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THE WATER CARRIAGE OF GOODS ACT (1936)

by

K.C.Mackay

McGill University
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PREFACE

He who undertakes to examine the history, application, provisions and effect of the Water Carriage of Goods Act, must do so with some trepidation. The English Carriage of Goods Act has already received the learned attention of Temperly and the authors of the latest editions of Scrutton on Charterparties and of Carver's Carriage of Goods by Sea, and at first glance it would seem superfluous to attempt a further examination of the Canadian Act which differs so little from the English. At best it would appear that any such work would be subject to the criticism that it did little more than bring the other works up to date and to some extent consider the slightly different Canadian Judicial trend.

But it was felt that a fresh interpretation from the Canadian point of view might be of some value. The monumental and authoritative works of Scrutton and Carver, treat the Act and the Hague Rules as an appendix to their main themes, which, in the former, is the law of Charterparties, and in the latter the law of the Sea Carriage of Goods in full. And while Temperly's little book is perhaps the best example of a sound explanation of an Act of Parliament yet produced in England, it

makes no pretensions to doing more than that. It contains an excellent and detailed study of the exceptions which is invaluable for all who deal with merchant shipping. Nevertheless it does not pretend to be an assessment of the Act's effectiveness, nor does it do more than refer in passing to some of the very real problems which the English Act, during its more than twenty-six years of application, has posed. The present work is intended to continue on from there and assess the present act in all its ramifications.

Much space had naturally been given to a full commentary on each rule as well as a discussion of the questions raised by them. It is hoped that, despite the existence of valuable commentaries on the English and American Acts, the present thesis will, in a modest way, assist in the comprehension of the principles of law which are contained in the Canadian Water Carriage of Goods Act of 1936.

TABLE OF CONTENTS

CHAPTER 1

History

CHAPTER 11

Application of the Act

CHAPTER 111

CHAPTER 1V

CHAPTER V

INDEX OF CASES

Dale v Hall .....1780 Wils. 281
Davidson Chemical Co. v Eastern Transportation Co. ...1928 AMC 161
Davis v Garrett .....(1830) 6 Bing. 725
Desmarais & Robitaille Ltee. v Davis.....Q.R. 34 K.B. 532
Diamond, The .....1906 P. 282
Dobell V SS "Rossmore" Co.....(1895) 2 Q.B. 408
Dominion Coal Co. v Lord Strathcona SS.....(1924) 2 D.L.R. 66
Dominion Glass Co. v "Anglo-Indian".....(1944) 4 D.L.R.121
Dominion Tankers v Shell Oil.....(1939)3 D.L.R. 646;
(1940)4 D.L.R. 115
Dominion Textile v C.S.L.....46 D.L.R. 255
Donaldson Line v Hugh Russell & Sons.....Q.R. 68 K.B. 138
(1940)3 D.L.R. 693
Donkin Creeden v "Chicago Maru" .....16 Ex.C.R. 503
Doran v Labrador Pulp .....15 D.L.R. 151
Dreyfus v Tempus Shipping Co.....1931 A.C. 726
Dunbeth, The .....1897 P. 133

Elder Dempster & Co. v Paterson, Zachamis & Co.....1924 A.C. 522
Empire Shipping v Hall Bryan .....(1940) 1 D.L.R . 695

Ferguson v Toronto, Hamilton & Buffalo Ry.....(1950) O.W.N. 105
Ferro, The .....1893 P. 38
Fitzgerald, The R.P. .....212 Fed. 678
Ford Motor Co. v Union Steamship Co.....(1925) 3 D.L.R. 1169
Foreman & Ellams Ltd. v Federal Steam Navigation Co...44 T.L.R. 250
(1928) 2 K.B. 424
Forward v Pillard .....(1785) 1 T.R. 27
Fugia Maggiore, The .....(1868) L.R. 2 A & E 106
Furness Withy & Co. v Rederiakt Banco .....(1917) 2 K.B. 573

Germania, The .....(1905) 196 U.S. 589
Giepel v Smith.....(1872) L.R. 7 Q.B. 404
Glenochil, The .....1896 P. 10
Glyn v Margetson .....1893 A.C. 351
Good v London Steam Shipowners Mutual Protecting Assoc....(1871) L.R. 6 C.P. 563
Goodwin v Lamport & Holt .....(1929) 34 W.L.R. 192
Gosse Millard Co. v Canadian Government Merchant Marine...1929 A.C. 223
Gourdeau v Simard .....35 R.L. 1
Grain Growers Export v Canadian SS Lines .....43 O.L.R. 330
59 S.C.R. 643

Hadj, Ali Alher & Sons v Anglo-Arabian Co. .....22 T.L.R. 600
Hain Steamship Co. v Tate & Lyle .....(1936) 2 All E.R. 597
G. Hall Coal Corp. v C.P.R. .....1925 Ex.C.R. 70
Hamilton Fraser & Co. v Pandorf .....(1887) 12 A.C. 518
Harland & Wolf v Burns & Laird Lines Ltd. .....1931 S.C. (Eng.) 722
Hart v Jones .....(1834) 17 R.L. 225
Heyn v Ocean Steamship Co. .....27 Ll.L.R. 334
Hill v Mc Henry .....1925 3 D.L.R. 1036
Hourani v Harrison .....(1927) 28 Ll.L.R. 120
Houston v Grand Trunk Ry. .....3 L.C.J. 269
Hughes Owens Co. v Cairn SS Line .....Q.R. 68 S.C. 26
Hunter v Potts .....(1815) 4 Comp. 203

Ingram & Rayle Ltd v Services Maratimes .....1914 1 K.B. 541
Insurance Co of North America v Colonial SS Lines ...(1942) Ex.C.R. 31; 79
1942 S.C.R. 357
Ives v U.S. .....58 F.(2nd) 201

James Richardson v Unus Shipping .....12 M.P.R. 39

Kawaski Kisen v Boulton SS Co. .....(1939) 2 K.B. 544
Kay v Wheater .....(1867) 2 C.P. 302
Kearney v Whitehaven Colliery Co. .....(1893) 1 Q.B. 700
Keystone Transports v Dosco .....(1942) 4 D.L.R. 604
Kish v Taylor .....1912 A.C. 604
K.V.P. v C.P.R. .....1949 Ex.C.R. 287
1950 S.C.R. 356

Lannon v Porter .....15 Ex.C.R. 126
Lennards' Carrying Co. v Asiatic Petroleum .....1915 A.C. 507
Liver Alkili Co. v Johnson .....(1874) L.R. 9 Ex. 339
L.R. 7 Ex. 267
Liverpool Borough Bank v Turner .....45 E.R. 715
Lloyd v Guibert ..... L.R. 1 Q.B. 115
Lord v Newsomsows & Co. Ltd. .....(1920) 1 k.b. 846

Maglee v Camden & Ambay Ry. .....45 N.Y. 514
Magnus v Buttermer .....(1852) 21 L.J. C.P. 119
Makins Produce Co. Inc. v Union SS Co. of N.Z. Ltd.....(1927) 1 D.L.R. 97
Manchester Trust v Furness Withy .....(1895) 2 Q.B. 539
Marcelino Gonzales y Compagnia v Nourse Ltd. .....(1936) 1 K.B. 565
Marguand v Bonner .....1856 E & R 232
Marlboro' Hill .....(1921) 1 A.C. 444
Master of Trinity House v Clerk .....1815 4 M & S 288
May v Hamburg .....290 U.S. 333
48 Ll.L.R. 35
May v Hamburg Amerikanische Paketfahrt A.G. .....54 S.C. 162
McFadden v Blue Star Line .....1905 1 K.B. 697, 707
Alex McFee & Co. v Montreal Transportation Co. .....42 D.L.R. 714
Meyer v Amexco. .....61 D.L.R. 348
Missouri SS Co.,Re .....(1889) 42 Ch.D. 321;
5 T.L.R. 438
Montana, The .....129 U.S. 397
Montreal Cotton Co. v C.S.L. .....55 D.L.R. 634
Montreal Trust v Can. Surety Co. .....(1939) 4 D.L.R. 614
Mountain v Whittle .....1921 A.C. 615

Naviera Visuonzada v Churchill & Son .....(1906) 1 K.B. 237
Nesbitt v Lushington .....(1792) 4 T.R. 783
N.Y. & Hastings SS. Co. v Teno .....(1929) A.M.C. 1472
Nitro-Phosphate Co. v London & St. KAtharine Docks ...9 Ch. Div. 527
Northumbrian Shipping v E. Timm & Son .....1939 A.C. 397
Nugent v Smith .....(1876) L.R. 1 C.P. 444

Oceanic Steamship Co. v Queensland State Wheat Board...(1941) 1 K.B. 402
Oyler v Mernam .....(1923) 1 D.L.R. 602

Pandorf v Hamilton ..... 16 Q.B.D. 633
Paquette v Sevigny .....28 R.L. 285
Parrish & Hermbecker v Burke .....(1943) 2 D.L.R. 193;
(1942 Ex.C.R. 159
Patterson SS Ltd. v Can. Co-pp. Wheat Producers .....(1934) 4 D.L.R. 449;
(1935) 4 D.L.R. 637
Patterson SS Ltd v Continental Grain Co. .....(1935) 3 D.L.R. 371
Patterson Steamships v Robin Hood Mills Ltd .....51 K.B. 322; 1937 3 D.L.R. 1
Pendle & Rivett Ltd v Ellerman Lines .....(1927) 12 Sol. J. 15
Peter Der Grosse .....(1875) 1 P.D. 414
Phelps, James Co. v Hill & Co.....(1841) 1 Q.B. 605
Pickering v Barkley .....(1648) Sty. 132
Poyosaki Kissen Kaisha v Societe des Affreteurs .....(1922) 27 Comin Cas. 157
Premier Gold Mine Co. v Coastwise SS.....35 B.C.R. 147;
(1926) 1 D.L.R. 1009

Quebec Marine Insurance v Commercial Bank of Canada....L.R. 3 P.C. 234

Rathbone v McIvor .....(1903) 2 K.B. 378
Reardon Smith Line Ltd v Black Sea & Baltic Gen. Ins...(1937) 42 Comm. Cas. 332
Renee Hyaffel .....(1916) 32 TLR 660
Rich v Kneeland .....1613 Hob. 17
Richard de Larranoga v Liverpool & London War Risks....(1921) 2 A.C. 141
Richardson v Burlington .....(1930) 4 D.L.R. 527
Richardson v Sannull .....(1898) 1 Q.B. 261
Rio Tinto Co. v Seed Shipping Co. .....1934 L.T. 764
Robert v Laurin .....(1882) 5 L.N. 179
Rodoccanachi v Elliot .....(1824) L.R. 9 C.P. 518
Rodney, The .....1900 P. 112
Rodo Canachi Sons & Co. v Milburn Bros.....(1886) 18 Q.B.D. 67
Rowsow v Atlantic Transport Co.....(1903) 2 K.B. 666
Royal Exchange Ins. v Kingsley Nav. Co. .....(1923) 1 D.L.R. 1048; 1923 A.C.23.
Russell v Niemann .....(1864) 17 C.B. (ns) 163
Russian Bank v Excess Insurance Co. .....(1918) 2 K.B. 123

Scottish Metropolitan Ass Co. v Can. SS. Lines ...(1930) 1 D.L.R. 201
Scales v Alaska SS Co. .....(1937) 2 D.L.R. 420
Shell Petroleum v Dominion Tankers .....(1937) 3 D.L.R.
Silver v Ocean SS. Lines .....(1930) 1 K.B. 416
Silver & Laylan v Ocean SS. Co. Ltd.....34 Ll.L.R. 149
Silvia, The .....(1898) 171 U.S. 462
Smith Hogg v Black Sea & Baltic Ins. Co. .....1940 A.C. 957
Smith & Sevice v Rosario Nilvate Co. .....(1894) 1 Q.B. 174
Spence v Chadwick .....(1847) 10 Q.B. 517
Stag Line v Foscolo, Mango & Co. .....1932 A.C. 328
Steel v State Line SS. Co. .....3 App. Cas. 16

Tamplin SS. Co. Ltd v Anglo-Mexican Petroleum Products....(1917) 1 K.B. 370
Teutonia, The .....L.R. 4 C.P. 171
Thames & Mersey Ins. Co. v Hamilton Fraser & Co.....12 A.C. 484
Thorley Ltd v Orchis SS. Co. Ltd. .....(1906) 23 T.L.R. 89
Thorsa, The .....1916 P. 257
Thrunscoe, The .....1897 P. 301
Torni .....1932 P. 78
Touraine, The .....(1933) 49 T.L.R. 237
Trent & Mersey Navigation Co. v Wood .....(1785) 8 Dig. 18
Turner v Haji Goolem Mohamed Agam .....1904 A.C. 826

U.S. Shipping Board v Bunge ,.....31 Comm. Cas. 118
U.S. Shipping Board v Rosenberg .....12 F.(2nd) 721
Re Unus Shippping.....1937 2 D.L.R. 239

Vipond v Furness Withy & Co. .....35 D.L.R. 278
Virginia Caroline v Norfolk & N.A. SS. Co. .....(1912) 1 K.B. 229, 243, 244.
Vita Foods Products v Unus Shipping Co. .....1939 A.C. 277

Watts, Watts & Co. Ltd v Milani & Co. Ltd.....(1917) A.C. 227
Weston v Riverton .....1924 Ex.C.R. 65
Willdamino .....47 S.C. (U.S.) 261
Williams v Vaambooge .....(1915) 21 Comm. Cas. 257
Woolf v Clagett .....(1800) 3 Esq. 257

Xantho .....3 A.C. 72

INTRODUCTION

It is a principle of common law that if goods are shipped in a general ship (a) without any express contract being made between the shipper of the goods and the shipowner or if a contract is made, one which does not contain any stipulations relieving the shipowner from liability for loss of/or damage to the goods, the shipowner acts as an insurer of their safety. He carries the goods at his absolute risk and impliedly undertakes that the voyage shall be performed without deviation or delay. There are, it is true, some exceptions to this absolute liability - the Act of God or of the King's enemies or an inherent defect in the goods themselves (b), or if loss or damage occurs through the fault of the shipper or of those for whom he is responsible. Thus a shipowner - at common law - has the same liability as a common carrier in respect to the loss or damage to the goods carried aboard his ship.

The common-law liability of a shipowner was the original law governing the carriage of goods by sea. In its stringency it could have acted as a deterrent on

(a) eg. - a ship whose carrying space is not reserved for a single charterer. The rule applies to a barge used for a voyage by river - Rich v Kneeland 1613 Hob. 17; or coastwise - Trent & Mersey Navigation v Wood (1785) 8 Dig. 18. But the rule does not apply to merchantmen who make subcontracts with lightermen to transport goods from ships to their warehouses - Consolidated Tea & Lands Co. v Olivers Wharf (1910) 2 KB 395.

(b) The Barcore 1896 P. 294 - but the shipowner is not protected if the goods developed inherent defect due to his or his servant's fault.

the expansion of maritime commerce in England which had begun in the 16th Century. But a shipowner was entitled to contract out of these liabilities to any extent, subject to the general rules as to legality and public policy which are applicable to all contracts. Shipowners frequently availed themselves of this right and the conditions and stipulations inserted for their benefit in contracts of affreightment were not only varied but, with respect to shippers, particularly onerous. Shipowners availed themselves of the maximum protection by introducing into contracts of carriage of goods by sea stipulations containing a great number of exceptions which almost completely exempted them from all loss of or damage to the goods carried in their bottoms. It is not surprising that this position was unsatisfactory not only to the shippers themselves but also to those who advanced monies on the goods shipped and to insurers who, of course, had no recourse against the shipowners if the goods insured were lost or damaged. In consequence of this situation, the various Carriage of Goods by Sea Acts were passed to give effect to the recommendations which had been made at the International Conference on Maritime Law which had been held in Brussels in 1922 (c). The Rules relating to Bills of Lading, which were drawn up by the Conference, are included in the schedule of the various acts which were subsequently passed by many of the Nations represented at Brussels.

(c) The history of the Rules is dealt with in Chapter 1.

The Act only applies to the outward shipment of goods, other than live animals and deck cargo, carried from a port in Canada to any other port whether in or outside Canada. Notwithstanding the application of the Act, shipper and shipowner are allowed freedom to contract as regards goods shipped in the coasting trade. This freedom of contracting is only allowed provided that there is no stipulation as to seaworthiness which is contrary to public policy; that no Bill of Lading is issued and that the terms agreed upon are contained in a receipt which is non-negotiable and marked as such. This provision is of great importance in a country such as Canada where the coasting trade is assuming an ever-increasing role in the commercial life of the country. Freedom of contract is also allowed to particular goods which are not ordinary commercial shipments and where the circumstances justify a separate agreement. Again such shipments are subject to the same provisos which apply to contracts covering shipments in the coastal trade.

The Rules only apply from the time the goods are loaded aboard a ship until they are discharged. This leaves the parties free to make what terms they please as to the period "prior to the loading on and subsequent to the discharge from the ship in which the goods are carried by sea." Further, the Rules only apply to "Contracts covered by a bill of lading or any similar document of title": they do not apply to charter parties,

but a bill of lading issued under a charterparty must comply with the rules.

The Rules were brought into effect on February 15, 1939, and apply to any Contract for the carriage of goods by water made after that date and to any bill of lading or similar document of title issued, whether before or after February 15, 1939, in pursuance of any such contract.

.....

The Act makes important changes in the common law liabilities of shipowners, but the rules of common law remain applicable except insofar as they are expressly modified by the Act (d). Thus, if it be shown that goods were shipped in good condition and were subsequently delivered in a damaged condition, there is an onus on the shipowner to prove that the case falls within one of the exceptions to liability which are contained either in the Act or the "Schedules of Rules" (e).

Before considering the Act in detail - which is the principal object of this thesis - it will be convenient to first consider the principle alterations which the Act effected on the law governing the water carriage of goods. These were:

(1) The Rules contain certain exceptions and stipulations in favour of the shipowner which constitute his maximum protection. He is allowed to surrender part or all of

(d) Stagline v Foscolo & Co. 1932 AC 328.

(e) Gosse Millard Co. v Canadian Government Merchant Marine.

this protection, provided such surrender is embodied on the Bill of Lading. But, subject to the exception as to the limitation of his liability, any clause in a bill of lading which stipulates that the shipowner shall be relieved from any of the obligations imposed upon him by the Act is absolutely null and void. Thus, if the Rules are varied, they can only be varied in favour of the shipper. It is stated in the Act that any bill of lading which contains or is evidence of any contract to which the rules apply must contain an express statement that it is to have effect subject to the provisions of the Rules. As shall be subsequently seen in considering the case of Vita Foods Products v Unus Shipping Ltd.(f). This provision, while originally considered to be the means by which the Act would be absolutely effective, suffers from the fact that the act contains no provision whereby this stipulation can be enforced. It was originally thought that where goods are shipped to England, and by the law of the place of issue of the Bill, the rules apply, that the parties could not contract out of the act and Rules by providing that the Bill of Lading was to be construed according to the law of England - the Common Law (g). This viewpoint which was held by Lord

(f) 46 CRC 231; (1939) 2DLR1; 1939 AC 277.

(g) The Torni 1932 p. 78.

Justice Scrutton was refuted by the Privy Council in the Vita Foods Case, a refutation which has tended to render the Act less forceful than the Conference originally had intended (h).

(2) The Act abolishes the absolute undertaking on the part of the shipowner to provide a seaworthy ship which is implied at common law and substitutes an obligation to exercise due diligence to make the ships seaworthy. Whether this change has benefitted the carrier is doubtful - the obligation to use due diligence is as stringent as the obligation to provide a seaworthy ship. In the event of loss or damage occurring through unseaworthiness, he must prove that he exercised due diligence to make the ship seaworthy; since the presumption is that due diligence was not exercised, whereas no presumption against seaworthiness existed at common law.

(3) The Rules permit deviation to save life or property and they also allow reasonable deviation. Deviation to save property was not allowed at Common Law unless a stipulation permitting it was expressly embodied in the contract of affreightment.

(h) The importance of this decision and its effect is discussed in full in Chapter VIII.

(4) The Rules relieve the shipowner from loss or damage due to "Any cause arising without the actual fault and privity of the carrier, or without the fault or neglect of his agents or servants. It has repeatedly been laid down that the words 'fault or neglect' must be read as 'fault and neglect'. Thus making the phrase conform to the provisions of the Canada Shipping Act (i).

(5) Subject to these exceptions the carrier must take good care of the goods and deliver them to the port of discharge in the condition in which he received them.

(6) The Rules contain provisions limiting the amount of the carrier's liability in certain cases where other acts exist stipulating specific limitations. It also enacts that removal of the goods without notice of claim shall, in certain cases, be prime facie evidence of discharge in the condition described in the bill of lading and they provide a time limit for legal proceedings against the carrier in respect of loss to or damage sustained by the goods shipped.

(i) It was first suggested in Hourani v Harrison (1927) 28 L.I.L.R. 120 that the word 'and' should be read for 'or'; nevertheless when Canada adopted the English Act, it was not deemed necessary to make this change, although the word 'and' was considered correct by Rand, J. in Dominion Glass Company v Anglo-Indian (1944) DLR 104.

The Act was intended not to codify the law of carriers of any nation which adopted the rules, but rather to create a new international law of carriage of goods by sea which would be interpreted without regard for the former law. Nevertheless it was stated in Stag Line v Foscolo (j) that the legislature intended to confirm the construction previously placed on the exceptions by the English Courts, which is possible without derogating from the international aspects of the Act itself.

The above is a brief outline setting out the essential principles embodied in the Water Carriage of Goods Act (k). Its history, application, interpretation and effect will be dealt with in the following chapters.

(j) Supra

(k) 1 Ed VIII Chap. 49 (CAN.)

HISTORY

I. Maritime Carriers

The law governing the movement of ships at sea was probably one of the earliest and best developed bodies of law to deal with international commerce. Certainly it was the earliest manifestation of what later was known as the law merchant - that body of law which was developed and applied by merchants in their dealings with one another and which was not subject to territorial limitations or to the vicissitudes of a purely national body of law. Maritime law predated, by many centuries, that other branch of the law Merchant, Negotiable Instruments, with which Maritime law was to become firmly allied.

