

contracting out of the Act. Subject to a saving which is not applicable here "this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The existence of the agreement therefore is no impediment to a resort to the provisions of the Act to ascertain what is the statutory weekly payment, and to an application for redemption of all liability therefor. This may, I think, take the form either of an application for review under Schedule 1, clause 16, or of an application to fix the statutory weekly payment on the footing that there is no such agreement as that of October 1913. The agreement is one which is obviously incapable of being enforced according to its terms by either party. If the employers are minded to discontinue it and to ask for a decision upon their statutory liability they are at liberty to do so. When the statutory weekly payment has been ascertained there may be no difficulty in making an order for redemption.

From the foregoing it follows that the order of the County Court Judge was, in my opinion, erroneous, for he redeemed part and preserved the rest. The Court of Appeal set aside that order, and while indicating that it was open to the workman (not the employer) to apply for review under clause 16, remitted the matter to the County Court Judge to determine whether the incapacity of the workman was "permanent" and "to make an order accordingly final and complete." Their order therefore proceeds upon the footing that although the workman might apply under clause 16 for review, it was competent to the Judge to redeem the agreement as it stands. For the reason I have given I think this also is erroneous.

In my judgment both orders below should be discharged and the matter remitted to the County Court Judge. If the employer proceeds with the application as it stands and without making any application to review or to fix the statutory compensation, the Judge will no doubt deal with it accordingly. If either employer or workman makes some application such as above a different result may ensue. It will be for the County Court Judge to decide what the statutory compensation is, and whether in the language of clause 17 "Any weekly payment has been continued for not less than six months." Neither question arises upon this appeal. As to the latter I expressly reserve my opinion upon it, and guard myself by saying that I must not be taken to assent to the Lord Chancellor's expression of opinion that "the redemption is to be of a weekly sum which has been actually paid for not less than six months." The proceedings up to the present time seem to me to have been misconceived. As regards the costs, I agree with the order proposed by the Lord Chancellor, including the order as to costs.

I have also purposely abstained from saying anything as to the meaning of "permanent." The question does not at present arise for decision.

Their Lordships set aside the orders of

the Court of Appeal and the County Court Judge, and remitted back to the latter, with expenses to appellant.

Counsel for the Appellant—D. Hogg, K.C.—Shakespeare. Agents—Corbin, Greener, & Cook, for Raley & Sons, Barnsley, Solicitors.

Counsel for the Respondents—Bairstow, K.C.—A. Neilson. Agents—Barlow, Barlow, & Lyde, for Wilmshurst & Stones, Huddersfield, Solicitors.

## HOUSE OF LORDS.

Monday, July 29, 1918.

(Before the Lord Chancellor (Finlay),  
Viscount Haldane, Lords Sumner, Par-  
moor, and Wrenbury.)

BRADLEY AND OTHERS *v.* NEWSUM,  
SONS, & COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL  
IN ENGLAND.)

*Ship — Freight — Whether Due when the  
Crew had Abandoned the Ship under  
Compulsion by the King's Enemies.*

The appellants, owners of the ship "J.," had contracted to deliver at Hull a cargo belonging to the respondents. Off the Firth of Forth the ship was torpedoed by an enemy submarine, and the master and crew were compelled to take to their boats under threat of violence. Further explosions were heard on board, and the ship was left apparently in a sinking state. The crew were picked up and taken to Aberdeen, where the master announced that his ship had been sunk. In fact, however, the ship had not sunk and was towed to Leith by salvors. Meantime the appellants' agents had advised the respondents of the loss of ship and cargo. The respondents having heard of the arrival of the ship at Leith claimed to elect to take possession of their cargo at Leith and that no freight was due. The action was brought by the respondents for delivery of the cargo.

*Held (dis. Lord Sumner)* that the ship had been abandoned in circumstances which indicated no intention not to perform the contract, and that the appellants' agents' letter did not amount to notice of abandonment of the contract so as to entitle the respondents to receive the cargo free of freight.

The facts appear from their Lordships' considered judgment:—

LORD CHANCELLOR (FINLAY)—This case relates to a contract for the carriage of cargo of timber from Archangel to Hull on the steamship "Jupiter," and the question is whether the cargo-owner, the plaintiff of the action and now respondent, was entitled without payment of freight to demand delivery of the timber at Leith, to which place the vessel had been brought by salvors. The claim rested on the contention that the

vessel was "derelict" when she was picked up by salvors, and that this amounted to an abandonment by the appellant of the contract of carriage which entitled the cargo-owner to take possession of the goods at Leith.

The cargo owner brought the action by writ dated 25th October 1916, claiming a declaration that he was entitled to such delivery. The points of claim alleged that the "Jupiter" while proceeding on the voyage was attacked on the 7th October by enemy submarines, and that the master and crew abandoned the vessel, which was picked up by vessels of H. M. Patrol Flotilla and brought into Leith, where she was beached and placed in the hands of the Receiver of Wrecks. In the points of defence the defendants denied the abandonment and pleaded that the crew was compelled to leave the vessel by an enemy submarine, and the defendants counter-claimed for the freight.

The respondents had chartered the "Jupiter," which belongs to the appellant, by the charter-party of the 18th July 1916 for the carriage from Archangel to Hull of a cargo of deal battens and other timber at agreed rates. By the 7th clause the Act of God, the King's enemies, restraints of princes and rulers, and the perils of the seas were excepted. Bills of lading were given, and these are held by the respondents.

What happened is best stated in the words of the protest by the master of the "Jupiter" and others, dated 11th October 1916:—"That after discharging the pilot and tug the vessel proceeded without the occurrence of anything worthy of note until 3:40 p.m. on the 7th October instant, when appearers' vessel was crossing the Firth of Forth, with the Longstone Lighthouse bearing S. by W. about 40 miles distant. Whilst following the route laid down by the Admiralty appearer, the master suddenly saw a submarine rise out of the water on his vessel's starboard side and about a quarter of a mile distant. The submarine at once fired a blank shot over appearers' vessel, followed immediately afterwards by two more live shots forward and aft of the appearers' vessel. The submarine then signalled to appearers to abandon their ship. Seeing no possible chance of escape, appearer, the master, at once ordered the crew to take to the boats, and the submarine signalled for these to go on her. On getting near the commander of the submarine asked appearer, the master, for the ship's papers, but was told they were still on board the vessel. The commander also demanded from the master the name of the vessel, to where she belonged, her registered tonnage, and what their position then was, which information was given by the master. Appearers' second boat, which contained the mate and second engineer, was then ordered alongside the submarine and the engineer was taken on board. Four of the Germans then proceeded to appearers' vessel in the mate's boat, taking the mate with them, and remained aboard about ten minutes, where they took possession of the ship's papers, forcing the mate to show them these with threats of loaded revolvers, and they then

returned to the submarine. Shortly afterwards appearer, the master, heard an explosion aboard his vessel, which had previously had a strong list to port, and which after the explosion took a strong list to starboard. The submarine subsequently took appearers' two boats to tow and towed them in a westerly direction for about five miles, when they were cast adrift, and during the towage appearers heard further explosions aboard their vessel, of which they lost sight in the gathering darkness. At 7:30 p.m. appearers were picked up by the trawler 'Ayacanora' of North Shields (No. 72), which vessel took appearers to Aberdeen, where they arrived at 10:30 a.m. on Sunday morning the 8th October, and where appearer, the master, at once reported the matter to the naval authorities, and appearer, the master, saith that as soon as he sighted the submarine he destroyed his secret instructions by tearing them up and throwing the pieces overboard; and appearers lastly say that they have subsequently heard that the vessel, floating on her cargo, has been picked up and beached near Newhaven."

The master was under the impression that the steamship had sunk, and on his arrival at Aberdeen on the morning of the 8th October telegraphed to Mr Bradley, "Ship sunk yesterday—submarine," and repeated this in his letter of that day to Mr Bradley. By Mr Bradley's instructions his agents, Messrs Bordewich, sent on the 9th October the following letter:—"Messrs N. Newsum, Sons, & Co., Limited, Hull.—Dear Sirs—S.S. 'Jupiter.'—We have the following letter from owner of this steamer to-day, which kindly note:—'It is with very great regret I advise you of the loss of my s.s. 'Jupiter,' which steamer was sunk by enemy submarine on Saturday last. The crew are all landed safely. Will you kindly advise charterers and oblige?'—Yours faithfully, (Signed) P. R. BORDEWICH & Co."

