bility of liability on their part, apply to Parliament to have special provisions inserted for their protection. That application is occasionally complied with, and then the argument is raised which their Lordships have heard to-day—namely that anybody who is not included in the enumeration of the particular persons so inserted must be taken to be excluded by the operation of the statute from protection just because they are not included and others are. The doctrine applicable to all such cases is that a great many things are put into a statute *ex abundanti cautelâ*, and it is not to be assumed that anybody not specifically included is for that reason alone excluded from the protection of the statute. Their Lordships, however, state this general position rather in view of the construction of statutes in general than as being specially relevant to this particular case. . . .

Appeal dismissed.

Counsel for the Appellant — W. Wills. Agents—Burton, Yeates, & Hart, Solicitors.

Counsel for the Respondents—C. M. Bailhache. Agents—Lowless & Co., Solicitors.

HOUSE OF LORDS.

Monday, May 21.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, and Atkinson.)

BOSTON FRUIT COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY.

(On Appeal from the Court of Appeal in England.)

Insurance — Marine Insurance — Policy Effected by Owner of Ship—Right of Charterer to Benefit of Policy—Demise of Ship.

The owners of a vessel effected a policy of insurance on her, the policy being in common form and purporting to be made on the proposal of certain insurance brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." The policy contained a collision clause. The vessel was chartered under a charter-party amounting to a demise of the ship during the currency of the charter to the charterers. Owing to her fault a collision took place with another vessel, the damages for which were paid by the charterers, who afterwards brought this action to recover them from the insurance company under the policy effected by the owners. There was no evidence of intention on the part of the owners to protect the charterers by insurance unless such intention could be inferred from the mere fact of the existence of the policy taken in connection with the language of the charter of which only the following clauses bore on the question, viz., clause 3, which declared that the charterers should pay for certain specified charges "and all other charges whatsoever" except repairs to hull and machinery and anything appertaining to keep the ship in working order; clause 17—"It is understood in event of steamer from above causes (stress of weather, etc.) putting into any port or ports other than those to which she is bound that the charterers are covered as to expenses as the owners are by their insurance"; clause 22—"That the owners shall pay for the insurance of the vessel."

Held that the charterers could not recover from the insurance company, there being no evidence that their interest was covered by the policy.

This was an appeal from a judgment of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.) affirming a judgment of Bigham, J.

The facts of the case appear sufficiently from the opinions of their Lordships *infra*, and in particular from the narrative at the commencement of the opinion of Lord Macnaghten.

Lord Chancellor (Loreburn)—In this case the charterers of the steamship "Barnstable," who navigated her under a charter-party amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which the "Barnstaple" had come into collision. The question now is whether the charterers can recover against the defendant underwriters on a policy, not effected by themselves but effected by brokers, instructed by the owners, which includes risk of having to pay damages arising from collision, and contains a description of the assured wide enough to cover the plaintiffs or any others concerned in interest. I have come to the same conclusion as did the Court of Appeal that this question must be answered in the negative. The substantial contentions of the plaintiffs are as follows—They say that being within the description they are entitled to the benefit of the policy because the owners were bound to insure and so must be taken to have insured charterers' risks by virtue of clause 22 of the charter-party. That clause provides "that the owners shall pay for the insurance on the vessel." In my opinion these words do not so bind the owners, and if an action were brought on such a clause for breach of a contract to insure it must fail. If what is suggested had been meant nothing would have been easier than to say it. Next the plaintiffs urge that they are entitled to the benefit of the policy because it must be taken to mean what it says, viz., that all "to whom the subject-matter of this policy does, may, or shall appertain in part or in

all" are insured. Now I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, the courts have disallowed his claim though he might be within the description. In the present case the plaintiffs and the assignees of the owners agreed in the course of the American litigation that the former had no insurance on the "Barnstaple," and the litigation was for a long time conducted by the plaintiffs on the footing that the owners intended to insure their own interest and no other. In reality this is the only evidence which we have in regard to intention. It appears conclusive to show that this appeal must fail.

