average freight for the voyage performed, that will be known as *pro rata* freight. The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not warrant an average adjustment at an intermediate port. To entitle a shipowner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port, being so much damaged as not to be worth forwarding, it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port.

> A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off, part of the cargo having been washed out of her and part jettisoned, and towed into Copenhagen, where her cargo was discharged and the ship having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on other vessels. The plaintiff's goods were so much damaged as not to be worth sending on, were properly, but without the plaintiff having any option in the matter, sold at Copenhagen. The plaintiff claimed the sale proceeds and the defendant counter-claimed for freight up to Copenhagen.

It was held that the shipowner was not entitled to *pro rata* freight.[76]

Thus *pro rata* freight is payable either when there is an agreement to that effect or when the cargo owner having had the opportunity, exercises an option in reference to the goods at an intermediate port. This requires mutual agreement to substitute the original contract of carriage with a new contract. Thus where the ship, on account of the intervention of war, could not go to her destination and discharged at an intermediate port, no *pro rata* freight was allowed.[77] The court cited PARKE J in *Vlierboom* v *Chapman*[78], to the effect : "To justify a

73. (1815) 4 M & S 37 : 105 ER 749.
74. *Coker & Co. Ltd.* v *Limerick SS Co. Ltd.*, (1918) 34 TLR 296.
75. *Oriental Steamship Co.* v *Taylor*, [1893] 2 QB 518.
76. *Hill* v *Wilson*, (1879) 4 CPD 329 : 48 LJ CP 764 : 41 LT 412.
77. *St. Enoch Shipping Co. Ltd.* v *Phosphate Mining Co.*, [1916] 2 KB 624.
78. (1844) 13 M & W 230 : 13 LJ Ex 384. To the same effect, *Hopper* v *Burness*, (1876) 1 CPD

claim for *pro rata* freight, there must be a voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference, that the further carriage of the goods was intentionally dispensed with." The consignee must accept the goods in such a way as to imply that he and the shipowner agree that the goods have been carried far enough and that the shorter transit shall be substituted for that named in the original contract.

Dead Freight

"Dead freight" means compensation, liquidated or unliquidated, for the loss suffered by the shipowner by the failure on the part of the charterer to supply a full cargo and the amount payable in respect thereof. Where it is unliquidated, it is such reasonable amount as the shipowner would have earned, after deducting such expenses as he would have incurred if a full cargo had been shipped. It is a sort of compensation for short loading. "Dead freight is an expression having a well known signification, viz., the freight which would have been payable for that part of the vessel which has not been occupied by merchandise, but ought to have been.[79] There is no right of lien on the cargo for dead freight unless the agreement so provides. Dead freight is not freight at all properly so called but is in reality damages for breach of contract, and was, therefore, held to be recoverable even where the master overloaded the ship to unseaworthiness with other cargo."[80]

Back Freight

"A duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best in the circumstances in which it may be placed; and as a correlative right he is entitled to charge its owner with the expenses properly incurred in so doing. If such circumstances make it necessary for the master to bring back the cargo home, he will be entitled to recover the freight for the return voyage also and that is called "back freight." An illustration is *Argos, The* (*Cargo Ex*).[81]

> The plaintiff's ship with a general cargo sailed from London for Harve with some petroleum on board, which was deliverable at Havre. But the authorities did not permit the ship, there being petroleum on it and Havre was already full of explosive materials. Thereupon the captain tried the neighbouring ports, but was not allowed to stay anywhere. Returning to Havre he discharged the general cargo and, as no body came for the petrol, he brought it back to London.

The shipowner was held entitled to freight, and expenses. Sir MONTAGUE E SMITH explained the relevant principles : "It seems to be a reasonable inference from the facts, that after the four days during which the petroleum had been lying at the harbour had expired, the authorities would not have allowed it to

137 at 140.

79. *See* CLEASBY B in *Gray* v *Carr*, (1871) LR 6 QB 522 : 40 LJ QB 257 : 25 LT 215.
80. *See* Lord ATKINSON in *Kish* v *Taylor*, [1912] AC 604.
81. (1873) LR 5 CP 134 : 42 LJ Adm 1 : 28 LT 77.

remain there. It was still in the master's possession, and the question is, whether he should have destroyed or saved it. If he was justified in trying to save it, their Lordships think he did the best for the interest of the shipper by bringing it back to England.... It is well established that, if a ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner.... Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the owner.