At 2 a.m. on Wednesday, the 11th October, the "Jupiter," which had been picked up by a Government patrol boat, was beached at Newhaven, a village within the limits of the port of Leith. The appellants were informed of this by a telephonic message from their agents at Leith, Messrs Furness, Withy, & Company, which they received at 10:35 a.m. on the morning of the same day (11th October). Mr Bradley requested Messrs Furness to protect his interests at Leith, and informed them that he would arrive that night. He left Hull by train at 5:5 p.m. and arrived at Leith after 11 p.m. Before he left Hull he had received from the respondents' solicitors the following telegram, dated 11th October 1916:—" 'Jupiter' we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please note."

The respondents' solicitors on the same day also sent to the Receiver of Wrecks at Leith the following telegram:—"Steamer 'Jupiter' we represent cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with

our sanction please do anything necessary protect property for our clients."

The shipowner asserted that he was entitled to take the cargo on to Hull, thus earning his freight, which would amount to more than £14,000, while the cargo-owners insisted on their right to take possession at Leith without payment of any freight as the voyage had not been completed. On the 26th October, the day after the writ in the action was issued, an agreement was entered into by a memorandum of that date arranging for the carriage to Hull of the cargo, reserving the question of liability for payment of freight to be decided in the action. The cargo was accordingly carried to Hull and delivered there.

The question now is whether freight was payable. Sankey, J., held that the case came within the authority of *The "Cito,"* 7 P.D. 5, and *The "Arno,"* 72 L.T.R. 621. He said that the abandonment of a vessel by its crew during a voyage without any intention to re-take possession gives the owner of the cargo the right to treat the contract of affreightment as at an end, and that the cargo-owners had exercised this right before the shipowner resumed possession. He summed up his view of the case thus—"In my view there was in fact an abandonment of the vessel, and there was on the part of the servants of the owner an act done clearly indicating their intention not to carry out the contract. In other words, there was the predicament mentioned by Smith, L.J., in *The Arno* of a ship left derelict in mid-ocean, and abandoned by its master and crew." His Lordship therefore gave judgment for the plaintiff for the relief claimed. In view of a possible appeal he found that the amount of freight, if payable, would be £14,050, 2s. 9d.

The shipowner appealed. The Court of Appeal were divided in opinion. The majority, Pickford, L.J., and Bankes, L.J., affirmed the judgment of Sankey, J., but on a different ground. They held that the letter of the 9th October 1916, from the shipowners' agent to the cargo owners, advising them of the loss of the steamship "Jupiter" amounted to an intimation that the shipowner was not in a position to carry out the contract, and justified the cargo owners in treating the contract of affreightment as at an end and in claiming the delivery of the cargo at Leith without payment of any freight. Sargant, J., differed. He held that the crew did not "abandon" the ship by quitting it under the compulsion of the enemy submarine, and that the communication of the supposed fact of the loss of the vessel did not amount to an intimation of the shipowners' intention not to carry out the contract. In accordance with the opinion of the majority the appeal was dismissed, with costs. It is from this decision that the present appeal has been brought to your Lordships' House by the shipowners.

The effect of the decisions by Sir Robert Phillimore in *The Kathleen*, L.R., 4 A. & E. 269, and of the Court of Appeal in *The Cito* and *The Arno*, is that if a ship be abandoned by her master and crew during a voyage the cargo owner may elect

to treat the contract of affreightment as at an end and claim delivery of his goods without payment of any freight. I agree with the principle of law laid down in these cases. This principle would apply to the present case if quitting the vessel under the circumstances amounted to an abandonment within the meaning of the rule as laid down in these cases. For this purpose there must be an abandonment without any intention to retake possession, and it must be the act of the master and crew. The test is sometimes said to be whether the vessel has become a derelict. This is merely another way of stating the same question. The word "derelict" is sometimes loosely used as denoting a vessel drifting about at sea without any crew on board, but the legal sense of the term is that this state of things must have been brought about by the abandonment of the vessel by the master and crew. A vessel would not be a derelict if the master and all the crew had been swept off the deck by a heavy sea and drowned, or if all on board were dead of the plague. Sir W. Scott laid it down in *The Aquila*, 1798, 1 C.P. 40, that it is sufficient to constitute a derelict if there has been abandonment at sea by the master and crew without hope of recovery. There must be no *spes recuperandi* and no *animus revertendi* (see *The Zeta*, L.R., 5 A. & E. 466), and this, as was said by Dr Lushington in *The Sarah Bell*, 1845, 4 Notes of Cases, 144, at p. 146, depends on the state of mind of the master and crew at the time when they quitted the vessel. If this be once ascertained a subsequent change of intention on their part and effort to save the vessel are immaterial. The *animus derelinquendi* is essential to constitute a derelict—*The John and Jane*, 1802, 4 C.R. 216. As was said by Sir Barnes Peacock in delivering the judgment of the Judicial Committee in *Cosman v. West*, 13 A.C. 160, at p. 180, the term "derelict" is legally applicable to a ship which is abandoned and deserted at sea by the master and crew without any intention of returning to her.

In *The Fenix* (1855, Swabey, 13) the crew of one of two vessels in collision jumped on to the other, and Dr Lushington pointed out that the salvors were not entitled to such a proportion as is usually given in cases of derelicts, because the vessel was not abandoned in consequence "of being improperly navigated, or because she was not seaworthy. It was merely from a sense of imminent danger, not knowing what the consequence of the collision might be. It was an abandonment for the security of the person, accompanied with an intention of returning provided that life should no longer be in danger. I cannot, therefore," he said, "consider this case to be placed in the degree of ordinary cases of derelict." The whole of this subject was considered in the High Court of Admiralty in Ireland in *The Cosmopolitan* (1848, 6 Notes of Cases, Sup. XVII). The circumstances of that case were similar to those of the *Fenix*, and the learned judge—Dr Stock—made an elaborate review of the authorities, and said, "The issue is *quo animo* the act of quitting was done." On the question of

derelict or not derelict, everything depends on the state of mind of the master and crew when they quit the vessel, and their state of mind may of course be inferred from the surrounding circumstances.

Dr. Lushington remarked in "*The Florence*," 1852, 16 Jur. N.S. 572, that the abandonment for the purpose of constituting a case of derelict must be by order of the master in consequence of danger by reason of damage to the ship and the state of the elements, and went on to say the master is, as I conceive, the proper person to form a judgment whether abandonment is absolutely necessary or not. He is the person whom the owners have voluntarily entrusted with the command of their vessel and the crew and the property embarked in it. They must be taken to have deemed him competent for the discharge of the duties committed to him, and especially that he would not without adequate cause leave to destruction their property." The question is not of the intention of the owner personally. In the immense majority of cases he does not and cannot know anything of the abandonment until after it has been effected but he acts in this matter through the master as his agent. The effect upon the contract of affreightment of the final abandonment of a vessel at sea is only an example of the general law of contract by which if one contracting party puts it out of his power to carry out the contract the other may treat the contract as at an end.

The question of what constitutes a derelict has very commonly arisen when the scale of salvage was under consideration, as more liberal remuneration was usually given if the vessel was a derelict, but it has also arisen when the point was whether the crew of the vessel were entitled to salvage remuneration in afterwards saving her, on the ground that their contract of service was brought to an end when the vessel became derelict—see "*The Florence*."

The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control. In "*The Danzig Packet*," 1837, 3 Hagg. Ad. R. 383, at p. 385, Sir John Nicholl, in dealing with the misconduct of salvors, who had attempted to exclude other salvors, said, "It is different in the case of a derelict. There the first occupant has a vested interest and a right to exclude possession if alone he can save the property. He takes possession indeed for the benefit of the Crown in the first instance, but subject to a liberal remuneration." In the marginal note to this passage there are inserted after the words "of the Crown," the words "or owners." The question of property in a derelict was discussed in "*The Cito*," and Brett, L.J., said that he was not prepared to accept the proposition that abandonment constituting a derelict, together with a subsequent seizure by anyone who found it, would make the ship a droit of Admiralty, and alter the property. It was stated by the King's Advocate in 1 Hagg. Ad. R. at p. 384, in the case of *Rex v. Property Derelict*, that the owner

would be entitled if he came in in time, otherwise the Crown, but this topic is, of course, quite immaterial for the purposes of the present case.