Maritime traffic first developed in the Mediterranean and it was natural, therefore, that the first Maritime codes should develop as a result of that traffic. It was the Merchants who were vitally interested in the traffic, who first drew up the rules by which they wished to have their commerce governed. These ruleswere their own, having little or no connections with the laws of the various cities and states which bordered the Mediterranean. The law merchant, created by traders, was obeyed by all who traded upon the seas, regardless of nationality.

One of the earliest uniform codes was that of Rhodes, which was drawn up about 300 B. C. This code was universally applied and for many centuries thereafter the law of the sea was referred to as the "Rhodian Law".

After the fall of Rhodes and the gradual shift westward began, many of the Italian state-cities drew up their own codes which were almost identical, even though created by the merchants of different states. In the twelfth century the Consuloda del Mare was executed in Barcelona and this was applied by the majority of maritime states. As the centre of commerce moved northward, a new code - the Code of Olèron developed and it was this code which was used by the medieval English merchants. This code served for several centuries until supplanted by the Sea Laws of Gotland, the maritime code of the Hanseatic League, But succeeding sea laws were based upon the Code of Olèron and retained the uniformity and adaptability which characterized the Law Merchant which - as Lord Cockburn once said (1) - "is not fixed or stereotyped but is capable of being enlarged to meet the requirements of trade." It was the constant enlargement and change which caused long established codes to be replaced by newer and more adaptable ones. The change of the centres of trade from the eastern Mediterranean to the North German trading cities has seen the rise and fall of numerous codes. The essential continuity remained and the rules changed but gradually and only then to meet new situations which arose as the concepts of trade, and the means of trading, developed.

(1) Goodwin v Roberts (1875) 10 EX 337

There was, during the period covered by the many codes, an almost complete uniformity and universality which can be explained only in light of the fact that the law of the sea was part of the law merchant and as such controlled and altered when necessary by the merchants themselves. Generally, disputes which arose had been decided by the Merchants themselves, but with the rise of nationalism in the seventeenth century and the development of national commercial courts, disputes were taken before these territorial tribunals. However, the law which these courts applied was the law merchant which was gradually being incorporated in the codes of each individual nation. Although each nation's sea code was at first almost identical - having been adopted from the Law Merchant - as they developed, certain modifications and dissimilarities appeared which caused the first cracks to appear in the hithertofore universal uniformity which the merchants had for so long achieved.

In England, Maritime law developed simultaneously with the expansion of English trade and English shipping and in doing so developed its own rules consonant with the great body of common law which had grown throughout the centuries. By the 18th Century, Maritime law in general and, in particular, that part of the law which governed the transport of goods was enmeshed in the tentacles of the common law.

The modern law of England covering carriage of goods by sea dates back from 1703, when it was laid down in Coggs v Bernard (m) that he who undertakes to transport merchandise, safely and soundly, is responsible for all damages sustained by that merchandise during carriage as a result of his negligence, even if he is not a common carrier. This case, which arose from facts of slight importance - the carriage of several casks of brandy from one cellar to another - was very carefully studied by the authors of this period and made jurisprudence in England for more than two centuries, for it set the standard by which the common law liability of a carrier was measured. This liability was described thusly:

"A carrier by sea is like a common carrier, apart from an express contract, absolutely responsible for the goods entrusted to him, and insures them against all contingencies, excepting only the Act of God and the enemies of the Queen (n)."

(m) (1790) 11 King's Bench Reports p. 909.

(n) Pandorf v Hamilton 16 QRD 633: In Liver Alkili Co. v Johnson LR 7 Ex 267, it was held that a lighterman or bargeman has the liability of a common carrier; this means that the liability of a common carrier extends from the time the goods are put in his possession until they are delivered to the consignee. The Act limits the shipowner's liability from the time of loading until discharge. Under the common law, when the goods are actually in transit, the relationship between the shipowner and the cargo owner is that of carrier and shipper, but when they are in the carrier's warehouse, awaiting shipment, the relationship is that of bailler, and the carrier is then only liable for losses arising from his negligence. As a carrier he is liable for all losses which occur unless due to the Acts of God or the King's enemies.

The carrier's position was thus made analogous to that of an insurer and he was absolutely responsible for delivery in like order and condition, at the destination, the goods entrusted to him for carriage. The only exceptions upon which he could, in law, rely, were Acts of God and of the King's enemies.

It is interesting to note that in Quebec the carrier's liability under the Civil Code is somewhat less stringent than his liability under the common law. Article 1675 cc states that carriers 'are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistable force, or has arisen from a defect in the thing itself.' Force majeure includes a wider number of exceptions than does Act of God (o), and although this Article raises a presumption against a carrier, as does the common law, this presumption can be rebutted by proving force majeure or a defect in the thing itself, e.g. bad packing (p). This provision of Quebec Law antedated the code, and even as early as 1800 differed from common law liability (q).

(o) Mackay: 'Impossibility of performance in Quebec Civil Law' McGill 1950; Houston v G.T.R. 3 L.C.J. 269

(p) Desmarais & Robitaille Ltée v Davis & Georgia Southern & Florida Ry. QR 34 KB 532; Robert v Laurin (1882) 5 L.N. 179:362

(q) Hart v Jones (1834) 17 RL 225

As has been pointed out, a carrier's common law liability only existed in the absence of an agreement to the contrary between the shipowners and the shipper. With the expansion of shipping and the construction of more seaworthy vessels, it became the custom for shipowners to restrict the very onerous liability placed upon them by common law. The two exceptions of Acts of God and the King's enemies were continuously added to as the carrier attempted to escape his heavy responsibility by inserting clauses in the bill of lading exonerating him from loss of/or damage to the goods shipped. Whenever the carrier was found liable by the courts to the cargo-owner, a new clause would be inserted in the bill of lading in order to take care of similar cases in the future. Due to the more complicated construction and the increased size of ships and the growth of large shipping companies, the number and type of exceptions were greatly multiplied. Agreements between these large shipping firms led to the same result since bills of lading were uniform, each firm including an exception as it was drawn up by one of their number. These clauses of exception were given full effect in England and many continental countries (r). So much

(r) But not in the United States, where many of these exceptions were deemed to be contrary to public policy - see The Montana 129 U.S. 397 Contra, the English decision in Re Missouri SS Co. (1889) 42 Ch. D.321.

so that the result was, that apparently the only obligation resting on the shipowners was to receive the freight, or as one writer put it, the companies felt that all they had to do was bank the price of the transport and there their responsibility ended (s).

The clauses were very often unreasonable and unjustly discriminated against the shipper. Not unnaturally their insertion caused the shippers to protest vigourously. One clause which caused much consternation and which obliged the shipper to have a well nigh blind confidence in the carrier whose responsibility was thereby virtually wiped out, was this:

> "The Company, its agents or employees shall not be responsible in anyway for.....(and here follows a list of all causes and possibilities for losses imaginable).....and any damages or losses resulting from the above mentioned cases, whether resulting from the negligence, fault or error in judgment of the pilots, captain, tailors, mechanics, stevedores or other persons in the service of the carrier."

Bills such as this amounted to an almost complete exoneration from the carriers' responsibility. Shippers had little choice but to comply with these conditions since it was essential that their goods be carried to their markets. The shipping companies, in order not to discourage trade, lowered their rates.

(s) F. Cyril James "The Hague Rules" 74 U.Pa. LR 675

2. The Movement for Uniformity

Parallelling the rapid growth of shipping, marine insurance underwent a considerable development. Insurance played a great part in the conflict between shipper and carrier, since in effect it was the large insurance companies which suffered from the carriers' limited responsibility. The insurers issued policies to the shippers covering all risks, as well as losses imputable to the carrier. In the event of a loss, the insurer paid the shipper and was thereupon subrogated in his rights, which subrogation was usually ineffective, since the loss was one from the responsibility for which the carrier had generally exempted himself. As could be expected, the insurance companies were far from contented with this situation which placed them in the position of having to pay out claims when there was no chance of recovering from the carrier through whose fault the claim had arisen.

The shippers and the insurers greatly desired to put an end to the constant multiplication of exonerating clauses, and with this view in mind met at Hamburg and drew up a series of resolutions. The most important of those concerned the clause exonerating the carrier for responsibility for the negligent acts of his employees. The delegates reasoned that, since the shippers were not consulted about the selection of the crew, the carrier should be responsible for their acts. This,

would cause the carrier to exercise greater care in choosing his employees. In England, the agitation grew against what was virtually a monopoly able to dictate their own conditions to the shippers. In particular, the Glasgow Trade Association was most persistent in its demands that the rights and immunities of the carriers be limited.

But it was especially in England that the opposition to any restriction on the rights of the carriers to draw up their own bills and include therein all the exceptions which they deemed necessary, was the strongest. England in the 1890's had the largest maritime fleet in the world. Nearly 75% of maritime cargo on the Atlantic was carried in British bottoms - only 10% in American (t). As the agitation of the shippers grew, the shipowners decided to call a meeting in London to repudiate the Hamburg findings. They arrived at the opinion that the carriers choice of employees was not free, but governed by the necessity of employing only competent mariners,

(t) At the beginning of the 19th Century 90% of the maritime commerce of the United States was transported on sailing ships constructed in and flying the American flag. At the beginning of the Civil War, the decline of American shipping began. The energies of that young and vigorous nation were devoted first to war and then to the opening and development of the West. Railways became the dominant form of transportation, for they had seized the imagination of all - financier and farmer, politician and packer. The commercial supremacy on the Atlantic was rapidly lost to the vast British Merchant fleet with its myriad lines of freighter and liners. By 1914 only 10% of the maritime traffic of the United States was effected in American bottoms.

whose competency had been tested by various examining boards set up by the government. They counteracted the accusation of monopolistic practices by saying that while land carriers, such as railroads, required governmental authorization before they could begin business, anybody with sufficient capital could start a steamship line. In fact, they said, an important part of the maritime traffic was in the hands of small independent carriers who complemented the services of the larger lines. Furthermore, since the development of large shipping firms and great liners, it was impossible for the carrier to oversee the operation of his ships in person and he depended upon his employees to run the ships safely and efficiently.

The diametrically opposed arguments of shippers and carriers were not to be easily reconciled and, such was the strength of the shipping interests that no action was taken by the legislature. A satisfactory solution to the problem was difficult because in principle the question is one of insurance subject to the requirement of public policy. Whichever faction have the burden of responsibility, the insurers would be required to pay. The question of whoshould bear the burden of the premiums was at issue. In theory, the risk could be placed entirely upon the carrier or upon the shipper. Various arguments were raised against both these solutions.

If the cargo-owner was made absolutely liable for loss of or damage to the goods shipped, he would only pay a minimum tariff for transportation and insure his risk of loss. This was freedom of contracting because it would, in this event, be unnecessary to prohibit the shipowners from assuming all or part of the risk if he wanted to. There were certain disadvantages attached to this arrangement.

a)No motive existed for the carrier to take care of the goods, other than the ordinary competition of other carriers.

b)No incentive to exercise care.

c)The distribution of risks should be based on freedom of contract as far as possible, but freedom of contract should only be preserved as long as it is consistent with the maintenance of the carrier's motives to exercise due care.

The arguments which were used against making the shipowners absolutely liable were these:

a) The carriers would become insurers and would protect themselves by raising rates; that is by becoming insurers they would be entitled to add a premium to the normal tariff.

b) Shippers' goods would have to be insured and the amount of valuation would be based on guesswork because the shippers could not safely be allowed to state the

value of their goods, if the principle of full responsibility was to be maintained; otherwise shippers would soon resort to undervaluation to gain lower freight rates. The contrary would probably be true during wartime when overvaluation might be made.

c) The carrier would be compelled to insist upon a freight rate which would cover not only the price of the carriage but also a premium, difficult,if not impossible, to calculate. This is unsound in theory and unworkable in practice.

d) The principle of freedom of contract would be destroyed.

It should be noted that at the time conflict between shipping and cargo interests came to a head, absolute freedom of contract was sacrosanct with both jurists and commentators. The least attempt by Parliament to control the activities of commerce was met with indignant protests that that great principle of common law - freedom of contract - was being abrogated. But how much freedom, in fact, did the shipper possess? It was alleged that both carrier and shipper were on an equal footing and could bargain with each other, like the majority of ordinary traders, and that they must be given absolute liberty to choose the form of contract which best suited their needs. This, of course, was absolute nonsense. When a shipper wished to expedite the shipment of his goods, a bill of

lading was imposed upon him by the shipowner, which he was bound to accept if he wished to avoid having his goods left sitting on the pier. And it has been shown that these bills were drawn up by the carrier and took care of his interests alone.

This, then, was the situation which existed in 1893 when the United States Congress decided that the situation had become so intolerable that immediate congressional aciont was needed to affirm the shippers rights. The action which congress took appeared in legislative form as the Harter Act.

3. The Harter Act (u)

The bill which was to become the Harter Act was introduced by Representative Michael D. Harter of Ohio on June 10th, 1892 (v). Harter, himself, represented powerful export interests in the American Middle West, and his object was to deal with the problem which had been posed by the methods used by the English Steamship Lines. The rules were to be applicable to all trans-atlantic commerce and, it was hoped, would limit under threat of sanction, the clauses which had hitherto been inserted in bills of lading.

It was appropriate that the first move to increase the responsibilities and liabilities of ocean carriers was made in the United States. The American Atlantic

(u) 46 USC Sec. 190-195

(v) Bill HR 9176 - 23 Cong. Rec. 6529

fleet was almost inexistant, and, as Harter himself explained, only 1% of American Maritime interests would be affected. On the other hand, the United States was forging ahead as one of the leading exporting nations of the world especially in the field of raw materials.

The initial bill was directed solely against the carriers; it prohibited the insertion in bills of lading of clauses exonerating the shipowner for the negligence, fault or error of his servants. The bill was revised to some extent in the House; deviation for the purpose of saving life and property was permitted and several alterations were made which directed the force of the Act at abusive clauses only, rather than at all clauses which lessened the carriers' common law liability as had been Harter's intention. When the bill was sent to the Senate, the Commerce Committee scrutinized it minutely, consulted shipowners, shippers and insurers and important concessions were made in the interest of all three. The Act was made applicable to all navigable waters; it permitted American shipowners to insert clauses in bills of lading exonerating themselves for the fault of their captains and crews, which they, unlike the English, had been unable to do previously since such clauses had always been considered as contrary to the public policy of the United States (w). The Act

(w) The Montana, supra.

was made inapplicable to cargoes of live animals, for the conditions imposed on the carriers were onerous and could impede the carriage of live animals. This type of carriage is particularly hazardous and it seemed preferable to allow the shipper and carrier to contract freely in such cases.

On the 13th day of February, 1893, the Harter Act was approved by the President of the United States and thereupon became the first act of a modern state designed to regulate the conditions under which goods were carried by sea.

The Harter Act was clearly a compromise between the interests of the shippers and carriers. It consequently caused numerous difficulties, especially in attempting to delimit the rights and liabilities of the shipowners. For example, it exonerated the shipowner for responsibility for the negligent acts of his servants, but it left him with the strict common law liability for accidental losses. Thus the carrier in defending an action for loss of or damage to a shipper's cargo would appear in the anomalous position of attempting to prove that the loss was caused by the negligence of his own servants and not by peril of the sea. Contrary to the intention of the bill's sponsors, the defendant carrier was often in the most advantageous position. However, despite the obvious weaknesses of the act, it remains of great historical - and to some extent practical - importance, for it symbolized the first

legislative step in obtaining uniformity in bills of lading covering transport on ocean-going vessels.

The Act was, in a way, experimental, but after a decade of operation it seemed that the experiment was a success - if a somewhat limited one. Australia in 1904, New Zealand in 1908 and Canada in 1910 adopted similar legislation entitled 'The Carriage of Goods by Sea Act' in the case of New Zealand and Australia and "The Water Carriage of Goods Act' in Canada. The only satisfactory explanation for the variation in titles would seem to be that in Canada the Act applied to navigation on the Great Lakes and on the St. Lawrence River and that the word sea might cause some confusion (x). These three acts were modeled after the Harter Act.

In England, the situation remained as before, much to the dissatisfaction of insurers and shippers. Most of the litigation arising out of the carriage of merchandise by sea occurred in English courts, where the majority of the shipping and insurance companies had their head offices. In interpreting the Harter Act or the three Dominion Acts, the English courts would read them as voluntary clauses in a bill of lading and construed them together with the remaining clauses with which they were often in contradiction.

(x) In the Act of 1936, which was copied from the English Act, the word 'sea' was deleted and 'water' substituted, except in exception 1V(2)L. Thiswas probably an inadvertence.

4. The Hague Rules

After the passing of the Harter Act, several international legal associations devoted themselves to the task of standardizing and making uniform, bills of lading. However, this task did not meet with much success. The London Conference of the International Law Association suggested a general bill of lading to be used by all lines, but this suggestion was never acted upon and goods continued to be transported under a great variety of bills of lading. At Paris, an International Conference of Underwriters passed a resolution favouring the Harter Act formula and its inclusion in all bills of lading.

In 1896, a special section of the International Law Association was formed for the purpose of conducting work in the field of maritime law in conjunction with shippers, carriers and insurers. The Comité Internationale Maritime devoted much time to various maritime problems, especially in the fields of collision, salvage, bottomery and limitation of liability, but, until 1920, ignored the equally uncertain field of bill of lading. Great success was achieved by the salvage and collision conventions and the committee was about to turn its efforts towards drawing up an international code of affreightment when the Great War intervened.

As a result of the war, a vast number of losses fell on shippers and insurers. The rapid expansion of

industry and the strain which was placed upon the existing and responsible shipping lines brought into being new and unreliable shipowners. Totally incompetent people with no notion of transport by sea, became large scale carriers. Theft became so common a practise during the war that it began to effect the former stability of the shipping economy. The complaints of shippers and insurers became so strong in England that the opposition from the carriers wilted. Perhaps not without a sense of resignation, if not approbation. The over expansion during the war of British and Dominion shipping had resulted in a serious economic setback to the large carriers. Competition had seldom been more bitter, especially between the long established and the new war-produced companies, and tariffs fell to an all time low. The demand of British and Dominion shippers became insistant that Britain limit the freedom with which carriers inserted exemptions from negligence clauses in bills of lading.

In 1920 the World Shipping Conference met and advocated that the principles of the Harter Act which were already in force in Canada, Australia and New Zealand be put into general effect. The next year the Comité Internationale Maritime drew up a draft copy of Rules for a universal bill containing these principles and a Bill of Lading Committee of the International Chamber of Commerce was formed to aid in securing the universal application

of this general bill of lading. In the same year, Lloyd George, then Prime Minister of England, appointed a commission to investigate this question and it recommended that the Empire adopt the Canadian Act of 1910, which was almost word for word the Harter Act. The recommendation of the commission was not acted upon, for at that time the International Chamber of Commerce was circulating copies of its draft rules to all interested parties and inviting them to send delegates to the Hague in September. Invitations were extended to shipping and cargo interests in all the larger maritime nations.

The Maritime Law Committee of the International Chamber of Commerce met in a series of sittings, under the Chairmanship of Sir Henry Duke, over a period of a few days. These sittings were devoted to receiving amendments, discussing and agreeing upon the ultimate form ofthe draft rules which had been drawn up by the Comité Internationale Maritime of the International Law Association in June of that year. At the end of the sessions the delegates were unanimously agreed upon the final form of the text which became known as the Hague Rules 1921. It was the intention of the delegates that the Rules would be voluntarily incorporated in bills of lading in the same manner as the York-Antwerp rules on general average which had been drawn up in 1860.

The principle of voluntary inclusion proved unacceptable to many shippers and, consequently, it was decided to redraft them in legislative form. In October 1922, the fifth International Diplomatic Conference on Maritime Law was held at Brussels and was well attended by delegates from all the Maritime nations. The Belgian government submitted to the conference the draft Rules (y) which had been agreed upon unanimously at the Hague in 1921 and thereafter amended to assume legislative form. The conference divided itself into committees and the text was examined minutely by the various committees and perfected. At the final meeting, the Bill of Lading Convention text was accepted by the delegates.

This modified text was submitted to the delegates at the Fifth International Conference on Maritime Law, reconvened at Brussels in August of the following year, who approved the Rules and signed the Convention (z).

The Rules themselves were contained in Article X of the Convention and it was provided:

" that the provision of the convention would apply to all Bills of Lading issued in any of the contracting states."

The contracting states were defined in Article XII:

(y) Draft convention for the Unification of Certain Rules relating to Bills of Lading.

(z) Treaty Series No. 17 (1931).

"Non-signatory states may accede to the present convention, whether or not they have been represented at the 'International Conference at Brussels." And in Article Xlll it was stipulated that 'The High Contracting parties may at the time of signature, ratification or accession declare that their acceptance to the present convention does not include any or all of the self-governing Dominions, or of the colonies, overseas possession, protectorates or territories under their sovereignty or authority." This article was inspired by British insistence that the Dominions should, if they so desired, retain their existing legislation, and that it must not be inferred that the Rules, when eventually enacted by the government of the United States, would apply to its Empire as a whole. In signing the Convention, the British delegate, signing on His Majesty's behalf, added this reservation to his signature:

"I further declare that my signature applies only to Great Britain and Northern Ireland, I reserve the right of each of the British Dominions, Colonies, overseas possessions and protectorates and of each of the territories over which His Britanic Majesty exercises a mandate to accede to this Convention under Article Xlll."

Great Britain's reservation with respect to the power of the Dominions and colonies to accede to the Convention or not, as they wished, is interesting. The Dominions, by 1914, had, through their own efforts achieved the right

to enter into commercial treaties, although it was not until the Statute of Westminster in 1931 that the right of the Dominions to make political treaties without the intervention of the British government, was confirmed. On the other hand, the right of colonies and protectorates to make treaties - whether commercial or political - had never before been recognized. Nor was this right extended to the colonies at subsequent conventions. It was granted solely for the purpose of determining the wishes of each political entity - regardless of status - with respect to bills of lading. The reason for this has never been satisfactorily explained, but, it is submitted, would appear to be this: In the 1920's, the British Empire had reached its peak - territorially, that is - for politically it had begun to decline during the war.