LORD MACNAGHTEN — In this case an American corporation, who were the charterers of the British steamship "Barnstaple" under a time charter, claim the benefit of a policy effected by the owners in England on the hull and machinery of the vessel. The policy was in a common form and purported to be made on the proposal of certain insurance brokers "as well in their own names as for and in the name and names of all and every other person or persons" to whom the subject-matter of the policy did, might, or should appertain in part or in all. There was a running-down clause attached to the policy. The "Barnstaple," owing to the fault of the persons in charge of the navigation, who were the servants of the charterers, ran down and sank another vessel. This disaster gave rise to protracted litigation in America. The "Barnstaple" was condemned in damages, and ultimately it was decided that as between the charterers and the owners the loss must fall on the charterers. Having discharged their liability in respect of the collision, the charterers sue the insurance company in this country. Their contention is that the charter imposed upon the owners an obligation to insure on behalf of the charterers as well as on their own behalf, or, in the alternative, that the owners were authorised to insure, and did in fact insure, on behalf of the charterers, or at least in terms wide enough to cover them, and that they had duly ratified and adopted the contract. There is not the slightest evidence of intention on the part of the owners to protect the charterers by insurance, unless such intention can be inferred from the mere fact of the existence of the policy in question taken in connection with the language of the charter. The main part of the argument was addressed to the construction of the charter. There are only three clauses which can have any bearing upon the question. They are clause 3, clause 17, and clause 22. Clause 3 declares that the charterers shall provide and pay for certain specified charges "and all other charges whatsoever" except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 17, after declaring among other things that should the vessel be driven into port or to anchorage by stress of weather the detention or loss of time should fall on the charterers, ends with this statement—"It is understood in event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." Up to this point there is no reference to insurance to be found in the charter. The next and only other mention of insurance is in clause 22, in the following words—"That the owners shall pay for the insurance on the vessel." Clause 3, if unexplained or unqualified, might possibly have given occasion for an argument to the effect that the expense of insurance was to be borne by the charterers. But clause 22 leaves no room for such a contention. And indeed, as was suggested in the course of the argument, the clause may have been inserted in order to put that matter beyond question. It will be observed that clause 22 does not indicate the amount to be insured or specify the risks to be covered. It merely says that the owners shall pay for the insurance on the vessel. It imposes no obligation on the owners which the charterers could enforce. The meaning, therefore, I think, must be simply this—that if the owners choose to insure they must pay the premiums without recourse to the charterers. The owners are not to trouble themselves about the charterers at all. The insurance contemplated, if effected, is no concern of the charterers. Now, if the matter rested there, it seems to me that the conclusion must be that when the owners proposed to insure, acting as they did without any communication with the charterers, the charterers cannot be regarded as persons within the contemplation of the proposal. They were not persons intended to be covered by the policy or persons for whose benefit the insurance was proposed. They were strangers to the contract altogether. Clause 17 is obscure. Vaughan Williams (L.J.) seems to think that under certain circumstances it might give the charterers the benefit of an insurance made by the owners. I cannot think that that can be the meaning. I prefer the suggestion of Mr Hamilton, that what was meant was only this — that if the charterers should desire protection against the risks contemplated they were to look out for themselves and themselves alone, just as the owners were to do by their insurance on the vessel. If this be the true meaning it would strengthen the view which I have already indicated as the result of clause 22, that the insurance on the vessel was intended to be for the benefit of the insuring owners and not in any event or under any circumstances for the benefit of the charterers. I am therefore of opinion, notwithstanding the very able argument of Mr Carver and Mr Llewelyn Davies, that the order appealed from is right, and that the appeal should be dismissed with costs.

LORD ROBERTSON—I concur.

LORD ATKINSON—I concur in the conclusion that the judgment of the Court of Appeal should be upheld and this appeal dismissed with costs. I think that clauses 17 and 22 of the charter-party, taken singly or together, do not on their true construction amount to a contract between the owners and charterers that the former should insure the ship, nor do they, in my opinion, impose any duty or obligation on the owners so to do, or constitute or appoint them the agents of the charterers for that purpose. I am further of opinion that whether Messrs Craggs & Son intended to insure on behalf of the appellants or not, or whether or not Messrs I. Holman & Son professed or intended to insure on their (the appellants) behalf and as their agents, the appellants with full knowledge of the facts repudiated in the American proceedings the authority of the persons who, as they now contend, acted as their agents, and disclaimed the contract those alleged agents entered into. In the American proceedings a statement of facts was agreed upon between the appellants and the owners. Par. 8 of this statement contains the following allegation:—"The appellants had no insurance on the said steamship." The excuse now given for this allegation is that at the time at which it was made the appellants were contesting their liability for the damages caused to another vessel by the negligent navigation of the "Barnstaple," but if their present contention be well founded they were interested in other risks different from and in addition to the risk of having to pay damages for injury caused to other vessels by the negligent navigation of the vessel which they had chartered. And the contention that unless they were held liable in damages for this collision they had no interest in the policy of assurance, and that while that liability was undetermined this allegation in par. 8 could not be treated as a repudiation of the authority of their agents, or a reprobation of the contract of assurance which prevents them now from approbating it, cannot, in my opinion, be sustained. At the time at which this statement of facts was agreed upon the appellants knew all the facts. They insisted, no doubt, upon a construction of the charter party which would have protected them from liability for the damages then sued for; but the fact that the question of construction was still *sub judice*, and that they did not know that their contention would fail, or that they would be held liable to pay these damages, may show a want of appreciation of the soundness of a legal argument or the correctness of a legal opinion, but does not, in my opinion, amount to such ignorance of fact as will entitle a party to escape from the consequences of an election between two remedies made by him while that ignorance continued. I think that the allegation in this par. 8 must be treated as an unequivocal expression on the part of the appellants of their determination not to adopt or ratify or be bound by the contract of insurance which had been entered into, and that though made in a suit between the appellant and a third party it is upon the authority of *Clough* v. *London and North-Western Railway Company* (25 L. T. Rep. 708; L. Rep. 7 Ex. 26) binding in the present case upon those who made it. Upon the true construction of the general clause in the policy of marine insurance so much discussed, I express no opinion. Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify the contract contained in it and take advantage of that contract, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured, though that intention was never communicated to the underwriter. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted, & Company* v. *Durant* (84 L. T. Rep. 777, (1901) A.C. 240) or whether the rule of construction which was adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract, namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract. Having come to the conclusion which I have mentioned on other points of the case, it is unnecessary for the purposes of this appeal that I should express any opinion upon this point, and I wish to hold myself entirely free, should the necessity arise to reconsider it upon a future occasion.

Appeal dismissed.

Counsel for the Appellants—Carver, K.C. —A. Llewelyn Davies. Agents—Biddle, Thorne, Welsford, & Sidgwick, Solicitors.

Counsel for the Respondents—Scrutton, K.C—J. A. Hamilton, K.C.—Maurice Hill. Agents—Waltons, Johnson, Bubb, & Whatton, Solicitors.

PRIVY COUNCIL.

Thursday, May 24.

(Present—The Lord Chancellor (Loreburn), Lords Davey, Dunedin, and Atkinson, and Sir Arthur Wilson.)

COMMISSIONER OF PUBLIC WORKS *v.* HILLS.

(ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.)

Contract—Breach—Penalty or Liquidated Damages—Criterion.

"The criterion of whether a sum, be it called penalty or damages, is truly liquidated damages, and as such not to