The crucial question is this—Was this vessel when she was picked up by salvors a derelict in the legal sense of the term, or in other words, had the master and crew abandoned her without any intention of returning to her and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene and had driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain. I entirely agree with Sargant, J.'s, observations on this part of the case. The physical act of leaving the vessel is only one feature in such a case; another and essential feature in order to make it a case of derelict is the state of mind of the captain and crew when they left. The question *quo animo* is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict. The "*Kathleen*," "*Cito*," and "*Arno*" appear to me to have no application. The case is merely one of temporary interruption of the voyage by the action of an enemy submarine, and this afforded no ground for the claim of the cargo owners to resume possession of the goods at Leith when the greater part of the voyage had been completed. The shipowner was ready and willing to carry the goods on to Hull and was entitled to do so.

The contention that the communication to the cargo owner of the erroneous information as to the loss of the ship amounted to abandonment of the contract of carriage is not sustainable. It was a very proper thing to convey this information to the cargo owners in order that they might take any action which the fact, if it really had occurred, would render expedient in their interests. I cannot see how it can possibly be considered as an intimation that the shipowner abandoned the contract of carriage whether the information was true or not.

For these reasons I think that the appeal should be allowed and judgment entered for the appellants, with costs here and below.

VISCOUNT HALDANE—This is an appeal from a judgment of the Court of Appeal (Pickford and Bankes, L.J.J., Sargant, J., dissenting) which affirmed a judgment of Sankey, J. The question raised was whether the respondents, the charterers of the steamship "*Jupiter*," were entitled to claim deli-

very of the cargo (which consisted of timber) at Leith, not being the port of destination, free of freight. The voyage contracted for with the appellants, the owners of the steamer, was to be from Archangel to Hull, where the cargo should have been delivered, and the matter of dispute was as to whether the appellants through their master had abandoned possession in the open sea of the steamer and cargo in such a way that the respondents were entitled to resume possession of their cargo at Leith where they found it, free of the freight, which would have amounted to £14,050, 2s.

The charter-party was dated 18th July 1916. It contained an exceptions clause which included in its terms the acts of the King's enemies, restraints of princes, perils of the seas, and other matters, even when occasioned by the negligence or error of the master. The cargo of timber was loaded at Archangel under several bills of lading, all in the same form and with the same exceptions as in the charter-party. The steamer started from Archangel on 25th September 1916 on the voyage. All went well until Saturday, 7th October, when she was crossing the Firth of Forth on her way to Hull. As she was crossing the Firth a German submarine attacked her. The submarine fired on the "Jupiter" and signalled to her crew to quit her. The master seeing no chance of escape ordered the crew into the boats. The submarine then signalled for the boats to come to her, and finally the mate's boat was ordered to lie alongside the submarine. Four armed Germans got into her and went back, taking the mate with them, to the "Jupiter," and there by threatening him with loaded revolvers compelled the mate to find and hand them the ship's papers. The Germans then went below and placed bombs in her and opened the sea connections. They then returned to the submarine. A little later an explosion on board the "Jupiter" was heard and she was seen to take a list to starboard. The submarine then took the steamer's boats in tow and towed them towards the coast of Scotland for about five miles. During this towage further explosions were heard by the master to take place on board the "Jupiter," but it became so dark that he could not see her any more. The submarine after towing the boats for five miles finally cast them off, and the master and crew were later on picked up by a trawler and taken to Aberdeen, where they arrived at 10:30 on Sunday morning the 8th October, and at once reported what had happened to the naval authorities. The master was under the impression that the "Jupiter" had been sunk, and telegraphed to the owners to that effect about noon on the Sunday. In the evening he heard that the "Jupiter" was afloat and in tow, but he appears to have been doubtful whether she could actually be saved.

On receipt of the telegram from the master the appellants instructed their brokers to inform the respondents of their news, and the brokers on Monday the 9th October sent to the respondents a copy of a letter which they had that day received from the appellants—"It is with very great

regret that I advise you of the loss of my s.s. 'Jupiter,' which steamer was sunk by enemy submarine on Saturday last. The crew have all been safely landed. Will you kindly advise charterers and oblige."

In fact the "Jupiter" had not been sunk. Her cargo was a buoyant one, and she remained afloat. Salvors got hold of her, and she was brought into Newhaven, close to Leith, on the night of the Tuesday or in the early morning of the Wednesday. On the Wednesday, at 10:35 a.m., Mr Bradley, who is one of the appellant owners, was informed by telephone by his agents at Leith that the "Jupiter" was afloat and had been brought in, and he asked them to protect his interests and said that he would come to Leith that evening. This he did. Just before starting, at 5 p.m., he received a telegram from the respondents' solicitors in these terms—" 'Jupiter,' we represent cargo of this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying." The respondents' solicitors also telegraphed in similar terms to the Receiver of Wrecks at Leith, requesting him further to do what was necessary to protect their clients' property.

It will be observed that the telegram from the respondents' solicitors to the appellant Bradley is based on the assertion that the steamer had been derelict. The real question is whether she was so. For the appellant Bradley went to Leith at once, and finally, on the footing that it was to be without prejudice to any of his rights, got hold of the steamer and navigated her to Hull, where the cargo of timber was landed.

What we have to consider is whether the steamer was really abandoned so as to become derelict and no longer possessed or owned by the appellants. If this was so, the contract was abandoned with the vessel, and the cargo owners were entitled to take possession of the cargo if they could, and free of freight. If the steamer had sunk and the cargo had somehow floated independently of her the result would have been the same. The physical fact of the actual loss of the steamer which was to have made the voyage would have imported the loss of all title to claim on the footing that the contract had been carried out. But the steamer was in fact not lost, and the question therefore is whether she was abandoned, so that the same result followed from her having ceased to be in point of law any longer the possession or property of the appellants. It will be convenient to consider this question in the first place as one of principle, before referring to authorities. I think that the letter of the 9th October 1916, sent by the appellants' brokers to the respondents, did not convey any intimation of intention on the part of the appellants to abandon their steamer if it had not been sunk. The intimation was merely one of their belief that she was sunk, and this belief was founded on what proved in the result to have been a mistake of fact. There was nothing in the letter which warranted the statement made by the respondents

through their solicitors in their telegram of the 11th when they had ascertained the truth, that the steamer not having been sunk but having been brought into Leith, the owners had abandoned her. If this be so, it follows that the foundation of the reasoning of Sankey, J., in his judgment is unsound. He held that there was an abandonment and that there was therefore a repudiation of the contract. But I am unable to find in the circumstances any evidence disclosing the element of intention in cases so essential to the application of the doctrine of abandonment where there has been no actual loss. The master and crew left the steamer not of their own volition but under duress, being forced to do so. As the result they cannot be taken to have chosen to repudiate their obligation to carry any more than they can be taken to have chosen to abandon the vessel. The fact of having been forced away from her is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them. I think there is confusion in the judgment of the Courts below between a being parted from the vessel by force of arms and a quitting of it as an act of free will. No doubt if they had quitted it because they desired to make sure of saving themselves from being drowned if she went down, that would have been an act to the performance of which they would have been moved by a motive none the less that it was one of the most potent. It would have been an act of volition, just as on the other hand it is plainly an act of volition when men elect to perish with a war vessel instead of being taken prisoners and saved. But in this case I am of opinion that there was no act on the part of the master and crew which the law can treat as one of free choice. They were not bound to choose to resist in vain, and they did not do so.

Once reached, this conclusion appears to me to be fatal to the similar reasoning which prevails with the majority in the Court of Appeal. I agree with Sargent, J., in thinking that the vessel was neither lost in fact nor was the subject of any intention to abandon her if she should not prove to be lost. There was no such intention indicated either by the owners or by the master and crew. All of them were for a time under the mistaken belief of facts that the vessel had been lost, but there was no more than this belief with the bare implications dependent on it.

Apart from the possible result of authority I should have thought that these considerations were fatal to the conclusions reached by Pickford and Bankes, L.J.J. But those learned judges were of opinion that they were bound to hold as they did because of the decided cases, and particularly by the decisions in "*The Cito*," 7 P.D. 5, and "*The Arno*," 72 L.T.R. 621. Now when I look at these cases I find in them mere exemplifications of a wider principle which seems to me not to apply here, the general principle laid down by Lord Campbell, L.C.J. in *Hochster v. De la Tour* (2 Ell.