Colonies, possessions, protectorates and mandated territories under British domination stretched from the Atlantic to Eurasia and from Arctic to Antartic. Never had any one country held sway over such a vast and dispersed area. Conditions in one colony were diametrically opposite to those in another and their interests were as equally divergent. In the field of shipping, the requirements of the Falkland Islands were totally dissimilar to those of Burma. The Hague Rules, while valuable in one colony, might place a very onerous responsibility on shipowners in another, where, for example, the climate was arduous. For this reason, the government of the United Kingdom left the choice of whether or not the Rules were to apply to outward shipments from a colony, to the

governor and legislature of that colony. A less generous view is that the British Government, in the interests of shipping, wanted the Rules to have as little universal application as possible. While old and long held principles, such as freedom of contracting, may die hard, the actions of the British government after the Brussels Convention of 1924 would seem to disprove this view. The Convention was signed in August and immediately the British authorities set to work to put the Rules into effect as legislation. The Carriage of Goods by Sea Act quickly passed both Houses of Parliament, received the King's signature and went into operation on January 1st, 1925. The greater part of the British Empire acceded to the Convention within two years. Australia, New Zealand, Canada preferred, however, to retain their own Acts, which had been based on the Harter Act. While Britain, once so opposed to the limitation of the rights of carriers to contract as they chose, had quickly adopted the Rules and put them into effect, other countries were very slow to respond to the wishes of the delegates at the Brussels Convention; that the unification and standardization of ocean bills of lading be proceeded with remus velesque.

Canada, which had a very small and unprofitable government sponsored merchant marine, had economic interests roughly identical with those of the United States. In both countries interests of the shippers were paramount and the

shippers preferred the 1910 Act, modelled on the Harter Act, rather than the Hague Rules. They felt that they were better off under the old act which, for one thing, provided that the responsibilities of the carrier arose as soon as the goods were in his possession and finished only when they were deposited on the proper quay at the port of discharge. From "warehouse to warehouse" rather than from "tackle to tackle" as circumscribed by the Rules. Furthermore, in virtue of the Rules, the shipper is presumed to have warranted to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight of goods shipped and must indemnify the carrier against all loss, damages and expenses arising from inaccuracies in each particular (a). There is no presumption of this sort either in the Canadian Act of 1910 nor in the Harter Act. Perhaps the most important consideration of all, as far as the shippers were concerned was that the burden of proving due diligence to make the ship seaworthy had been shifted. Under the Act of 1910, in the event of loss, the carrier was obliged to show that he had exercised due diligence even if the loss was not due to unseaworthiness. Under the Rules, on the other hand, the shipper must establish the connection between loss and the unseaworthiness of the ship if he

(a) The Hague Rules Art. 111 (5)

would succeed in his action (b). For these reasons, then, the shippers felt, and with some justification, that the old Act would afford them greater protection than the Rules. They accordingly exerted their not inconsiderable political influence at Ottawa and delayed Canada's contribution to the cause of universal uniformity and standardization in the field of ocean bills of lading until 1936.

Whereas, the opposition to the adoption of the Hague Rules had, in Canada, been quiet, although extremely effective, the opposition of the American shipping interests was as vociferous as it was illogical. To a great extent the Hague Rules had been adopted by the Convention as a result of the efforts of American inter-nationalists who led the movement for uniformity in ocean bills of lading. In this they followed in the modern American tradition which has been instrumental in expending the field of public international law in general. Men like Judge Charles M. Hough, the President of the Maritime Law Association of the United States, contributed much to the final drafting of the Rules and to their adoption by the Brussels Convention. Nevertheless, opposition to the Rules in the United States was stronger than in most other countries. The reason for this was the same as that which generated the shipper's opposition in

(b) Ibid Art. 1V: Nor, under the Act of 1910, was any limit placed on the carrier's liability.

Article 1V (5) of the Hague Rules limits the carriers' liability to 100 pounds sterling per package or unit, or the equivalent of this sum in other money ($500.00 in the Canadian Water Carriage of Goods Act (1936))

Canada: The Harter Act gave them greater protection than would the Hague Rules.

A bill to give effect to the Rules was introduced in the House of Representatives in 1923 by George W. Edwards of Pennsylvania. At the same time, Senator Kenneth D. McKellar of Tennessee, a strong advocate of the shipping interests, introduced a bill in the Senate to amend the Harter Act so as to eliminate the requirements of 'due diligence' and subject shipowners to the implied warranty at Common Law that their ships were seaworthy at all times. This bill met with no success, but neither didthe one in the house, which encountered strong opposition from the supporters of McKellar's bill. Among these were numbered, The National Industrial Traffic League which filed a brief with the State Department, in which was expressed the League's opposition to the convention. The Insurance Company of North America - then the largest maritime insurer in the United States - and, finally, the Institute of American Meat Packers. The Insurance Company of North America was in favour of a uniform international bill of lading, but it could not accept the limitation of the period for which the carrier was responsible for the goods in his care. It preferred the longer period stipulated by the Harter Act. Thecompany's opposition was essentially based on the fear that the Rules would replace rather thansupplement the Harter Act. This fear,

as shall be seen, proved groundless.

The arguments of the American Meat Packers (c) were truly astonishing. They questionned the sudden exhibition of haste for the adoption of uniform universal rights of shippers and carriers when, throughout the years, no one had given ear to their complaints of the existing system. Their arguments against the bill were, in brief, these:

Who will interpret the Rules? They were drawn up by lawyers for the benefit oflawyers (d). Practically each phrase is subject to an ambiguous interpretation. The packers were, they said, quite prepared to support any law which clearly defined the respective rights of carriers and shippers, but these equivocal rules would provide no solution to disputes or difficulties, but, rather, would engender them. Who, they demanded, favoured and extolled the rules:

Lawyers representing the large shipping lines and those who practised maritime law and envisioned a multitude of actions which would be to their profit.

(c) The Hague Rules v the Harter Act - Argument in opposition to the adoption of the Hague Rules on American Export and Import Commerce. Prepared by the Institute of America Meat Packers 1922.

(d) The present Canadian Income Tax Act has been subject to the same criticism.

The shipping companies which would obtain the advantage of the Rules, and at the same time oppose all legislation on the matter. The insurers who saw an increase in the number of policies issued to cover risks excluded by the Rules. (In fact, the insurers did not adopt this point of view).

The forwarding agents who forsaw a vast increase in their work through obtaining through bills of lading for less fortunate inland exporters who did not have their own agents at the port of embarkation (e).

Bankers who were not in the leastwise interested in the conditions contained in the bill of lading. They would not accept as collateral, the best of cargoes, unless entirely covered by insurance.

Who would suffer from the adoption of the rules? The small American businessman who would have to sell the goods, finance the transaction, pay the lawyers, bankers, shipowners, insurers and forwarding agents and hope to obtain some profit from the sale. Why should a shipping company be placed in a more favourable position than Railway Companies, they asked, and why should the shipper bear any of the risk when he has abandoned all control over the care of the merdhandise?

(e) This point, although ridiculous per se, does refer to the problem of the status of Through Bills of Lading under the Act. That is, a bill of lading which covers goods shipped from Winnipeg to Montreal by ship and from London to New York by motor van. See Chapter Vll for a full discussion of this problem.

Thus went the argument of this most powerful opposition to the partisans of the Rules. It is amusing, in after years, to read of these arguments and to see especially, in view of the Packers reputations, the consideration shown for the small American businessman. One of the most curious phenomena on the American economic scene has been the support given by the representatives of the small businessmen and farmers to the interests of the trusts. The trusts, such as the railroads in the 19th Century, the packers and the Standard Oil trust, are only required to raise the cry that the interests of the small businessman or the farmer is at stake and the small businessman - without much thought - will support the trusts, although the trusts in general and the meat packing industry in particular did much, until 1932, to aggravate the lot of the farmer and eliminate the small packer (f).

The opposition to the Hague Rules was, however, very effective. Despite the support of such organizations as the International Chamber of Commerce, the American Acceptance Council (the bankers), the United States Chamber of Commerce, the American Institute of Marine Insurance, and not unnaturally, the American Steamship Owners Association, the bill to give effect to the Rules in the United States was defeated in the House of Representatives in both 1925 and 1926. In 1927, Senator Borah introduced the Bill in

(f) For an interesting view of this thesis, see G. Myers 'The History of the Great American Fortune'.

the Senate, but it was lost in committee. Notwithstanding the efforts of the United States Chamber of Commerce, which met on several occasions to discuss amendments which would be acceptable to all concerned, interest in the whole matter began to wane.

The British Chamber of Shipping greatly resented the lack of progress in the United States and, in 1932, considered a movement to repeal the Carriage of Goods by Sea (1924) Act, in view of the fact that few countries outside the commonwealth had honoured their signatures to the convention. Belgium had given effect to the Rules in 1928 (g) but no other countries seemed inclined to do so, to the disadvantage of British Steamship Lines.

In 1933 the situation in the United States came to a head with the decision of the United States Supreme Court in May v Hamburg (h). The Court held that a shipowner must either produce a vessel actually seaworthy or else prove that his servants had used due diligence <u>in all respects</u> as a condition precedent to securing the Harter Act exoneration from errors in Management and faults in navigation. The burden placed

(g) Law of November 1928: Article 91 of the Belgian Commercial Code.

(h) 290 US 333; 48 U.L.R. 35

on the carrier was so onerous that immediate correction became necessary.

In 1935, the bill was again introduced to the Senate by Senator White of Maine. The opposition to the Bill was limited to a futile objection by Senator McKellar, and the Bill was passed, then sent to the House for approval. On April 16, 1936, the late President Roosevelt signed both the Bill and the Convention and finally after an almost unprecedented struggle, the United States Carriage of Goods by Sea Act became law (i).

The success of the American proponents of the Convention was followed in France by the adoption of the Rules in the same month (j). The Canadian Act was assented to on June 23rd, while Denmark followed in 1937 and Norway in 1938.

Some degree of confusion existed in Canada as to when the Rules went into effect. The Water Carriage of Goods Act (1936) was assented to June 23. Section (7) (2) and 9 state that the Rules would not be effective until duly procalimed by the governor-general in Council. On July 2, the Act was duly proclaimed to be in force (k). From this proclamation it would appear that the Rules were also brought into effect at the same time. However, in

(i) U.S.Code, Tille 46 Section 1300; 49 stet, 1207.
(j) 'Lex Relative aux transports des merdhandises par mer'
(k) P.C. 1623

1939, a further proclamation was published to the effect that 'the Rules' contained in the Schedule to the Act shall apply to any contract for the carriage of goods by water made after February 15, 1939, and to any bill of lading or similar document of title issued, whether before or after February 15, 1939, in pursuance of any such contract (1). This point was raised before the Supreme Court of Canada in the Anglo-Indian (m), where the shipper contended that the Rules were not in effect in Canada in January 1938 and that the carrier was liable at common law for the loss of the shippers' goods. In dealing with this question, Mr. Justice Kerwin said that the proclamation of July 2, brought the Act into force and was also effective in bringing the Rules in effect.

"The Schedule which contains the Rules is part of the Act, and it was never intended that Sections 1 to 9 should be brought into force at one time and the Rules at a different time. The further proclamation of the Rules in 1939 was unnecessary and inoperative." After some unintended legislation, then, Canada finally had joined the movement for uniformity.

The ideal which had inspired the delegates at the convention was the eventual adoption by all maritime nations of a uniform standard bill of lading which would be acceptable to all those interested in the transport

(1) (1939) P. C. 343

(m) Dominion Glass Co.Ltd. v "Anglo-Indian" 1944 SCR 359; 1944 4 DLR 721

of goods by sea. But progress towards this ideal has been painfully slow. Almost 30 years have elapsed since the Rules were first drafted and as yet only five nations (n) other than those which are or were members of the British Commonwealth, have passed legislation giving effect to the Rules. But if uniformity is an ideal, it is a practical ideal and one which would be of universal benefit if given universal application. Perhaps it is not too much to hope that the United Nations may exert its influence towards a wider adoption of the Rules by the member nations of that organization.

(n) Six including the Phillipine Islands, which accepted the American Act in 1936. It excluded the application of the Rules in shipments between the Phillipines and the U.S.A., which was deemed to be domestic trade. Sweden, Italy and Germany drafted legislation containing the Rules but the acts have never been proclaimed.

APPLICATION OF THE ACT

1: General Applications and the Conflict of Laws.

Section 2 of the Water Carriage of Goods Act states, that:

"Subject to the provision of this Act, the Rules relating to Bills of Lading as contained in the Schedule .....shall have effect in relation to and in connection with the Carriage of Goods by Water in ships carrying goods from any port in Canada to any other part whether in or outside Canada."

As the section stands, it effectively declares that all outward shipments (o) must be made subject to the rights and immunities contained in the Rules, with the exception of, (a) the coasting trade (b) cargo of a special nature - deck cargo or live animals (c) or where the circumstances reasonably justify a special agreement and no bill of lading is issued.

Exceptions found in the Schedule.

Special agreements may not be made in the case of ordinary commercial shipments in the ordinary course of trade. In such special circumstances a carrier and a shipper may make special terms with regard to particular goods, to be embodied in a receipt, which shall be a non-negotiable document and not a bill of lading.

The Act then goes on to say in Section 4, that wherever the Rules apply, that is, whenever a bill of lading is issued for ordinary outward bound commercial shipments, the bill of lading must contain "an express

(o) Lannon v The Ship Loyd S. Porter. 15 EX C.R. 126

statement that it is to have effect subject to the provisions of the rules." In virtue of this section, what has come to be known as a 'clause paramount' must be introduced into every bill to which the Rules apply (p).

Both section 2 and 4 would appear to be expressed in the clearest and most unambiguous of languages and open to no misinterpretations. While the framers of the Act undoubtedly intended that this should be so, it is true to say that these two sections which define the application of the Act have led to not a little confusion. Confusion which, in the process of clarification, left the Act in a much weaker and less uniform state than the delegates at Brussels had ever envisioned in their most pessimistic moments. In short, in attempting to clarify the Act's application, the Privy Coucil (q) has established the principle that it is now possible to legally contract out of the provisions of the Hague Rules and thereby nullify the stipulation that the Act applies to all Bills of Lading (saving the mentioned exceptions) issued in Canada on outward shipments.

The problem, in essence, is this: what Law must the Court supply in considering a contract of affreightment entered into in a foreign jurisdiction? The lex loci contractus, the lex fori or the law by which the parties intended to be governed?

(p) See appendix II for example of Clause Paramount.

(q) Vita Food Products Inc. v Unus Shipping Co. (1939) 2 DLR 1

The original interpretation which the English commentators (r) gave to the sections dealing with the application of the Act was extremely broad. They felt that the Act was to be construed literally and, therefore, it should apply to all Bills of Lading save those exceptions which were expressly provided for in the Act itself. It was their opinion that whenever the question of the Act's application was before the courts - those courts should apply the lex loci contractus - thereby giving the widest effect to the ideal of uniformity. So if goods were shipped from Canada to England under a Bill of Lading which did not contain a 'clause paramount', the English Courts would be bound to apply Canadian Law - The Water Carriage of Goods Act - and, in so doing would be bound, in virtue of Section 4 - to hold that the Bill was null and void. This view which, it is submitted, is correct and more modern than that which was taken prior to the enacting of the United Kingdom Act and which was based on the Judgment of Wills, J. in Lloyd v. Guibert (s) where it was said that where a 'contract of affreightment does not provide otherwise as between the parties to the contract, in respect to sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves.' This judgment was followd by Chitty, J. in Re Missouri Steamship Co., (t) who said that the decision

(r) Temperly "Carriage of Goods by Sea"; Scrutton 12th ed / Preface
(s) LR 1 QB 114
(t) 4 Ch. D. 321 at p. 327

was not confined to the particular facts of that case but was applicable, not merely to questions of contraction and the rights incident to, or arising out of, the contract of affreightment, but to questions as to the validity of stipulations in the contract itself.

"It is just", he said, "to presume that in reference to all such questions the parties have submitted themselves to the law of one country only, namely, that of the flag; and so to hold is to adopt a simply natural and consistent rule."

The Supreme Court of Canada in Richardson v Burlington (u) applied what had now become the general rule of English law, that the parties were governed by the law of the ship's flag, unless there is a strong indication that they intended otherwise, and not, as in other contracts the 'lex loci contractus'. In Bunge North American Grain Corporation v Skarp (v) MacLean, President, attempted to limit what had become a general rule by saying that where a bill of lading contains special clauses, not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract was made, the parties are presumed to have contracted subject tp the law which gives effect to such clauses." He thus attempted to direct the initial presumption towards the lex loci contractus wherever

(u) (1930) 4 D.L.R. 897.

(v) (1933) Ex. C. R. 75

The Hague Rules applied, rather than toward the law of the ship's flag. He held, therefore, that where a contract of carriage was made in the United States and both Plaintiff's were United States Corporations and the contract contained a clause valid and necessary according to American law, that American law applied even though the ship was Canadian. Here, then, was the first indication that the lex loci contractus should be applied rather than the law of the ship's flag (w).

It is well to point out that all these decisions enunciated or affirmed the principle that the parties to the contract are free to choose the law by which they intend to be governed. A principle which was only repudiated in the Torni.- below.

After the Act came into force in 1942, this question first received judicial consideration in the Torni (x). Here goods were shipped aboard an Esthonian steamship from Jaffa for carriage to Hull, England. The bill provided that the contract was to be construed according to English law and, moreover, it did not contain a clause paramount, which by virtue of the Palistinian Carriage of Goods by Sea Ordinance (y) it was bound to do.

(w) This view was also preferred in France: cf Cour de Cass Dec. 5,1910 (American Trading Co. v Quebec SS Co.) where it was held that: "Entre personnes de nationalité differentes la loi du lieu où le contrat est intervenue est, en principe, celle à laquelle il faut s'attacher.

(x) 1932 P. 78

(y) 1926 No. 42 Sec. 4

The shippers took an action in England for damage or short delivery and defendant shipowners raised various exceptions contained in the bill, to which plaintiffs pleaded that the bill was subject to Palistinian law and was, therefore, governed by the ordinance which made the Hague Rules applicable.

It was held in the Court of Appeal that the express terms of the Ordinance could not be defeated by the insertion of a clause in the contract that the bill was to be interpreted according to English law and that the bill was subject to the provisions of the Ordinance and rules thereunder, and then, with those items read into it, should be construed according to English law. The important of the insertion of a clause providing that the contract is to be governed by English law is apparent. If the bill is made in Palistine, it would, in virtue of the Ordinance, be subjected to the Ordinance and the rules contained therein would be incorporated, de plano, into the bill. If, however, the bill stipulates that it is to be governed by English law and the courts give effect to that clause, the rules would not apply, since by English law, they only apply to outward shipments; the parties have absolute freedom of contract with regard to inward shipments. If the Courts refuse to apply the law of the place of shipment to a bill of lading, the effect will be

to allow parties to contract out of the Hague Rules whenever the action arises - as it generally does - in the courts of the country of destination. Thus the international convention and the whole framework of the legislation giving effect to it would be completely stultified.

The Court felt, in the Torni, that any other holding would be inconsistent with the desired historical ideal of universal uniform legislation. Scrutton, J. considered that the purpose of the Act would be nullified if it were possible to contract out of the Hague Rules and that, therefore, in construing bills of lading entered into in countries which had adopted the Rules, the cardinal principle was that the Courts must apply the lex loci contractus even though the parties may have intended that the law of anothercountry should govern the contract.

The United States Act (z) has, to some extent, foreseen this difficulty and stated that the Act shall apply to inward as well as outward shipments. This stipulation is open to the criticism that the United States Act is attempting to legislate extra-territorially and that foreign courts would ignore the stipulation of the American Act as regards inward shipments. It is, however, an attempt to extend uniformity and aslong as the American Act is identical to that of the country in which litigation arises, it cannot interfere with the law of that

(z) United States Carriage of Goods by Sea Act (1936) 49 STAT 1207.

country since, in applying its own law to a bill covering a shipment made to the United States, it would, in fact, if not in law, be applying the provision of the American Act.

In the Australian "Sea Carriage of Goods Act", section 9 states that the parties to a contract relating to the carriage of goods from Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment and any stipulation or agreement to the contrary or purporting to nullify or lessen the jurisdiction of the Australian Courts shall be illegal, null and void and of no effect. This goes farther than the other acts in that it determines that foreign courts must, when dealing with contracts of affreightment entered into in Australia, apply the lex loci contractus.

In 1941 this stipulation of the Australian Act came before the English Courts (a), but the judgment, from the point of view of giving a sound construction to the terms of the Act, was unsatisfactory. The bill of lading which was before the Court had been drawn in Australia. It stated in Clause 1 that the Australian Act would apply and that anything inconsistant thereto should be null and void. It further stated - in Clause 16 - that the contract would be governed by the law of

(a) Oceanic Steamship Co. v Queensland State Wheat Board (1941) 1KB 402.

England. The Court of Appeal held that clause 16 was nullified by Clause 1 and that, therefore, the bill of lading was subject to the jurisdiction of the Australian Courts. Unfortunately, the court discussed the case on the footing of two inconsistent clauses and not on the basis that clause 16 was also inconsistent with the express terms of a statute in force in the country of the place of shipment by which both parties were bound. Undoubtedly the court did not feel that it could assume the arduous task of limiting in any way, the far reaching judgment of the Privy Council in the Vita Food case which had been handed down two years earlier (b).

The case of Vita Food Products Inc. v. Unus Shipping Company (c) arose out of an action in damages by American cargo owners for the loss suffered in respect to a consignment of herring carried aboard respondent's ship, The Hurry-On, from Newfoundland to New York, and subsequently delivered in a damaged condition. A bill of lading had been issued on behalf of the owners, who were Canadians, and it acknowledged receipt on board of the cargo in good order and condition.

(b) This case has so altered the application of the rules that it is desirable to give a complete summary of the decision of the Privy Council.

(c) Supra.