By whom payable

Prima facie it is the responsibility of the charterer to pay the freight amount. But he may protect himself by providing that his liability would end on completion of loading. The shipowner would then be protected in his right to freight by exercising lien on the cargo. Further those who claim or take delivery of the goods do so under an implied promise to pay the freight. Section 1 of the Bills of Lading Act, 1856 provides about this change over of responsibility.

> **Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.**

This provision has the effect of imposing liability for payment of freight upon the consignee of the goods named in the bill and upon every indorsee of the bill of lading to whom the property in the goods has passed by reason of the indorsement of the bill or consignment of the goods. Section 2 of the Act, however, provides that this does not have the effect of relieving the shipper or owner of the goods of any liability to which he may have been subject.

The extent to which the responsibility to pay freight remains that of the shipper is shown by the following passage in a Division Bench judgment of the Patna High Court in a case[82] in which the goods were consigned on the basis that freight was to be paid by the consignee on delivery of goods to him, but he did not come forward to take delivery. The court observed:[83]

> "It is well settled that the person who is primarily liable for payment of freight is the consignor and this liability of the consignor is to be implied from the fact that he had made over the goods to the carrier for the purpose of being carried to destination and that this liability of the consignor may,

82. *Dehri Rohtas Light Rly Co. Ltd.* v *Manipal Printers and Publishers P Ltd.*, AIR 1963 Pat 46, 48.

83. At p. 48.

in some cases, be independent of the question of actual ownership of the goods. It follows that the consignee as such is not liable to pay the freight, because ordinarily he is not to be treated as a party to the contract of carriage. But if the facts of the case show that the consignor acted to the knowledge of the carrier as agent only, the person on whose behalf he acted as agent is in reality the principal and liable to pay the freight. Thus, the consignee is liable for the freight when he has made himself liable by express contract or when he is treated as the undisclosed principal of the consignor or when it is understood between the consignor and the carrier that freight is to be paid by the consignee. In view of these well settled principles, the mere fact that the entry 'to pay' is made in the relevant column of the railway receipt or the forwarding note is not sufficient to show that the consignee was liable to pay the freight."

This passage was cited with approval by the Kerala High Court in *Mogu Liner Ltd.* v *Manipal Printers and Publishers P Ltd.*[84] in a case involving sea transport. The court had to determine as to who was entitled to sue under the contract for damage to the goods. The above-stated observation proved helpful in determining the right of the party on whose behalf the consignment had been shipped.

Right to sue for loss or damage

One of the effects of Section 1, cited above, is that the right to sue the shipowner or insurer for loss or damage becomes vested in the indorsee or consignee to whom the property in the goods has passed. And a corollary of this effect is that the charterer loses the right to sue.[85] Even where this Act is not applicable and the shipper is not prevented from enforcing the claim for loss or damage, he would be holding the amount recovered under a constructive trust for the consignee to whom the property goods had passed.[86]

The Kerala High Court faced a case on this point in *Mogu Liner Ltd.* v *Manipal Printers and Publishers P Ltd.*[87] State Trading Corporation arranged the import of a quantity of newsprint for distribution among newspaper publishers. Of that quantity 38 reels of glazed newsprint were meant for the plaintiffs (respondents here). The Corporation effected the purchase with a view to supply the same to the plaintiff against their newsprint quota for the year 1979-1980. The cargo was entrusted to the carrier for delivery to the plaintiff at Cochin. The insurance was effected by STC on behalf of the plaintiff. The formal sale was effected by the STC to the plaintiff while the cargo was at high seas. The consignment was discharged at Cochin, where it was received by the Port

84. AIR 1991 Ker 183, 188-189.

85. See *Albacruz* v *Albazero* : *The Albazero*, 1977 AC 774, where the consignee was not able to sue because of the expiry of the period of one year prescribed by Article III, Rule 6 of the Hague Rules and the consignor was prevented from suing by reason of Section 1 of the Bills of Lading Act, 1855 (English).

86. *Dunlop* v *Lambert*, (1839) 9 Cl & F 600 : 7 ER 824 HL.