& Bl. 678). There the defendant had bound himself to employ the plaintiff as courier from a date subsequent to that of the writ. The breach alleged was that before the day for the commencement of the employment the defendant had intimated a refusal to carry out the agreement. The jury found for the plaintiff, and there was a motion in arrest of judgment or for a non-suit. The defendant contended that there could be no breach until the day for performance, which had not arrived when the action was commenced, and that both parties remained bound. But the Court of Queen's Bench held that, both on principle and on authority, the parties were from the time of making the agreement engaged each with the other, and that it was a breach of an implied contract if either of them renounced the engagement. Otherwise if the plaintiff had no remedy unless he continued to treat this contract as in force, he could not enter into any other employment which would prevent him from being bound to performance when the due date should arrive, and this would merely tend to increase the damages. He ought therefore to be held as at liberty to rely on the defendant's assertion of intention to treat their obligation as altogether at an end, and the defendant should not be permitted to take this assertion back. The repudiation in advance therefore entitled the plaintiff to say that there had been a breach of contract. The principle laid down in this judgment has often been followed, and is undoubtedly right. I think it explains and is the foundation of the decisions on abandonment of contracts to carry at sea when there has been no actual loss of the vessel.

In the case of "*The Kathleen*," L.R., 4 A. and E. 269, a barque laden with cargo shipped in America for Bremen as the port of destination was run into in the Channel and in consequence abandoned. It was held that the abandonment put an end to the contract to pay freight, notwithstanding that the barque and cargo were ultimately salvaged and properly sold by order of the Court, reserving question of freight. Sir Robert Phillimore in giving judgment said that even if a new implied contract in the course of the salvage operations might have given the shipowner a title to *pro rata* freight, no such claim could be established in the face of what had happened. By abandoning the ship was rendered derelict and put into the possession of the salvors, and it was clear that the original contract no longer subsisted, and that the title to the possession of the cargo became as from the time of the abandonment one in the cargo owners, so far as they could assert at all, only through the salvors and the salvage court, and not through the shipowners.

In "*The Cito*," 7 P.D. 5, the Court of Appeal gave a similar decision. Brett, L.J., explained the law as being that "by an abandonment of a ship without any intention to retake possession of it the shipowner has, so far as he can, abandoned the contract so as to allow the other party to it, the cargo owner, to treat it as abandoned." Cotton, L.J., added that it was

true "that the shipowners could not by their own act put an end to the contract of affreightment, but by their abandonment they gave a right to the cargo owners to elect to treat the contract as at an end, and the shipowners could not . . . after their abandonment have objected if the cargo owners had found another vessel and taken the cargo on in it to the port of destination." Lindley, L. J., concurred.

"*The Arno*," 72 L.T.R. 621, was also a decision of the Court of Appeal. The vessel had been justifiably abandoned owing to perils of the sea on the 31st March 1895. She drifted with her cargo until the 3rd April, when salvors found her and brought both ship and cargo to Liverpool, the port of destination and discharge, where they arrived on the 25th April. On the 11th April the owner, having heard of the towage of the ship by salvors, but not knowing to what port in England they might bring her, got the salvors to agree on that date to hold for him, subject to their claim for salvage. On the 18th April the cargo owners claimed to be entitled to the possession of their cargo free of freight. It was held that the salvors were not the agents of the shipowner so as to make their possession of the cargo his. He did not get possession of it until arrival at Liverpool, and then before he could claim had to pay salvage on the cargo. Thus a new burden had been put on the cargo owner inconsistent with the original contract of affreightment, and he was entitled to elect, as he had done, while this state of things existed, to treat the contract as repudiated. The judgments, in my opinion, merely exemplify the principle of *Hochster v. De la Tour*.

In the case before us, if the vessel had been in point of fact lost, that would have put an end to the very basis of the contract of carriage, and not the less if, the ship having been lost, the cargo had floated and the cargo owner had rescued it. But that did not happen here. Nor did the owners through the master and crew or otherwise express or imply an intention to abandon. All that really happened was that in the erroneous belief that the former alternative, an actual loss of the "Jupiter," had taken place, the owners of the steamer informed the cargo owners of what they believed to have happened. They were wrong in this, but their mistaken statement of the facts disclosed no intention that I can discover to repudiate if the facts were otherwise and the vessel was actually still in existence.

I agree with the view of Sargant, J., who dissented from the majority in the Court of Appeal, and I think that we ought to reverse the judgment.

LORD SUMNER—Two questions have been raised in this case—the first as to the effect of the communications between the parties on shore; the second as to the nature and effect of the events which took place at sea. I think that the shipowners' letter, passed on to the cargo owners at Hull, did not intimate an intention no longer to be bound by the contract of carriage. It stated a fact, and it stated it wrong. The cargo

owners could not have taken it as a statement of such an intention, for they must have seen that if he had known as much as they knew his intention would have been the very opposite. The episode seems to me irrelevant. There is nothing on the record to show that the solicitors who first put forward the cargo owners' claim to take the cargo to Leith, knew anything about this letter when they did so. Their clients may have been underwriters; they may have acted on news of the ship not obtained from the cargo owners at all. They have never laid stress on this letter as the foundation of substantive rights, and the prominence given to it in the Court of Appeal was excessive.

The real point of the case is the fact that the "Jupiter" was left for good at sea to fare as she might, and that the master and crew came ashore. The word "abandonment," though unavoidable, is apt to be ambiguous. It introduces special considerations of marine insurance law not now in question. As little is it a question of abandoning a contract. The effect upon the contract is a conclusion of law. The fact was that all the shipowners' servants abandoned ship and cargo on the high seas, to sink or swim, and believed she had sunk, although the ship just floated on her cargo till she was salvaged next day.

It is common enough for a laden ship to be left derelict at sea, and many decisions have settled the legal consequence. Several sets of rights are affected. A salvor's possessory right is different where the ship is derelict and where it is not. The crew of a derelict may claim that their contract of employment has terminated, and may be awarded remuneration as salvors for services rendered. The rights of assured and underwriters may be in question, or, as here, the right of a cargo owner to claim that the performance of the contract of carriage has come to an end and cannot be renewed. It is highly desirable, since so many interests may be affected by it, that existing views about what makes a derelict should not be unsettled, and that the test of a ship's being derelict should be such as can be readily applied, and will not be dependent on inquiry into the state of mind of men who unfortunately may not have survived the marine disaster. As to the rights of the cargo owner, the authorities, extending over about forty years, are all one way. *The "Kathleen"*, L.R., 4 A. & E. 269, *The "Cito"*, 7 P.D. 5, and *The "Arno"*, 72 L.T.R. 621, are all decisions on motions in salvage actions for delivery of cargo to the cargo owners freight free. They have often been applied in cases not formally reported, and have been followed in the Supreme Court of the United States—*The "Elisa" Lines*, 199 U.S. 119.

The proposition there laid down was that by the general principle of contract an open cessation of performance with the intent to do no more, even if justified, excuses the other party from future performance on his side. No contrary decision has been found. Judge Carver states their effect thus—"Where a ship has been definitely aban-

done at sea by the master and crew without any intention of coming back to her, the freighter is entitled to treat the contract of carriage as abandoned, so that if the ship or cargo be afterwards brought into port by salvors the cargo owners may claim to have their goods without paying any freight even though the shipowner is ready and demands to be allowed to take them on to their destination"; and the learned authors of Scrutton on Charter Parties (I quote from the edition of 1914, p. 318) say—"Where the shipowner has no longer a right to carry on, or where he abandons the ship and cargo, or where he delays repair or transhipment beyond a reasonable time, the goods owner who receives the goods will not thereby give the shipowner any claim for freight *pro rata*. Obviously it is *a fortiori* to say that there will be no claim for ordinary bill of lading freight. Lord Justice Kennedy's work on civil salvage is to the like effect.

I think that the argument disclosed a misapprehension of the principle on which these decisions rests, for the suggestion was that, except that it is done by an agent, a master's act in leaving ship and cargo derelict at sea is identical in principle with an intimation by one of the parties to an executory contract made to the other that he does not intend to perform his part of the contract or to be bound by his obligations under it when the time for performance or observance may arrive. Hence it was argued that in such a case (1) the actual intention of the captain as a mental state is crucial; (2) that the actual intention of the shipowner is also material since his mind is deemed to have gone to the making of the contract and must therefore play its part in the unmaking of it, and that any breach by leaving the ship derelict cannot be final so long as it is possible that he may repair the consequences of the master's conduct; and (3) that the act of quitting the ship cannot have effect on the rights of the contracting party until it has been intimated to him by the shipowner or on his behalf. I think this argument was fallacious.