The bill of lading was an old one and did not incorporate by means of a clause paramount, the Rules which had been adopted by the Newfoundland Carriage of Goods by Sea Act (1932 Newf. Cap.18). During the voyage, the Hurry-On ran ashore and the herrings were unloaded and shipped to New York aboard another ship and were found, upon arrival, to have been damaged. It was also found as a fact that the ship was not unseaworthy, the loss having been due to the captain's negligence in navigation. The provisions either of the Bill actually drawn up or of the Act which would exempt the respondent ship owner from liability for a loss due to negligence, but it was contended that as the Act had not been complied with, the exceptions in the Bill could not avail the carrier and that, therefore, he was subject to the liabilities of a common carrier and, as such, liable for the loss sustained.

This contention was rejected by the Supreme Court of Nova Scotia, in which Court the action arose, on the grounds that if the Bill was in fact illegal, both parties were in 'pari delicto' and therefore, the action ought to fail. From this judgment the cargo-owner appealed to the Privy Council where he first of all contended that since Section 1 (d) provided that the rules 'should have effect subject to the provisions of this Act', the rules could not apply to a bill unless

(d) Section 2 of the Canadian Act.

the terms of section 3 (e) respecting the clause paramount were complied with.

To this contention it was said that these words mean that the rules are to apply but subject to the modifications contained in Sections 2,4,5 and 6 (3) of the Act.

"To read these words" said Lord Wright "as meaning that the rules are only to have effect if the requirements of Section 3 are complied with, would be to put an unnecessarily wide interpretation upon them instead of the narrower meaning which is more natural and abvious. Section 1 is the dominent section and section 3 merely requires the Bill to contain an express statement of the effect of Section 1. This raises the question whether section 3, which cannot change the effect of section 1 is under Newfoundland law, directory or imperative, and if imperative, whether a failure to comply with it renders the contract void either in Newfoundland or other Court?" His Lordship then came to the conclusion, contrary to that of Greer, J. in The Torni, that the provision of section 3 is directory merely and bills of lading free of the clause paramount are valid contracts.

In arriving at this conclusion, Lord Wright cited the word of Lord Campbell in Liverpool Borough Bank v Turner (f):

(f) 45 E.R. 715; Kearney v Whitehaven Colliery Co. (1893) 10B 700.

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

In citing these words, sight was apparently lost of one of the principle intentions of those who drew up the Hague Rules - that the stipulation contained in section 3 should be obligatory in order that the interest of uniformity might be furthered. He, Lord Wright, went on to say that whetheror not illegality would vitiate the whole contract is a question to be determined on the merit of each case.

"The rule by which contracts not expressly forbidden by statute or declared to be void, are in proper cases nullified for disobedience is a rule of public policy only - (but only the public policy of Newfoundland, not that of England) - and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

He reasoned that the Bill would necessarily have been void by Newfoundland Law even if it did not contain a clause paramount, for it had contained the Hague Rules in extenso it would have been legal. Further-

more, the Act does not impose penalties for failure to comply with Section 3 nor does it specifically prohibit such failure (g). Moreover, the Act contains no provision which would prevent a contract of affreightment where no Bill of Lading is issued.

"The omission of the clause paramount does not make the Bill of Lading an illegal document, in whole or in part, either within Newfoundland or outside. Section 3 is, in the Lordship's judgment, directory. It is not obligatory nor does failure to comply with its terms nullify the contract contained in the Bill of Lading."

This reasoning underlines a serious weakness in the Act. Although it provides that a reference to the rules shall be incorporated in every document to which they apply, nothing is said as to the penalty for omission. Attempts to diminish the application of the rules renders the bill void, but the entire absence of a clause paramount and therefore the rules, from a Bill of Lading, would not appear to be followed by any consequences either at Civil or Criminal Law. Legal consequences are perhaps necessary to ensure absolute

(g) Harland & Wold v Burns & Laird Lines Ltd. 1931 SC 722; Montreal Trust Co. v Canadian Surety Co. (1939) 4 DLR 614 QUE K.B; Canadian & Dominion Sugar çCo. Ltd. v Canadian National (West Indies) SS Ltd. 1947 A.C. 46; on this point of regarding the demand made by a shipper for a bill of lading see Chap. 1V.

application of the rules, but the problems of enforcement are probably unsurmountable.

Lord Wright then proceeded to enunciate the most important principle in the judgment, that it is possible for the parties to a bill of lading to contract out of the Hague Rules by choosing a law which would in the circumstances, permit freedom of contract. Thus, in this case, the parties stipulated that the contract was to be governed by English law, in virtue of which the bill would be entirely legal even if illegal by Newfoundland law. The most interesting part of the judgment is the reasoning used to evade what was hitherto believed to be the cardinal rule, that the proper law is the lex loci contractus. The proper law of a contract is, when the intention of the parties to that contract is expressed in words, the law by which they intended to be governed. The intention of the parties must be 'bonefide, legal and not against public policy and it is immaterial that the contract has no connection with such law.' In this case, Lord Wright felt that there was a prima facie intention on the part of the contracting parties that English law should apply inasmuch as the bill of lading so provided, that the ship was subject to the Imperial Merchant Shipping Act (1894) under which it was registered and that, moreover, "the underwriters are likely to be English." It is little wonder that in view of this last very dubious reason and the fact that

while the ship was indeed subject to the Merchant Shipping Act, it was of Canadian registry that Lord Aitkin could say that "connection with English law is not, as a matter of principle, essential."

It was this view of Lord Wright's regarding the proper law governing a bill of lading which has since allowed contracting parties to evade the Hague Rules. Perhaps the fact that the general problem as to what law is to govern was left open by all the Acts - with the exception, as we have seen, of the Australian Act - has led to the present situation. The Act delimits the scope of its own application, in defining, in section 2, the cases to which it applies but it does not state what law is to be applied although the presumption is that the lax loci contractus is the proper law governing bills entered into within the territorial limits of the Act.

The Editors of Dicey's Conflict of Laws (h) would seem to favour a limited interpretation of this decision in as far as it effects the proper law. They grant that while Lord Wright properly applied English law (i), it cannot be said that the parties should have been free to choose a law other than English, since the law originally applied was the law of Nova Scotia, the lexi fori, which

(h) Sixth Ed. p. 586

(i) The interests of the editors being inclined toward the development of rules of law. Private International Law, rather than the uniform interpretation of the Hague Rules.

law was, in fact, identical to English law. Furthermore, they are inclined to agree with Lord Wright that "owing to their worldwide importance preference might be given, especially in Maritime matters, to the 'familiar principles of English Commercial law'." This is an interesting thesis on the conflict of laws and one which no doubt has much validity in the field of private International law but which, it is submitted, has had a most harmful effect on the principle of universal uniformity which was the intention of the framers of the Hague Rules.

Lord Wright stated that although a court in Newfoundland would be bound to apply the law enacted by its own legislature and thus would hold the bill to be illegal, the court of Nova Scotia was bound to apply English Law in determining whether or not the contract was void for non-compliance with the Newfoundland act, and if the court found that, by English Law, the bill was valid, it must then be held to be valid in Nova Scotia. He comparedthe supposed finding of a Newfoundland court that the bill was illegal with the finding of the United States Supreme Court in the Montana (j) where it was held that an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship, was void as being against the public policy of the United States., And the finding of the Nova Scotia

(j) 129 U.S. 397

Court of the bill's legality was, he said, analogous to the decision of an English Court in Re Missouri Steamship Co. (k) where, upon facts identical to those in the Montana, a contrary decision was reached.

The Privy Council in the Vita Foods case did, in effect, repudiate the once general rule that the law of the ship's flag was to be preferred to the lexi loci contractus, which hadgenerally been held prior to the coming into force of the Act. Nevertheless, they did enunciate, if not as a principle of law, as a policy, that the parties to a contract of affreightment could, at their option, contract out of the provisions of the Hague Rules. This the board accomplished by saying that while a bill of lading may be illegal by the lax loci contractus, where English Law was expressly intended, and since by English Law section 3 is directory and not mandatory, the bill of lading is a valid contract even though the stipulation contained in section 3 is omitted. As has been shown, it was possible for the Privy Council

(k) (1889) 42 Ch. 321; In Botany Worsted Mills v Knott 76 Fed. Rep. 582 it was held that where a bill of lading contained exemptions from damage for acts of negligence, and provided that the contract should be governed by the law of the flag - the United Kingdom - and the contract was not made nor was any part of it intended to be performed, within British jurisdiction that each exemption not being allowed by United States law, the provisions of the bill of lading were void, notwithstanding such provisions would be valid by British Law.

to reach this decision for these reasons a) the convenience of commercial interests who though do not know the lexi loci contractus must be considered b) the scope and purpose of the Act limited is limited; the Act only applied to outward shipments from the United Kingdom; c) the question of omitting contracts because of public policy must be judged on the merits of each case.

The effect of this decision is discussed at length in Chapter VII, but it is enough to say, at this point, that it has almost completely stultified the intention of the delegates to the convention at Brussels and at the same time given judicial approval to the protests which the representatives of shipping interests made at the convention.

II

2: THE DEFINITIONS

Article I In these Rules the following expressions have the meanings hereby assignedto them respectively, that is to say:

(a) 'Carrier' includes the owner or charterer who enters into a contract of carriage with a shipper;

The principle question which arises with respect to this definition is whether, once the ship has been chartered, the owner is no longer deemed to be the carrier and is replaced for all purposes - including liability for loss - by the charterer. It is to the advantage of the shipper to be able to proceed against the owner for loss or damage to

his goods, rather than against the charterer who may be less solvent.

The shipper's right to treat his contract of affreightment as having been entered into with the shipowner even though the ship has been chartered, as long as the memorandum of charterparty does not amount to the demise of the whole ship (l). However, at present, charterparties of the whole ship are uncommon. Where the terms of the charterparty are unknown to the shipper (m), or where the fact that a charterparty exists is unknown to the shipper, it may be disregarded by him for purposes of claiming for loss or damage to his goods (n). In Turner v Haji Goolem Mohamed Agam (o), it was held that even if the shipper knew of the terms, that in itself is not sufficient to exonerate the owner, although his liability may be somewhat modified thereby. In order that the shipowner may exculpate himself, he is bound to show that the contract of affreightment was entered into by the shipper and the charterer alone and that the owner was not a party to the contract. This

(l) Affreightment by charterparty may be either of the whole ship or of some principal part of it,(Article 2414 cc). If of the whole ship it may be of two kinds (a) Locatio Navis - where the bulk is the subject matter of the charterparty, and (b) Locatio Navis et Operarnum Magistri et Nautiorum - under which the ship passes to the charterer in a state fit for the purposes of mercantile adventure. (Scrutton P.321; The Master of Trinity House v Clerk (1815) 4 M & S 288.
(m) The Fugia Maggiore (1868) LR 2 A & E 106
(n) Manchester Trust v Furness (1895) 2 QB 539.
(o) 1904 AC 826

may be proven, but in the absence of proof it may be inferred from the fact that the person signing the bill of lading was neither the owner's servant or agent and had no expressed or implied authorization to sign the bill (p).

The general rule is this: the shipper is entitled to hold the owner responsible for the loss or damage to his goods, and the owner is precluded from pleading any exceptions contained in the charterparty which are not also contained in the bill of lading. Thus the charterparty must comply with the provisions of the Hague Rules (q).

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

Bills of lading are usually issued after the goods have been shipped and the former law, which remains unaltered, is that the bill of lading even though issued after the goods are shipped is evidence of a contract of affreightment which the parties have agreed shall be

(p) Marquand v Bonner 1856 E & R 232; cited in Scrutton on Charterparties.
(q) See Ch. VI - Article V

evidenced by a bill of lading. The only exception to this rule exists when the bill contradicts the terms of the previous agreement. Even if the previous agreement is not expressed, as is generally the case, it can be implied from the local bill of lading at the port of shipment. This bill is seldom issued, for it consists of customs of the trade at that port which govern carriers and shippers and the conditions are deemed known by the shipper. Generally, he can examine a copy of these conditions which the carrier keeps at his office at the port of loading.

"Any similar document of title "includes agreements which do not, in form, follow that required for bills of lading under the Rules. The category includes 'received for shipment' bills (r) which are documents of title given to the shipper as a receipt for his goods which the carrier intends to carry by sea. Such receipts are not bills of lading nor are they negotiable instruments but merely a record of the cargo having been delivered to the carrier (s).

While the Rules do not apply to a bill of lading issued to a charterer since the contract of carriage is contained in the charterparty, it does not apply "if the charterer endorses the bill to a consignee to where the property pases upon or be reason of such consignment..... ...." in accordance with Section 2 of the Bills of Lading Act (t).

(r) The Marlborough Hill (1921) 1 AC 444
(s) Montreal Trust v Canadian Surety Co. et al. 1939 4 DLR 614 (Que.KB) per Bond J.
(t) 1927 RSC Cap. 17

(c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;(u)

(d) "Ship" means any vessel used for the carriage of goods by water; (v)

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

The term 'carriage of goods' covers the period fomr the time the goods are hooked on the ship's tackle for loading until the time they are unhooked from the tackle in the process of discharging (w). This is, however, an overgeneralization in view of the decision in Goodwin & Holt (x) where it was held to continue after the goods had been discharged into a lighter. Here, Roche, J., said that when goods are being discharged into lighters, goods which are already on the lighters are not discharged from the ship within the meaning of the rule as long as the lighter is still waiting to receive other goods. This treats goods unequally; therefore, the better law is that the carriage of goods runs "from tackle to tackle".

(u) See Chapter Vl infra.
(v) Supra p.
(w) Per Wright J. in Gosse Millard v Canadian Government Merchant Marine: supra
(x) (1929) 141 LT 494.

Goods handled in bulk, such as wheat, are considered as loaded on the ship when it emerges from the elevator spout into the hold and discharged when it passes up the suction pipe into the elevator (y). Since customs and usages vary from port to port, determining when the ship is loaded with a bulk cargo would depend upon the circumstances of the case.

.....

Having determined the exact scope and application of the rules, consideration may now be given to a full examination of how the courts in England, Canada and the United States have interpreted them.

(y) Knauth "Ocean Bills of Lading"; Paterson S.S.Ltd v Continental Grain Co. 1935 3 DLR 371

THE INTERPRETATION OF THE ACT

In the preceding chapters, the development of the Rules was traced from their conception to their eventual embodiment in the various Carriage of Goods by Sea Acts which have, since the Brussel's Conference, been adopted by an ever increasing number of states. The Acts, while remaining enactments of a national legislature, contain rules which by their conception and nature have a purely international character. They are an attempt to unify all existing legislation on Bills of Lading as they affect carriage by sea, and draw from that unification a standard set of rules which would, as the delegates at the conference hoped, have universal application among the world's Maritime Nations.

The very universality of the Rules has led, in turn, to the contentious problem of how national courts should interpret national legislation of a purely international character. International legislation, which results from conventions, is subject to interpretation by international tribunals, but where an international convention merely draws up rules and recommends their adoption by signatory nations, it is left for the national courts to decide how these rules are to be interpreted. Several of the signatory parties at the Brussel's convention had, as has already been pointed out, legislation similar to that which it was proposed to adopt, Indeed, the Canadian Water Carriags of Goods Act (1910) had been used as a model by

the delegates when drawing up the rules. The United Kingdom, while possessing no analogous act - did have a comprehensive body of jurisprudence covering all aspects of the myriad forms and stipulations contained in bills of lading. The problem that arose, therefore, after the adoption of the uniform rules, was how to interpret them in a uniform manner. The very uniformity which had - at both the Hague and Brussels - appeared to be such a desirable end would be rendered nugatory if rules were interpreted only in the light of each country's jurisprudence. Thus, if uniformity was to be maintained, a uniform interpretation of the Rules was essential.

The rules were intended to be of international application and therefore they should be interpreted according to canons of construction which would be internationally approved and recognized. In England, the Courts tended, after 1924, to interpret the Act according to the law of England, which existed before its enactment. This policy was strongly advocated by the editors of Scrutton on Charterparties (z). This purely insular interpretation which did not take into consideration the existing law of

(z) 12th Edition - Preface - Another cardinal principle in construing rules is that the liability carefully to carry and care for the cargo during the voyage is primary and paramount. In cases where a wide interpretation of the exceptions from liability would reduce the carrier's obligation to small dimensions, a narrower interpretation should be put in the exceptions. See the dissenting judgment of Greer, L.J. in Gosse Millard v C.G.M.M. and approved by Lord Sumner in the House of Lords. (1928 I K B at p.793).

other countries or even the construction of the provisions which might be given by foreign courts was, at first, approved by the House of Lords. In Gosse Millard Ltd. v Canadian Government Merchant Marine (a), one of the questions before the House was the interpretation of the phrase 'in the management of the ship' in Article 1V, Rule 2(a). Here, a cargo of tin plates had been damaged by rain due to the negligence of the crew in failing to cover the hold with a tarpaulin while the ship was in dry-dock and the shipowner attempted to exculpate himself by pleading that the damage arose from the neglect of the carrier's servants in the management of the ship. The Court, however, interpreted these words in accordance with the construction which had been given them by the Courts prior to the enactment of the Act. That is, that they did not include negligence of the crew for the cargo exclusively. Lord Sumner said (b) that "by forebearing to define 'management' of the ship' the Legislature has, in my opinion, shown a clear intention to conserve and enforce the old clause as it was previously understood and regularly construed by the court of Law."

The Lord Chancellor, Lord Hailsham, added: "I am unable to find any reason for supposing that the words

(a) (1929) A.C. 223
(b) at p. 237

as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the Carriage of Goods by Sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion."

Both Judges were, however, applying certain principles of construction to particular words contained in the Rules; they did not go as far as interpreting the meaning of one of the provisions or the extent of its application.

This womewhat restricted interpretation was not one which recommended itself to the House of Lords, where the question of the principles governing the interpretation of the provisions of the Act came to a head in Stag Line v Foscolo Mango & Co. (c). The facts of this case were these: A cargo of coal had been loaded under a Bill of Lading which was subject to the provision of the Carriage of Goods by Sea Act (d) and which also contained a provision giving the owners 'liberty to call at any port .....for bunkering and other purposes. On board the ship were two engineers who were to test a new heating apparatus after it sailed from Swansea, and it was intended to disembark them at Lundy after the tests had been made. Due, however, to a penchant which the ship's firemen

(c) 1932 A.C. 329
(d) (Imp.) 1924

apparently had for consuming large quantities of intoxicants during their last night ashore, they - the firemen - were incapable of firing the ship's furnaces and of creating sufficient heat to test the new heating apparatus, and the tests were delayed. By the time they were eventually made, the ship had passed Lundy and it was necessary to deviate in order that the engineers could be disembarked at St. Ives. In proceeding there and for some time after the ship was off route and while off route, stranded and the ship and cargo were lost. An action for damages was instituted by the cargo-owners which was met with the defense that the loss was due to a peril of the sea and that, moreover, the deviation was reasonable and therefore fell within the exception contained in Article 1V, Rule 4.

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or ofthe contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

The English courts in construing liberties to deviate contained in contracts of affreightment had always taken the view that they must be limited primâ facie to deviations within the joint adventure contemplated by the contract (e). In applying this rule, the trial court held that the deviation was unreasonable, since the cargo-owner had no interest in the landing of the engineers. In the Court of Appeals, Scrutton, L. J., said that as the limits

(e) Glyn v Margetson 1893 A.C. 351

of reasonable deviation were laid down in the Teutonia (f), the words of the Act should be given no wider meaning. Thus the question before the House of Lords was a) what canons of interpretation should be applied to the Act and b) having applied those canons, what construction must be given to the words 'reasonable deviation'.

In determining these questions, Lord Atkin said (g):

"In approaching these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning and not to colour one' interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this canon would be well founded. I will repeat the well-known words of Lord Herschell in Bank of England V. Vagliano Bros (h)..... If this is the canon of construction in regard to a codifying act, still more doesit apply to an act like the

(f) L.R. 4 C.P. 171

(g) at p. 343.

(h) 1891 A.C. 107 - Lord Herschell's rule for interpreting a statute was this: "I think the proper course (for the interpretation of statute) is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and, then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.....the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was."

present, which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to Bills of Lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from parts in the United Kingdom; and the rules will often have to be interpreted in the Courts of the foreign consignees. For the purpose of uniformity, it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predelection for the former law, <u>always preserving the right</u> to say that words used in the English language, which have already in the particular context received judicial interpretation, may be presumed to be used in the sense already judicially imputed to them."

In the same case, Lord Macmillan said that "these rules must come under the consideration of foreign countries and it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance."

Thus their lordships laid down the principle that the Act should be construed in such a way as would best allow the application of uniform international rules of interpretation. Lord Atkin's proviso that English courts have the right to determine the meaning of words in the English language, is of great importance, for it

allowed those courts to introduce judicial interpretations of words which were antecedant to the Act. Thus the definition of the word 'management of a ship' which Lord Sumner had given in Gross Millard v Canadian Government Merchant Marine and which had been construed according to decisions given prior to 1924, would seem to fall within this proviso; although Lord Atkins, in deciding the second question as to what constituted 'reasonable deviation' did not confine himself to previous decisions (i). He disagreed with the narrow interpretation given by Scrutton, L.J., in the Court of Appeals, and which was based on the old case of the Teutonia (j) and said, in essence, that what was constituted reasonable deviation was a question of fact. Nevertheless, he was of the opinion on the facts, that the deviation in this case had been unreasonable and, therefore, the exception of perils of the sea no longer applied (k) and the carrier was liable to the cargo-owner for the loss of the goods.

The principle laid down in Stag Line v Foscolo, Mango has since been applied by both English and Canadian Courts. In Dominion Glass Co.Ltd. v. Ship Anglo-Indian (l), Mr. Justice Kerwin, in the Supreme Court of Canada, in

(i) See Cap. V.
(j) Supra
(k) See Cap. V.
(l) 1944 SCR 409

interpreting the provisions of clause 2 of Article 111 with respect to the shipowners obligation to care for the goods, adopted the statements of Lords Atkin and Macmillan as his own. It was his opinion that they expressed the proper method to be followed by the Canadian Courts in construing the rules.

It is clear that principles governing the interpretation of the Act have now been settled, having been laid down in the House of Lords and adopted by the Supreme Court of Canada. Nevertheless, the principle which was so ably expounded by Lord Atkin - that the Courts should only consider the words used and, keeping in mind all the relevant circumstances of the case at bar, give them a reasonable interpretation - has not been applied to what are known as the exceptions (m). These have been construed solely in the light of jurisprudence made prior to the enactment of the Carriage of Goods by Sea Act in 1924. In fact, however, the principle is not affected since it is submitted that the exceptions fall within Lord Atkin's proviso that an English court may define words of the English language which have already been used in a particular context.