87. AIR 1991 Ker 183. *See* at pp. 188-189.

Authority. Only some reels turned out to be of glazed newsprint. The rest were of ordinary newsprint and some of them in damaged state. The plaintiff's action against the carrier for damage was held to be not maintainable. There was no privity between the plaintiff and the shipowner. Nor they had become the owners of the goods through the booking documents. The goods were sold to them during the voyage. The court said :

> "There is no evidence in the case to hold that the owners of the vessel knew that STC is the agent of the plaintiff, though the mark assigned to the cargo would indicate that the disputed cargo was intended for the plaintiff. That circumstance is not sufficient to hold that the plaintiff is competent to file the suit."[88]

Lien

Lien means the right to retain the cargo until charges are paid. The owner of a ship has a lien on the cargo for freight and for general average.

88. *Ibid.*, per P. K. SHAMSUDDIN J.

5

Carriage of Passengers

Passage Money

The passenger has to pay the passage money, which is the same as freight in the case of carriage of goods. It is recoverable only on the completion of the journey. Thus where the ship was captured as prize and though the passenger, his family and luggage were released, it was held that passage money was not payable till the matter was decided by the court.[1] If the money has become payable, the master will have a lien on the luggage of the passenger for his passage money.[2] Where the passage money has been paid in advance, it is not recoverable except where the ship is lost before the commencement of the voyage. In a contract to carry a passenger from London to West Indies, the passage money was paid, the luggage was loaded in the Thames and the passenger was to board at Portsmouth. But the ship was lost in going round to that place. The passage money was not allowed to be recovered back.[3]

Liability for Personal Injuries

Basis of liability

Whether the carrier falls in the category of common carriers or private carriers, it does not make much difference because the basis of liability is the same.[4] A carrier of goods is a bailee of the goods and is, therefore, under an obligation to assure the safety of the goods. But in the case of passengers there is no bailment. The passengers are on self-care.[5] The carrier is under no obligation to assure their safety. He is only bound to exercise due care to carry them safely.[6]

1. *Mulloy* v *Backer*, (1804) 5 East 316 : 102 ER 1091.
2. *Wolf* v *Summers*, (1811) 2 Camp 631 : 170 ER 1275.
3. *Gillan* v *Simpkin*, (1815) 4 Camp 241 : 171 ER 77.
4. With this difference only that while a private carrier can refuse passengers, a public carrier has to accept them according to his profession provided only that the passenger is in a fit condition and the carrier has accommodation. *Clarke* v *West Ham Corpn.*, [1909] 2 KB 858 CA ; *Readhead* v *Midland Ry Co.*, (1869) LR 4 QB 379 ; *Garton* v *Bristol and Exeter Ry Co.*, (1861) 1 B & S 112 : 30 LJQB 275.
5. For example, it was observed in *O'Connor* v *British Transport Commission*, [1958] 1 All ER 558 at 563 : [1958] 1 WLR 346 that railway undertaking is entitled to assume that a very young child would be accompanied by and cared by an adult.
6. *East India Ry Co.* v *Kalidas Mukerjee*, [1901] AC 396 PC ; *Luddit* v *Ginger Coote Airways Ltd.*, [1947] AC 233 : [1947] 1 All ER 328 PC.

Standard of care

Carriers of passengers are not insurers of the safety of the passengers, nor do they warrant passenger worthiness of the their vehicles.[7] But they are bound to keep their vehicles as fit as reasonable care caution can do. They must remove such defects from their vehicles as reasonable and careful examination would have revealed.[8] "Their undertaking is to take all due care to carry safely as far as reasonable care and foresight can attain that end."[9] This duty is of common law origin and, therefore, does not depend upon contract and remains the same whether the carriage is gratuitous or for reward.[10]

A carrier of passengers may not be liable for acts of persons over whom they have no control, but he has to warn passengers of such dangers as he apprehends and over whom he has no control. He is supposed to know better than passengers of such dangers and it would be negligence in him if he does not warn the passengers.[11]

Duty in emergency

The carrier or his driver is under a duty to take reasonable steps to assure the safety of passengers against an emergent danger, e.g., the vehicle encountering a thick fog.[12] A driver may save a major mishap even if he does so at the cost of injuring some passengers provided that he did nothing more than a driver