As the judgments in "*The Cito*" and "*The Arno*" show, there is an analogy between those cases and *Mersey Steel and Iron Company v. Naylor, Benzon, & Company*, 9 A.C. 434, but the distinctions between them must be kept in mind. The master is the shipowner's agent to perform the voyage and to take such decisions and do such acts in the course of it as must be taken then and there by the person in command, but his employment does not of itself ordinarily authorise him to vary a contract made by his employer. His actions may have far-reaching consequences, but he is not authorised to form or express his employer's intentions as such in a matter of his employer's contract. If the shipowner by his authorised agent has definitely ended the performance of the voyage *in medio* and quitted possession of the cargo, which is the effect of leaving the derelict, the cargo owner is free to do what he will with his own. Thus only the result is the same and not the question as in the *Mersey Steel Company's* case, which turns not on the signifi-

cance of an act but on the intimation of an intention—not on performance entirely brought to a premature end, but on anticipatory refusal to perform at all.

If this is right the master's frame of mind is not the question; his acts are. If the master and crew perished the result would be the same. Whether he was moved to quit the vessel by one kind of peril or another cannot matter when he does quit it, provided he does so for good and not for the purpose of procuring the means of prosecuting the voyage in the course of a temporary absence. In some ways, indeed, the matter is most conclusive when least is known of the captain's actual mental processes. The shipowner's intention is not material, nor is even his knowledge, for if the voyage is at an end and the cargo owner has availed himself of his liberty, the shipowner cannot revive it by acquiring knowledge and thereupon forming an intention. Equally little can intimation to the cargo owner matter, for if the master's action has in truth put an end to the voyage and the cargo owner knows it, he is free to avail himself of his legal rights without more ado.

The effect on the contract of carriage of maritime disaster occurring in the course of a voyage was originally always discussed in connection with claims for freight *pro rata itineris peracti*. It was not until the middle of the last century that the shipowner's right to tranship at a port of refuge and earn the original bill of lading freight by carrying on in another bottom was fully recognised in this country, and it has never been formally decided that he has the same right when the ship is abandoned at sea and possession of the cargo has been abandoned with it instead of being retained at the port of refuge as in earlier cases. Yet the language used in the earlier cases is significant, though the circumstances of the two types of cases differ so widely. In *Hunter v. Prinsep*, 10 East, 374, where the cargo had been sold at the master's instance by order of a court in a port of distress, Lord Ellenborough says—"If no freight be earned and he declines proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods and selling them accordingly, which was unnecessary and which disabled him from forwarding the goods, was in effect declining to proceed to earn freight." I ask myself why the captain's conduct in leaving the goods to their fate at sea is not also in effect a "declining to proceed to earn freight," which gives the freighter a similar right to possession. If stress be laid on the words "which was unnecessary" I recall that the salvors were held to have got possession in *Cossmann v. West*, 13 A.C. 160, though the abandonment was only necessary because the captain had first scuttled the ship. Again in *Shipton v. Thornton*, 9 A. & E. 314, which established the right to tranship in order to complete the earning of the bill of lading freight, Lord Denman says—"In the case supposed" (that is the case of a ship disabled in a port of refuge without fault of the master) "let the owner of the goods arrive and insist, as



he undoubtedly may, that the goods shall not proceed but be delivered to him at the intermediate port; there is then no question that the whole freight at the original rate must be paid, and that because the freighter prevents the master, who was able and willing and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract." Whatever other criticisms may arise on this language, I think it is clear that this passage, which states the principles on which the right to tranship or carry on was upheld, rests on the proposition that the master is able and willing to fulfil the contract, which, though a contract for carriage in a named ship, is deemed to be validly performable in another where carriage in the original ship to the destination is both impossible and excusable. This prevents it from being a mere claim to take the benefit of a contract arising out of a breach of the contract; it becomes the next best performance that maritime perils allow. If, however, the captain is neither able nor willing to complete the voyage, but by every act open to a seaman has thrown it up for good, what is there to prevent the owner of the goods from insisting that he may take possession of his own goods, possession of which the master has abandoned? I think it ought to be remembered that these cases lie, logically as well as historically, behind *The "Cito"* and *The "Arno,"* and that the current of authority ought to be surveyed as a whole.

The matter may be tested in two other ways. The shipowner has a possessory lien on goods shipped on board his vessel to secure the earning and payment of his freight. If he loses possession, what term in the bill of lading contract prevents the cargo owner from taking possession of his own property, or constrains him to ship it over again or to re-deliver it to the shipowner for his benefit? No term in fact assuredly, and no authority whatever, is forthcoming to support the implication of such a term in law. Now it is clear that if a ship and cargo are left derelict at sea the shipowner loses possession, and with it his lien—the ship and cargo are at large to be taken into the possession of the first salvor. "In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services but they have the entire and absolute possession or control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in the ordinary case of disaster, when the master remains in command he retains the possession of the ship. . . . Unless a vessel is derelict, the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him"—see *Cossmann v. West*, 13 A.C., at p. 181. Again, when a ship is in distress, under certain circumstances the master, though in general only the servant of the shipowner, becomes agent of necessity

for the cargo owner to dispose of his cargo, independently of the ship, the voyage, and bill of lading contract. When does this happen? "The agency of the master from necessity," says Parke, B., in *Vlierboom v. Chapman*, 13 M. & W. 230, "arises from his total inability to carry the goods to the place of destination." How are these authorities to be reconciled with the view that although the master is so little able to prosecute the voyage or to carry the goods in any way to their destination that he leaves them and the ship out at sea for good, still the cargo owner cannot act as his own agent of necessity and cannot do what the first salvor can do, namely, take and keep possession of his own goods, but if he meddles at all, becomes an agent of necessity for the shipowner, and must assist him to earn a freight which he cannot earn for himself.

Cases of derelicts are common enough, but no single decision was produced in which, under circumstances similar to these, a ship has not been treated as derelict with all the consequences that follow thereupon. Sankey, J., found that the ship and cargo were left derelict. I think he was right. Pickford, L.J., agreed with him. Banks, L.J., expressed no opinion on the point. Evans, P., so found in the salvage action. The judgment of Sargant, J., alone holds that the ship was not abandoned, because the master and crew acted involuntarily, and that the facts show no intention on their part to abandon the contract of affreightment on behalf of the shipowners. Even he does not see any ground for supposing that there was any intention of returning to the "Jupiter" or hope of recovering her. Before your Lordships it has also been argued that the ship was not left derelict, because it has not been shown that the master had not some hope or intention of returning to the ship if the enemy left him the chance of doing so. Now as Brett, L.J., says in "*The Cito*," the abandonment of the ship does not put an end to the contract. It is certainly kept alive for the purpose of enforcing causes of action already accrued upon it; possibly it is kept alive for the purpose of enabling the shipowner to carry on the goods and earn the bill of lading freight if he can recover possession before the cargo owner has done so or has intimated his election to take his cargo where it lies and not at the port of delivery. This point, expressly reserved in "*The Cito*" and "*The Arno*," need not be decided now. I have endeavoured to show that the supposed intention of the master to abandon his owner's contract for him is not material, and it is clear that the cargo owners elected to take their goods at Leith, subject only to the salvor's claim, at a time when the shipowner had taken no steps to prosecute the voyage or even ascertain that it was possible to do so. What he did was far less than was done by the shipowners in "*The Arno*," and yet was held by the Court of Appeal to be ineffectual to prevent the cargo owner from claiming his cargo freight free.

After all, what is the evidence about the abandonment of the vessel? It is all contained in the protest—and it is the master's

own tale, in his own words, not cross-examined too, and not contradicted. The pleadings and judgment in the salvage action add some significant details as to the ship's state next day, but none as to her condition on the 7th October. The story cannot now be carried by inference or by speculation beyond where it was left by the master. The ship was fired on by an enemy submarine but was not hit. Signals were made to the captain to abandon ship. He deciphered the signals; he presumably considered the matter, though probably very rapidly. He saw no possible chance of escape. He decided to obey and at once gave orders to take to the boats. In all this I assume that he displayed neither lack of courage nor lack of wisdom. He did not try to run; perhaps he did not think of it. He did not try to fight; probably the attempt would have been foolhardy. He decided to do what he thought was the only thing to be done, and I take it that he was right. Still he decided. He decided under duress, but pressure which would have released him from a contract thereby induced or have negatived any *consensus ad idem* is very different from that mechanical action which is illustrated by *Scott v. Shepherd*, 2 Wm. Bl. 892, or the "*Cosmopolitan*," 1848, 6 Notes of Cases, Supp. xvii, or "*The Fenix*," 1855, 5 Swabey 3. His act was neither unintentional nor involuntary.