(m) Art. 1V (2) perils of the sea, Act of Goods, etc.

RISKS, RESPONSIBILITIES AND LIABILITIES

In considering the responsibilities, liabilities, rights and immunities of a carrier under the Act, it is essential that the period during which these rights and responsibilities exist be clearly defined. At what point does the risk, assumed by the carrier in virtue of the Act, begin and at what point does it end? Article 11 limits the risk to the period running from the time the goods are loaded aboard the ship until they are discharged.

"Subject to the provisions of Article VI under every contract of carriage of goods by water, the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the right and immunities hereinafter set forth:"

In effect, the period of responsibility during which the Act and Rules apply exists "from tackle to tackle" - from loading to discharge. Unlike the provisions of the Harter Act and the former Canadian Act which applied while the goods were in the effective control of the carrier, the Rules do not apply while the goods are in a warehouse awaiting loading nor after discharge, but before delivery. The carrier is at liberty to enter into a separate contract during those periods, or rely on his common law responsibility as a warehouseman or baillee. The problem, in fact, is in determining at what points the goods may be considered to

be loaded and discharged.

In an old case (n), under a contract of carriage, a shipper loaded the carrier's vessel with peas, while it was stuck in the ice, with the intention that they be carried to the port of destination with the opening of navigation. While the goods were so on board, the vessel struck a submerged rock and sank. One of the questions before the court was whether the shipowner was liable as a carrier or warehouseman. This case raised the problem but did not solve it. Under the Act of 1910 this problem was non-existant since responsibility inured to the carrier till the moment the goods were delivered. Even where the goods were left on an open wharf in accordance with local custom and the consignee had been given notice that they were there, the carrier was liable for them until the consignee actually took delivery (o). This provision often placed a very heavy burden on the carrier. The provisions of Article 11 are less burdensome, although, as has been pointed out, the problem of knowing when discharge has been complete is great.

In Goodwin v Lamport & Holt (p) this question was dealt with at length. Here a cargo of cotton had been transferred from the ship to a lighter which was being used to take the ship's cargo ashore. The transfer of the cotton was complete, but while part of a cargo of heavy machinery was being unloaded, it slipped from the cables,

(n) Cluxton v Dickson (1876) 27 U.C.C.C. 170
(o) Bras d'Or Navigation Co. v Similovitz (1926) 41 KB 147
(p) 34 LI LR 192

fell and damaged the cotton. The question was whether the discharge of the cotton had been completed so as to remove it from the scope of the rules as defined by Article 11. The Court held that discharge had not been completed and that the contract of affreightment and, with it, liability for the damage, still subsisted. It would appear from this case that discharge and presumably loading must be interpreted in the light of the fact at issue.

It is difficult to know which the courts would say in the event of discharge proving impossible. In a case (q) decided on the basis of the old Act of 1910 the contract was said to subsist until actual delivery had been effected. It was held that, under a contract for the transfer of grain from Port Arthur to Montreal, delivery must be in conformity with the terms of the bill of lading and according to the customs of the port of delivery. The custom of the port of Montreal required delivery of grain into Montreal elevators and when the Master was prevented by reason of the congestion of the port from unloading, and then due to the lateness of the season, his vessel became icebound until spring, the contract of affreightment subsists and that the shipowner continue to hold the goods as a carrier until delivery has been made and is answerable for the safety of the goods to the extend imposed

(q) Patterson Steamships Ltd. v Continental Grain Co. 1935 3 DLR 371; 1935 SCR 402.

upon him by the bill of lading and the Act. While this case deals with the Act of 1910, it is submitted that, if the word 'discharge' is substituted for 'delivery', it is equally applicable to the Act and Rules of 1936. On the other hand, where wheat was shipped from Fort William to Montreal and where it was transferred, according to custom, to a canal-sized vessel at Port Colborne, which vessel instead of proceeding to Montreal remained at Port Colborne where it became icebound and sank during the winter months, the contract for carriage of goods by water (which contained the Rules) was held not to exist at the time of the loss since discharge - if not delivery - had been affected (r).

In general, therefore, loading and discharge must be interpreted as including all those operations which by custom or by law devolve upon the ship itself. The courts must look at the facts in each case separately and determine from them when the carrier assumed the risk set down in the Rules and when he was relieved from that risk.

1: SEAWORTHINESS

ARTICLE 111, Rule 1:

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(a) make the ship seaworthy;
(b) properly man, equip, and supply the ship;
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(r) Insurance Co. of North America v Colonial SS Ltd. 1942 SCR 357.

The obligation to exercise due diligence to make the ship seaworthy is not subject to any of the rights and immunities granted by Article 1V. It make the use of due diligence by the shipowner, his servants or agents (s) absolute and puts it clearly beyond the scope of the itemized exemptions of Article 1V. If the carrier fails to exercise due diligence, no clause in the Rules can protect him from a claim for loss of cargo and he is not entitled to claim the exemption from liability for perils of the seas or accidents of navigation.

At Common Law and apart from any contractual or statutory limitation of liability a carrier warrants that his ship is seaworthy at the time the goods are placed on board. In order words "that the vessel has that degree of fitness, in relation to the character of the goods to be carried, which a prudent owner of the goods would require a vessel to have at the commencement of the voyage, in view of all probable conditions and contingencies (t)." The Act abolishes the absolute obligation to provide a seaworthy ship and substitutes, therefore, an absolute obligation to exercise due diligence to make the ship seaworthy.

(s) The Australia Star (1940) 67 LI LR 110; Dobell v SS Rossmore (1895) 2 QB 408.

(t) Corporation of the Royal Exchange Ins. v Kingsley Navigation Co.Ltd. (1923) 1 DLR 1048 (PC)

The extent of the carriers' obligation under this provision of the Act was discussed by Lord Wright in Angliss v P & O Steam Navigation Co. (u). He held that the phrase limited the shipowner's obligation to due diligence in his capacity as carrier and to "such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment." Thus if he has a ship built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions, for example, by requiring the builder to satisfy Lloyd's Register or by engaging skilled naval architects and inspectors. In this case, however, the Privy Council held that the carrier was not responsible for damage caused by a latent defect in the ship which was due to poor work by the builder's workmen which could not have been detected by inspectors employed by the carrier nor could he be held responsible for damage due to the defective design of a deck bar and bulkhead which was in accordance with the then existing standards.

In Grain Growers Export Co. v Canada SS Lined Ltd.(v) Hodgens, J.A., in the Ontario Court of Appeal, dealing with the question of what constituted seaworthiness, stated that it included "not only staunchness of the ship but also comprehends a condition which will likewise insure the safety of the cargo both from perils of the sea as commonly

(u) (1927) 2 KB 456

(v) 43 QLR 330; affirmed by the Supreme Court of Canada 59 SCR 643.

understood and from causes not accompanied by violence of the elements such as leakage." In this case the carriers had loaded a cargo of grain at Port Colborne to ship to Montreal. Immediately after its departure, the barge sprang a leak and part of the cargo was destroyed. The shippers claimed that the shipowners had not exercised due diligence to make the vessel seaworthy since after having been laid up for two years, it had been put to sea without proper caulking. It was held that the carrier failed to establish (w) that the barge was in fact seaworthy. A previous inspection by insurers had resulted in a recommendation that the ship be caulked in order to put it in a seaworthy state and there was no evidence that this was done; therefore, there was no "exercise of due diligence."

Ferguson J., in his dissenting opinion, stated that evidence of repairs, work and the employment of competent persons to do the work of filling up the boat and making her seaworthy, coupled with a subsequent inspection by competent surveyors, was sufficient evidence of due diligence within the meaning of the Act. To hold otherwise would, he felt, be tantamount to holding that the duty of the carrier to provide a seaworthy ship is absolute except as to latent defects; with the effect that when a shipment was made, the carrier warranted the fitness of the ship when she sailed and not merely that they had

(w) for an explanation of burden of proof see p.108

honestly and bona fide endeavoured to make her fit. This case is of interest in that it shows how little difference exists between the absolute liability to supply a seaworthy ship and the requirement to use due diligence. Ferguson J., attempts to point up this anomolous situation. That if a ship is discovered to be unseaworthy, that finding is primâ facie proof that due diligence was not exercised and the only way of showing that due diligence was, in fact, exercised is by showing that the unseaworthiness was due to a latent defect.

The view adopted by Ferguson J. is perhaps equitable, but in view of the words of Lord Wright in Angliss v P.O. Navigation Ltd. (x), in which he said that it was incumbent upon the shipowner to hire experts to oversee the building of a ship, the present situation would appear to be this: The owner warrants that he has been duly diligent to see that the ship is seaworthy. This means that the due diligence used has been substantialed and not merely a sincere, although unsuccessful, effort to make the ship seaworthy, but such an intelligent and efficient attempt as shall make the ship seaworthy as far as diligence can secure it.

In appearance the undertaking to use diligence to make the ship seaworthy is less onerous than the old Common Law undertaking that the ship is in fact sea-

(x) Supra

worthy. In reality there is no great gain to the ship-. owners by the substitution. If the vessel is unseaworthy due diligence cannot have been used by the owner, his servants or agents and if due dilgence has been used the vessel will, in fact, be seaworthy. The only additional relief afforded to the shipowner by the substitution would occur where the unseaworthiness arose as a result of a latent defect. If the vessel is in fact seaworthy the owner is exempt from liability even though he has failed to use due diligence to make her so (y).

It must be remembered that the seaworthiness of a vessel is adjudged in relation to the service for which the ship is intended. Thus where a barge was sunk by water being accidently poured on its deck from the sanitary discharge-pipe of the ship to which it was moored while loading coal, the defendants claimed that the barge was unseaworthy since it had openings on the deck. To this argument Maclennan J., sitting in Admiralty, said that the seaworthiness of the scow must be considered in regard to the service in which it was engaged, and if a scow is reasonably fit for work in which it was used, it

(y) The Carib Prince 170 US 655, CP., the remarks of Brown J., "The Harter Act does not relieve the shipowner from furnishing a seaworthy vessel and that for damages due to latent defects in existence when the voyage began, the carrier is liable despite having used due care. While it is possible that the framers of this Act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence has been used to make them seaworthy, it must be conceded that the language of the Act does not express such intent...." These words are applicable to the situation created by the Rules.

is seaworthy (z).

The principle of seaworthiness extends to all the ship's 'accoutrements'. If the shipowner's servants permit a bent bolt to remain in the steering apparatus of the ship and during the voyage, it breaks, causing the ship to run aground with a consequent loss of the cargo, it cannot be said that the owner, who knew or should have known of the condition of the bolt, has exercised due exercised due diligence to make the ship seaworthy (a).

Where the owner of a ship transporting a cargo of wheat fails to supply shifting board to prevent the shifting of the wheat during the voyage, he has not fulfilled his obligation to exercise due diligence to make the holds in which the goods are carried, fit and safe for their reception and carriage (b), even where it was not customary for ships such as his, and sailing on the Great Lakes to be so supplied (c). But where a ship was loaded in Japan with Manchurian maize for consignment to Vancouver and during the trip heavy seas forced the closing of the ventilators, and in consequence heating a and damage of the maize, an action based on insufficient ventilation and therefore unseaworthiness could not be

(z) George Hall Coal & Shipping Corp v CPR Co.(1925) ex C.R.147
(a) Scottish & Metropolitan Ltd. v Can. SS. Lines Ltd. 1930 1 DLR 201 (1929 SCR)
(b) James Richardson & Sons Ltd. v Unus Shipping Co. Ltd. (1937) 12 Mar. Prov. Rep. 39.
(c) Patterson Steamships Ltd. v Canadian Co-Operative Wheat Producers Ltd. (1935) 4 DLR 637.

maintained since four ventilators, with which the ship was equipped, would have been sufficient to air the holds had the heavy seas not prevented their operation (d).

The owner is responsible for the failure of his servants to exercise due diligence, since diligence requires more for its fulfillment than personal diligence on the part of the owner. Diligence must be exercised by those preparing the vessel for sea to make her seaworthy whether the owner, his agents or an independent contractor is in charge of the preparations. It has been held by the United States Supreme Court (e) that the diligence required of shipowners to enable them to claim the benefits of their Act with reference to due diligence is diligence with respect to the vessel and not in obtaining certificates as to its seaworthiness and that it is not sufficient that the shipowner employ competent men to make the inspection. He is still accountable for the failure of the men he employs to discover latent defects (f). In Dobell & Co. v SS Rossmore (g), Kay L. J. said:

"It seems to me that the owner has not fulfilled the whole of his duty within the terms of the contract, merely by appointing a competent shipwright,

(d) Donkin Creeden Ltd. v SS "Chicago Maru" (1916) 16 Ex C 503.
(e) Bank Line v Porter 278 US 623; following in Re Unus Shipping (1937) 2 DLR; 17 MPR 39.
(f) Scottish & Metropolitan Assurance Co. v Can. SS Lines, Supra.
(g) (1895) 2 QB 408.

and that he has not fulfilled the condition upon which alone he is entitled to exemption."

Where the evidence conclusively points to the fact that not only was the ship unseaworthy but that the owners, through their agents or servants, failed to exercise due diligence to make her seaworthy the owners are liable for all losses or damage to the cargo. Although the owners are not responsible for latent defects, where the defects consists in dry-rot which was known to have existed in different parts of the ship and this condition was remedied and the only latent factor being the nature and extent of the development of the rot, the owners are responsible for such defect. With the details of the vessel before them, her age, history and record, it was for the surveyors employed by the owner to discover the extent and nature of the rot. Their failure to do so was the responsibility of their employers, the shipowners (h). But this principle of the absolute liability of the owner for the omissions of his agents has been somewhat limited by the Supreme Court of Canada. In "The Anglo-Indian" (i), a shipowner was said to have used due diligence in making a ship seaworthy when, in respect of a cargo being carried which has potentialities of heating and causing fire, expert advice was obtained and it

(h) Canadian Transport Co. Ltd. v Hunt, Leuchers, Hepburn Ltd. (City of Alberni) (1947) 2 DLR 647 (B.C. Adm. Ex Co.)
(i) Dominion Glass Co. Ltd. v "Anglo-Indian", Supra.

reasonably appeared from that advice that, in the condition of the cargo it could safely be carried, even though the advice was erroneous.

One question with respect to seaworthiness which has arisen as a result of the phraseology of Secion I is whether the Doctrine of Stages still applies to a contract of affreightment subject to the Rules. This question has not been satisfactorily answered by either the courts or the authorities. The phrase "before and at the beginning of the voyage" seems to exclude the duty to use due diligence to make the ship seaworthy at any later stage of the voyage. Where the voyage is divisible into stages, at Common Law, the condition as to seaworthiness is sufficiently fulfilled if the ship, on entering upon any particular stage of the voyage, is seaworthy for that stage. She need not necessarily be fit, at that time, to perform the whole voyage. Thus, if her course lies partly by river and partly by sea, the ship is considered seaworthy if on leaving the inland port she is fit to encounter the usual perils of navigating a river, and it is not required at that point that she be fit to put to sea (j). She must, however, on leaving the river be fit for the voyage across the sea, otherwise there is a breach of the conditions as to seaworthiness when she puts to sea.

(j) Cunnigham v Colvils, Lowden (1888) 16 R (Ct of Sessions) 295.

Wherever the voyage is composed of different stages having distinct conditions of navigation or requiring a different complement of men or different equipment it is enough that the ship at the beginning of each stage is in a state of preparation which fits her to perform it.

Where the Rules apply, it would seem, that the Doctrine of Stages is subjected to some limitation. If the ship is, in fact, seaworthy at the beginning of the voyage but upon entering the second stage it ceases to be so, the owner will not be liable for loss of cargo, if the defect is not remedied, since the obligation exists before and at the beginning of the voyage. Lord Porter in Northumbrian Shipping v Timm (k) expressed this view thus:

"Prima facie a ship must be seaworthy on sailing from her starting point for the whole voyage upon which she is engaged, but it has long been established that the voyage may be divided into stages, and that it is sufficient if she be satisfactorily equipped for each stage at its commencement. The principle is older than the age of steam." It has been held to apply to such stages as lying in harbour (l); proceeding down a river (m) and passing from one port to another (n).

(k) 1939 AC 397.
(l) McFadden v Blue Star Line (1905) 1 KB 697.
(m) Bouillon v Lupton (1863) 33 LJ 48.
(n) Biccard v Shepherd (1861) 14 Moo. P.C. 471.

Lord Porter's statement clearly envisions the continuation of the doctrine, but his conclusions are not entirely conclusive since the case dealt with inadequate bunkering. The owners instructed the master, at Vancouver, to bunker at the Virgin Islands. On sailing, however, the ship did not have sufficient coal to carry her to the Virgin Islands and sailed for Port Royal where she ran on a reef off Jamaica and became a total loss. It was held that the owners through their agent had failed to exercise due diligence to make the ship in all respects seaworthy upon sailing from Vancouver, since the bunkers were insufficiently filled. The principle point in this case would seem to be that, if the owner makes arrangements for the ship to call at usual and proper bunkering ports during the voyage and provided that there is sufficient coal to carry the ship from its first port to the prearranged bunkering port, then he has used due diligence.

One question has been raised by the absolute obligation to exercise due diligence is this: in a situation where there has been neither seaworthiness or due diligence yet the damage results solely from a fault in navigation, is the owner still precluded from relying on the exemptions in Article IV? For example, a steamship has a cracked shaft that will be dangerous in rough weather. By negligence the ship is permitted to sail without repair. It reaches its port of destination in

safety but negligently collides in the harbour with another ship. Is the shipowner liable to the shipper for damage to the cargo carried aboard his ship through his negligent failure to examine the shaft before sailing, although the shaft had no connection with the damage. If the cause of the loss is a failure to use care to make the ship seaworthy, that cause would not fall within the exonerating clauses of Article IV even though such failure is due to a fault in the management of the ship. In Smith, Hogg v Black Sea & Baltic Insurance (o), the House of Lords dealing with a case where there had been both unseaworthiness and fault, came to the conclusion that it was immaterial "whether there may have been other co-operating causes covered by exceptions" once there had been a finding of unseaworthiness or failure to exercise

(o) 1940 AC 957; Per Lord Wright: Lord Porter, on the other hand, while finding that due diligence had not been exercised and therefore the carrier was liable refused to decide "what would be the result if the loss were attributable partly to bad management and partly to unseaworthiness".

due diligence (p). But this decision does not mean that exemption would be refused for a fault in management because of a failure to use care to make the ship seaworthy, if the fault were distinct from the fault of management and not contributing to the loss. The diligence to which Section I refers is diligence which it is the carrier's duty to employ. As regards his liability for damage to cargo, his only duty is to avoid

(p) The view of the American Courts, when interpreting the Harter Act, is at variance with the above English decisions under the Act. In May v Hamburg-Americkanische Paketfahrt A.G. (54 SC 162) it was held that where an owner failed to exercise due diligence to make a seaworthy ship he was deprived of his right of a general-average contribution even though the damages were caused by negligent navigation and that accordingly the rule is that no causal connection between the loss and the unseaworthiness is necessary. The Court relied on Marine Insurance cases which have held that a breach of warranty of seaworthiness voids the policy, irrespective of causal connection with a subsequent loss. In Quebec Marine Insurance Co. v Commercial Bank of Canada (LR 3 PC 234 (1870)) it was held that in a voyage policy there is, by implication of law a warranty of seaworthiness which had not been complied with; as the vessel sailed with a defect of such a nature (cracked boiler) that so long as it remained unremedied, it made her unseaworthy for the voyage and that although the defect was afterwards repaired, and before the loss, it voided the policy.

In view of the broad interpretations given to "unseaworthiness" by the Canadian and English courts, it is submitted that this viewpoint cannot be accepted. The American Courts, in particular, have always given a particularly broad interpretation to the word: eg. a hole in the floor of a room containing a leaky oil can and which caused the oil to leak into the hold and damage the cargo (The RP Fitzgerald 212 Fed. 678); a jammed ventilator shaft which caused injury to a sailor attempting to open it (Ives v US 58 F (2nd) 201).

such damage and if no damage results from his lack of diligence the carrier is at liberty to be as careless as he pleases. From these premises may be drawn the conclusion that the damage for which exemption from liability is granted must not be damage resulting from failure to employ that diligence in preparing the vessel for sea upon the exercise of which the Act insists. If, however, the damage results from a cause totally separate from the ship's unseaworthiness, the lack of due diligence has no bearing upon the loss of the cargo.

The theory behind this conclusion is that the lack of diligence must have some connection with the damage due to fault or management before it can exclude the owner from pleading an exception from liability. If nothing happens to the cargo during the trip, the owners lack of diligence and the ship's unseaworthiness are immaterial. Therefore, if the damage is due to a cause which has absolutely no connection with the lack of unseaworthiness, why should he be liable? The reason that the obligation in Article III section I was made absolute and in nowise subject to the exemptions of Article IV was only to ensure that the exoneration from fault in the management of the vessel should not derogate from the obligation to use due diligence to make the ship seaworthy.

2: LOADING

ARTICLE III, Rule 2:

Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Subject to the protection which the carrier enjoys under Article IV, his obligation to care for the cargo, which is created by this section, is absolute. However, since the obligation is, in fact, subject to the exception, it often proves to be of the greatest importance for a shipowner to prove that damage to the cargo aboard his ship was not due to a lack of due diligence to make the holds fit for the reception, carriage and ventilation of goods but rather to improper care of the cargo. Swinfen Eady J. discussed this question, in The Thorsa (q): whether improper stowage is unseaworthiness, and came to the conclusion that it is negligence but not unseaworthiness per se, but that the word was capable of a very broad interpretation and depending on the facts of the case, the improper care of the cargo could be d eemed unseaworthiness. This opinion again raises the problem of what is unseaworthiness.

In determining what unseaworthiness is, much is left to fact "It will be a question", said Lord Justice Blackburn "taking the whole circumstances together; was

(q) 1916 B 257.

this ship reasonably fit when she sailed to encounter the perils of the seas, and was the damage that happened a consequence of her being unfit if she was unfit? That question will have to be determined upon the whole of the circumstances together."