7. *John Carter (Fine Worsteds) Ltd.* v *Hanson Haulage (Leeds) Ltd.*, [1965] 2 QB 495 : [1965] 1 All ER 113 ; *Holton* v *London and SW Ry Co.*, 1885 Cab & EL 542 : 8 Digest (Repl) 81, no liability for latent defects but burden lies upon the carrier to show that the mishap was due to a latent defect ; *Manser* v *Eastern Countries Ry Co.*, (1860) 3 LT 585, things latent when the machine is new may become detectable when it becomes used and is put to test ; *Richardson* v *GE Ry Co.*, (1876) 1 CPD 342 CA, no liability for defects which reasonable examination would not have revealed.
8. Testing and examination of the vehicle from time to time is a duty. *Jones* v *Page*, (1867) 15 LT 619 ; *Ritchie* v *Western Scottish Motor Traction Co. Ltd.*, 1935 SLT 13 ; *O'Conner* v *British Transport Commission*, [1958] 1 All ER 558 : [1958] 1 WLR 346 CA, no liability for child falling from guard's van as the door handle was not defective or unsuitable for normal use ; *Readhead* v *Midland Ry Co.*, (1869) LR 4 QB 379, carrier is answerable for his failure to take proper care in assuring soundness and sufficiency of his vehicle ; *Philipson* v *Imperial Airways Ltd.*, 1939 AC 332 : [1939] 1 All ER 761 HL, duty to provide airworthy aircraft; *Fossbroke-Hobbes* v *Airwork Ltd. and Br-American Air Services Ltd.*, [1937] 1 All ER 108, duty to provide competent staff; *White* v *Steadman*, [1913] 3 KB 340, carriage horse not suitable for the purpose ; *Barkway* v *South Wales Transport Ltd.*, [1950] 1 All ER 392 HL, regulations under the Motor Vehicles Act as to maintenance and fitness of vehicles.
9. HALSBURY'S LAWS OF ENGLAND, 180, Vol 5, 4th ed 1974. Citing : *Clarke* v *West Ham Corpn.*, [1909] 2 KB 858 ; *O'Connor* v *British Transport Commission*, [1958] 1 All ER 558 : [1958] 1 WLR 346 CA ; *Barkway* v *South Wales Transport Co. Ltd.*, [1950] 1 All ER 392 HL.
10. *Mc Cawley* v *Turnese Ry Co.*, (1872) LR 8 QB 57, liability of gratuitous carrier for negligence whether simple or gross. *Austin* v *Great Western Ry Co.*, 1867 LR 2 QB 442, liability to a child travelling free.
11. *Daniel* v *Directors of Metropolitan Ry Co.*, (1871) LR 5 HL 45 ; *East Indian Ry Co.* v *Kalidas Mukerjee*, [1901] AC 396 PC ; *Radley* v *London Passenger Transport Board*, [1942] 1 All ER 433 ; *Hale* v *Hants and Dorset Motor Service Ltd.*, [1947] 2 All ER 628 CA ; *Lewys* v *Burnett and Dunbar*, [1945] 2 All ER 555.
12. *London, Tilbury and Southend Ry Co.* v *Paterson*, (1913) 29 TLR 413 HL ; *Wanger* v *West Ham Corpn.*, (1920) 37 TLR 86 DC ; *Scholarb and NE Ry Co.*, [1936] 1 All ER 71.

of ordinary prudence would have done in the circumstances.[13] If it reasonably appears to a passenger that the driver is causing danger on account of his negligence, he may leap to safety and if he is injured in the process, the carrier will be liable, even if the circumstances, as they turned out to be afterwards, show that he would not have been injured if he had not leapt.[14]

A carrier should not permit his passengers to carry dangerous articles with them. It would be negligence in him if he does so, but not so if he is unaware, because the passenger in question carried the dangerous article in a packing which created no reasonable suspicion about its contents.[15]

Duty of care and exclusion of liability

The carrier owes the duty of reasonable care to the passengers and will be liable for the consequences of his negligence. The position is thus stated in HALSBURY'S LAWS OF ENGLAND:[16]

> "The common law liability of carriers of passengers is limited to the use of due care, skill and foresight to carry the passengers safely;[17] there is no absolute warranty of seaworthiness, but the shipowner is liable for unseaworthiness or want of safety occasioned by the negligence of his employees or independent contractors.[18] The liability can be excluded by conditions in the contract provided they are brought to the passenger's notice."[19]

Proper notice of terms.—Where proper notice of terms is not given, the passenger will not be bound by the terms. This was laid down by the House of Lords in *Henderson* v *Stevenson*[20]:

> The plaintiff bought a steamer ticket on the face of which were these words only : "Dublin to Whitehaven"; on the back were printed certain conditions one of which excluded the liability of the company for loss, injury or delay to the passenger or his luggage. The plaintiff had not seen the back of the ticket, nor was there any indication on the face about the conditions on the back. The plaintiff's luggage was lost in the shipwreck caused by the fault of the company's servants. He was held entitled to recover his loss from the company in spite of the exemption clauses.