At this time it was not dark, but before the submarine cast off the boats it had become dark enough for the vessel to be lost sight of. After the boats were left free by the enemy—which was before 7:30 p.m.—the master might have put back to look for the vessel; after he was picked up by the "*Ayacanora*" he might have prevailed on her commander to go back. He believed she had sunk and did neither, but the fact that he wrongly thought she had foundered does not prevent his action from being voluntarily deliberate and unconstrained. Whether there was a mistake or not on the part of the master, says Dr Lushington in the "*Sarah Bell*," 1845, 4 Notes of Cases, 144, is not of the slightest importance, for assuming it to have been a mistake his mind was actuated thereby, and the *spes recuperandi* must be governed by the feelings of the individual's own mind at the time. So in the "*Janet Court*," 1897 P. 59, Jeune, P., took it as obvious that if a master believed his ship had been sunk after he quitted her, he could have had no intention of returning, although he was in fact wrong, as in that respect the captain always is in salvage cases where the ship is saved. What is clear about the whole story is that in fact he then had neither *animus* nor *spes revertendi*, and if he left the ship to her fate for good and all he did so all the more decidedly because he did actually think that she was no longer on the surface but was at the bottom. If a master and crew quit ship and cargo at sea they commit a very grave dereliction of duty unless the grave peril in which they find themselves justifies their action. Ships are sometimes left without justification, but I feel sure not often, and in my opinion the inference

from such an abandonment *de facto* is that the voyage cannot be further prosecuted. If this is to be rebutted it must be by positive evidence. There is no such evidence here. If all that is proved is that there was an abandonment *de facto* the presumption is that the master intended to do what he did in fact. He acted as if he had no hope of return, and unless it is proved that he had such a hope it must be taken that he had none. It is not as though salvors were standing by and the captain had remained with them ("*The Septir*," 5 Asp. Mar. C. 411), or as if the ship was aground or near the shore and the crew had gone ashore for their personal safety but took steps to recover the vessel—"The *Clarisse*," Swabey 129. Even when a ship is left at sea there is often so far a hope of return that the captain says to himself—"If I do fall in with possible salvors I will send them back"; but as Dr Lushington says in "*The Coromandel*," Swa. at p. 208—"It may be that they intended, if possible, to employ steamers to go and rescue the vessel, but is not that the case every day." This does not prevent the ship from being a derelict when no salvors are sent back. Surely the rights of first salvors to possession and control, the right of the crew to salvage remuneration for salvage services, the right of cargo owners to take charge of their own goods, cannot be left *in dubio* till the interior of the captain's mind is explored, if death has not for ever closed that inquiry. Would the ship have been no derelict if all the crew had been drowned and evidence was therefore unprocurable about their hope or despair of return? Whatever objections there are to the *argumentum ab inconvenienti*, at least it should dissuade us from applying novel tests to familiar incidents and disturbing the ordinary legal conclusions drawn from well-known nautical conduct. The casualty may take place in one hemisphere and within reach of the shipper—must he stay his hand till the fate of the crew is known and the master's liberty of judgment can be investigated, or till the shipowner, perhaps a foreigner resident in the other hemisphere, hears of the accident and has a chance to intimate one intention or another? A shipowner's first step in such a case is nearly always to abandon his ship to underwriters and thereby to abandon to them such right as he may have to carry on and earn freight; if so, in ninety-nine cases out of a hundred his election will thus virtually be not to abandon further performance of the contract, and the ship underwriter's position will be permanently superior to that of the cargo underwriter. Cargo underwriters insure against loss of cargo by marine perils but not against liability to pay freight. In such a predicament the cargo owner will naturally leave the derelict alone.

Again, when a ship has proceeded but a short distance on her voyage and is abandoned, the shipowner has the minimum of interest in recovering the cargo while the shipper may still be near at hand. Towards the end of the voyage the shipowner may be able to earn a great reward by recovering

and delivering at its destination a cargo so damaged as to be valueless, though being still in specie it may be good enough to earn freight. If so, the cargo-owner's interest probably is to rescue the cargo from further transit, while there is still time to arrest the damage and pluck something from the disaster. I think it would be lamentable if in these cases the cargo-owner were compelled to stay his hand and do nothing to save the cargo, lest having done so he should only saddle himself with a liability for freight which the shipowner himself might never have earned, instead of letting well alone and claiming a total loss on his insurance policy. It is to the advantage of all parties, and of the public too, that when a ship is known to have been left to her fate at sea no uncertainty about the rights should stand in the way of an energetic attempt to save the cargo.

It is said that every case of marine disaster is legally a question of fact. Be it so. Let it be too that the captain and crew had to go. No one blames them, but is the prosecution of the voyage terminated or only suspended according as the captain's motive or his judgment is good or bad? A ship may be a derelict with all the consequences that follow in law though she was corruptly abandoned, and equally a derelict though the master did it for the best. The owner may be liable in damages to the cargo-owner according as he has or has not exceptions of barratry or negligence of the captain in the bill of lading to protect him, but if the mere *de facto* termination of the voyage produces legal results they follow equally no matter what the captain's motives may have been. Though the question is one of fact, it is one which in typical states of fact can only be answered one way. Negligence in a running-down case is a question of fact for a jury, but there is an abundance of ordinary conjunctures connected with such accidents in which a jury's verdict must recognise the ordinary views taken of such facts or it will be set aside. The fact that the captain and crew had little choice here and virtually had to leave their ship to save their lives is an ordinary incident of derelicts. Whether this is caused by fire or by the King's enemies or perils of the sea cannot distinguish the cases from one another. They have to leave the ship, and they go and the ship is left derelict, and the clearer the compulsion the clearer is the termination of the voyage unless special circumstances show a *spes* (not a speculation) *revertendi*—a plan, not a bare possibility of leaving the ship the better to procure help and to continue the voyage. For myself I do not see how the judgment of the majority in the Court of Appeal can be reversed without disregarding "*The Cito*" and "*The Arno*," and without taking a view of maritime disaster which will introduce new considerations into all these cases, and I should dismiss the appeal.

LORD PARMOOR—The relevant facts for consideration in this appeal are as follows:—The respondents are endorsees of bills of lading dated Archangel, September 1916, and signed on behalf of the appellants, the

owners of the "*Jupiter*," for the carriage of a cargo of wood to Hull at freight to be paid as *per* charter-party. When off the coast of Scotland on the 7th October the "*Jupiter*" was captured by a German submarine. The master and crew were compelled to take to their boats under threats from loaded revolvers, and bombs were exploded on board the ship. When last seen by the crew the ship was believed to be sinking, and the captain telegraphed from Aberdeen to the owner on the 6th October—"Ship sunk yesterday submarine arrived all well Sailors' Home." The ship in fact was not sunk, but was picked up by salvors, beached at Newhaven near Leith on the 11th October, and there taken possession of by the Receiver of Wrecks, to whom she was handed over by the salvors. Subsequently there were certain messages and letters to which frequent reference was made during the argument, but it will be convenient in the first place to consider what would have been the respective rights of the parties if there had been no such messages or letters.

The main argument put forward on behalf of the respondents in the statement and points of claim was that the "*Jupiter*" was abandoned by the master and crew during the voyage to which the contract of affreightment attached, and that such abandonment without any intention to re-take possession gave the cargo-owner the right to treat the contract of affreightment as at an end, and that he so treated it. In support of this contention the counsel for the respondents relied on "*The Cito*," 7 P.D. 5, "*The Arno*," 72 L.T.R. 621, and "*The Kathleen*," L.R., 4 A. & E. 289.

I think that the term "abandonment" of a vessel in the ordinary sense denotes some discretion or volition on behalf of the master, and that it is not applicable to a capture followed by the forcible removal of the master and crew under enemy threats. The vessel was abandoned, not by the master and crew, but by the captors, who intended to sink her but in fact left her a derelict. If this is the right view of the incidents which took place on the 7th day of October it cannot be said that there was in any sense an act done on the part of the shipowner or his representatives indicating an intention to repudiate the contract of affreightment such as would entitle the freighter to infer that the shipowner did not intend to carry out the contract and give him a right to treat it as at an end. I agree with Sargent, J., that the conditions of this case are *totò calo* different from the case of abandonment of the "*Cito*" or the "*Arno*," where the master and crew exercised a discretion to abandon the vessel under stress of the violence of the weather.