The question of whether improper stowage can be considered to be unseaworthiness most often arises in connection with the proper ventilation of the holds. Where, for example, a cargo of grain has been damaged due to improper or inadequate ventilation. The fact that a cargo is improperly stowed in that it is not supplied with sufficient ventilation may be "unseaworthiness" as far as such cargoes are concerned (r), but where a steamship company has, in carrying on its business for a number of years, deliberately adopted a certain system as to the carriage of grain cargoes without any apparent objection being raised thereto by shippers, such system should not be held to be improper unless a contrary system is recognized as proper and necessary (s).

Whether or not a particular loss is caused by unseaworthiness and for which the owner is liable is due

(r) Rathbone v MacIver (1903) 2 KB 378; per Vaughan Williams LJ, "We ought to hold that the work 'unseaworthiness' covers, not only the unseaworthiness of the ship in the sense that it was not fit to meet the perils of the sea, but also in the sense that the ship was not in a fit condition to carry the cargo".

(s) Balfour, Guthrie & Co. v C.P.R. (1917) 3 WWR 410.

to improper care is dependent not only upon the fact of the case but upon the interpretation which the court will give to the word unseaworthiness. If the court adopts a broad interpretation such as that given by Vaughan Williams L.J. in Rathbone v MacIver (t) it will generally find that the ship was unseaworthy and if the owner would exculpate himself he must then show that the exercised due diligence to make it seaworthy or what is the same thing, the unseaworthiness was due to a latent defect. On the other hand, if the court adopts a narrow and limited interpretation of the word, and finds that the damage was due to improper care, the shipowner can rely on any of the exonerating clauses in Article IV.

The duty of the shipowner to stow safely is a primary one and although delegated to stevedores the owner remains liable under this section. It may be noted, that the reservation in a charterparty, of the captain's right to supervise the stowage has not the effect of relieving the charterers of their duty of stowing safely. To the extent, however, that the master exercises supervision and limits the charterers control of the stowage, the charterers liability will be limited in a corresponding degree (u).

(t) Supra.
(u) Canadian Transport Co. v Court Line Ltd. 1940 AC 934.

The words 'properly discharge' have been held to mean "to deliver from the ships' tackle in the same apparent order and condition as on shipment (v)". Evidence in the form either of an admission or proof that the cargo was shipped in good order and conditions and delivered from the ship's tackle in a damaged condition is evidence of a breach of this article and the onus is then on the shipowner to show that the damage was due to one of the causes specified in Article IV. If the cause of the damage is unexplained the owner will be liable (w). Apparently any usual manner and place of discharge is authorized by the article, eg. depositing the cargo in a lighter for transhipment to shore (x). Evidence adduced eg. a shipper as to the condition of a shipment at the time of loading would appear to be sufficient to make out a prima facie case which the shipowner would be required to meet in order to negative responsibility.

3. ISSUED BILLS OF LADING

ARTICLE III, Rule 3:

After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill oflading

(v) Lord Wright in Gosse Millard v Can. Gov't Merchant Marine supra.
(w) Silver v Ocean SS Lines (1930) 1 KB 416.
(x) Goodwin v Hunt, supra.

showing among other things,

> (a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
> (b) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
> (c) the apparent order and condition of the goods.
> Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.' (y).

It was laid down in Harland & Wolff v Burns & Laird Lines Ltd. (z) that a contract of carriage covered any contract of affreightment the parties to which intended on or after shipment to issue a bill of lading, if they were entitled so to do, upon the demand of the shipper. Thus following the ruling in this case (which was done by the House of Lords in the Vita Foods Case) there is nothing to prevent control of water carriage where there is no bill of lading. If no demand is subsequently made, the contract of affreightment is a valid subsisting contract which must be interpreted according to common law, saving special conditions in the document initially issued, and not according to the Rules.

(y) This Rule must be read in conjunction with that contained in Section 7 of this Article.
(z) 1931 Sess. C.T. 722.

It is undoubtedly true that those who drafted them intended that the Rules should apply to all contracts of affreightment except those which were specifically excepted. The decision of the Privy Council in the Vita Foods case restricted the application of the Rules to shipments covered by a bill of lading - and bills of lading need only be issued when the shipper so demands.

When the goods are placed in the hands of the shipowner he generally issues a 'custody' or 'received for shipment' bill of lading. This bill governs the risk covering the loss of the goods before loading and after discharge. They may be in any form. The parties, if they wish, may agree to apply the provisions of the Act of 1910 throughout the period when the carrier - shipper relationship exists. Compliance with the shippers demand for a bill of lading is facilitated by allowing the 'received for shipment' bill of lading to be turned into a 'shipped' bill of lading by stamping the name of the ship and the date on the 'received for shipment' bill, or where the name of the ship and the date were known and inserted in the bill, in advance, owners' agent stamps the bill with an appropriate certificate (a). The received for shipment bill of lading may, as stated above, take any form. It is not uncommon to find that shipowners have a local bill of lading covering service at the port of shipment which is deemed to be

(a) Very often in this form 'Certified that the within mentioned goods have been shipped by above steamer'.

incorporated in any informal 'received for shipment' bill. Once the 'shipped' bill of lading is issued, it becomes the formal, effective expression of the contract and brings the Rules into effect, even though issued after the goods are shipped. But, following the decision in the Vita Foods case, if the shipper neglects to ask for a 'shipped' bill, the Rules will not apply to the contract of affreightment, which is then governed by the stipulations contained in the 'received for shipment' bill or in the document of title to the goods which the shipper has taken up upon delivery of those goods into the custody of the carrier.

In Canadian & Dominion Sugar Co. Ltd. v Canadian National (West Indies) SS Ltd. (b) a 'received for shipment' bill of lading in respect of a quantity of sugar shipped on the respondents steamship stated that the sugar was 'received on apparent good order and condition' but contained on the margin a stamped endorsement 'Signed under guarantee to produce ships clean receipt' (c). The sugar was damaged by water while awaiting shipment and the shipowner issued, instead of a clean receipt, one which stated 'many bags stained, torn and resewn'. The cargo-owner alleged that the carrier was liable for the damage.

The Privy Council held that section 3(c) of Article III expressly applies only if the shipper demands a bill of lading showing the apparent order and condition

(b) 1947 AC 46.
(c) A clean receipt is one in which the acknowledgement of the receipt of goods is not qualified by any reservation as to their quality Armstrong v Allen (1892) 8 TLR 613.

of the goods, section 7, provides that after the goods are loaded, the bill of lading to be issued by the carrier, shall if the shipper so demands be a shipped bill of lading. Section 3 only applies when a bill of lading is demanded and here no demand was made and the condition of Rule 7 was not fulfilled. The court followed its own holding in the Vita Foods case and held thatthe issuing of a bill of lading was not imperative.

"There is, indeed, no law which prevents goods being carried at sea without any bill of lading, or makes any particular form of bill of lading obligatory. The bill of lading here was what the parties intended and was not unlawful or void."

Clause (b) of Section 3 allows the carrier to insert either the number of packages or quantity or the weight. He may number the pieces and state the weight to be unknown in the bill of lading, in which case the bill will be prima facie evidence (d) of the number of pieces shipped but not of their weight (e).

4. PROOF

ARTICLE III, Rule 4:

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein

(d) See Section 4 infra.
(e) Pendle & Rivett Ltd. v Ellerman Lines Ltd. (1927) 12 Sol. J 15; In Quebec Civil Law it is sufficient to describe a crate as 'one case of dry goods; contents and the condition of the contents of the package unknown'. Chauvin v Canada SS Lines (1921) 59 SC 264.

described in accordance with paragraph 3 (a), (b), and (c).

By virtue of the Bill of Lading Act, a bill of lading is conclusive evidence in favour of the consignee of the shipment of the goods against the person signing the bill and it may estop the carrier from proving that the statements as to number, quantity or weight were incorrect (f).

This section does not say that the bill of lading is to be only prima facie evidence. The principle established in Naviera Visconzada v Churchill & Son (g) that the shipcarrier is estopped from denying statements in the bill of lading as to the apparent order and condition of the goods with respect to a person taking the bill of lading on the faith of those statements applies to shipments made under these rules (h). It is only as against an endorsee for valuable consideration, or a holder who takes delivery under the terms of the bill, that this estoppel arises. The representations are - as against the shipper - considered to be admissions on the part of the carrier which he is entitled to disprove.

If the bill of lading does not describe the goods as being received in apparent good order and condition, there is no reason, under the Rules, for refusing effect

(f) Silver v Ocean SS Co. Supra.
(g) (1906) 1 KB 237.
(h) Silver v Ocean SS Co. Supra; Canadian & Dominion Sugar Co. v C.N. (W.I.) SS Ltd. 1947 AC 46.

to the bill of lading according to its construction. As Scrutton L.J. said in Silver v Ocean SS Co.

"Section 4 of Article III has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition, as against people who accepted the bill of lading on the strength of the statement contained in it".

If the goods are received in a damaged condition, the burden of proof is on the carrier to show that the damage was due to one of the causes for which the Rules exonerate him. At Common Law, a carrier is responsible for loss if the shipper shows that the goods were placed on board and that they never arrived (i) and when there is no proof as to the manner which goods delivered in good order to a carrier by water have been damaged during shipment, the carrier is responsible unless he can bring himself within the common law exceptions (j).

5. ACCURACY OF WEIGHT

ARTICLE III, Rule 5:

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him,

(i) Chauvin v C.S.L., supra.
(j) Or, in Quebec, within the exception of Article 1675 cc ie: Cas fortuit, faute majeure or an inherent defect in the goods themselves.

and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity, shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Where by the usages of a particular trade, the weight of any bulk cargo inserted in a bill of lading is a weight accepted by a third person other than the carrier or the shipper, then notwithstanding Rule 4, the bill of lading is not deemed to be prima facie evidence against the carrier of the receipt of goods of the weight inserted in the bill and the accuracy at the time of shipment is not to be denied.

The effect of the guarantee by the shipper as to the accuracy of the weight and quantity precludes him from being able to recover from the carrier for any quantity or weight not contained in the bill and would render him liable for any loss resulting from the guarantee (k). This would not seem to apply to the consignee. In a bill of lading for coal, where the master stated that the bill showed the actual weight of the coal taken on board and the consignee proved that the quantity delivered to him was less than was stated in the bill of lading, the onus was placed upon the shipowner to show that the weight in

(k) Bills of Lading Act.

the bill was wrong. This he may do by showing mistakes by tally-men from whose tallies the bill of lading was made out, or by indirect evidence sufficient to satisfy the court, beyond doubt, that he delivered all he received (l). For this purpose, the carrier in defending an action for shortweight may implead the shipper guarantor (m).

6. NOTICE OF LOSS

ARTICLE III, Rule 6:

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

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

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

(l) Corporation of the Town of Weston v SS "Riverton" 1924 Ex. Ct.
(m) Scrutton in Charterparties 15th Ed. p. 560.

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

It would appear from this rule that if the shipper or the consignee fails to give notice of loss of or damage to the goods within 3 days after delivery, such delivery shall be prima facie evidence of the delivery of the carrier of the goods as described in the bill of lading. This stipulation, in effect, removes the possibility of the insertion in a bill of lading of a claim clause requiring that notice be given if a right of action is to be maintained. That is the only purpose of the first paragraph of this rule since whether notice has been given or not a right of action exists for one year after delivery or receipt of the goods by the consignee. When the paragraph states that unless notice is given within three days, lack of notice shall be prima facie proof that the goods were received in good order, it does not affect the existing law of delict since whether notice is given or not the consignee or shipper would have the burden of proving that the goods were not received in good order.

The fact that absence of notice does not preclude action being instituted within one year was made clear in the American Act which provides (n)

(n) Section 3 (6).

"That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not effect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

This stipulation merely affirms in another form the rules laid down in the Act.

ARTICLE III, Rule 7:

After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be as "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading. (o).

ARTICLE III, Rule 8:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from

(o) See commentary in Section 3 Supra.

liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

This section precludes the carrier from contracting out of part or all of the Rules, but allows him to undertake additional risks for the benefit of the shipper. Any lessening of the carrier's liability under the Rules renders the contract of affreightment null and void. A clause giving liberty to tranship is not annulled by this rule (p). But a clause in a bill of lading requiring claims for loss of or damage to goods to be made within a fixed period after delivery is rendered null and void and of no effect (q).

A benefit of insurance clause is one in which the carrier stipulates that he shall have the benefits of any insurance effected by the owner of the goods.

(p) Marceline Ganzales y Compagnia v Nourse Ltd. 1936 1 KB 565.
(q) Coventry Sheppard v Larenaga SS Co. (1942) 73 LI L.R. 256.

RIGHTS AND IMMUNITIES: THE EXCEPTIONS

ARTICLE IV, Rule 1:

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The rule of Article IV reiterates the absolute obligation of the shipowner to use due diligence to provide a seaworthy ship and states that if this obligation is fulfilled, he shall not be responsible for any damage resulting from unseaworthiness.

The problem of unseaworthiness was dealt with at length in the preceding chapter and it appeared from the dicussion in that chapter that the test which the courts generally apply is, in the words of Lord Cairns, this:

"The ship should be in a condition to encounter

whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter" (r).

In virtue of this section, if a loss occurs, which the court has found to have resulted from unseaworthiness the burden of proving due diligence is on the carrier. The onus placed upon the carrier is heavy and at times he is required to prove that the unseaworthiness was due to a latent defect. For in most other cases the courts will assume that the due diligence was not exercised (s) and the defence afforded by his having used due diligence must be strictly made out (t). Where the carrier has successfully negatived lack of due diligence and this finding is confirmed in appeal, the Supreme Court of Canada will not disturb these concurrent findings of fact unless adequate reasons are shown therefore (u).

1. THE BURDEN OF PROOF

ARTICLE IV, Rule 2:

Neither the carrier, nor the ship shall be responsible for loss or damage arising or resulting from;

When goods are shipped, subject to the rules, in good order and condition and are subsequently delivered

(r) Steel v State Line SS Co. (1877) 3 App. Cas. 72.
(s) Grain Growers Export Co. v C.S.L. 43 OLR 330.
(t) Scottish & Metropolitan Assoc. Co. v Can. SS Lines.
(u) Grain Growers Export Co. v C.S.L., supra.

in a damaged condition, the shipper or consignee has a right of action against the carrier based on the prima facie presumption that the damage to the goods was occasioned by the carrier's default. That presumption may be rebutted by the carrier's showing that the loss was due to a cause falling within one of the seventeen exceptions contained in this rule.

The first condition precedent to rebutting this presumption by a plea that the loss falls within one of the exceptions, is that the carrier show that he has exercised due diligence to make his ship seaworthy if unseaworthiness was, in any way or to any degree a cause of the loss (v). Secondly, saving exceptions (a) and (b) the carrier is not protected if he or his servants or his agents have been, in any way, negligent. Thus the initial burden placed on the carrier in the event of a loss is to show that he exercised due diligence to make the ship seaworthy and secondly that the loss falls within one of the exceptions contained in this rule (w), although in certain circumstances he may be estopped by statements in the bill of lading from relying on an exception vis-a-vis a third person who takes the bill of lading for value on the fault of statements made therein (x). If it appears that the damage has been caused by the perils of the sea

(v) See Chapter IV.
(w) Gosse Millard v Can. Gov't Merchant Marine, supra.
(x) Silver v Ocean SS Co., supra.

or some other specifically mentioned cause within the exceptions of the bill of lading then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care or skill on the part of the shipowner, his servants or agents. Where the evidence shows that the damage was partly due to one of those excepted causes and partly to causes not excepted, the shipowner is only relieved from liability for such damage as he can prove to be due to the excepted cause (y).

The rule that the burden of proving negligence is upon the shipper once the carrier has established that due diligence was exercised and that the cause of the damage was due to one of the exceptions only applies in respect to the sixteen exceptions (a) to (p). If the shipowner shows that the loss falls within one of those exceptions, the burden is shifted to the cargo-owner to prove negligence. The catch-all exception of (q) applies to losses which are not specifically mentioned in (a) to (p) - such incidents as breakage, pilfering and rust. Where goods are delivered in a broken condition, for example, the burden remains upon the carrier throughout. He must show that due diligence was used to make the ship seaworthy. If there is any causal connection between the breakage and unseaworthiness, he must show how the breakage occurred in order to rebut the presumption that it

(y) Gosse Millard v Can. Gov't Merchant Marine, supra.

was due to unseaworthiness, if such was the cause. Finally he must prove that it was not due to the negligence of his servants or agents in loading, handling, stowing or discharging the goods. Unlike the sixteen preceding cases where the shipper is bound to prove negligence if he would remove the statutory protection from the carrier, the carrier in clause (q) is bound to prove that he was not negligent.

2. THE EXCEPTIONS

(a) Act, neglect or default of the master mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship (z).

The words 'in the navigation or in the management of the ship' have no precise legal meaning and as a result the line between error in navigation and management of the ship and fault in care and custody of the cargo is difficult to draw. The importance of attempting to draw such a line cannot be overstated in view of the principle which is contained in this Rule.

This principle originated as a clause inserted in bills of lading over eighty years ago as protection for the shipowner. In virtue of the bill, he would generally assume liability for damage incurred in caring for the

(z) The 'immunities' will be interpreted in the light of decisions of English, American and Canadian Courts on similar stipulations on charterparties and bills of lading in accordance with the canons of construction laid down by the courts - see Chapter II.

cargo and which was due to either himself or his servants. He had no desire, however, to assume responsibility for damage to the cargo which resulted from the negligence of his servants in navigating or managing the ship. Both in the Harter Act and in the Hague Rules this exoneration for the errors of his servants in managing the ship was continued, for to stipulate otherwise would place an extremely heavy burden on the carrier. The present situation is that if the cargo is damaged as a result of the improper handling, stowing, carrying, keeping, caring for or discharging of the cargo, the carrier is responsible for that damage. If, on the other hand, the damage occurs as a result of improper or negligent navigation or management of the ship he is not. In other words, if a negligent act or default relates to the care of the cargo and no part of the ship's apparatus is concerned, the management of the ship is not in question and the owner is liable (a). If the act or default has reference to some part of the ship unconnected with the cargo, the management of the ship is clearly in issue and the shipowner is exempt.

The problem arises in construing the phrase 'management of a ship'. The courts have generally held that the application of the exemption depends on the

(a) Perrault 'Perils de la Mer' (1943) R du B 86 - distinguished between commercial fault (the handling of cargo) and nautical fault (the handling of the ship).

facts as appreciated by persons experienced in dealing with steamers (b). It would seem to go somewhat beyond a strict interpretation of the word navigation, since errors in management may occur when the ship is tied to the pier (c). Thus stowage of cargo is not management (d) but measures taken in working some part of the ship unconnected with the cargo have almost uniformly been held to be on the nature of management (e).

The difficulty arises in dealing with the intermediate cases where the damage to cargo is due to failure to take care of some part of the ship used for cargo purposes, such as the refrigerating plant. In Foreman & Ellams Ltd. v Federal Steam Navigation Co. Ltd. (f) inattention to the temperature of the refrigerator was held not to be a default in the management of a ship. But a contrary conclusion was reached in Rowson v Atlantic Transport Co. (g) because the refrigerator in the case cooled the ship's stores as well as the cargo, and because the management of the ship was therefore involved. The case of Gosse Millard v Canadian Government Merchant Marine (h), which one of the leading cases on this rule, did little to clear up this difficulty. In this case the shipowner

(b) Per: Lord Sumner in Suzuki & Co. Ltd. v Bunyan & Co. Ltd. (1926) 31 Comm Cos. 183.
(c) The Glenochil 1896 P.10.
(d) The Ferro (1893) P.38; the Mississippi 113 Fed. 985.
(e) The Rodney (1900) P.112; the Eloma 64 Fed. 880.
(f) 44 TLR 250.
(g) (1903) 2 KB 666.
(h) 1929 AC 223.

had allowed a cargo of tin plate to rust, while the ship was in dry dock, due to the negligence of his servants in omitting to cover the holds with tarpaulins. These precautions were required as cargo operations and the board decided that they had nothing to do with the management of the ship.

In 'The Glenochil' (i), the ship, in the course of a voyage from New Orleans to London encountered heavy weather, while unloading and reloading at London it was necessary to fill some of the water ballast tanks in order to stiffen the ship. In doing so, the water passed through a broken pipe and leaked onto the cargo and damaged it. It It was found that the break in the pipe would have been discovered upon inspection, but it was held that the failure to make such an inspection was negligence 'in the management of the ship' and the carrier was accordingly not liable.

In 'The Germania' (j) the vessel reached port in the winter with some 200 pounds of ice on deck. Through the negligent discharge of the cargo, she rolled over and sank at the dock. This was held not to be an error in the management of the ship.

(i) Supra.
(j) (1905) 196 US 589 - Per Holmes J. "If the primary purpose is to affect the ballast of the ship, the change in management of the vessel, but if the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault...we think it plain that a case may occur which in different aspects falls within both sections, and if this be true, the question which section (1 or 3 of the Harter Act) is to govern must be determined by the primary nature and objects of the act which cause the loss".

In the recent case of Kalamazoo Vegetable Parchment Paper Co. v C.P.R. (k) the Supreme Court of Canada discussed the question of the proper construction to be given to the words 'management of a ship'. The interpretation of the Court is the latest word on the subject but although the Judges entered into an exhaustive examination of the jurisprudence, the decision would not appear to have drawn any less vague a line between 'management of a ship' and 'care of the cargo' than preceding jurisprudence.

The facts in the Kalamazoo Paper Co. case were these: Defendants ship the 'SS Nootka' sailed from Port Alice on Vancouver Island to Vancouver with a cargo of wood pulp. During the voyage, the ship stranded on a rock owing to fog, and after dislodging it was noticed that she had sprung a leak and being unable to reach her destination, it was run aground to prevent sinking, and as a result the cargo was damaged. The shipper brought an action alleging that the damage was in part due to the negligence of the captain and the crew in failing to use all the available pumping facilities to keep the water level down after the ship had been grounded. The carrier contended that there was a duty on the captain to utilize the full pumping capacity, not only for the general safety of the ship but also to prevent a collapse of the bulkhead between the forward hold and the engine room: if the pressure of the cargo and water had broken through that barrier, the vessel

(k) 1950 2 DLR 369

would have been in the gravest danger; and all measures taken to anticipate such danger would be acts of management. This contention was supported by the court and the question which remained was whether 'an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to care of the cargo.