13. *Sutherland* v *Glasgow Corpn.*, 1951 SC (HL) 1 ; *O'Hara* v *Central SMT Co. Ltd.*, 1941 SC 363 ; *Parkinson* v *Liverpool Corpn.*, [1950] 1 All ER 367 CA.
14. *Jones* v *Boyce*, (1816) 1 Stark 493 : 8 Digest (Repl) 80 ; *Kearney* v *Great S and W Ry Co.*, (1886) 18 LR Ir 303.
15. *East Indian Ry Co.* v *Kalidas Mukerjee*, [1901] AC 398 PC.
16. Para 319, p. 147, Vol. 5, 4th ed 1974.
17. Citing, *Readhead* v *Midland Ry Co.*, (1869) LR 4 QB 379 ; *Luddit* v *Ginger Coote Airways Ltd.*, [1947] AC 233 : [1947] 1 All ER 328 PC.
18. Citing *John* v *Bacon*, (1870) LR 5 CP 437.
19. Citing *Parke* v *SE Ry Co.*, (1877) 2 CPD 416 CA ; *Richardson Spence & Co and Lord Gough SS Ltd.* v *Rowntree*, [1894] AC 217 HL ; *Cooke* v *T Wilson Sons & Co. Ltd.*, (1915) 84 LJKB 888 CA ; *Hood* v *Anchor Line (Henderson Bros.) Ltd.*, [1918] AC 837 HL ; *Coderton* v *Naviera Aznar SA*, [1960] 2 Lloyd's Rep 450.
20. (1875) 32 LT 709 : (1875) 2 HL SC App 470.

The House of Lords observed that the plaintiff could not be said to have accepted a term "which he has not seen, of which he knew nothing, and which is not in any way ostensibly connected with that, which is printed and written upon the face of the contract presented to him". The result would have been otherwise if words like "*For conditions see back*" had been printed on the face of the ticket to draw the passengers' attention to the place where the conditions were printed. The principle would, therefore, seem to be that where a written document is presented to a party for acceptance, a reasonably sufficient notice must be given to him of the presence of terms and conditions. Notice will be regarded as sufficient if it will "convey to the minds of people in general that the ticket contains conditions". This was clearly recognised in the subsequent case of *Parker* v *South Eastern Rail Co.*[21] :

> The plaintiff deposited his bag at the cloakroom at a railway station and received a ticket. On the face of the ticket were printed, among other things, the words, "see back" and on the back there was a notice that "the company will not be responsible for any package exceeding the value of £ 10". A notice to the same effect was also hung up in the cloak-room. The plaintiff's bag was lost and he claimed the full value of his bag which was more than £ 10. The company relied upon the exemption clause. The plaintiff contended that although he knew there was some writing on the ticket, he did not see what is was as he thought that the ticket was a mere receipt for the money paid by him.

MELLISH LJ pointed out that if the plaintiff "knew there was writing on the ticket, but he did not know to believe that the writing contained conditions, nevertheless he would be bound", for there was reasonable notice that the writing contained conditions.

Where, on the other hand, a folded up ticket was handed over to a passenger and the conditions printed on it were also obliterated in part by a stamp in red ink[22] and where, in another case, the words on a ticket, "For conditions see back", were obliterated by the date stamp,[23] it was held in either case that no proper notice of the terms had been given.

The principle has been cited with approval by the Calcutta High Court in two cases[24] and was applied by the Calcutta High Court in *Mackillican* v *The Combagnie Marikcmes de France*[25].