In the second place the counsel for the respondents relied on the fact that the vessel was left as a derelict, and the consequent inability of the appellants to carry on without interruption the contract of affreightment put an end to that contract. I think that it is impossible to maintain this proposition in general terms. The circumstances of the present case are an apt illustration to the contrary. Assuming for

this purpose that no subsequent communications had passed between the shipowner and the cargo owner, but that the vessel in spite of being for a time without a crew did successfully perform the voyage to Hull for delivery of the cargo to that port, I see no ground on which the cargo owner could have disputed his liability to pay freight under the terms of the contract. The same argument would apply to carriers by land as to carriers by sea. If carriers who had done no act evincing an intention to abandon the contract of affreightment in fact deliver goods entrusted to them in accordance with the terms of a contract of carriage, freight is not the less payable under the contract if during the conveyance the carriers have for a time lost control of the vehicle in which the goods were packed. Mr Wright, however, used the additional argument that it was not only a case of temporary inability to perform the contract, but that there was evidence of an intention on the part of the shipowner not to return to the vessel or take any steps to perform his obligations under the contract. I find no evidence of any such intention. The subsequent action of the appellants appears to have been based not on any intention to abandon a floating vessel but on the mistaken view that the captors had succeeded in sinking the ship after taking off the master and crew, and that the vessel had gone to the bottom of the sea.

A further point made on behalf of the respondents was that if a carrier or his representatives had been removed from the vehicle of carriage, whether ship or cart or train, and the freighter finds his goods on such ship or other vehicle, the freighter is then entitled to take possession of his goods and to deal with them in such way as he may think fit, not being under any liability to pay freight to the carrier since the contract of affreightment had not at such time been completed. I think that before a freighter is entitled to take possession of goods which he has entrusted to a carrier for carriage under a contract of affreightment he must show either that he is exercising a right which the contract has given him or that the contract itself has in some way been terminated. For reasons already stated I think that the contract of affreightment had not terminated either through repudiation by the shipowner accepted by the freighter or by the fact that the vessel in which the goods were being carried was for a time without a crew, and in the terms of the contract the freighter was certainly not entitled to take delivery on the open sea or at any other port than the port of delivery. No doubt if the shipowner had abandoned the ship and cargo so as to put an end to the contract of affreightment he could not, by gaining possession of his ship from salvors, revive the contract or establish a right to freight, but these conditions do not apply to the capture of the 'Jupiter' and the forcible removal of the master and crew.

The last point raised on behalf of the respondents depends on the messages and correspondence which passed subsequently

to the capture of the vessel. The majority of the Court of Appeal held that these messages and correspondence amount to a statement by the shipowner that he is not in a position to carry out the contract of affreightment, and that, as the freighter acted on this communication, the shipowner, who made it, is bound to observe it. A letter was sent by the shipowner to be communicated to the charterers in the following terms:—"It is with very great regret I advise you of the loss of my steamship 'Jupiter,' which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige."

At the time when the shipowner made this communication he was under the mistaken impression that the "Jupiter" had been sunk. I cannot find anything more in the letter than a communication from the shipowner giving the information which he had received as to the conditions of the vessel and crew. I am unable to construe this communication as an intimation of the intention of the shipowner not to carry out the obligation of his contract, or that it was written in such form as to prevent the shipowner stating later that it was sent under a mistake of fact. On the 11th October the following telegram was sent on behalf of the respondents—" 'Jupiter' we represent owners cargo of this steamer recently brought into Leith derelict our clients elect take possession their property where now lying please take note."

This telegram shows that the respondents or their representatives very early ascertained that the shipowner had made a mistake in stating that the vessel had been sunk. On the same day a further telegram was sent to Leith—"Steamer 'Jupiter' we represent owners cargo understand she is now lying at Newhaven please note our clients claim elect take possession their property where steamer now is please do not allow cargo to be dealt with except with our sanction please do anything necessary protect property for our clients."

The advisers to the respondents were properly astute to protect the interests of their client, but on the assumption that, apart from these communications, the contract for affreightment was still in force, I cannot draw the inference that the message sent by the shipowner under a mistake of fact, read in connection with the subsequent telegrams, is sufficient evidence of an act done by the shipowner indicating his intention to repudiate the contract of affreightment such as would entitle the freighter to put an end to the contract and to place him in a position to take possession of his goods without payment of freight.

In my opinion the appeal should be allowed, with costs.

LORD WRENBURY—The decision is in this case, in my judgment, to be reached by the application to the facts of certain principles of the law of contract. The application of the principles may not be easy, but the principles themselves are not

difficult of statement, and but for the arguments which we have heard are not, I should have thought, capable of serious dispute.

A contract between two persons results from the *consensus* of the two minds agreeing *animo contrahendi* to terms which each accepts and which create obligations between them. The contract having been entered into may be determined in any one of three ways. First—*consensus* created the contract and *consensus* may determine it. If the two parties agree to determine the contract, it is determined. Secondly—some contracts though expressed in absolute terms are by the nature of the matter so obviously dependent upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus in a contract for personal service for a term of years will be implied a condition if the party shall so long live. Thirdly—if the one party to the contract by words or by conduct expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, "I take you at your word; I accept your repudiation of your promise and will sue you for breach." This is really no addition to but a particular application of the principle first above stated. The first party has in fact made an offer. This offer is—"I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts them by *consensus* the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the *consensus* of the parties which brings the contract to an end. In the first and third cases it is *consensus dehors* the contract. In the second it is the *consensus* to the implied term contained in the contract.

But it is said in argument there is a fourth way in which a contract of affreightment may be determined, and in this case *consensus* is not necessary. I hope I state the contention accurately when I say it is this. If the performance of the contract of carriage has ceased by the shipowner abandoning his ship, whether *sine animo revertendi* or *sine spe revertendi*, the cargo owner may, if he can while the ship is derelict or in the hands of salvors, retake possession of his cargo. If he can be first in the field and forestall the shipowner in resuming possession, he may take his cargo and refuse to allow the shipowner to resume the voyage, and may escape payment of any freight even if the goods in fact reach the contractual port of discharge. Let me assume, in the first place, that the shipowner has abandoned his ship *sine animo revertendi*, that his intention in that respect has by words or by conduct been communicated to the cargo owner, and that before any

change of intention has been communicated the cargo owner has acted upon the expressed intention and accepted it. In that state of facts it seems to me that upon the principles already stated there is a *consensus* which terminates the contract. But the contention is carried much beyond that. The contention is rested not upon any *animus*—not upon any intention—but upon a certain fact. "My case," said Mr Wright in summarizing his argument, "is abandonment in fact and possession claimed by the cargo owner before possession is taken by the shipowner." The contention is that if the shipowner's possession has ceased—if the ship is out of the owner's possession—is afloat but not in the possession of her owner—then whether the owner's possession has been determined by violence or has been abandoned voluntarily, whether with or without sufficient cause, the cargo owner may take possession if he can, and if he does so will not be liable for freight. The ground upon which the contention is rested is that there has occurred a complete interruption of the contract of carriage, and that therefore it results, not that the contract is at an end, but that at the option of the cargo owner it can be brought to an end. I cannot accept that proposition.

In order to make clear what my view is of the law applicable to such a case, I must say something of what is commonly called "anticipatory breach" of contract. The expression is I think unfortunate. In *Hochster v. De la Tour*, 2 Ell. & Bl. 678, the leading case upon this subject, Lord Campbell made no use of the expression in his judgments. It is used several times by Lord Esher in *Johnstone v. Milling*, 16 Q.B.D. 474, but not by either of his colleagues. The words used are of course immaterial unless they lead in course of time to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promiser before that time arrives says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen, L.J.'s words in *Johnstone v. Milling*, it is "a wrongful renunciation of the contractual relation into which he has entered." It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by *consensus* of the parties and not by some superior force that the contract is determined. I cannot see that the doctrine of what is generally called "anticipatory breach" lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of

the contracting parties can either tie or untie the bonds of a contract.

I ask myself this question. What consequence results from the following facts without more:—(1) The ship has been abandoned at sea; (2) neither shipowner nor cargo owner is in possession, the ship has no one on board; (3) the shipowner and cargo owner arrive together at the place where in fact the ship is found to be. Which of the two has prior right to take possession? The answer to my mind is that contractually the shipowner is entitled as against the cargo owner to take possession of the ship and complete the voyage. It is a wrongful act on the part of the cargo owner to prevent his doing so unless the contract has been determined. He cannot say, I will take possession of my cargo so as to determine it. He can only say, I will take possession of my cargo because the contract has been determined. But the very question is whether it has been determined or not.

