Thursday, December 21.

FIRST DIVISION.

[Lord Hunter, Ordinary.

STANDARD OIL COMPANY OF NEW YORK *v.* CLAN LINE STEAMERS, LIMITED (OWNERS OF S.S. "CLAN GORDON").

Ship — Bill of Lading — Exceptions and Exemptions — Exception of Accidents of Navigation not Resulting from Negligence of Owners—Owners' Failure to Communicate to Master Instructions as to Loading Issued by Builders—Liability for Loss.

Ship — Seaworthiness—Owners' Failure to Communicate to Master Instructions as to Loading Issued by Builders—Liability for Loss—Harter Act 1893.

The owners of a line of steamers agreed to supply a vessel for the carriage of goods from New York to China. The charter-party provided that the contract should be subject to all the exemptions contained in the Harter Act of the United States of 1893, clause 3 of which provides "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy . . . neither the vessel, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel." The bills of lading, issued in conformity with that Act, provided that the following exemptions from liability should apply:—"Perils of the sea . . . or any latent defect in hull, machinery, or appurtenances, . . . or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship. . . "). The "Clan Gordon," the vessel supplied, was a turret steamer, a type of vessel in regard to which the builders had, consequent on a disaster to a vessel of that class, circulated to owners of such vessels general loading instructions which contained, *inter alia*, the following direction:—"This vessel is not intended to load down to her marks with a homogeneous cargo without water ballast." This information was not supplied to the master of the "Clan Gordon," who was a thoroughly competent man of wide experience in the command of ships, and of turret ships in particular. When she left New York the "Clan Gordon," which was loaded with a more or less homogeneous cargo, had two of her water ballast tanks full and was down to her marks. Two days out the master, thinking his ship would trim and sail better without water ballast, ordered the tanks to be pumped out. When they were nearly empty the ship, in fine weather and in a calm sea, turned turtle on the application of the port helm owing to the loss of stability following on the withdrawal of almost all the water in the ballast tanks.

In an action against the owners for the loss of the cargo, *held* (*diss.* Lord Sands and *rev.* judgment of Lord Hunter, Ordinary) that the defenders were not liable in respect (1) that the disaster resulted from an error of judgment on the part of the master, against which the defenders were protected by clause 3 of the Harter Act as incorporated with the bills of lading, the failure of the owners to communicate to the master, who was an experienced and competent seaman, the instructions of the builders with regard to the loading of turret ships not amounting to negligence; and (2) that the non-communication of these instructions to an experienced and competent master did not render the vessel unseaworthy.

The Harter Act 1893, sec. 3, provides, *inter alia*—"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel. . . ."

The Standard Oil Company of New York, *pursuers*, raised an action against the Clan Line Steamers, Limited, Glasgow, *defenders*, whereby they sought to recover the sum of £111,235, as representing the value of a cargo shipped by them in the defenders' steamer "Clan Gordon," which during the voyage was together with her whole cargo totally lost.

The pursuers, *inter alia*, pleaded—"3. The 'Clan Gordon' having been sent to sea in an unseaworthy condition, and the pursuers having thereby suffered loss and damage as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons. 4. The 'Clan Gordon' having been lost through a cause for which the defenders are liable under the contract condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons. 5. The defenders having failed to exercise due diligence to make the 'Clan Gordon' in all respects seaworthy, and the pursuers having suffered loss and damage through her unseaworthiness as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defenders pleaded, *inter alia*—"3. The 'Clan Gordon' having been in a seaworthy condition when the cargo was loaded, and also when she sailed from New York, the defenders should be assoilzied. 4. In any event the 'Clan Gordon' and her cargo having been lost through a cause for which the defenders are not liable under

the contract, the defenders should be assoilzied."

The *facts* of the case are set forth in the opinion of the Lord Ordinary (HUNTER), who on 13th January 1922 granted decree for the sum of £97,892, 17s. 7d. in full of the conclusions of the action.

Opinion—"In this action the Standard Oil Company of New York seeks to recover from the Clan Line Steamers Limited the sum of £111,235, in respect of the loss of cargo belonging to them on board the s.s. 'Clan Gordon,' of which the defenders were owners at the time when the vessel was lost with her whole cargo as after mentioned.

"By charter-party dated 2nd April 1919 the defenders agreed to supply vessels belonging to them to the pursuers for the carriage of the pursuers' goods from the port of New York or Philadelphia to ports (as the pursuer might elect) in Japan, North China, South China, Indo China, the Phillipine Islands, and Straits Settlements. The vessels so provided were to be tight, staunch, strong, and in every way fitted for the voyage they were to undertake, including proper ballast and dunnage. 'The pursuers were, under the said charter-party, to provide full cargoes of refined petroleum, and further, had the privilege of shipping general cargo including petroleum and/or its products in barrels and/or cases and/or drums up to 10 per cent. of "vessels" capacity if full cargoes.' It was also agreed that the contract should be subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States of America approved on 13th February 1893, known as the 'Harter Act,' and that bills of lading should be issued in conformity with said Act.

"In terms of the charter-party the 'Clan Gordon' in July 1919 proceeded to load at the port of New York a full cargo of motor spirit, and refined petroleum in cases and of refined wax in bags. The 'Clan Gordon' was a turret steamer built of steel in 1900, and of the burden of 2292·45 tons registered. According to her bills of lading the cargo she took on board consisted of 12,500 cases of Pratt's motor spirit, 12,000 cases of nonpareil and 67,512 cases of brilliant, making a total of 92,012 cases. In addition there was 12,534 bags of paraffin wax. It was mutually agreed in the bills of lading that the following exemptions from liability should apply:—'Perils of the sea or other waters . . . or any latent defect in hull, machinery, or appurtenances, . . . or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager).

"At or about 5 p.m. on 28th July 1919 the 'Clan Gordon' sailed from New York with the said motor spirit, refined petroleum, and paraffin wax on board bound for Dalny in China.

"At or about 4 p.m. on 30th July 1919 the 'Clan Gordon' listed to port and never righted, and shortly thereafter turned bottom upwards and was totally lost with her whole cargo. The weather was fine and the sea calm. On the day of the accident the master of the ship had ordered the ballast water, amounting to 290 tons in Nos. 1 and 2 tanks, to be pumped out. His account of what occurred is given in these words—'The actual pumping began upon the 30th. It began at eight in the morning. At noon on 30th July it was reported that No. 1 tank was empty. No. 2 tank was then started at once. At four o'clock the carpenter reported that No. 2 tank only contained 6 inches of water on the port side. The reason why it was on the port side was because the vessel had a little list to port then. That list was reported to me. The extent of the list was 4 to 5 degrees. I was steering at the time on a course south 2, west, true. We were making about ten knots. The chief officer was on watch at the time. About 4·30 on the 30th I gave an order to the quartermaster to port his helm because I wanted to get bearings on south-west courses. He did not go hard-a-port at first. He began to port the helm a little bit at first. My object in doing this was to get bearings on south-west courses. (Q) As he began to put over the helm what happened?—(A) Nothing happened immediately. It was when I gave the second order to put the helm hard-a-port that she began to list. Then she fell right over. She first went over to about 14 degrees, and then fell right over to about 60 or 70 degrees. This all happened very quickly. After that the men all came up on deck and got the boats out. When I noticed the list of 13 or 14 degrees I gave the helmsman another order. First of all, after I had given the order 'hard-a-port' she went over to 14 degrees. Then I gave the order to the quartermaster to put his helm hard-a-starboard. That was to try and right the list if I could, but then she went over. When she took this heavy list I rang to the engines to stop, but by this time the engine-room evidently was empty of people. We took to the boats and some of the men jumped into the water, with the result that everyone was saved except two Indians and one wireless operator, who were drowned.' The vessel turned with her keel up. According to the master he was greatly puzzled to explain what could have caused the casualty.

"The pursuers maintain that they are entitled to succeed against the defenders upon two grounds—(First) That the 'Clan Gordon' was so loaded when she left New York that she was not sufficiently stable for the contemplated voyage, and (second) that on the assumption that she was stable with Nos. 1 and 2 ballast tanks full, the defenders had special knowledge as to the danger of these tanks being emptied obtained by them from the builders, which they failed to communicate to the master, and that in consequence of this failure on their part to properly instruct the captain the vessel was unseaworthy.

