words apt for the purpose. This being a consolidation statute, it may well be that the language of the Acts whose provisions were consolidated was copied; but, however that may be, there is no force in the argument, since it is apparent that the same Legislature, on the same occasion and in the same statute, must be held to have intended to include the charterer in the description "owner" in the several sections already referred to. (2) Because of the history of this legislation limiting liability and the recitals and provisions contained in some of the earlier statutes. That history is given in Marsden on Collision (ch. 7, p. 145, 5th edit.). The earliest Act, 7 Geo. II, c. 15, appeared to have been passed in consequence of the decision in *Boucher* v. *Lawson* (H. 8, Geo. II), see per Buller, J., in *Yates* v. *Hall* (1 T.R. 73), in which the shipowner was held liable for the loss of a case of bullion put on board his ship and stolen by his servant the master. It was followed by 26 Geo. III, c. 86; then by 53 Geo. III, c. 159; and ultimately by 17 and 18 Vict. c. 104. It is quite true that the object of these statutes, as expressed in their preambles, was to increase the number of British ships and cause merchants and others to be interested in them, but I should think that few things would tend more to encourage men to build ships than to secure them facilities for hiring them out under charter-parties, and few things would tend more to induce charterers to hire them than that the protection from serious or overwhelming loss which the registered owner enjoys should be extended to the hirer. To extend that protection to charterers would, therefore, forward the policy of these Acts, not thwart it; and I see nothing in them to necessitate the conclusion that charterers by demise may not be well treated as coming within the description of "owners" within the meaning of these statutes. Besides, it must be borne in mind that the protection is now extended to the owners of foreign ships. I therefore think that there is nothing in this contention. But it is said that because the words "the owner of a British sea-going ship or any share therein" are used in the 502nd section, and the words "the owner of any sea-going ship or any share therein" used in the 503rd section, and the use of the words "or any share therein," it shows, to use the words of Moulton, L.J., that "the Legislature were thinking of the real owners and not the lessee." But it would have been necessary to introduce the words "any share therein" whether the word "owner" includes a charterer by demise or not, because each part-owner, where there are more owners than one, being one of the joint employers of the actual wrongdoers, is liable for the entire damage done, and if the damage was caused through the "actual fault" or with "the privity" of one or more of the part-owners sued, then, since all were not blameless, the liability of none of them could be limited but for those words, though some of them were blameless and came within the equity of the statute. The words "or any share therein" were introduced, in my opinion, for the protection of such meritorious persons. I am quite unable, however, to see how their presence in these sections shows that the Legislature never meant to protect a person with the special and temporary ownership possessed by a charterer by demise, who was, moreover, as meritorious an object of protection as the registered owner. The actual "fee simple" owner becomes liable, not because he is owner, but because he is the master or employer of the persons whose negligence causes the damage — Lord Cairns, L.C., in *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743; Lord Blackburn in *Simpson* v. *Thomson*, 3 App. Cas. 279. The charterer by demise becomes liable precisely for the same reason and on the same ground, and I see no reason why the word "owner" or "owners," when used in sections 503 and 504, should not be construed, as it must be construed in many other sections, so as to include a charterer by demise. I therefore think that the decisions of Deane, J., and the Court of Appeal were wrong and should be reversed, and that this appeal should be allowed, with costs appropriate to the circumstances of the case.

LORD COLLINS concurred.

Appeal sustained.

Counsel for the Appellants—J. A. Hamilton, K.C. — Dawson Miller. Agents — Thomas Cooper & Sons, Solicitors.

Counsel for the Respondents — Butler Aspinall, K.C.—A. D. Bateson. Agents—Pritchard & Sons, Solicitors.

HOUSE OF LORDS.

Thursday, March 5.

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

NORTH AND SOUTH WALES BANK *v.* MACBETH.

NORTH AND SOUTH WALES BANK *v.* IRVINE.

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

Bill of Exchange—Negotiable Instrument—Cheque Payable to Order—"Fictitious Person" as Payee—Forged Indorsement—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 7 (3)—*Set-off.*

M was induced by the fraud of W to draw a cheque in favour of K or order. K was an existing person, and when M drew the cheque in his favour he intended that K or his indorsee should receive the money. W obtained the cheque, forged K's indorsement, paid the cheque into his own account with the N. and S. W. Bank, and they, on

presenting it to M's bank received payment.