The court held that assuming there to have been neglect as alleged, it was an omission in relation to the 'management of the ship' and not in relation to the care owed to the cargo, and therefore, the carrier was excluded from liability. In decision which was explained by Rand J. in the following words:

"It may be that duty to the ship as a whole takes precedence over duty to a portion of the cargo; but the necessary effect of the language of Article III, Rule 2, 'subject to the provisions of Article IV' seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may also be an omission in relation to cargo. To construe it otherwise would be to add to the language of Clause (a) the words 'and not being a neglect in the care of the goods'".

As the matter now stands (1951) where the act applies, the effect of this ruling appears to be that if a cargo carrying part of a ship is negligently managed

whilst in use for the ship's purpose - even indirectly, with resulting damage to the cargo, the shipowner is exempt. This allows the owner to escape responsibility in many cases as long as he is able to show that the apparatus in question was used for ship's purposes, though only remotely so. It was the intention of the framers of the act to saddle the shipowner with liability for negligence in management of the cargo carrying apparatus of the ship: viz Article III rule 2, which obliges him carefully to stow, keep and care for the goods. The antithesis established by Article IV rule 2 was intended to lie between acts and defaults primarily relating to the safety and general upkeep of the ship and acts and defaults primarily relating to the care of those parts of a ship destined for cargo. This intention appears to have been nullified by the phraseology of the Act which should, in order to carry out the original intentions, contain in clause (a) the words "and not being a neglect in the care of the goods". The position as presently established places a heavier burden on the cargo owners or their insurers than was originally intended.

A review of the jurisprudence shows that the exemption of clause (a) covers:

1) Failure to inspect a water ballast tank before filling up - The Glenochil (1).

(1) supra.

ii) Negligent use of an iron rod to clear in waste pipe leading from the crew's wash house - The Touraine (m).

iii) Improper abandonment of a ship - Bulgaris v Bunge & Co. Ltd. (n).

iv) A ship stranding due to the pilot's falling asleep - Shell Petroleum v Dominion Tankers (o).

v) The engineers misinterpretation of a signal from the bridge and causing the ship to run into a lock in the Lachine Canal - Canada SS Lines v Chartrand (p).

vi) Omission to use pumping facilities - KVP v CPR (q).

vii) Failure to close the iron covers of port holes - The Silvia (r).

viii) Failure to close bilge cock - Good v London Steam Shipowners Mutual Protecting Assoc. (s).

ix) Boatswain knocking hole in drain pipe - Rodney (t).

and that it does not cover:

i) Bad stowage - The Ferro (u) wherein Gorill Barnes J. said: "it seems to me a perversion of terms to say that the management of a ship has anything to do with

(m) 1928 P.58
(n) (1933) 49 TLR 237.
(o) (1940) 3 DLR 115; 50 C.R.TC 191 (Ex.ct.)
(p) 1933 Ex. C.R. 147.
(q) Supra.
(r) (1871) LR 6 CP 563.
(s) 1893 P.38.
(t) 1900 P.112.
(u) (1927) 32 Comm.Cos. 365.

the stowage of cargo." (

ii) Failure to prevent pilfering of the cargo - Hourani v Harrison (v).

iii) Failure to protect the cargo holdby tarpaulins - Gosse Millard v Can. Gov't Merchant Marine (w).

iv) Failure to make proper use of the refrigerating machinery - Foremen & Ellen Ltd. v Fed. Steam Navigation Co. Ltd. (x): although it appears that it does where the machinery is used for cooling the ships' provisions as well as the cargo (y).

v) Unnecessary delay in port owing to an apprehension of difficulty or damage in continuing the voyage - The Renée Hyaffel (z).

vi) An erroneous decision by the master, while in port as to the route he will pursue - Lord v Newson Sons & Co. Ltd. (a).

vii) Masters failure upon going ashore to order that full steam be kept up - Poyosaki Kissen Kaisha v Société des Affréteurs (b).

Finally it must be noted that navigation does not refer merely to the time when the vessel is at sea; since

(v) supra.
(w) supra.
(x) supra.
(y) Rowson v Atlantic Transport (supra).
(z) (1916) 32 TLR 660.
(a) (1920) k KB 846.
(b) (1922) 27 Comm.Cos.157: This decision was disapproved by Scrutton J.J. in a dissenting opinion given in The Saguki (31 Co.,Cos.183) where he said that he failed to understand the reasons. It is so near the line that it has probably gone too far.

there is no stipulation in the rules that the exception only applies during the ordinary course of the voyage. Like the Rules in general the exception applies from the time the goods are taken on board until they are discharged (c).

These cases point out that a proper construction of the phrase 'management of a ship' is dependent upon the facts of each case after due consideration is given judicial precedents.

(b) "Fire, unless caused by the actual fault or privity of the carrier".

This clause is derived from section 502 of the Imperial Merchant Shipping Act, 1894 (d) which extends protection to the owner of a British seagoing ship from liability for any loss or damage happening without his actual fault or privity where any goods put on board his ship are lost or damaged by reason of fire on board the ship. This provision protects the shipowner from liability for loss by fire where the fire is the result of unseaworthiness, provided there has been no actual fault or privity of the owner. By virtue of section 7 (1) of the Act, this protection is not diminished by the Rules. The question is, therefore, whether in order to obtain

(c) The Glenochil (supra); Carmichael & Co. v Liverpool Sailing Shipowners etc. Assoc. 19 QBP 242; The Germanic (supra).
(d) A similar more all-inclusive clause is contained in sec. 649 of the Canadian Shipping Act.

exemption under clause (b), it is prerequisite that due diligence has been exercised as stipulated in Article III (1) or does the exemption exist even where the fire was caused by failure to use due diligence?

In Dreyfus & Co. v Tempus Shipping Co. (e) it was held that in virtue of section 502 of the Merchant Shipping Act the owner is not liable though the fire was caused by unseaworthiness but without his actual fault or privity. This view is approved in Williamson & Payne's 'Carriage of Goods by Sea' (f) but in MacLachlin in Merchant Shipping (g) states that the exception as to fire does not operate if the fire has been caused by failure to use due diligence to make the ship seaworthy. This latter opinion, it is submitted, is correct since the obligation contained in Article III, Rule 1 is paramount and not subject to any of the rights and immunities contained in Article IV.

The first Canadian case on this point arose as a result of the conditions contained in the Act of 1910 but is equally applicable to the Hague Rules of 1921 in view of the fact that the language used is similar.

(e) 1931 AC 726; Lord Duredin decided that, as Vaughan Williams L.J. had pointed out in the Court of Appeal, to require that the exception only operates when a ship is seaworthy in effect change the words in sec. 502 'British Seagoing Ship' to 'British Seagoing Seaworthy Ship'.
(f) at p. 42.
(g) at p. 497; Scrutton 15th Ed. p. 466 supports this viewpoint.

This was the case of the Royal Exchange Ins. v The Kingsley Navigation Co. Ltd. which was decided by the Privy Council in 1923 (h). Here the shipper consigned a number of barrels of lime to the Plaintiff's insureds aboard defendant's barge. During the voyage, the barge and its tug put into an intermediate port, where it was noticed that the barge was on fire and it was towed into deep water where it burnt and sank. It was found as a fact that the barge was rotten and not in a seaworthy condition to carry a cargo of lime and it was found, further, that due diligence had not been used to make it seaworthy. Was this a loss arising from fire without the actual fault or privity of the owner?

It was held that the ship's unseaworthiness was the natural and direct cause of leakage, sufficient to bring water into contact with the lime, tending to cause oxidation and combustion and that the ignition was a natural and direct cause of the heat generated by such contact and that, therefore, the loss was directly attributable to the unseaworthiness of the ship and was not a loss arising from fire. The board went on to point out that the proximate cause of a loss is not necessarily the cause nearest in time (i) and that the causation from the unseaworthiness of the barge to the outbreak of the fire was unbroken. The onus was

(h) (1923) 1 DLR 1048.
(i) Following the words of Lord Stow in Leyland Shipping v Norwich Union 1918 AC 350.

on the respondent to show that the loss happened without his actual fault or privity. Since the words 'actual fault' include acts of omission, eg. failure to use due diligence, and if an owner has means of knowledge which he ought to have used, and does not avail himself of them, his omission so to do may be a fault and, if so, it is an actual fault which precludes him from obtaining the protection of clause (b).

This decision points out the essential difference between the Hague Rules and the Merchant Shipping Act. The latter absolves the owner from loss by fire where there is no actual fault or privity, the former, however, treats the owner's failure to comply with the absolute obligation to exercise due diligence as a personal fault which, if the fire is caused by unseaworthiness remains his immunity. This decision antedates that of the House of Lords in Dreyfus v Tempus Shipping but in the "Anglo-Indian" (j) the Supreme Court of Canada had occasion to review this problem in the light of the Hague Rules and the Dreyfus case.

The Court held that if the direct cause of the loss to cargo is the unseaworthiness of the ship, even though the fire was proximate cause, the loss is not one arising as a resulting from fire within the exception, notwithstanding it may be proved that the unseaworthiness was caused without the actual fault or privity of the carrier. The exception operates only where the loss is a

(j) Dominion Glass Co.Ltd. v SS Anglo Indian (1944) 4 DLR 104.

direct result of fire. Following the reasoning given in The Royal Exchange Insurance case, the court held that clause (b) is subject to the absolute obligation contained in Article III (1) as Rand J. stated in construing this exception that:

"...in Article III the carrier's liabilities are set forth. Rule 2 of that Article, by its introductory language 'Subject to the provision of Article IV' declares that the responsibility so created is not absolute; ie the exceptions trench upon the duty so prescribed. On the other hand, there is no such subjection of Rule 1 of Article III to Article IV; and, in a manner complementary to Rule 1 of Article III, Rule 1 of Article IV expressly and exclusively deals with liability for loss or damage arising from unseaworthiness. The effect of that special treatment is, I think, to render the exercise of diligence absolute and to prove it quite outside the scope any of the itemized exceptions. The language of Item (b) is virtually identical with that of section 502 of the Merchant Shipping Act, and in the absence of the above provisions of the Rules call for a similar construction as to seaworthiness "(as in the Dreyfus case)" but as Item (b) clearly gives exemption in the case of fire caused by negligence, other than that of the carrier himself, arising in the course of the duties Rule 2 of Article III, the exception is fully satisfied consistently with what

appears to be perfectly plain and straightforward language and I feel bound to assume that the legislature did not intend to the item a mere extended scope."

The words of Mr. Justice Bond are cited at length because it is felt that they sum up, clearly and concisely the present law regarding the interpretation of this exception. They also serve to introduce the definition of actual fault and privity - that is negligence of the carrier himself as opposed to the negligence of his servants.

If the carrier seeks the exoneration of clause (b), he must show affirmatively that the damage happened without his actual fault or privity (k). Where the shipowner is a corporation, the corporation is not protected by the section unless the evidence negatives the fault or privity of the directing mind 'the very ego and centre' of the corporation - the directors to whom the management of the ship is entrusted (l).

Fire of any type unless caused by unseaworthiness or by the negligence of the owner, falls within this exemption. One obvious exception is fire caused by lightning which is deemed and Act of God. Damage by smoke and water used to extinguish a fire is damage 'by reason of fire' (m).

(k) Patterson SS Lines v Canadian Co-operative Wheat Growers Assoc. supra.
(l) Leonards Carrying Co. v Asiatic Petroleum Co. (1915) AC 706 - where the management of the company was registered managing owner of a ship and he actually managed the ship on behalf of the owners and since he was liable, the company was liable; Royal Exchange Insurance Co. v Kingsley (supra).
(m) The Diamond 1906 P. 282.

If, however, the goods are destroyed by fire whilst on the way to or from the ship the exception does not, of course, apply since the Rules apply only from loading to discharge. Thus the shipowner will be liable for all lossess occurring at those times unless he has excluded responsibility for fires in the bill of lading. Nor is he protected by an exception against perils of the sea, since fire is not a peril of the sea. But the exceptions of perils of the sea might apply to an outbreak of fire in some exceptional cases, for example, if the cargo heated to the point of combustion owing to the necessity for keeping ventilators closed during inclement weather (n).

(c) "Perils, dangers and accidents of the sea or other navigable waters."

This exception has for many hundreds of years appeared on bills of lading, in one form or another but the longer exception would not seem to cover any more ground than the simple phrase 'perils of the sea' which covers all losses of a marine character incidental to a ship as a means of transportation by sea.

Many definitions have been given by eminent judges of the phrase 'perils of the sea'; none of which are entirely satisfactory since, as Lord Macnaughton pointed out in the case of Thames & Mersey Insurance Co. v Hamilton, Fraser & Co. (o) it is not possible to frame

(n) Hamilton, Fraser & Co. v Pandorf & Co. 1887 12 AC 518; Chicago Maru v Dorkin (supra).
(o) 12 AC 484.

a definition which would include every case proper to be included and no other.

"I think" he said "that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad commonsense view and not in the light of strained analogies and fanciful resemblances."

What is probably the best definition was given by Lopes, L.J., in Pandorf & Co. v Hamilton, Fraser & Co. (p). He defined the phrase thus: "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody." This statement he paraphrased as follows: "sea damage occuring at sea and nobody's fault." Lord Herschell in the Xantho (q) criticised this definition on the grounds that he could not concur in the view that a disaster which happens from the fault of somebody can never be a peril of the sea, and that it would be unsound to hold that the exception was always excluded 'when the inroad of the sea which occasioned the loss was induced by some intervention of human agency'. The authors of Scrutton on Charterparties state that the term includes 'any damage to the goods carried caused by sea, water, storms, collisbn, stranding or other perils peculiar to the sea or to a ship at sea,

(p) (1885) 16 QBD 629 at p. 633.
(q) 1887 12 AC 503.

which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure'. (r).

In the light of the above definitions certain characteristics pertaining to perils of the sea emerge. In order that the carrier can successfully plead the exception, the damage to the cargo must have been due to an accident of a marine character exclusively which occurs to a ship whose owner has exercised due diligence to make the ship seaworthy and where the owner or his servants have not been negligent, having regard to the character of the ship.

The damage done must be due to an accident and not to mere wear and tear or natural decay, such as must inevitably occur in the ordinary course of the voyage. In The Xantho (s) it was laid down that there must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The provisions was added in Pandorf & Co. v Hamilton Fraser & Co. (t) that even if it is not one of the necessary incidents of the adventure, it may be a peril of the sea although not of an unforseen character.

(r) 15th Ed. p. 247. In Compana de Navigacion Interior SA v Firemans Fund Insurance Co., 31 LI. L.R. 166, the limited states Supreme Court held that the exception must be interpreted with regard to the character of the ship in question where this was known to both parties to the contract, and that weather which might not amount to perils of the seas in the case of a liner might fall within that expression in the case of a small tug.
(s) Supra.
(t) per Fitzgerald L.J.

Gales which cannot be said to be unexpected do not generally constitute a peril of the sea, but there may be incidents connected with turbulent seas of an unexpected or fortuitous nature which, would constitute a peril of the sea (u). In Davison Chemical Co. v Eastern Transportation Co. (v) it was said that "The theory that to constitute a peril of the sea a storm must be of such intensity as not to be anticipated is one which finds no support in law. Damage is caused by a peril of the sea within the contract of affreightment, when the cause of the entrance of the water is not unseaworthiness or negligence or ordinary wear and tear, but the unusual stress of water or the violent action of the elements". It was held that a severe storm which carried away the hatch covers so that the cargo was damaged by water was a peril of the sea. In Boston Iron & Metal Co. v Automobile Insurance Co. (w) it was stated that 'a peril of the sea need not be something catastrophic in nature, but is something arising from the violent action of the elements without rather than from weakness within the vessel'. Similarly in Keystone Transports Ltd. v Dominion Steel & Coal Corp., where a ship was encountered a storm; the tarpaulins were ripped off and the cargo was damaged, it was held that this storm constituted a

(u) Per Hall J. in Donaldson Line v Hugh Russell & Sons Q 68 KB 135; Bond J. in Keystone Transports Ltd. v Dominion Steel & Coal Corp. Ltd. (1942) 4 DLR 513 SCR.
(v) 1929 AMC 161.
(w) 1929 AMC 554.

peril of the sea. A severe storm was also held to be a peril of the sea in Parrish & Heinbecker v Burke Towing & Salvage Co. (x).

Although storms at sea are not per se, considered perils of the sea, it is evident from the above line of cases that the court will seldom exclude the application of the exception where cargo has suffered damage as a result of a storm. The precedent for the present broad view which the courts have adopted is the case of Mountain v Whittle (y). This was the case of a houseboat, the seams of which above the water line had become defective, which was being towed in fine weather and in closed water in order to be repaired at another pier. A powerful tug was employed and this caused a wave so high as to force water into the defective seams. "Sinking by such a wave" said Lord Sumner "seems to me a fortuitous casualty, whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave."

This idea is well expressed in Dictionnaire de Droit Commerciale (z).

"D'ailleurs l'etat agité de la mer, bien qu'il n'y ait eu ni tempete, ni naufrage du navure, doit être considere comme une fortune de mer dont les suites sont à la charge de l'assureur, lorsque cette agitation acquiert

(x) (1943) 2 DLR 193 (SCC). Parrish & Heinbecker v Burke Towing & Salvage Co.
(y) 1921 AC 615.
(z) Vol I Assurances Maritimes No. 388.

des proportions insolides et susceptibles de compromettre la solidité d'un navire en bon etat."

Among the cases wherein the loss was held to be accidental within the meaning of the exception are the following illustrations:

The destruction of the bottom of a wooden ship by rates in seas where such damage might be expected to occur, Hunter v Potts (a).

The breaking of barrels of molasses during transit when a heavy sea was encountered, Canadian National Steamships v Bayliss (b).

Injury to the ship caused by her taking ground in the ordinary and expected course of the voyage, Magnus v Buttermer (c).

The accident causing the damage must be of a marine character in order to constitute a loss by perils of the sea, as has been shown by the jurisprudence, it is not necessary, however, that there should be any extra-ordinary violence of the winds or waves, nor that the damage be due to contact with seawater or occuring while the ship is waterborne. In the Thrunscoe (d) damage to cargo injured by heat from the engine-room owing to the necessity of keeping ventilators shut during stormy weather was deemed to be due to a peril of the sea. But the carrier

(a) (1815) 4 Comp.203 - Cited in Pandorf v Hamilton Fraser (supra).
(b) 1937 1 DLR 545 (SCC): The contrary had been held in "The Catherine Chalmers" (1874) 32 LT 847, where wine had oozed from casks which developed leaks owing to strains created by the rolling of the seas.
(c) (1852) 21 L.J. CP 119.
(d) 1897 P. 301.

must prove that the heating was due to the necessity of closing the ventilators.

Accidents which, although they occur at sea, are in no way due to the fact that the ship is at sea and might equally be encountered on land are not perils of the sea. The phrase is perils of the sea and not perils on the sea and thus accidents which fall within the exception must be of a character peculiar to the sea. This factor is stressed in the decision given Pandorf V Hamilton Fraser. In Kay v Wheater (e) it was decided that a rat on board a ship which confined its attention to eating cargo was not a peril of the sea, nor was it an Act of God (f). But in the Pandorf case the rat ate a hole in a lead pipe which communicated with the sea, whereby salt water entered the hold and the cargo was damaged. It was held in the Court of Appeal that in determining whether an accident was of a marine character, it was not the immediate cause - the causa proxima - but the real effective cause - the causa causans - which must be looked to and that although the causa proxima, sea water, might be a peril of the sea, the causa causans - a rat, was not and that therefore the carrier was liable. The House of Lords reversed this decision and held that if the shipowner has carried with reasonable care, he will be excused wherever the causa proxima of the loss is characteristic of the sea,

(e) (1867) 2 CP 302.
(f) Dale v Hall (1750) Wils. 281.

here the incursion of sea water, though some antecedent link in the chain of causation may not fall within the exception; that is, the rat.

This case, although the leading one in this exception, is poor since it follows that if a rat eats cargo it is not a peril, if he eats the ship so as to make it unseaworthy but no water enters, it is not a peril but if he eats a part of the ship and water does enter, the rat is a peril of the sea. The House was trying to underline the principle that if sea damage to the cargo occurred and it was nobody's fault it was a peril of the sea and the carrier was exonerated from liability. The devious workings of the common law mentality are prominently displayed in this judgment. The rapid codification of the common law whixh has occurred in the last fifty years is the logical result of the well nigh incomprehensible juridical gymnastics which were performed in the Common Law courts of England to arrive at principles of law. Unfortunately the Hague Rules did little to clarify the exceptions themselves and the courts of England, Canada and the United States have almost invariably continued to construe the term perils of the sea in the manner which was expounded in the House of Lords in Pandorf v Harrison, Fraser & Co. The phrase now seems to cover all dangers which are peculiarly incident to a ship's being or sailing on the seas.

(d) Act of God.

A loss is considered as having occurred through an act of God when it is directly and exclusively due to superhuman causes, without human intervention and without any negligence on the part of the shipowner or his servants (g).

The term is similar in meaning to that given the Civil Law expression of 'vis major' although the latter is broad enough to include events which are outside the scope of the term 'act of God' (h). 'Fortuitous events are those which are unforseen and caused by superior force which it was impossible to resist', is the definition given to the expression in the Quebec Civil Code (i), or as Mignault preferred to put it:

'Un événement que la prudence humaine ne peut prevoir et auquel on ne peut resister quand on l'a prévu'.

This latter definition applies equally to the expression act of God as it is used in the Hague Rules. It is complete since it contains the sine qua non of either a fortuitous event or an act of God - that the event be irresistible and unforseeable:- that is, that it has originated from something which no human care or provisions could have prevented.