"According to Lord Cairns' well-known definition of the term in *Steel* v. *State Line*

Steamship Company, 1877, L.R., 3 A.C. 72, at 77, seaworthy as applied to a ship means that she is in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter on the voyage on which she is embarking. In the present case the 'Clan Gordon' was starting a voyage from New York at a season of the year when she might expect to experience a hurricane on the coast of Mexico. Under such circumstances the angle of inclination of the vessel which might be anticipated would be something between 10 and 25 degrees. The question of her stability at New York would therefore depend upon whether or not she had righting power to recover equilibrium at the more extreme of these angles. The stability of a vessel is usually shown by a curve or curves which constitute a diagrammatical representation of the value of the righting lever possessed by her at different angles of inclination. For the pursuers Mr Camps, as the result of very careful and elaborate calculations, has prepared a curve showing in his view the 'Clan Gordon's' stability when she left New York. For the defenders Dr Douglas and Mr Wall, as the result of equally careful and elaborate calculations, have prepared curves showing their views on the same point. There are substantial differences between the curves presented by the two sides, to which I have to refer subsequently in detail. Meantime I may say that, looking to the voyage which the 'Clan Gordon' was to make, if I were to accept Mr Camps' curve as accurate, I should hold that the vessel was unseaworthy at New York as having an insufficient margin of stability, but that I should reach a different conclusion if I preferred the defenders' curves.

"[*His Lordship here compared the various stability curves spoken to by the expert witnesses.*]

"There are certain circumstances that rather confirm the view that the 'Clan Gordon' was seaworthy so far as stability was concerned when she left New York, or at all events are consistent with that view. Mr Le Blanc says 'the vessel was down to her marks and loaded well in every respect, and with the water ballast in Nos. 1 and 2 tanks I am of opinion that she was absolutely safe and seaworthy.' Mr Martire, the foreman stevedore employed at loading the vessel, says the ship was properly stowed and in proper trim when she left New York. He adds in answer to another question that although during the last few days of loading she leaned just a little to the port side the last day she was upright. When she left the dock she was straight. Mr Beggs, the Sandy Hook pilot who piloted the 'Clan Gordon' to sea on 28th July 1919, says that she steered very well, that when the helm was ported or starboarded she showed no signs of tenderness and gave no indication whatever of instability.

"The immediate cause of the capsizing of the 'Clan Gordon' was the list to port taken during the emptying of the tanks owing to the presence of free water and the action of the helm which was put hard-a-port just before the accident, causing a centrifugal upsetting movement. On the evidence of Mr Wall, illustrated as it was by a very carefully prepared model, I think that the emptying of the tanks by the captain was an efficient cause of the accident on the assumption that the 'Clan Gordon' had a sufficient margin of stability so long as these tanks were not emptied. On this branch of the case the pursuers have not, in my opinion, succeeded in establishing a case of unseaworthiness.

"The question that has now to be considered is whether the defenders failed to communicate to the captain of the 'Clan Gordon' information in their possession which would have informed him of the necessity for retaining water ballast in the tanks of that vessel. It is brought out in evidence that turret vessels have a different curve of stability from ordinary wall-sided vessels. . . .

"In 1909 the 'Clan Ranald,' a sister ship of the 'Clan Gordon' and also owned by the defenders, turned turtle and was lost off the coast of Australia when on a voyage from Adelaide. There appears to be little doubt that the direct cause of this accident was the way in which the cargo she was carrying had been stowed, but it is not necessary to determine where the exact fault lay. The year following this accident Messrs Doxford of Sunderland, the builders of the vessel, caused certain experiments to be made as to the stability of turret ships. As a result of these experiments general instructions as to the loading of such vessels were embodied in a document a copy of which is No. 141 of process. Copies of this document were sent to each of the British owners owning turret ships built by Messrs Doxford. In particular a copy was sent to the defenders as the owners of the 'Clan Gordon.' No. 141 of process is in these terms—'This vessel is not intended to load down to her marks with a homogeneous cargo without water ballast.

"'If the cargo is homogeneous throughout, the ballast in the double bottom in Nos. 2, 3, and E and B tanks must be run up before commencing to fill the 'tween-decks. The cargo would then have a density of 58¼ cubic feet per ton reckoned on the bale space and 63¼ cubic feet per ton reckoned on the grain space. In the case of a cargo of varying density that portion in the 'tween-decks must always be lighter, and if the density of the 'tween-deck cargo is only 71 per cent. of that in the holds, one ballast tank only, say the No. 3 tank, need be run up. If 86 per cent. then 42 per cent. of the tanks must be run up; other proportions by interpolation.

"'If whilst preserving these proportions the mean stowage is insufficient to load the vessel down to her marks, and it is desired to carry coal on the turret deck, then for each 100 tons of coal 125 tons of water ballast must be added in the double bottom before *the coal* is put on board. In no case must a tank be partially filled. Each tank must be completely filled in its turn.'

"There is no clear evidence of what use,

if any, was made by the defenders of the copies of this document which were sent to them as owners of several turret ships. Captain Barr, who is the secretary and a director of the defenders' company, says he has no recollection of receiving the document, although he admits that the paper reached the defenders. He adds that the document was one which in ordinary course would be referred to the late Mr Lyell, who was their engineer entirely responsible for all structural matters and for instructions to masters of their ships. 'These notices relating to stowage would be sent through Mr Lyell to our ships if they were sent. If he thought it necessary to do so they would naturally go from him as superintending engineer to the ships. Whether he did so or not we have no record. The only fact we have been able to bring to light is that in point of fact a copy has been recently found on board the "Clan Stuart."' It is proved that Captain M'Lean, who was in command of the 'Clan Gordon,' was not provided with a copy of these instructions, which he saw for the first time after he returned from New York after the accident.

"It was suggested for the defenders that the instructions contained in No. 141 are not clear in their terms, and that any captain would have the greatest difficulty in thinking how they would apply to his vessel. Some of the answers given by the captain are founded on by the defenders as indicating that even if the instructions had been communicated to him he would not have refrained from emptying the tanks as he did. I am unable to adopt the defenders' view as to the ambiguity of the directions contained in No 141. of process. It appears to me clear that in terms of that document there ought to be a substantial amount of water ballast where the ship is loaded to her lines with a homogeneous cargo, *i.e.*, where the density thereof between decks and in the under hold is similar, and that some water ballast must be carried in her tanks if the density of her 'tween-decks cargo is 71 per cent. or more of that of the cargo in the lower holds, the quantity varying in proportion to the ratio of the density of these two portions of the cargo. Captain Ruthven, who has had very large and extensive experience as a sea captain, says that the instructions seem to him fairly clear, that he would not find any fault with them, and that he would have had no difficulty at all in utilising them.

"There is a certain discrepancy in the evidence as to the relative density of the cargo carried 'tween-decks by the 'Clan Gordon' and that in the lower holds. The experts speak to the density of the 'tween-decks cargo being something between 92 and 97 per cent. of the density of the lower cargo, while the captain suggests that the proportion is about 83 per cent., but I think that that figure is affected by a miscalculation which he had made as to the cargo 'tween-decks. No one suggests that the proportion was not above that of 71 to 100, and therefore if the directions had been followed, some water ballast ought to have been kept in the tanks. . . .

"The question now arises whether the failure of the defenders to communicate instructions to the captain having a direct bearing upon the vessel's stability when loaded with a cargo such as she was carrying constitutes unseaworthiness. The term seaworthy as applied to a vessel means reasonable fitness at the time of starting a voyage as regards structure and equipment to encounter the risks she may be expected to have to face, and to carry the goods entrusted to her with safety to their port of destination. Failure to comply with this requirement may arise among many other causes from faulty stowage of the cargo or incapacity of the master or crew. It is I think obvious that ignorance by a competent seaman of special information as to the particular ship which he has to command may render that vessel as unfit for a contemplated voyage as failure on his part to possess ordinary seamanlike skill and capacity. On the evidence led in this case it appears to me that Captain M'Lean's ignorance as to the grave risk of disaster incurred from emptying the tanks containing the water ballast when carrying a cargo so nearly homogeneous as that on board the 'Clan Gordon' constituted an initial unfitness of that vessel for the voyage from New York to Dalny.