Held that K was not a "fictitious" person within the meaning of section 7, sub-section 3, of the Bills of Exchange Act 1882, and that accordingly the N. and S. W. Bank were liable in the amount of the cheque to M.

Held further, in an action under precisely similar circumstances between I and the bank, that the fact that W had advanced to I a sum of money only £120 less than the sum in the cheque was immaterial, and that the bank had no right of set-off.

Appeals from the judgments of the Court of Appeal (LORD ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.) affirming judgments of BRAY, J., at the trial of the actions before him without a jury. The facts are given in the judgment.

Their Lordships gave considered judgment as follows:—

North and South Wales Bank v. *Macbeth.*

LORD CHANCELLOR (LOREBURN) — The reasons for deciding this case in favour of the plaintiff are stated so clearly in the judgments of Bray, J., and of the Court of Appeal, that I need not say much in moving your Lordships to dismiss the present appeal. The plaintiff was induced by the fraud of William White to draw a cheque for £11,250, in favour of one T. A. Kerr, or order. T. A. Kerr was an existing person, and when the plaintiff drew the cheque in his favour he intended that Kerr or his indorsee should receive the money. White obtained the cheque, forged Kerr's indorsement, paid the cheque into his own account at the defendants', the North and South Wales, Bank, and they, on presenting it to the plaintiff's bank, received payment. It was not, in these circumstances, disputed that the defendants were liable to the plaintiff unless they could show that the payee of the cheque, T. A. Kerr, was a "fictitious" person within the meaning of the Bills of Exchange Act, sec. 7, sub-sec. 3. I adopt the language of Bray, J.—"It seems to me that when there is a real drawer who has designated an existing person as a payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious." If the argument for the appellants were to prevail—namely, that the payee was a fictitious person because White (who was himself no party to the cheque) did not intend the payee to receive the proceeds of the cheque—most serious consequences would ensue. It would follow, as it seems to me, that every cheque to order might be treated as a cheque to bearer if the drawer had been deceived, no matter by whom, into drawing it. To state such a proposition is to refute it. Yet nothing short of this could establish the appellant's contention. As to authorities, I agree with the Court of Appeal in thinking that neither *Bank of England* v. *Vagliano* (1891) A. C. 107, nor *Clutton* v. *Attenborough*, (1897) A. C. 90, govern the present case. I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill, and in the latter authority the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque. That being so, I think that this appeal should be dismissed with costs.

LORD ROBERTSON—We have been frequently told that the question before us is, What is the meaning of the word "fictitious"? It would be more accurate to say that the question is, What is the meaning of the words "fictitious person"? And I cannot help thinking that, at least in the present case, this has not been sufficiently attended to. Dr Johnson, it is true, gives "counterfeit, false, not genuine," as one meaning of the word "fictitious"; but the illustration given—viz., "fame"—shows that this meaning is applicable to things; he gives another, "feigned, imaginary," and the illustration given is "The human persons are as fictitious as the airy ones." This last is the sense applicable to persons, and "person" is the word with which we have to deal. Now, I hope that I shall not be thought too crude if I say that the present question seems to me to be decided when once we know that T. A. Kerr, so far from being a "feigned or imaginary" person, was a living man, in business, known to the drawer of the cheque and intended by him to receive the proceeds. All that has been said against the cheque does not seem to me to touch this question. The argument, if good for anything, brings within this section all bills obtained by fraud, and credits the Legislature with expressing this by describing the payee as a fictitious person. I am unable to adopt this conclusion. The case of *Vagliano* is so entirely different in its facts as to be inapplicable to that before us.

LORD COLLINS concurred.