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21. (1877) 2 CPD 416 : [1874-80] All ER Rep 166.
22. *Richardson, Spence & Co.* v *Routree*, [1894] AC 217.
23. *Sugar* v *London Midland & Scottish Railway Co.*, [1941] 1 All ER 172. For a comment on this case *see* Turpin : *Contract and Imposed Terms*, (1956) 73 South African Law Journal 144 at p. 154. A consignment note signed neither by the consignor nor consignee and containing a clause on the back excluding the jurisdiction of all the courts except one, was held not binding. There was no proper notification. *Road Transport Corpn.* v *Kirloskar Bros.*, AIR 1981 Bom 299. A lottery ticket containing at the back small print as to jurisdiction, held not binding, *Special Secy. Govt. of Rajasthan* v *Venkataramna Seshiyer*, AIR 1984 AP 5.
24. *Madras Railway Co.* v *Govinda Rau*, (1898) 21 Mad 172 at p. 174 ; *Sheikh Dawood* v *S.I. Rly Co. Ltd.*, ILR 1945 Mad 194 at p. 178.
25. (1880) 6 Cal Series 227

The plaintiff accepted a steamer ticket containing conditions printed in the French language. He claimed that he was not bound by them, being unable to read French.

Rejecting this contention, GARTH CJ said : "Although he may not understand French, he was a man of business contracting with a French company, whose tickets he knew very well were written in the French language. He had ample time and means to get the tickets explained and translated to him before he went on board ; and it very plainly disclosed upon the face of it that the conditions endorsed were those upon which the defendants agreed to carry him."[26] "Similarly, it has been held that where reasonably sufficient notice of existence of the terms is given, it would be no defence to say that the plaintiff was illiterate or otherwise unable to read."[27]

In the application of this principle the courts have had to distinguish between two kinds of document, namely, contractual documents and mere receipts and vouchers. Emphasising its distinction in *Parker* v *South Eastern Railway Co.*[28] MELLISH LJ said : "I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the ship-owner for the loss of the goods, he might swear that he had never read the bill of lading and that he did not know that it contained the terms of the contract of carriage." A document is said to be contractual if it embodies the contract, that is to say, if the persons to whom it is delivered should know that it is supposed to contain conditions. But where the paper is not supposed to express the conditions of the contract, it will be regarded as a mere voucher *etc.*, and extra care will have to be taken to communicate its terms than mere warning on the face.

Where a passenger fell down an opening in the saloon of the steamer, it was held that as he was there lawfully and in the ordinary course of things would not expect any opening in the floor of a saloon, the carrier was liable for the negligence.[29] Similarly, where a passenger fell through an unguarded and improperly lighted hatchway, the carrier was held liable, though the hatchway belonged to another person. The carrier invited him to use the hatchway for

26. At p. 234.
27. *Thompson* v *London, Midland & Scottish Rly. Co.*, [1930] 1 KB 41. For a criticism of this decision *see* Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499 at p. 518.
28. (1877) 2 CPD 416.
29. *Taylor* v *Peninsular & Oriental Steam Navigation Co.*, (1869) 21 LT 442.

transit to the ship and was liable for the injury he sustained through the condition of the hatchway, even though it was under the care of others.[30]

Extent to which liability can be excluded.—Since a contract for the carriage of passengers is considered to be an ordinary contract, it gives the carrier liberty to exclude his liability by means of exemption clauses.[31] Thus where liability on a free pass for loss of life, however caused, was excluded, the passenger could not recover under the contract though her husband was drowned by the negligence of the carrier's servants.[32] Similarly, where the contract was that notice of loss or injury must be given within three days of the termination of the journey, the clause was held to be binding on the passenger and his failure to give notice within the time so delimited absolved the carrier from liability.[33]

The exclusion clauses are now subjected to the test of reasonableness. The (English) Unfair Contract Terms Act, 1977 expressly forbids exclusion of liability for death and injury. Even where this Act is not applicable, any clause excluding liability for personal injuries would be regarded as victimisation and, therefore, not binding on the passenger.

Burden of proof

The burden of proving negligence is on the claimant, except where negligence is so obvious that *res ipsa loquitur* applies.[34] In such a case the carrier is liable unless he proves that there was no negligence on his part. Where, for example, on account of improper maintenance the door of a train flew open the moment a passenger put his hand upon a bar of its window, negligence was presumed.[35] The type of accidents which create a presumption of negligence are listed in HALSBURY thus:[36]

> "Thus, there is evidence of negligence if two trains come into collision,[37] or if a train leaves the rails,[38] of if a vehicle overturns,[39] stops suddenly,[40] loses a wheel,[41] mounts the footpath,[42] or collides with a per-