"As I have already indicated, the charter-party between the pursuers and the defenders incorporated as part of the contract between them the provisions of the Harter Act. By section 3 of that Act it is provided 'that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel.' In *M'Fadden* v. *Blue Star Line*, 1905, 1 K.B. 697, it was held by Mr Justice Channell that this provision does not cut down the warranty of seaworthiness imposed on a shipowner to one to use due diligence to make the ship seaworthy. In *Dobell & Company* v. *S.S. Rossmore Company*, 1895, 2 Q.B. 408, it was held that the clause as to diligence required that not only the owner but also all persons employed by him to ensure seaworthiness should use due diligence. I do not think therefore that the provisions of the Harter Act can be founded on by the defenders as entitling them to escape liability if the conclusion to which I have come as to the unseaworthiness of the 'Clan Gordon' be sound. The terms of the bills of lading do not in this respect give the defenders any more extended exemption than the provisions of the Harter Act.

"Section 503 of the Merchant Shipping Act 1894 as amended by section 69 of the Merchant Shipping Act 1906 limits the liability of the owners of a ship to pay damage in respect of loss of goods carried to an amount not exceeding £8 for each ton of the ship's tonnage as reckoned in the

Acts, provided the loss has taken place without their actual fault or privity. It has been decided and was admitted in argument that the onus of establishing that the loss occurred without his actual fault or privity is on an owner who seeks the benefit of restricted liability under the Acts. In the *Asiatic Petroleum Company, Limited* v. *Lennard's Carrying Company, Limited*, 1914, 1 K.B. 419, L.J. Buckley at p. 437 said—'To avail himself of the statutory defence he, *i.e.*, the owner, must show that he himself is not blameworthy for having either done or omitted to do something or been privy to something. It is not necessary to show knowledge. If he has means of knowledge which he ought to have used and does not avail himself of them, his omission so to do may be a fault, and if so it is an actual fault and he cannot claim the protection of the section.' In that case the question arose under section 502 of the Merchant Shipping Act 1894, where the cargo had been destroyed by fire caused by the unseaworthiness of the ship. The case is instructive on the question of fault where the owners are a company. It was held by L.JJ. Buckley and Hamilton on the facts of the case that the loss had happened with the actual fault or privity of the owners, inasmuch as the managing owner who had knowledge of the defective condition of the vessel's boilers failed to give special instructions to the captain and chief engineer regarding their supervision, or to take any steps to prevent the vessel putting to sea with her boilers in an unseaworthy condition. The decision was affirmed by the House of Lords, 1915 A.C. 705. Lord Dunedin at p. 715 said—'I am quite sure that you cannot at least put as a general proposition in law that it is true that nothing will ever be the actual fault or privity of an incorporated company unless it is the actual fault of the whole board of directors. But I think the true criterion of the case is that which was found and applied by Hamilton, L.J., that the parties who plead the 502nd section must bring themselves within its terms, and therefore the question is, have the company freed themselves by showing that this arose without their actual fault or privity? I think they have not.' Applying the same criterion to the facts of the present case, I think that I must hold that the defenders have failed to discharge the onus upon them.

"It was admitted that on the assumption that the defenders' liability is unrestricted my award should be for £97,892, 17s. 7d., for which sum accordingly I give decree."

The defenders reclaimed, and argued—All contracts of affreightment contained an implied warranty that the shipowner would furnish a seaworthy ship fit to make the voyage. An exception to this warranty must in order to be valid be specially mentioned in the contract—*Steel* v. *State Line Steamship Company*, 1877, L.R., 3 A.C. 72, 4 R. (H.L.) 103; *The "Laertes,"* 1887, 12 P.D. 187. *Esto* that it was legitimate for this shipowner to contract out of this general warranty of seaworthiness, he might contract for a lesser obligation provided he brought himself within section 3 of the Harter Act, the true reading of which was that in case of a mishap due to an error in judgment or management the shipowner could escape liability if he could show he used due diligence—*The "Carib Prince,"* 1897, 170 U.S. Reports 655; *M'Fadden* v. *Blue Star Line*, (1905) 1 K.B. 697; *Moore* v. *Lunn*, 1922, 38 T.L.R. 649; *Dobell & Company* v. *S.S. Rossmore Company*, (1895) 2 Q.B. 408. The incorporation of the Harter Act did thus impinge upon the general obligation to provide a seaworthy vessel—*The "Europa,"* 1908 P. 84; *Kish* v. *Taylor, Sons, & Company*, (1912) A.C. 604. In the present case the pursuers alleged an objective unseaworthiness, and a subjective unseaworthiness in the shape of an uninstructed captain whose ignorance led him to commit the error in judgment which resulted in the loss of his ship. The defenders' failure in 1919 to communicate the builders' instructions of 1910 to the captain did not render an otherwise competent master incompetent. The defenders were not bound to do so, more particularly as these instructions were quite unintelligible and more calculated to confuse than to inform the captain. Turret ships were not uncommon—in fact there were many of them. In any event the captain had been warned by the defenders' agents at New York that he should keep his ballast tanks full. The master's error of judgment did not accordingly amount to "unseaworthiness" for which the defenders could be held responsible—*The "Glenochil,"* (1896) P. 10; *The "Rodney,"* (1900) P. 112. The loss of the ship and cargo was not due to the defenders' actual fault or privity. They were not liable for the whole loss—Merchant Shipping Act 1894, sec. 503, as amended by section 69 of the Merchant Shipping Act 1906. Counsel also referred to the following authorities:—*The "Gunford" Ship Company, Limited* v. *Thames and Mersey Marine Insurance Company, Limited*, 1910 S.C. 1072, 47 S.L.R. 860; *The "Schwan,"* (1908) P. 93, (1908) A.C. 450; *The "Yarmouth,"* (1909) P. 293; *Asiatic Petroleum Company, Limited* v. *Lennard's Carrying Company, Limited*, (1914) 1 K.B. 419, (1915) A.C. 705; *Colonial Securities Trust Company, Limited* v. *Massey*, (1896) 1 Q.B. 38.

Argued for the respondents—The pursuers had proved that the "Clan Gordon" was unseaworthy as loaded when she started on her voyage, in respect that she left port with such an insufficient margin of stability as to render her unseaworthy. The master, further, did not know a certain fact which was material to the vessel's safety on this particular voyage, and this ignorance sufficed to render him a positive danger to the ship. The ship also was not properly equipped for this voyage, as such water as she had in her ballast tanks was not really ballast. Anything which could be thrown overboard at will was not really ballast. The loss of the ship and cargo was occasioned through the defenders' fault. They were furnished by the shipbuilders with certain instructions regarding the

loading of the vessel, which they failed to communicate to the master. It was more difficult for the captain of a turret ship than for the captain of an ordinary wall-sided ship to tell whether his ship was "stiff" or "cranky," and accordingly the owners should have been particularly careful to impart to the captain any special knowledge they might become possessed of regarding the ship's stability. No competent master would have pumped out his ballast tanks if he had been given these builders' instructions regarding the ship's stability. No error of judgment or fault having been committed, which could be dissociated from these instructions, the defenders could not say that the loss occurred without their fault or privity, but through the master's fault or error of judgment, and thus escape from the charge of having contributed to the loss. The defenders' neglect thus sufficed to render the master in his ignorance a real danger to his ship. A condition-precedent to pleading the Harter Act was that the defenders had exercised all due diligence to render the ship seaworthy. The Harter Act did not exempt the defenders from liability for an act of management to which they had contributed. The defenders had not by contract expressly limited their liability for any loss resulting from their negligence. If, as was here the case, the ship was unseaworthy at the outset of the voyage, no subsequent act of management on the master's part would cut down the defenders' liability for loss. Counsel referred to the following authorities:—*The "Schwan,"* (1909) A.C. 450, *per* Lord Atkinson at p. 454; *Tait* v. *Levi*, (1811) 14 East 480, *per* Lord Ellenborough; *Charlton & Bagshaw* v. *Law & Company*, 1913 S.C. 317, 50 S.L.R. 214; *Elderslie Steamship Company, Limited* v. *Borthwick*, (1905) A.C. 93; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 1883, 10 Q.B.D. 521, *per* Brett, L.J., at p. 532; *The "Carib Prince"; International Navigation Company* v. *Farr*, 1900, 181 U.S. Reports 218, *per* Fuller, C.J., at p. 226; *The "Southwark,"* 1903, 191 U.S. Reports 1; *M'Fadden* v. *Blue Star Line; Moore* v. *Lunn* (*cit.*), *per* Bailhache, J.; *Asiatic Petroleum Company, Limited* v. *Lennard's Carrying Company, Limited*, (1915) A.C. 705, *per* Lord Dunedin at p. 716.