North and South Wales Bank v. *Irvine.*

LORD CHANCELLOR (LOREBURN) — In this appeal two points were raised by Mr Isaacs. The first is identical with that raised in the case of *North and South Wales Bank* v. *Macbeth*, and ought not in my opinion to prevail, for reasons which I have already stated. The second point made by the appellants is that, assuming the Court of Appeal to be right in giving judgment for the plaintiff, yet the damages ought not to be £2300, but only £120. Irvine, the plaintiff, was induced by the fraud of one White to sign a cheque for £2300, payable to John Davies or order. He intended that Davies, who was a real person well known to all concerned, should receive the money. White forged Davies' name and procured his bankers, the defendants the North and South Wales Bank, to present it and obtain payment from the plaintiff's bankers. For this the defendants are liable to the full extent of £2300, unless the following

additional fact can in part relieve them. White advanced to the plaintiff £2180 to enable the plaintiff to meet this cheque for £2300. So the plaintiff, in fact, has only lost up to the present time the difference—namely, £120—and the defendants urge that he can recover from them nothing beyond this actual loss. I do not think so. I agree with Buckley, L.J., that the whole £2300 paid to the defendants was paid out of Irvine's money at his own bankers. Where he got that money is irrelevant. He may have to account for £2180 of it to White's trustees. I do not know whether it will be so or not, it will depend on the rights between the plaintiff and White's trustees. But I see nothing that can entitle the defendants to stand in the shoes of White's trustees and claim against the plaintiff what in effect is a set-off arising out of an indebtedness of the plaintiff, not to themselves, but to White. If any case could be cited in favour of the defendants' contention it might be necessary to contrast it with other authorities, but I think there is no such case, and that the law is plain.

LORD ROBERTSON and LORD COLLINS concurred.

Appeal dismissed.

Counsel for the Appellants—Rufus Isaacs, K.C.—Maurice Hill—H. Beazley. Agents—Rawle, Johnstone, & Company, Solicitors.

Counsel for the Respondents—Horridge, K.C.—Leslie Scott. Agents—Walker, Son, & Field, Solicitors.

HOUSE OF LORDS.

Friday, March 6.

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

MACBETH & COMPANY *v.* MARITIME INSURANCE COMPANY.

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

Insurance—Marine Insurance—Constructive Total Loss—Cost of Repairs—Value of Wreck.

In deciding the question whether or not there has been a constructive total loss of a vessel which has been wrecked, the selling value of the wreck falls to be added to the cost of repairing the vessel.

A vessel's value was £12,000. She was wrecked. The cost of repairing her was £11,000; the wreck was worth £1000. *Held* that she was a constructive total loss.

Judgment of Court of Appeal *reversed*. *Angel* v. *Merchants' Marine Insurance Company* (1903), 1 K.B. 811, *overruled*.

Appeal from a judgment of the Court of Appeal (LORD ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.), who had affirmed a judgment of WALTON, J., in favour of the respondents, the defendants below, at the trial of the action before him without a jury.

The facts sufficiently appear from the considered judgments, *infra*.

LORD CHANCELLOR (LOREBURN)—In this case the steamship "Araucania" was insured by the respondents in a valued policy for £12,000, free of particular average, and with a condition that in reckoning whether or not there should be a constructive total loss the repaired value should be taken at the valuation of £12,000. She went ashore. The learned Judge has found, and it is not disputed, that the cost of repairing was £11,000. So if that alone is to be considered, she was not a constructive total loss. But she would be so if, to the cost of repairing, the selling value of the wreck were to be added. Whether or not it ought to be added is the question before the House. The learned Judges, both in the Court of first instance and in the Court of Appeal, answered that question in the negative, not upon any view of their own, but in deference to the decision of *Angel* v. *Merchants' Marine Insurance Company*, pronounced by the Court of Appeal in 1903. In *Angel's* case one of the Lords Justices expressed himself on this point in terms of dissent from his colleagues. This question admits of ready answer as soon as it is ascertained what is the true test by which a court is to be guided. Really the choice lies between two tests. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is £11,000, and the repaired value is £12,000. If the latter test be adopted, then the appeal must be allowed, for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so. If this were an open question, there seems to me ground for arguing that the former is the sound view. But I think that this is not really an open question, notwithstanding the recent decision in *Angel's* case. I will not enter upon a criticism of the authorities. I have had the advantage of seeing in print the opinion of Lord Collins, who fully discusses them, and I agree in his conclusion. When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation, and this test has been laid down repeatedly by many high authorities over a long period of time. I think that it was too late to disturb it in 1903. I will merely add that in my opinion the rule can only apply where there has been a wreck or something equivalent to a wreck. If an