30. *John* v *Bacon*, (1870) LR 5 CP 437 ; 39 LJ CP 365 : 22 LT 477.
31. *Haigh* v *Royal Mail Steam Packet Co.*, (1883) 52 LJ QB 640 : 49 LT 802 CA.
32. *Stella, The*, [1900] p. 161 : 69 LJP 70.
33. *Jones* v *Oceanic Steam Navigation Co.*, [1924] 2 KB 730.
34. Which means that something which has happened would not have happened if proper care had been taken and that becomes an evidence of negligence in itself. *Gee* v *Metropolitan Ry Co.*, (1873) LR 8 QB 161 ; *Keaney* v *London, Brighton and South Coast Ry Co.*, (1871) LR 6 QB 759 ; *Burns* v *North British Ry Co.*, 1914 SC 754 (Scotland), a person waiting at a platform hit by an open door of moving train ; *Foshroke Hobbs* v *Airwork Ltd. and British-American Air Services Ltd.*, [1937] 1 All ER 108.
35. *Stella, The*, [1990] P 161 : 69 LJ P 70 : [1900-1903] All ER Rep 184 : 82 LT 390 : 16 TLR 306.
36. LAWS OF ENGLAND, 184, Vol 5, 4th ed 1974.
37. *Carpue* v *London and Brighton Ry Co.*, (1844) 5 QB 747 ; *Skinner* v *London, Brighton and South Coast Ry Co.*, (1850) 5 Exch 787 ; *Ayles* v *SE Ry Co.*, (1868) LR 3 Exch 146.
38. *Dawson* v *Manchester, Sheffield and Lancashire Ry Co.*, (1862) 5 LT 682.
39. *Halliwell* v *Venables*, (1930) 99 LJKB 353 CA.
40. *Southerland* v *Glasgow Corpn.*, 1951 SC (HL) 1, Scotland ; *Parkinson* v *Liverpool Corpn.*, [1950] 1 All ER 367 CA.
41. *Lilly* v *T. Tilling Ltd. and LCC (No. 1)*, (1912) 57 Sol Jo 59 CA.
42. *Barkway* v *S Wales Transport Corpn. Ltd.*, [1950] 1 All ER 392, HL ; *Wing* v *London General Omnibus Co.*, [1909] 2 KB 652 CA.

manent structure on the footpath,[43] or if a tyre bursts,[44] of if an aircraft crashes on take off.[45]".

Apart from such self-evident casualties, the burden of proving negligence is on the plaintiff.

Liability for loss of Luggage

A shipowner is entitled to limit his liability in respect of the loss of the passenger's personal effects.[46] In reference to this liability, the position is stated in HALSBURY'S LAWS OF ENGLAND[47] as follows:

> "In the absence of special contract, a shipowner's liability in respect of passenger's luggage is the same as his common law liability in respect of cargo, but he is not liable for loss to luggage in the passengers's control resulting from the passenger's want of care".[48]

In addition, the passenger can sue the shipowner in tort and, in the case of a collision, other ships involved in it. The provisions of the Occupiers' Liability Act, 1957 also apply because a passenger is a visitor on invitation. Besides, the shipping legislation imposes certain duties on carriers which can create remedies in favour of passengers against the carrier.

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43. *Isaac Walton & Co. Ltd.* v *Vanguard Motor Bus Co. Ltd.*, (1908) 72 JP 505 DC ; *Trinder* v *Great Western Ry Co.*, (1919) 35 TLR 291.
44. *Barkways* v *South Wales Transport Co. Ltd.*, [1950] 1 All ER 392 HL.
45. *Fosbroke-Hobbes* v *Airwork Ltd. and British-American Air Services Ltd.*, [1917] 1 All ER 108.
46. *Gee* v *Metropolitan Ry. Co.*, (1873) 8 QB 161.
47. 147, Vol 5, 4th ed 1974.
48. *Taubman* v *Pacific Steam Navigation Co.*, (1872) 26 LT 704 : [1861-73] All ER Rep 207 ; *Stella, The*, [1906] P 161 ; *Great Western Ry Co.* v *Buneh*, (1888) 13 App Cas 31 HL ; *Steers* v *Midland Ry Co.*, (1920) 36 TLR 703 ; *Vasper* v *Great Western Ry Co.*, [1928] 1 KB 340.

SUBJECT INDEX