LORD PRESIDENT—The defenders' s.s. "Clan Gordon" left New York harbour on 28th July 1919 with a cargo of case-oil, case-naphtha, and wax in bags for China. She had Nos. 1 and 2 water-ballast tanks full, and was down to her marks. Two days out the master, thinking his ship would trim and sail better without water ballast, ordered the tanks to be pumped out. When they were nearly empty, the ship turned turtle in calm weather on the application of a port helm.

The pursuers attribute the disaster to the unseaworthiness of the vessel, (1) because as she left New York she had too little water ballast to give her a sufficient margin of stability for the voyage, and (2) because the master was incompetent, in respect that certain instructions or suggestions with regard to the loading of the vessel which the owners had received from the builders some nine years previously had not been communicated to the master at or before the commencement of the voyage.

It became clear in the course of the discussion before us that the actual cause of the disaster was the pumping out of Nos. 1 and 2 water-ballast tanks, which brought the vessel into a state of equilibrium so unstable that the combined effect of the impulses contributed by the application of the port helm and by the loose water still remaining in the ballast tanks—to some extent in all of them, but particularly in Nos. 1 and 2—was enough to upset the ship. As she left New York the condition of the ship was that—apart from the distribution of weight in her own structure and in the permanent bunkers—there was an excess of 400 tons weight of cargo, dunnage, fresh water, and stores in the lower parts of the ship as compared with the higher. To this excess, 290 tons of water in Nos. 1 and 2 water-ballast tanks fell to be added, making roughly 700 tons in all. The work of loading had been performed by skilled stevedores under the master's eye, and, as handled by the master and pilot during the first two days—the 28th and 29th—the ship had disclosed no sign of tenderness whatever, though purposely submitted (with the object of discovering any tendency in that direction) to the test of energetic helm action both to port and starboard. It seems to follow that even if the pursuers proved that the ship (with only 290 tons of water ballast) had an insufficient margin of stability for a voyage to China, and was therefore unseaworthy in reference to that voyage, the disaster which overtook her was not attributable to that unseaworthiness but to the master's error of judgment in pumping out the tanks.

The proof is mainly devoted to an investigation of the ship's curve of statical stability at all ranges of inclination from the vertical, and the controversy with regard to her actual margin of stability when she left New York turns on the droop in that curve, which, as in the case of all vessels of her type, commences after an inclination from the vertical of 17 degrees or thereby has been reached. It is plain that the causes of the disaster had no connection with the ship's righting power at an inclination of 17 degrees or more. It arose from the complete loss of stability which followed on the withdrawal of almost all the water in the ballast tanks. At first sight this seems to make the first of the pursuers' grounds of attack on the seaworthiness of the ship irrelevant. But it has an important bearing on their second ground, because parties are in sharp conflict as to the significance of the instructions which were communicated by the builders to the owners. According to the case stated by the pursuers on record, those instructions, if they had been in the master's hands or before his mind, would have instructed him that the ship should not have been loaded down to her

marks with a cargo such as she carried from New York without something approaching to 500 tons of water in her ballast tanks; and that she was therefore without sufficient margin of stability when she had only 290 tons of water in them. It thus becomes important for the pursuers to show that the "Clan Gordon" was in fact without sufficient margin of stability when she left New York, loaded as she then was. [*His Lordship examined the evidence in detail and continued*]—

I agree with the Lord Ordinary in thinking that the pursuers have failed to make out their first ground of attack on the seaworthiness of the vessel as she left New York.

The Lord Ordinary has sustained the pursuers' second ground of attack. It raises questions of much importance to the interests of safety at sea and of considerable legal interest. Both the judgment reclaimed against (so far as this head is concerned) and the argument by which it was supported before us, rest on the following propositions of fact and law:—(1) The instructions for loading which the builders had circulated to the owners in 1910, a year after the loss of the "Clan Ranald" and nine years before the disaster to the "Clan Gordon," contained special information as to the manner of loading the "Clan Gordon," the general effect of which was that in the design of the ship the presence of water ballast, more or less, had been assumed, in the event of her being loaded down to her marks with a "homogeneous" cargo. (2) This special information had not been communicated to the master of the "Clan Gordon" at or before the commencement of her last voyage. (3) Ignorance by a competent seaman, such as the master of the "Clan Gordon" admittedly was, with regard to his ship, may make the ship unseaworthy. (4) The master's proved ignorance as to the risks incurred in emptying all the ballast tanks when the loading of the ship approximated so far to the conditions of "homogeneity" as in the case of the "Clan Gordon" made the ship unseaworthy.

Before examining these propositions, and particularly the 3rd, explanations with regard to two matters are necessary.

(First) By "homogeneous" loading, the builders referred to the state of matters when (*a*) the cargo spaces are completely filled, and (*b*) the cargo itself is of uniform weight per cubic foot, either (i) in the cargo spaces throughout, or (ii) in the holds and 'tween decks respectively. In the latter case the denser cargo will no doubt be stored preferably in the hold. It is obvious that as the top of the cargo in each compartment of the cargo space rises in the course of filling, the higher up in the ship will the centre of gravity of the cargo in that compartment be; and it is further obvious that the more nearly the density of such cargo approaches to uniformity, the more important will be the effect in raising the centre of gravity of the ship as a loaded whole, for that uniformity makes it impossible to apply the corrective of stowing denser cargo underneath other cargo less dense.

(Second) The builders' instructions can only be relied on if stated generally, as I have endeavoured fairly to state them above. The reason for this is as follows:—The present case is not concerned with the 4th paragraph of those instructions, but the particulars contained in the 2nd and 3rd paragraphs are proved if literally read to be actually fallacious. This makes it necessary to read them as conveying no more than a general indication. The pursuers' case is that the "Clan Gordon" was for practical purposes "homogeneously" loaded when she left New York, the ratio of the density of the cargo in her 'tween-decks to that of the cargo in the holds being (according to them) as 97·7 to 100. I have not myself been able to verify this percentage. The master's percentage of 83 to 100 is correct on the footing that regard be had only to cargo and dunnage in the holds and 'tween-decks respectively, and that no account is taken of the fact that the 'tween-decks were not completely filled. The latter circumstance gave his calculation a further margin of safety. But on the basis of either percentage the paragraphs in question would require something little short of 500 tons of water to be in the ballast tanks. Now it has already been shown to be impossible to prove the "Clan Gordon" anything but seaworthy so far as stability goes with only 290 tons of water in her ballast tanks, and it is thus in vain to contend that she could not have the necessary margin with less than a quantity in the neighbourhood of 500. The explanation of this appears from the evidence, for the calculations on which the instructions (and paragraphs 2 and 3 in particular) were based were vitiated by the two errors. In the first place the pursuers' expert took as the light weight of the vessel a figure derived from a twenty-year-old calculation by the builders with reference to the light weight of a sister ship, which is proved by the builders' chief draughtsman to be materially under the mark owing to a serious error which becomes apparent on an examination of the detailed calculation itself. Again, the centres of gravity of the cargo in the holds and in the 'tween-decks were calculated by the pursuers on the assumption that the cargo completely filled both holds and 'tween-decks, leaving no head room in either. This is proved not to have been the case in the 'tween-decks at anyrate. The result is to put the centre of gravity of the cargo in the 'tween-decks too high. Moreover, the calculations took no account of dunnage, fresh-water tanks, or stores. No one reading the instructions gets any notice of these sources of error or variation.

These defects in the instructions constitute awkward circumstances in any argument which is founded upon them. But I do not think they are altogether fatal to the pursuers' case, for the master admits that if he had been ordered by the owners to act in accordance with the instructions he would not have pumped out the 290 tons whatever difficulties he might have had in understanding their true meaning and application.

The crux of this part of the case lies in a correct appreciation of the limits of the

third of the propositions enumerated above on which the judgment reclaimed against turns. It is trite law that a ship in herself unexceptionable may be made unseaworthy by being put into the hands of a master who is not a competent seaman, either generally or with reference to a particular voyage. But there are very few decided cases on this topic, and of the three which were quoted to us—"*Gunfords*" *Ship Company* v. *Thames and Mersey Marine Insurance Company*, 1910 S.C. 1072, *aff.* 1911 S.C. (H.L.) 84, also in [1911] A.C. 529; *Tait* v. *Levi*, (1811) 14 East 480; and *The "Schwan,"* [1908] P. 356, [1909] P. 93, *rev.* [1909] A.C. 450—only the last sheds any light on the kind of problem which the pursuers' argument in this case presents. The "Schwan" was fitted with a sea-cock of foreign make, and so peculiarly designed that (1) when closed against the sea in the way that a competent seaman would naturally close it, it nevertheless continued to admit sea water into the ship, while (2) there was nothing about its appearance to disclose its peculiarities to a competent seaman or to acquaint him with the necessity of using special means to close it. The ship was held to be unseaworthy because (fitted as she was) she was a dangerous instrument of carriage even when put into the hands of competent men, the danger being not only beyond the ken of ordinary competence but one which did not disclose itself. In short, for so special a ship a crew of special competency had to be supplied in order to make her seaworthy, and such special competency could only be secured by giving special instructions to the crew (otherwise perfectly competent) regarding the sea-cock at or before the commencement of the voyage.