Further, upon authority, what is the result of abandonment at sea in itself and without more? Does it put an end to the contract of affreightment? Lord Esher in "*The Cito*," 7 P. Div. 5, says it does not. "Suppose," he says, "a wrongful abandonment without its being occasioned by the perils of the sea, it is clear that in that case the owner of the cargo might sue the shipowner for his breach of contract, so it cannot be said that it puts an end to the contract of affreightment." The ground of the decision in "*The Cito*" seems to me to be clear from Lord Esher's next words—"It is sufficient," he says, "I think, for the determination of the present case to say that by an abandonment of a ship without any intention to retake possession of it the shipowner has so far as he can abandoned the contract so as to allow the other party to it, the cargo owner, to treat it as abandoned." If the ship is abandoned *sine animo revertendi* and the cargo owner has accepted that intention, I feel no difficulty in arriving at the conclusion at which the Court of Appeal arrived in "*The Cito*." In "*The Arno*," 72 L.T.R. 621, both Gainsford Bruce, J., and Lord Esher rest the case upon the intention of the shipowner.

If I am right in these views there is no fourth way in which a contract of affreightment as distinguished from all other contracts is capable of being determined. If it were alleged and shown that every contract of affreightment contains an implied term that the contract of carriage shall be performed continuously and without any interruption of the shipowner's possession, then I could understand that the respondents might succeed—that would be the second case above stated; but that is not alleged or shown. The respondents did not agree on that point. If they had done so I cannot tell whether the appellants might not successfully have contended the contrary. Under these circumstances I cannot but preserve my opinion upon the question. I cannot resolve it in favour of the respondents, who did not raise it and give their opponents an opportunity of answering it. It is under these circumstances that I have

to apply to the facts of this case the principles applicable to all contracts with which I started.

The facts are that there was a contract of affreightment from Archangel to Hull, and that in point of fact the goods were in the result and as the result of arrangement carried in the vessel to the contractual port of discharge. During the voyage, namely, on the 7th October, the master and crew were removed *vi et armis* from the vessel by a German submarine, which endeavoured to sink and, as everyone thought, had succeeded in sinking the ship. The submarine towed the master and crew five miles from the spot and there cast them adrift. Night was coming on, and everyone thought the ship was at the bottom of the sea. The crew were picked up, and from Aberdeen they telegraphed on the 8th October to their owner that the ship had been sunk by a submarine. Later in the same day the master wrote to his owner that he had heard in the evening that the ship was in tow, but that it was doubtful whether they (the salvors) would save her. That letter will have reached the owner presumably on the 10th October. On the 8th October after receipt of the telegram (but of course before receipt of the letter) the owner wrote to the brokers who had effected the charter advising them of the loss of the ship (which he of course then believed, but erroneously, to have been sunk) and asking them to advise the charterers of the fact. On the 9th October the brokers wrote to the charterers accordingly. On the 11th October about 10:35 a.m. the owner was informed that the ship had been taken to Leith. In fact she was at Newhaven, near Leith. At 5:5 p.m. he started by train for Leith. In the interval—namely, about 2:47 p.m.—he received a telegram from the solicitor of the charterers. The charterers having learned somehow that in point of fact the ship had not been sunk telegraphed by their solicitors to the shipowner that the ship had been brought in and that they elected to take possession of the cargo. The shipowner by letter the same evening wrote that he was going to bring the cargo forward to its destination. The position therefore is as follows:—The shipowner tells the charterers the ship is sunk; the charterers reply—"She is not sunk, but we avail ourselves of your erroneous belief that she is sunk and determine the contract." The shipowner replies—"You cannot do that. I find she is not sunk. I am going to perform." There is not much *consensus* about that. It comes to this: The owner says—"I was always ready and willing to perform. I thought performance had become impossible and I said so. That is all." Unless the case turns, not upon intention but on the fact that the owners were out of possession, it seems to me that the respondents cannot succeed.

There is another ground upon which the contention was sought to be rested, and that was inability to perform. Intention not to perform or inability to perform raises, it is said, the right of the cargo owner to treat the contract as at an end.

If there was inability to perform—if the contractual act had become impossible—then upon the second ground above stated the contract would, no doubt, determine by the operation of the implied term that if the act proved to be impossible the contracting parties were not bound. But the point is not open upon the facts of the present case. The contractual act had not become impossible, and the cargo owner when he acted knew that it had not become impossible. The shipowner's letter of the 8th October was not, I think, an expression of intention at all, but assuming that it was, it results only in this. The shipowner, I will assume, says—"My contract has become impossible; I am not going to perform it." The cargo owner replies—"Your expression of intention not to perform is made in ignorance of the real facts; the contract has not become impossible, but I will accept your expression of intention and will elect to determine the contract." To say that that is a *consensus* to determine the contract seems to me impossible.

In my view abandonment at sea is not an operative cause but only evidence, although it may no doubt be strong evidence, of intention. If the owner voluntarily abandons at sea it may well be that the *onus* is on him to show the *animus revertendi*. If he abandons only in the sense that he is compulsorily dispossessed by violence, the abandonment, or as I prefer to call it, the dispossession, does not in itself effect anything in affecting the contract. If the owner having been dispossessed by violence does by words or by conduct express an intention not to seek to regain possession, no doubt the option arises in the cargo owner to treat the contract at an end. Nothing of that kind arose here. The owner did not abandon in any way as an act of volition; having been dispossessed by violence he did no act to express an intention not to seek to regain possession. He did in fact seek to regain possession, and subject to the prior rights of the salvors I think he was entitled to take it. For these reasons I think that the appeal must be allowed and judgment entered for the appellants upon the claim for £14,050, 2s. 9d. and upon the counterclaim, with costs of both claim and counterclaim.

Their Lordships allowed the appeal with expenses.

Counsel for the Appellants—Mackinnon, K.C.—L. Noad. Agents—Downing, Handcock, Middleton, & Lewis, Solicitors.

Counsel for the Respondents—Leck, K.C.—R. A. Wright, K.C.—Lequesne. Agents—William A. Crump & Sons, Solicitors.

## HOUSE OF LORDS.

Monday, October 28, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lords Dunedin Atkinson, and Phillimore).

### CASDAGLI v. CASDAGLI.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND).

*Foreign—Domicile—Extra-territoriality—Acquisition of Egyptian Domicile of Choice by a British Subject—Jurisdiction.*

The appellant pleaded as a bar to divorce proceedings before the English Courts that he had acquired an Egyptian domicile of choice. The Courts below decided it was impossible for a British subject to acquire an Egyptian domicile.

Held that a British subject may acquire an Egyptian domicile, and the appellant had in fact done so; therefore the English Courts had no jurisdiction to dissolve the appellant's marriage.

*Re Tootal's Trusts*, 23 Ch. D. 532, and dicta of Lord Watson in *Abd-ul-Messih v. Farra*, 13 A.C. 431, overruled.

Decision of the Court of Appeal (1918, P. 89) reversed.

The facts fully appear from the considered address of the Lord Chancellor:—

LORD CHANCELLOR (FINLAY)—This appeal arises out of proceedings for divorce taken in the Divorce Court in England by the wife (the respondent in this appeal) against her husband (the appellant). The husband by act on petition alleged that he had acquired a domicile of choice in Egypt, that there was no English domicile, and that the English Court had no jurisdiction to entertain a suit against him for dissolution of marriage. The wife by her answer set up that the husband had never abandoned his domicile of origin, which was English, and that the Court therefore had jurisdiction.

Evidence was taken orally and upon affidavit. The case was tried before Horridge, J. He held that he was bound by authority to decide that a British subject registered as such at the British Consulate could not in point of law acquire a domicile in Egypt, and his decision was affirmed by the majority of the Court of Appeal (Swinfen Eady, L.J., and Warrington, L.J.), while Scrutton, L.J., dissented, holding that there was no rule of law against the acquisition of a domicile in Egypt by a British subject.

From the decision of the Court of Appeal the present appeal is now brought to your Lordships' House. The facts are not in dispute, and the only question is whether it is in point of law impossible for a registered British subject to acquire a domicile in Egypt. It was contended for the respondent that this point had been decided in her favour by Chitty, J., in *re Tootal's Trusts*, 23 Ch. D. 532, and by the Judicial Committee in *Abd-ul-Messih v. Farra*, 13 A.C. 431, and that these cases had been correctly decided and ought to be followed by your Lordships' House.