The principle exemplified in the "Schwan" does not, in my opinion, apply to the case of any of those manifold dangers in ships and their handling which neither arise from latent specialty nor lie beyond the sphere of competent seamanlike skill, and I think it would be subversive of the conditions of safety in navigation if it were to be extended so as to apply to such dangers. I can imagine nothing more detrimental to security at sea than to put upon owners who have appointed a competent master a duty to give instructions to him in matters which fall within the province of his competence. The master of the "Clan Gordon" was admittedly a thoroughly competent man, of wide experience in the command of ships and of turret-deck ships in particular. It may be true of many shipping disasters that the master would have been none the worse of having the technical equipment of his mind rubbed up, or of rehearsing its application to the problem of loading and navigating his particular ship before the voyage began, and some of those disasters might possibly have been prevented by such a process. But this means no more than that the most competent of men are not above the human liability to error. My opinion therefore is that if an owner is to be held in breach of the warranty of seaworthiness on account, not of the *incompetence* but of the *uninstructed competence* of the master, that can only be because there is proved to exist some special circumstance affecting the particular ship which makes her dangerous in the hands of a competent master, unless specially instructed.

I pass therefore to consider whether there is any special circumstance alleged and proved in this case to have affected the "Clan Gordon." She belonged to the class known as turret-deck ships, but no individual specialty of any kind whatsoever is attributed to her among other ships of her class. Moreover, it has not been asserted, and no attempt has been made to prove, that turret-deck ships as a class are unseaworthy in the hands of competent masters without special instructions. Turret ships have been built in large numbers since 1903 by Doxfords and by Vickers. No instructions for their loading have ever been issued by the last-named builders, and it is evident from the testimony of Doxfords' representative that that firm never regarded the instructions of 1910 as having the peremptory or mandatory character which must have been attributed to them if their turret ships had been discovered to be dangerous in the hands of competent masters unless specially instructed. I am not at liberty to assume that any such discovery was made in the absence of both averment and proof to support it—an absence which is only made more significant by the fact that the issue of the instructions was the outcome of the disaster to the "Clan Ranald." Again, it is not even said, either on record or in evidence, that the question of the use of water ballast in the case of a "homogeneous" loading is peculiar to the design of turret ships as distinct from that of other types of cargo vessels which have lower holds and 'tween-decks; although, and this is an important point, it may well be that loadings which approach so far to the condition of what is called "homogeneity" as did that of the "Clan Gordon" on her last voyage are rare, and present problems of more than usual nicety. Like ordinary cargo vessels and shelter-deck vessels, turret ships are proved to have carried all kinds of cargo on all sorts of voyages for nearly twenty years, and the single disaster of the "Clan Ranald" was accompanied by circumstances which had no connection with the special features of turret ships. Further, the obvious difference in the configuration of their sides from that of ordinary ships is not said by anyone to hide any secret in relation to stability or otherwise from competent seamen, and it appears from the proof that masters who like the captain of the "Clan Gordon" have sailed in and commanded them for many years, while impressed by their high stability up to angles of inclination of say 15 degrees, were not blind to the necessity of using care with them. It is proved that the master applied his mind before starting to the distribution of the weight of the various contents of the ship and to the density of the cargo. Further, the question of water ballast was not overlooked, for it formed the subject of considerable discussion between him and the owners' agents

in New York. One of the latter, Mr Barthold, had had experience of case-oil cargoes loaded in shelter-deck ships, and drew the master's attention to the question of water ballast. Convinced by his own calculations and by his long experience of turret ships, and the "Clan Gordon" in particular, the master not only did not adopt Mr Barthold's suggestions, but was so satisfied with the stability of his vessel as loaded, apart from water ballast altogether, that he would have ordered Nos. 1 and 2 water-ballast tanks to be pumped out before leaving New York if circumstances had not made that course inconvenient. His discussion with Mr Barthold is all the more remarkable because it was also concerned with the placing of a quantity of extra coal in a closed-off portion of one of the 'tween-decks. This circumstance materially affected the distribution of the weights in the ship, but it was before the master in considering her stability. The event showed that Mr Barthold was right and the master wrong. But my opinion is, that in the absence of some special circumstance affecting the ship of the kind indicated above, the question whether the distribution of weight in the ship gave her sufficient stability was eminently one for decision in accordance with the skill and experience of a competent master within whose province it peculiarly lay.

I think therefore that the pursuers have failed to make out their case on the second ground also.

If, then, as I hold was the case, the owners have proved that they supplied a ship which as she left the port of departure was in herself seaworthy, and was equipped with a competent master, they are protected by clause 3 of the Harter Act (as incorporated with the bill of lading) from the consequences of a disaster which resulted from a fault or error on the part of the master in the management of the vessel at sea.

At the conclusion of their argument the pursuers presented a subordinate point, apart from any question of seaworthiness. They founded on the qualification (contained in the bill of lading) of the immunity which the bill confers on the owners from the consequences of accidents occasioned by the master's fault, namely, that the accident be not one which has resulted from want of due diligence by the owners. The argument was that if the owners had communicated the builders' instructions to the master at or before the commencement of the voyage, the master might have been prevented from falling into the mistake which Mr Barthold's suggestions were ineffectual to prevent, and instead of pumping out Nos. 1 and 2 water-ballast tanks, he might have decided to leave them full and so have preserved the ship from mishap. The argument assumes that the master was competent, although the builders' instructions were not communicated to him; it treats the communication of the instructions, not as a condition of the seaworthiness of the ship, but as a means of conveying to the master a possible useful suggestion with regard to her loading and her management at sea. The pursuers themselves describe the instructions on record as "instructions and/or suggestions." If by his skill and experience the master was competent without "instructions," I am unable to hold the owners negligent because they did not communicate to him "suggestions" as to the manner in which he should perform the duties which fell within the sphere of his proper competence. He is placed in a position of great trust because he is competent to discharge its responsibilities; and for the reasons I have explained in an earlier part of this opinion I think it would be destructive of the guarantee of security which that undivided responsibility affords, to hold the owners negligent because they did not interfere with it.

I think, therefore, that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied from the conclusions of the summons. It will be seen that in arriving at this conclusion I differ from the Lord Ordinary not on the facts of the case but on the law which is applicable to them.

LORD SKERRINGTON—The evidence adduced by the pursuers and by the defenders respectively was directed for the most part to proving or to rebutting the proposition that when the defenders' steamship "Clan Gordon" left New York for China carrying a full cargo under bills of lading in favour of the pursuers she did not possess the margin of stability necessary for her intended voyage and was in consequence unseaworthy at and before its commencement. The Lord Ordinary came to the conclusion upon the evidence that this attack upon the initial stability of the "Clan Gordon" had failed, but he held that initial unseaworthiness had been established upon an entirely different ground. He accordingly granted decree against the defenders for the value of the cargo, the whole of which had been lost when the "Clan Gordon" overturned and sank on the third day of her voyage from New York. The defenders reclaimed against this interlocutor, and the pursuers took advantage of the reclaiming note in order to re-open the important question which the Lord Ordinary had in substance decided against them, though the record of his decision must be sought for not in the interlocutor reclaimed against but in the opinion which he delivered along with it. After hearing an exhaustive discussion of the evidence against and in favour of the sufficiency of the "Clan Gordon's" margin of stability at the time when she started on her voyage from New York I do not think that the position can be better summarised than it was by the defenders' senior counsel Mr Macmillan when he said that the scientific evidence left the Lord Ordinary no alternative except to hold that this part of the pursuers' case had not been proved. I may add that the general evidence (that of the stevedores, the captain, and the pilot) in regard to this matter is scanty, but that it is on the whole unfavourable to the pursuers' contention. Accordingly I agree

with the Lord Ordinary that the pursuers have failed to prove that the 290 tons of water ballast which the defenders' vessel carried in two of her tanks when she left New York were insufficient to provide her with the necessary margin of stability, having regard to the nature and weight of her cargo and stores and to the manner in which these were distributed throughout the ship.

The proximate cause of the loss of the "Clan Gordon" was the act of her captain in ordering the two tanks containing the 290 tons of water ballast to be emptied upon the third day of the voyage. This order was obeyed, and it is not disputed that its effect was to reduce the ship to a condition of unstable equilibrium with the result that although the weather and sea were calm she listed and capsized and sank taking her cargo with her. In the 9th article of the condescendence the pursuers allege that the ship "was unseaworthy when she sailed from New York and unfit for the intended voyage," and they state the particulars under four heads. The first is that which has been already referred to and which the Lord Ordinary held not to have been proved. The three remaining heads must be read together as constituting a second and alternative ground for holding the vessel to have been initially unseaworthy. They come to this, that the ship being so loaded as to become unstable if she were to lose her 290 tons of water ballast in the course of the voyage, "she was not properly equipped for her voyage," and her "captain was not in a position to command the vessel" because he had not been furnished with a copy of the "general instructions as to loading" the "Clan Gordon" provided by her builders, or, alternatively, because he had not been "instructed that special precautions were necessary (as they were) in the matter of keeping the tanks full while at sea." It is important to notice that there is no suggestion in the pursuers' averments or in the evidence that the "Clan Gordon" possessed any peculiarity which differentiated her from other turret ships. Assuming these averments to be relevant they have not in my judgment been proved. No witness testified that a competent and careful master placed in command of the "Clan Gordon" or of any other turret ship after a long experience of vessels of that type would be incapable of forming a sound practical judgment as to how her cargoes ought to be distributed with a view to her stability or as to how much water ballast (if any) she ought to carry—unless he had previously enjoyed the advantage of studying the builders' instructions in the case of the "Clan Gordon" or some similar document in the case of another ship, or unless he had been "instructed that special precautions were necessary in the matter of keeping the tanks full while at sea." Even if one holds it to be proved that the loss of the "Clan Gordon" was in fact attributable to her captain not having been furnished with a copy of the builders' instructions it does not follow, and it has not been proved, that similar disasters to turret ships have occurred or are likely to occur in consequence of the absence of such instructions. Once more I call attention to the fact that the case would have assumed a different aspect if the catastrophe had been due to some peculiarity in the "Clan Gordon" which a competent captain who had experience of turret ships could not have been expected to discover and guard against.

For the reasons thus shortly indicated I am of opinion that the pursuers' second and alternative reason for challenging the initial seaworthiness of the "Clan Gordon" has not been established. The pursuers' counsel argued that even on this assumption the Lord Ordinary's interlocutor could be supported upon the separate ground that the loss of the "Clan Gordon" and her cargo was a direct consequence of the defenders having negligently failed to supply the captain with a copy of the builders' instructions, and that the defenders were therefore not entitled to found upon the exceptions in their favour contained in the bills of lading. If I am right in thinking that the captain was not incapacitated by the want of these instructions from forming a sound practical judgment as to the conditions necessary in order to secure her stability, it follows that the defenders were under no duty to furnish him with special instructions as to this matter.

I agree with your Lordship that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied.

LORD CULLEN—The main case here advanced by the pursuers is that the "Clan Gordon" was unseaworthy. The charge of unseaworthiness is presented under two different aspects. In the first place it is said that when the vessel began her voyage with 290 tons of water ballast in her tanks this amount of ballast was insufficient to secure her stability, and that it would have been impossible for her to carry sufficient water ballast to secure stability, as the cargo and bunkers were distributed, without overloading her. On this head of the case the Lord Ordinary in a very careful judgment has found in fact in favour of the defenders. I agree in that conclusion, and having had an opportunity of perusing and considering the opinion which has been delivered by your Lordship in the chair, I concur in the reasons therein so fully stated for upholding it, to which reasons I feel that I cannot usefully add anything.

The second ground advanced by the pursuers for their contention that the "Clan Gordon" was unseaworthy is that she was not equipped with a competent master.

The truth of the general proposition that a ship otherwise seaworthy may be unseaworthy because placed under the command of an incompetent master is not disputed, although the reported cases illustrative of it are few in number. The clear case is where there is a defect in the master of the qualifications which are regarded as necessary to make fitness and reliability for the post of master in the general sense. There is no such case here. It is common ground that Captain M'Lean possessed all the pro-

fessional qualifications sufficient to attest his perfect competency for the post of a master of steamships in general.

This being so, the pursuers' contention is that while Captain M'Lean was perfectly competent for the post of master of ships in general he was nevertheless incompetent for the command of the "Clan Gordon." The contention does not relate itself to any peculiarity in the individual vessel. It relates itself to a numerous class of vessels to which the "Clan Gordon" belonged, to wit, the class of turret ships.

Accordingly the pursuers' contention involves the following allegations—(*a*) that the qualifications which attest a seaman's competency for the post of master in ships in general do not attest his competency as the master of a turret ship, and that some further qualification is required; (*b*) that Captain M'Lean did not possess such further qualification, and in particular that it was not furnished by his having had a long period of previous service on board turret ships, including three or four voyages in the capacity of master of the "Clan Gordon."

A priori there is no reason why the pursuers' proposition should not be true. Turret ships, although numerous, might be proved to be so peculiar that competency to command them fell to be judged by a special and separate standard, and was not attested by possession of all the qualifications required for the command of ships in general combined with the long experience on board turret ships which Captain M'Lean had had. But the acceptance of the proposition requires definite proof.

On turning to the record in the action I experience a difficulty in finding in it any clear statement of the pursuers' case under this head as above formulated. In condescendence 3 the pursuers aver that a turret vessel has a low curve of stability at the earlier angles of inclination, and that if loaded down to her marks with a cargo of uniform density which completely fills her lower holds and 'tween-decks she must carry water ballast in order to secure stability and seaworthiness. But there is an absence of averment on what is here crucial—that is to say, averment to the effect that these qualities in a turret ship so differentiate it from ships in general that a separate standard of competency in the master is required, to which Captain M'Lean did not conform. In condescendence 8 the pursuers aver that "no competent master" would have distributed the weights of the "Clan Gordon" as they were distributed, or would have allowed the two tanks to be emptied if he had had Doxfords' "instructions" communicated to him. It may or may not be true that Captain M'Lean would have exercised a different judgment in these matters if he had had the assistance of Doxfords' "instructions" or similar material, but the above averments are not a relevant attack on his competency to command turret ships in contrast to other ships. In condescendence 9 the pursuers say, *inter alia*, "(3) she was not properly equipped for the voyage in respect that she had not on board proper directions for the guidance of the captain, for her loading, and for preserving her stability; (4) the captain was not furnished with the instructions for loading provided by the builders, nor was he instructed that special precautions were necessary (as they were) in the matter of keeping the tanks full while at sea. This was owing to want of due diligence on the part of the defenders. Without such instructions the captain was not in a position to command the vessel." But it is not here or elsewhere on record averred that it is customary for shipowners to provide masters, otherwise competent, with special instructions on the subject of loading, ballasting, and stability, either in the case of ships in general or in the case of turret ships in particular. There is, it is true, the averment that without such instructions "the captain was not in a position to command the vessel." But why this disability for command should attend a generally competent master in the particular case of a command of a turret ship is not properly explained.

The case, however, went to proof, and the question for consideration is whether the evidence establishes the defective competency in the master as above formulated which makes the pursuers' case of unseaworthiness under this head. The question is one to be solved by those having the required knowledge, skill, and experience of nautical affairs, and in particular of the loading and ballasting of vessels so as to ensure stability. Witnesses of this class were adduced, There is much interesting evidence about curves of stability and the difference between the curves of wall-sided ships and turret ships. There is also much evidence about the intelligibility and accuracy of Doxfords' "instructions" and their usefulness to a master in exercising his judgment in loading and ballasting his ship under given conditions. But I confess that I am unable to find in the evidence of those qualified to speak by knowledge and skill in nautical affairs any affirmance of what here is the pursuers' proposition, to wit, that the conditions of stability of a turret ship are so special that a master possessing the general competency and the long experience of turret ships which Captain M'Lean had is not competent to be entrusted with the loading and ballasting of such a vessel unless he possesses some additional knowledge, skill, or experience. If this proposition is not proved, I am unable to see the relevance to this question of unseaworthiness, of the fact that Doxfords' instructions were not communicated to Captain M'Lean. In the state of the evidence regarding his competency these instructions do not, I think, fall to be credited with any higher character than that of being advice to guide a competent master in exercising his judgment in loading and ballasting his vessel. Doxfords' representative, in reply to the question "What was the object of issuing these instructions?" says, "I presume that they were just for the guidance of the master." He does not put it higher. And I do not find that any of the other witnesses qualified to speak say that without the communication

to Captain M'Lean of this guidance he was not competent for the command of the "Clan Gordon." To say that the communication of it to him would or might have avoided the disaster seems beside the point here. The most competent and experienced masters sometimes make serious errors of judgment, and if Captain M'Lean would or might have acted differently had he had Doxfords' instructions or similar material to aid him, that does not seem to me in the state of the evidence to involve more than this, that he would or might have avoided an error of judgment in a matter which his competency and experence made him fit to be entrusted with.

I am accordingly of opinion that the charge of unseaworthiness in this second aspect of it fails.

The pursuers, alternatively, presented their case against the defenders by saying that the exemptions in the bills of lading did not apply, in respect that the master's error in dispensing with water ballast was caused or materially contributed to by the fault of the defenders in not communicating to him the contents of Doxfords' instructions. But the pursuers do not show that the defenders were under a duty to communicate these to him. If it be held not proved that Captain M'Lean was incompetent to command the ship, then there was no duty that I can see on the defenders' part to give him instructions about how to load and ballast it, whether in the form of Doxfords' paper or otherwise. It might, perhaps, be useful to masters in general if they were supplied with detailed information of a kind which would facilitate the practical exercise of their judgment in loading and ballasting and help to avoid errors. But no one suggests that shipowners are in custom to supply competent masters with such aids to facilitate the exercise of their qualifications, or are regarded as under obligation to do so. If a master is duly attested to possess the qualifications which fit him to be entrusted by the owners with a particular command, I take it that the responsibility for the due application of his competent qualifications in loading, ballasting, and navigating the vessel rests with him, and that the owners are entitled to leave it there.

LORD SANDS—Upon the first question in this case, viz., whether the "Clan Gordon" was physically seaworthy, so far as stability is concerned, when she left New York, I agree with the Lord Ordinary that it is not proved that she was unseaworthy. [*His Lordship dealt with the question in detail, and continued*]—

I turn now to the second question in the case, viz., whether, on the assumption that the "Clan Gordon" was physically seaworthy when she left New York, the defenders are responsible for the loss resulting from her foundering in the course of the voyage.

The pursuers sue as shippers of cargo entrusted to the defenders for carriage by sea and not delivered by the defenders in terms of the bills of lading. The primary cause of the non-delivery of the cargo was the loss of the vessel through an error of the captain in discharging the water ballast in the course of the voyage. I say "water ballast," but perhaps I ought to say "water in the ballast tanks." This water was not taken in as ballast for the voyage, and according to the captain it would have been pumped out in harbour if there had been time. For the captain's error the defenders are responsible unless they can succeed in showing that under the terms of the particular contract they were relieved of responsibility for the captain's error. The contract is subject to the conditions of the Harter Act of the United States of America. Under that Act it is provided—"3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel. . . ."

If a case can be figured under that Act where the ship has been made "in all respects seaworthy and properly equipped, manned, and supplied," and yet has been lost through an error in navigation to the occurrence of which the owner has by his own negligence contributed, a question might arise as to whether the exemption applied. (I figure, for example, the case of failure to advise a master that a ship was liable to seizure in a certain port to which she might perhaps put in.) If that question admitted of only one possible answer and that in the affirmative, then a further question might arise as to whether this clause of the Harter Act overrode an express provision of the charter-party or the bill of lading which was inconsistent with it. But that is not the position. The question whether this clause in the Harter Act in the case figured exempts the owner from the consequences of his own negligence or want of due diligence is a doubtful one. In these circumstances (as the bill of lading and the Harter Act must, if possible be read consistently together), if we find a provision in the bill of lading dealing expressly with the matter, it seems to me that the bill of lading must be held to have adopted as the true construction of the Harter Act the terms of contract in this regard which the bill of lading itself contains.

I turn therefore to the bill of lading. That provides—". . . It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring, by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labour, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, by collisions, stranding, or other accidents of navigation

of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager. . . ." The question seems to turn upon the words—"The negligence, default, or error in judgment of the master. . . . not resulting, however, in any case from want of due diligence by the owners of the ship or any of them." What does "resulting from" import upon a reasonable construction of the provision? I do not think that it can be read as meaning "caused solely by" or "solely attributable to." Negligence of the master, among other defaults, is not to exempt from want of due diligence of the owner. But negligence whether of the master or anybody else excludes a complete causal relation. A cannot *cause* B to be negligent. In my view, particularly as it is the consequences of the want of due diligence of the contracting party that is being determined, "resulting from" is satisfied by "contributed to by." I do not think that a party to a contract who had undertaken liability for whatever resulted from his own negligence could be heard to say—"I was negligent; my negligence must be treated as a contributory cause of the accident, but you have not established that if there had been due diligence on my part there would have been no error or resulting accident."

I am accordingly of opinion that if any want of due diligence by the owners is here proved to have been either the sole or a contributory cause of the error of the captain, the defenders cannot escape liability in respect of the exemptions from liability contained in the Harter Act and the bill of lading. In this view it seems unnecessary to determine whether ignorance, error, or a foolish resolution in the mind of the captain when the vessel weighed anchor rendered the vessel technically unseaworthy. The man in the street would probably regard the term "seaworthy" as applicable to the physical construction, condition, and equipment of a ship, not to the qualifications of the officers and crew, just as he would regard a well-constructed house as "wind and water tight" though it might be in the care of an incompetent pack of servants who left the windows open in spite of the rain. The law, however, has extended the term "seaworthiness" in a technical sense so as to cover certain qualifications of the officers and crew. How far the term may legitimately be so extended may be doubtful, and the process of extension suggests a somewhat slippery plane. Is a vessel with a superstitious crew unseaworthy if she sails on Friday? In the view which I take of the terms of the contract it is unnecessary for the purposes of this case to adventure upon that slippery plane.

The "Clan Gordon" was what is called a "turret ship." The turret ship was an invention of a quarter of a century ago. The ship was supposed to possess certain advantages.. Turret ships were not altogether a failure, for a considerable number were built, though even in their heyday the number on the seas was very small in relation to the whole volume of shipping. They got beyond the experimental stage in the same way as the aeroplane and the airship may now be said to have got beyond that stage. On the other hand, as I gather from the evidence, they never got beyond the experimental stage in the sense in which the aeroplane and the airship may still be said not to have got beyond it. The latter are normally safe and serviceable and have been used both in war and peace, but their action under special conditions is not yet fully understood and occasionally something unforeseen occurs. Up to a certain angle of inclination caused by list, the turret ship possesses a stronger righting force than a wall-sided ship. This is so far an advantage, but as I gather from the evidence in this case, this may prove—to use a phrase which is now almost juridical—"of the nature of a trap." A vessel may, in consequence either of its build or of its loading on a particular voyage, be either "cranky" or "stiff," *i.e.*, it may tend or not tend to list. Shipmasters test their ships and judge of their stability by observation of their conduct under certain conditions, both generally and on the particular voyage. But naturally they do not test their vessels by taking steps to induce an extreme list in order to see whether the vessel can recover from it. Now in the case of a wall-sided ship a righting force which exists with a list of ten degrees may be counted upon not only to persist but to increase up to a list of thirty degrees. In the case of a turret ship there is no such assurance. The righting force may rapidly diminish. Accordingly the behaviour of a turret ship under ordinary conditions may tend to induce an undue sense of security as to her stability under every condition that may reasonably be contemplated.

In regard to righting force I may here advert to what does not appear to be clearly explained in the evidence but what was conceded at the bar. There is a wide difference between righting force, according as the list is caused by a sudden and temporary impact, or by a constant tilting force. In the former case, although the curve of stability falls, there is an accumulation of resistance on righting force corresponding to the area of a triangle until the curve falls below the base line (subject only to certain limitations by reason of momentum which are not properly understood). In the latter case, that of a constant displacing force, the resistance begins to diminish the moment the summit of the curve is reached, and if the constant displacing force continues to subsist the vessel must continue to list further and further as the curve falls. Further—and this applies even where the original tilting force is dynamic and temporary—a persistent static tilting force caused by the movement of free water increases the more the vessel lists.

In 1909 the "Clan Ranald," a sister ship to the "Clan Gordon," capsized in fine weather under circumstances which a Court of Inquiry found not to be explained. This

circumstance induced Messrs Doxford, the builders of the "Clan Gordon," to make inquiry as regards the stability of these vessels. The result of this inquiry was the communication to the defenders by Messrs Doxford of "General Instructions as to Loading the s.s. 'Clan Gordon.'" A great deal has been said in this case as to the alleged ambiguity of these instructions. But the first article, at all events, is clear and explicit—"This vessel is not intended to be loaded down to her marks with a homogeneous cargo without water ballast."

In regard to this direction I make the following observations:—(1) This was sound. The "Clan Gordon" could not, as is now conceded, be safely loaded down to her marks with a homogeneous cargo without water ballast. (2) This was new to the defenders. Mr Barr, one of their directors, the registered manager of the "Clan Gordon," and defenders' leading witness, says—"Of course we consider that when we get vessels, we get these vessels which are sufficiently stable to carry homogeneous cargo without water ballast." (3) The instructions were rules for the "Clan Gordon" and similar vessels, not newly discovered rules of Messrs Doxford applicable to all vessels whether wall-sided or turret. This seems to have been assumed at the proof, and there is a lack of direct evidence on the point, but it seems to me to be clearly implied in the evidence of Mr Barr, the managing director of a great shipping line owning a large fleet of wall-sided vessels. According to him they were "utterly against all experience." Moreover, the defenders produced a list of voyages of turret ships purporting to show that it was the practice to carry such cargoes on these ships without water ballast. It cannot be suggested that this was because turret ships were deemed more stable than wall-sided ships. (4) The defender did not believe the information given, or take steps to verify it. Mr Barr says—"It was so utterly against all the experiences of the steamers which we ourselves had that it would certainly not appeal to us as a document that would be of any use to us or a serious document we need take serious notice of. . . . There was nothing, as I may say, to cause us to give this very serious consideration." (5) The defenders took no steps to communicate the information to Captain M'Lean either upon his appointment as master of the "Clan Gordon" or subsequently, or to ascertain that he had this information. (6) Captain M'Lean was not aware that the "Clan Gordon" could not safely be loaded down to her marks with a homogeneous cargo without water ballast.

In these circumstances I am of opinion that the capsizing of the vessel through the discharge of the water ballast and the loss of the cargo must be held to have been occasioned by an error on the part of the master "resulting from want of due diligence by the owner of the ship." I do not think that the defenders can be heard to urge that even if the captain had been in possession of this information he might have disbelieved or disregarded it.

I am unable to attach much weight to what both the defenders and Captain M'Lean attach importance to, as worthy to be set against any such information as was contained in the instructions, viz., experience in the working of the vessel. The righting power of a ship, under given conditions, at all possible angles of inclination, can be calculated with almost mathematical certainty. It is difficult to see how experience can be set against this. It would be quite different if the question were one such as labouring, or shipping seas, or quick response to the helm, or even minor "crankiness," which can be tested on every voyage. Righting power at a considerable angle of inclination could be tested only if the ship were either accidentally or deliberately exposed to extraordinary peril. This is demonstrated by the facts of the present case. It is now common ground that this vessel was unseaworthy without water ballast when loaded down to her marks with a homogeneous cargo, and that this is demonstrable by calculations. Yet the vessel had kept the sea without mishap for some twenty years. The most memorable case of a ship turning turtle was that of H.M.S. "Captain." It is said that she was allowed to sail before certain calculations were completed which would have demonstrated her instability. But had she made twenty voyages without mishap before the calculations were made, this would not, as it seems to me, have been an experience of the working of the vessel to justify the sending of her out on a twenty-first voyage when these calculations had shown her to be unseaworthy.

A good deal of the evidence concerns the question whether the instructions were intelligible. After studying the evidence, listening to the arguments and explanations of counsel, and carefully considering these instructions, I think I understand them and see how they could be reasonably applied. Whether an ordinary sea captain should have been expected to understand them and to be able to apply them I cannot say. But the engineer of the defenders' company ought to have been able to do so, and to communicate them in a form intelligible to the shipmasters. Whatever obscurity may lurk in certain parts of the instructions, I think there is no obscurity in the instruction that the ship must not be loaded down to her marks with a homogeneous cargo without water ballast.

A homogeneous cargo is a cargo of uniform weight and uniform density. By density is meant weight in relation to available space in the part of the ship where this cargo is stowed—lower holds or upper holds, or in this case, lower holds and 'tween-decks. Accordingly when the upper holds are only partially filled, the cargo, though homogeneous in the ordinary sense of being of uniform material, is not a homogeneous cargo. The density above is less than the density below. In the present case I think the cargo must be regarded as having been a homogeneous one under the instructions. It would be a coincidence which would rarely happen that a ship was brought exactly to her

marks just when the last available cubic foot of space in the upper holds had been filled. It would not be a reasonable application of the direction to hold it to be inapplicable wherever this position is not exactly reached however near the approximation. In the present case it appears to me that the approximation was so near that the instruction must be held to have been applicable without any necessity or justification for considering the more complicated rules applicable to a non-homogeneous cargo.

The defenders rely, though as it appeared to me somewhat half-heartedly, upon counsel given to the master by Mr Barthold, the commercial agent of the defenders at New York. Mr Barthold advised the master to take water ballast. He did not do so, however, in virtue of his knowledge of Messrs Doxford's instructions. Nor did he do so as an expert. On the contrary, as he himself says, he stated to the master it was not his knowledge but his ignorance of turret ships that caused him some anxiety. The master was under no obligation either to take Mr Barthold's instructions or to defer to his advice. I am of opinion, therefore, that the action of Mr Barthold does not absolve the defenders. There is indeed one aspect of the matter in which Mr Barthold's anxiety in view of the nature of the cargo suggests an argument adverse to the defenders. The master paid no heed to it as being a landsman's idea. It seems to me not unlikely that it might have reminded him of Messrs Doxford's warning if that document had ever been brought before him.

The broad view of the matter appears to me to be this. A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the "Clan Gordon" would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the "Clan Gordon."

Upon the question whether the defenders are entitled to the benefit of the statutory limitation of liability I agree with the Lord Ordinary.

Upon the whole matter I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be affirmed.

Their Lordships recalled the interlocutor of the Lord Ordinary and assoilzied the defenders from the conclusions of the summons.

Counsel for the Pursuers — Dean of Faculty (Sandeman, K.C.) — Normand. Agents—J. & J. Ross, W.S.

Counsel for the Defenders — Macmillan, K.C.—Jamieson. Agents—Webster, Will, & Company, W.S.

Friday, December 1.

FIRST DIVISION.

[Appeal from the Railway and Canal Commission.

CALEDONIAN RAILWAY COMPANY *v.* LORD ADVOCATE.

Railway — Annual Accounts — Lump-Sum Toll — Payments in respect of Running Powers — Whether to be Entered in Revenue Accounts among Items known as "Above the Line" — Railway Companies (Accounts and Returns) Act 1911 (1 *and* 2 *Geo. V, cap.* 34), *sec.* 1, *First Schedule No.* 8.

In account No. 8 of the Statutory Form of Accounts contained in the First Schedule to the Railway Companies (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34), the first seven items known as those "above the line" relate to revenue receipts and expenditure which are more or less affected by the varying volume of traffic. The remaining items grouped under the heading of "Miscellaneous receipts" and known as those "below the line" consist of items not affected by the varying conditions of traffic, such as rents from houses, hotels, and other rents, including "lump-sum tolls."

Under an agreement by which a railway company acquired running powers over a branch line belonging to another company, it was provided that in respect of the exercise of the said running powers the company acquiring them should pay to the other company a fixed toll of 1d. per ton on minerals and a fixed toll of 2d. per ton on other merchandise carried over the branch line or any part thereof, subject to the stipulation that the amount so payable in any year was not to be less than £3800. This sum having been paid for certain years in which the traffic was negligible, *held* that the payment was not a "lump-sum toll" within the meaning of Account No. 8, and that it therefore fell to be entered "above the line" in the account.

The Caledonian Railway Company presented an application to the Court of the Railway and Canal Commission, calling the Lord Advocate as representing the Ministry of Transport as *respondent*, for the determination of a difference which had arisen with reference to the amount of compensation payable to the applicants by the Government in respect of the latter having taken over the control of the applicants' railway at the outbreak of war on 4th August 1914.

The application raised several questions, but the argument in the appeal was limited to the question whether a sum of £3800, being a minimum sum payable yearly under an agreement by the North British Railway to the applicants in respect of running powers over part of the applicants' lines, fell to be entered under one or other of the