The two characteristics of acts of God are irresistibility or superhuman causes and unforseeability or absence of human intervention and negligence. When an event possesses these characteristics it is an act of God

(g) Nugent v Smith (1876) L.R. 1 C.P. 444.
(h) Mackay "Impossibility of performance" Cap.VI - Force majeur is broad enough to cover the exceptions (c) - (k) as well as acts of God.
(i) Art. 17 (24).

and exonerates the carrier from loss or damage to the cargo. The event which the carrier alleges to have been an act of God must be proven by him to have been due to some force which he was absolutely unable to resist - even the slightest evidence that the carrier was able to resist the event or at least to moderate its effects is sufficient to remove the protection given by this exception. This, it is submitted is the correct view and the one which would be followed in all Civil Law Jurisprudence (j). On the other hand it seems that in Common Law Jurisprudence if damage is caused partly by the shipowner's negligence and partly by superhuman causes without such negligence, the court will permit the shipowner to prove, if he can, that a portion of the damage done was due solely to the act of God and that, therefore, he ought not to be held responsible for such portion (k).

An irresistible cause is either death or the action of the elements. There is no problem raised by death, but there is with respect to the action of the elements. How grave must the acts of nature be before the courts will consider them to be an act of God?

By far the most common acts of nature which are deemed to be acts of God are those actions of the elements which are patently not due to human intervention. Among them can be included lightning, a storm at sea, floods,

(j) France, Belgium, Quebec, etc.
(k) Nitro-Phosphate Co. v London & St. Katherine Docks Co. 9 CH.Div 527.

unprecedentedly violent rain falls, earthquakes and, in one case, an extraordinarily high tide which though not wholly unprecedented, could not reasonably have been expected to recur (l). On the other hand, damage by rats is not an act of God (m). While it is, in general, not too difficult for the courts to classify accidents of nature as acts of God, they must bear in mind the admonition of Troplong, who in writing of fortuitous events, said that it is wrong to describe as vis majeur, an event which is only the ordinary result of the natural course of things: "La pluie, les vents, la neige, le chaud ne sont pas des cas fortuits; ce sont des accidents néces-saire de l'ordre des saisons, des alternatives inevitables d'une température erative normale. On ne les élève au rang de cas fortuits qu'autant que par leur intensité et leur force excessive ils sortent de la marche accoutumée de la nature...." En un mot, les saisons ont leur ordre et leur dérangement; le dérangement seul dégénere en cas fortuit." (n).

This precept has been cited since it accurately reflects the limitations of the term act of God. It is perhaps unnecessary to point out that a storm, for example, which could not be considered to have been an act of God, will, in view of the broad constructions given to that term by the courts, be deemed a peril of the sea.

(l) ibid.
(m) Dale v Hall (supra).
(m) Louage No. 207.

If a carrier is able to prove that the occurrence which caused the loss of or the damage to the cargo was both extraordinary and unprecedented, that is sufficient to render the exception of acts of God applicable. It is not, however, necessary to prove that the action of the elements was overwhelming. He must also prove that the accident was unforseeable and could not have been prevented by reasonable care and foresight. Reasonable care will always be interpreted in the light of the carrier's supposed experience in carrying goods by sea. A reasonable man might not be supposed to know that tarpaulins must be affixed to the hatch covers, whereas a carrier would be presumed to have known this and a storm of such intensity that water entered the holds would not be deemed an act of God for the carrier, since the damage caused was due to his negligence in failing to properly cover the hatches. Since the courts, not unnaturally, presume that those who set themselves up as carriers have special aptitudes with respect to their trade, they will interpret his unforseeability very strictly.

An act of God must be the direct cause of the damage if the carrier would plead it successfully. In the case of Liver Alkili Co. v Johnson (o), the plaintiff shipped some salt upon defendant's barge, which due to the foggy weather then prevailing, ran off course, struck a stony bank and foundered with its cargo. It was held that

(o) (1874) LR 9 Ex. 339.

the goods were not lost by the act of God, for as Blackburn J. said, "The goods were injured by reason of the barge getting on the shoal in consequence of the fog. This was a peril of navigation, but could in no sense be called the Act of God". Here the owner was liable although in virtue of the Hague Rules he would have been excused by the exception of perils of the sea. This decision appears to be based on the fact that the fog itself did no damage whatever to the goods and that since the damage must be directly exclusive due to an act of nature before it can be considered to have occurred through an act of God, the exception in the Bill of Lading had no application.

Finally, the loss must have occurred without any negligence attributable to the owner or his servants in order to constitute a loss by an act of God. The carrier is required to use all the care that can be reasonably required of him. As pointed out above, the standard of reasonable care is considered in the light of the carrier's occupation. Once he has taken all the precautions that a reasonable carrier would take, he will not be deemed negligent if damage occurs as a result of an act of God. He is bound, however, to do everything in his power to minimize the effects of the act which causes the damage, if he fails to do all that he reasonably can to avert the damage and fails to apply due diligence in preventing the damage an inevitable accident will not afford him immunity. He comes within the rule which gives immunity from the effects of vis majeur as the act of God only when he uses all the

known means to which prudent and experienced carriers ordinarily have recourse. It is incumbent upon him to prove not only that the accident amounted to an act of God but that he did in fact attempt to prevent its effects. It must be shown to be such that it could not have been prevented by any amount of foresight, pains and care reasonably to be expected from the shipowner (p).

(e) Act of War.

The phrase 'Act of War' is of much wider scope than the old supplied exception of the King's enemies. Acts of war would include any acts which result from the existence of a state of war regardless of whether the ship flew the flag of one of the belligerants or of a neutral nation. Like the other exceptions it must be strictly limited to losses which are the direct and exclusive result of an act of war (q). Acts of war include detention of the ship by one of the belligerants if the ship belonged to a neutral or captive where the shipowner's state is at war with the state of those capturing the ship (r). But where a ship is seized and confiscated by the courts of a foreign land for violations of the revenue laws, when both countries are at peace, such confiscation does not come within the exception.

(p) Abbott on Shipping 14th Ed. p. 577.
(q) Richard de Larranoga v Liverpool & Lond War Risks (1921) 2 AC 141.
(r) Russell v Niemann (1864) 17 CB (ns) 163.

The one question which arises in connection with this exception is how the courts construe the word war. A state of war has - in Hall's classic definition - been said to exist 'when differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace'. (s). The carrier's defense of act of war is not dependent upon that presently unfashionable practice of a declaration of war. During the last war, Canada, for example, did not declare war until September 10th, 1939, but German ships in Canadian ports were seized on September 3rd. Once a state of war, whether declared or not, has been recognized by the federal executive power, the courts are bound to acknowledge this recognition and interpret the exception accordingly. As Lord Ellenborough remarked in Blackburn v Thompson (t):

"It would be unsafe for courts of Justice to take upon themselves, without authority, to decide upon such relations. In short the courts are invariably bound to recognize that a state of war exists, even though the war is not of a type which would be classified

(s) Treatise on International Law 6th Ed. p. 60.
(t) (1812) 15 East 89.

as such by international law" (u).

When the executive of the state recognizes that a state of war exists, the tribunals must accept such recognition without seeking a true definition of war. Whether or not the existence of war, as an exception, will effectively relive the carrier for responsibility for damage to the cargo is a matter for the courts discretion and depends upon the circumstances of each case.

(f) Acts of Public Enemies.

This exception - then termed the King's enemies - was implied at common law. In its present form it must be read together with the preceding exception, act of war.

(u) In a charterparty the word 'war' receives the business or commercial meaning in which it would be understood in its context. Kawaski Kisen v Boultom SS Co. (1939) 2 KB 544. It is submitted that this is broader than the interpretation which must be given the word in the Act. Charterparties are private contracts and not, as bills of lading, subject to the provisions contained in an international set of rules. Certainly commercial meanings would vary from country to country. It is certain the Japanese shipowners did not recognize that Japan was at war with China whereas most other shipowners did. In Australia Dispatch Line v Anglo Canadian Shipping Co. (1940) 4 DLR 104, where all the parties to a charterparty had treated the outbreak of the Sino-Japanese war as frustrating the charterparty it was held that they were bound by their conduct. It would not be open to the parties to a bill of lading to agree similarly, for the court would follow the ruling of the executive.

Public enemies means the enemies of the state of the carrier, whether the state is represented by an emperor, president or assembly (v) or the people. It is uncertain whether it includes pirates; Scrutton is of the opinion that it does since pirates are 'hostes humani generis'. The former view was that it did not (w). The question is, however, unimportant since the exception of perils of the sea includes pirates (x).

It applies only to the acts of public enemies - that is, hostile acts commited by the forces of a state at war with Canada. It must, therefore, be limited to acts done in time of war. It was held not to apply to confiscation in time of peace in Spence v Chadwick (y). If a ship is confiscated in time of war by the country to which the ship belongs and that country is foreign, the confiscation will not, in England at least, be considered an act of public enemies (z). The acts of an armed band of depredators are not the acts of public enemies. It is essential that the act be that of public enemies and, for purposes of this exception public enemies only exist in time of war and are the citizens of the state at war with the state of which the cargo-owner

(v) Russel v Neimann (supra)
(w) Story on Bailments see 526.
(x) Pichering v Barkley (1648) Sty 132.
(y) (1847) 10 QB 517
(z) Forward v Pillard (1785) 1 TR 27.

or the shipowner is a subject. In Becker Group v London Assurance Corporation (a), a German Captain who had put into an Italian port to avoid capture refused to deliver the cargo to the Italians except on terms to which he was not entitled and the goods were confiscated by the Italians. It was held, under a policy of marine insurance containing this exception, that this was not a loss arising from the act of public enemies.

In an old case (b) it was held that throwing some dollars overboard in order to prevent them from falling into the hands of an enemy is a loss by the King's enemies. This is an interesting point and it shows that there may be a direct intervention between the act and the loss by the shipowner which will not, in this exception, be considered a fault of the carrier.

(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

From the wording of this exception it would appear that it covers all the ground which is covered by the preceding two exceptions and goes beyond it in including the acts of friendly states or even the acts of the government of the shipowner's country. It is broad enough to include all those acts which, in civil law, are termed 'faits du prince' and, in effect, it is identical and would include all administrative acts and orders-in-council

(a) (1918) AC 101.
(b) Butler v Wildman (1820) 3 B & Ald 398.

which affect the safe and sound delivery of the cargo. In an age when governments had not found it either necessary or advisable to interfere in the commercial life of the country it was said that a restraint sanctioned by the municipal law of the country of the carrier would not appear to be a restraint of princes (c). It is submitted, however, that the activities of the carrier's own government, which have become increasingly comprehensive, call for the application of this exception. Thus the exception includes every case in which the voyage is interrupted by the agents of a government. This exception has been held to cover all political disturbances or impediments (d). It is, however, subject to the general rule governing all exceptions, for it must be shown that the restraint prevented the fulfillment of the contract and not merely that it made the fulfillment more difficult or expensive.

Among those incidents which the courts have held to be a restraint of princes or the following:

The requisition by the Admiralty of a ship (for naval purpose); (e)

The closing of the Dardanelles by the Turkish government during World War I; (f)

A prohibition by a foreign government, even though the ship is outside the jurisdiction of that government, if the shipowner or his captain is a subject of the

(c) Aubert v Gray (1882) 32 L.J.Q.B. 50.
(d) Smith & Service v Rosario Nitrate Co. (1894) 1 QB 174.
(e) Tamplin SS Co. Ltd. v Anglo-Mexican Petroleum Products (1917) 1 KB 370.
(f) Russian Bank Co. v Rederiakt Banco (1917) 2 KB 123.

government concerned (g); and embargo (h) a blockade (i) or a siege (j).

The exception applies to the seizure of the ship or cargo or both by the government of Canada or of a foreign country for state purposes or as the result of the due process of law where the acts of the shipowner has not been the direct result of the seizure. Thus where the ship was seized in the process of a civil case, the exception would apply, but where it was seized, or confiscated under the Customs and Excise Act for having been used in smuggling operations, it would not. The shipowner is not protected by the exception if the restraint or seizure is brought about by a break of his absolute undertaking to exercise due diligence to make the ship seaworthy. As has been pointed out, this is true of all exceptions.

It is not necessary for the carrier to prove an actual seizure or restraint in order to come within the exception. Thus a declaration of war which brings the voyage within the rule of trading with the enemy is a restraint of princes, even though the shipowner does not wait to have his ship seized for trading with the enemy and immediately abandons the trip upon the outbreak of hostilities. Thus the master of a Canadian ship which was due to sail from Halifax to Hamburg on September 4th

(g) Furness Withy & Co. v Rederiakt Banco (1917) 2 KB 573.
(h) Aubert v Gray (supra).
(i) Geipel v Smith (1872) LR 7 QB 404.
(j) Rodoccanachi v Elliot 1824 LR 9 CP 518.

1939, was entitled to abandon the voyage even though the order-in-Council which prohibited trading with the enemy was not proclaimed until September 5th. However, mere apprehension of interference by a government is not enough, there must be a restraint in existence, a prohibition, or the valid anticipation of a prohibition or other act of the government showing intention to employ force against the ship or cargo or those in charge of them if the voyage is continued (k). So, if the Canadian ship was in Vancouver on September 4th and abandoned a voyage to Japan it would not fall within the exception. The shipowner will be protected by the exception if the performance of the contract is rendered impossible by an embargo or by any intervention of the government concerned, as for example, where war breaks out between two friendly states and a blockade is instituted by one state at the port of discharge.

The exception does not apply to the plundering of the cargo by a mob, since the word people must be construed sui generis with the other words of the exception and means the supreme power of the country. As Lord Kenyon observed in Nesbitt v Lushington: "That which happened in this case does not fall within the meaning of arrests, restraints, and detainments of King's, Princes and people. The meaning of 'people' may be

(k) Watts, Watts & Co Ltd. v Milani & Co. Ltd. (1917) AC 227.

discovered here by the accompanying words; it means the ruling power of the country". (1).

(h) Quarantine restrictions.

Prior to the Hague Rules this exception was invariably construed by English courts, at least, as a restraint of princes, since any loss or damage which might result from a government prohibition to discharge goods could be directly attributable to the decree of a state. Undoubtedly the exception was specifically included to ensure greater certainty in all countries which might adopt the Rules, and where the construction of the exception of restraint of princes might not have included quarantine restrictions.

(i) Act or omission of the shipper or owner of the goods, his agents or representatives.

This exception is self-explanatory. The carrier will not be held responsible for a loss which is attributable to the shipper, if he himself has not been negligent.

(j) Strikes or lock-outs or stoppage or restraint of labour from whatever cause whether partial or general.

The insertion of this exception was a tacit recognition of the increased power of labour and of the disastrous effect which strikes in general and shipping strikes in particular, have on maritime commerce.

(1) (1792) 4 TR 783.

Fifty years ago, a strike was not deemed to be vis majeur and did not have the effect of rendering the performance of an obligation impossible without resultant liability being incurred by the debtor of the obligation (m). This attitude has changed and strikes are now considered, in both Civil and Common Law, to be fortuitous events, and this change of attitude is demonstrated by the inclusion of this exception with the carriers other, more historical, immunities.

This phrase, as used in the Act, implies a labour dispute; it does not, therefore, cover the case where workmen abandon their work to take unauthorized holidays or for fear of epidemics or where the employer arbitrarily dismisses them (n). The exception specifically states that the term strike is not to be restricted to wage disputes. It would cover such incidents as arose in Williams v Naambooge (o) where the crew objected to facing German mines and submarines and consequently refused to sail. It does not, however, apply to workmen in the employ of the shipper or receiver of the cargo, if by the use of reasonable diligence he could have procured other suitable labour (p). But it would apply to stevedores hired by the shipowner to unload the cargo.

(m) Mackay "Impossibility of Performance" Cap. IV pt 2 sec. 3 and authorities cited therein.
(n) Richardson v Samuel (1898) 1 QB 261.
(o) (1915) 21 Comm. Cases 257.
(p) Bulman v Dickison v Fenwick & Co. (1894) 1 QB 179.

The American Act contains a proviso to this exception: "that nothing herein contained shall be construed to relive the carrier from responsibility for the carrier's own acts." This was inserted in order to insure that a carrier should be bound by the legal principle "ex turpi causa non oritur actio".

Where the carrier had been negligent and caused damage to the cargo he was to be precluded from obtaining the protection of this exception of he incited a strike in order to plead this exception and nullify the effects of his negligence. In view of the existence of the legal principle that no one can take advantage of his own wrongs it seems that this proviso is superfluous and indeed the decisions of the American courts show that those courts have never had occasion to act on the proviso (q).

(k) Riots and civil commotions.

These words have the same meaning as in a contract of marine insurance. They would include such incidents as occurred in Nesbitt v Lushington (r) where the ship's cargo was seized by an armed mob.

(l) Saving or attempting to save a life or property at sea.

At Common Law, a deviation is allowed where it is for the purpose of saving life. The ship, therefore, may

(q) Knauth "Ocean Bills of Lading".
(r) supra.

lawfully deviate for the purpose of communicating with a ship in distress, since danger to life may be involved (s). The rule was, and is, that where no other stipulations exist and where the act does not apply, if the persons aboard the distressed vessel can be saved without saving the ship, then any effort which is made to save the ship after the passengers and crew have been removed in safety is deemed a breach of contract. On the other hand, if the preservation of life can only be effected through the concurrent saving of property and the real motive which leads to the deviation is the purpose of saving life, then the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating (t).

Under this exception, the ship may also deviate to save property and the narrow restrictions of the common law exception no longer apply. But this clause will only exonerate a shipowner from liability for damage, by which occurs in the course of a deviation undertaken for the purpose of saving property, if such deviation was, under all the circumstances, reasonable.

What constitutes reasonable deviation is discussed below at length, under Article IV, Rule 4 in Chapter V.

(s) Abbott in Shipping.
(t) Abbott in Shipping.

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

In order to obtain the protection of this exception, the carrier must succeed in showing that the damage complained of was caused by the inherent quality or vice of the cargo itself. Once he has shown such a state to have existed, his defense will not fail because he is unable to name the particular quality or vice, since the negation of other causes may establish inherent vice. In Bradley & Sons Ltd. v Federal Steam Navigation Co. Ltd. (u), the carrier succeeded in showing that the cargo had been properly handled and cared for and that the damage could not be attributed to any known cause, and it was held that the cargo was inherently unable to withstand the ordinary incidents of the voyage.

As in the case of the other exceptions, the onus is upon the carrier to establish inherent vice and he must discharge that onus if he would succeed.

(n) Insufficiency of packing.

The immunity granted by this exception extends to damage caused by another parcel belonging to the same owner, if the packing of the other parcel, though adequate to protect its own contents, is such as to make it dangerous to cargo stowed near it (v). A statement in a bill of

(u) (1927) 27 LI. L.R. 221.
(v) Silver & layton v Ocean SS Co. Ltd. 34 Ll. L.R. 149.

lading as to the "apparent good order and condition" of the goods when received on board may estop the carrier from pleading this exception against a personwho has taken the bill of lading on the faith of that statement and he is thus barred from proving an insufficiency of packing which was reasonably apparent to him or his agents at the time of shipment (w). Obiter in the case of Goodwin v Lamport & Holt (x) suggested that where, as in that case, goods fell from tackle and damaged other goods which had already been unloaded into a lighter, that if the cause of the falling had been due to insufficient packing, the carrier might have raised this exception as a defense against the claim of the owner of the goods which had been damaged. It can only be said that, in view of the decision in Silver & Layton v Ocean SS Co. Ltd (y), this suggestion possesses some validity. Unfortunately there are no decisions on this point.

(o) Insufficiency or inadequancy of marks.

This exception has for its purpose, the relief of the shipowner from liability for the delivery of goods, the marks of which do not tally with those contained in the bill of lading when those marks are insufficient or inadequate.

(w) Scrutton L.J. in Silver v Ocean SS Co. Ltd. 1930 1 KB 416.
(x) 1929 34 Ll. L.R. 142.
(y) supra.

(p) Latent defects not discoverable by due diligence.

This exception refers to latent defects in the ship itself, whereas the exception contained in Item (m) refers to latent defects in the cargo. However, in virtue of Rule 1 of this Article, the carrier is immune from liability for latent defects. It would seem that this exception widens the scope of Rule 1 and covers defects which would not have been discovered by the exercise of due diligence even though the shipowner could not show that he had in fact exercised such diligence (z).

The application of this exception to the facts of a particular case may raise difficult questions as to the range of persons whose due diligence is involved and as to the exact meaning of the word latent. In the Quebec Civil Code 'latent defects' are those defects in the thing itself, or its accessories, as render it unfit for the use for which it was intended and which are not apparent (a).

(z) Corporation Argentina v Royal Mail Lines (1939) 64 Ll. L.R. 188: Scrutton (15th Ed. p.467) suggests that it may protect the carrier if, for example, a share crane belonging to him breaks owing to a latent defect not discoverable by due diligence, thus widening the interpretation given in Rule 1, which restricts latent defects to those in ships.

(a) Articles 1522 and 1523.

In Angliss & Co. v P & O S^{S} Co. (b) the range of persons was deemed to extend to the original builders of the ship where the shipowner had the ship built and to those experts who were employed to supervise the building.

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

It was held in Hourani v Harrison (c) that the first 'or' in this exception was an error in draftsmanship and must be read conjunctively and as being equivalent to 'without the actual fault and privity of the carrier and without the fault or neglect of the agenst, etc.' It is curious that the Canadian draftsmen who had the advantage of reading this decision, which was supported by the trial judge in The Gosse Millard case (d) and not questioned in the House of Lords, did not alter the word. They did, in fact, make several other alterations such as 'water' for 'sea' and in Article I they substituted 'merchandise' for

(b) 1927 KB 465; Dominion Glass v Anglo-Indian (supra) see remarks of Rand J. at p. 743.
(c) supra.
(d) supra.

'merchandises'. The American act which was drafted in the same year as the Canadian, does rectify this error.

This exception is in fact a catch-all exception which includes all those exceptions which are not enumerated such as rust, pilferage, breakage, vermin and the rest of the exceptions which in 1922 were usually included in bills of lading.

To avoid liability, the fault or neglect must not be that of the shipowner or of any of the responsible persons who are enumerated. The words are intended to exclude what would otherwise be a liability for a loss, if the shipowner can show that neither he nor his servants or agents were responsible in any way for the loss or damage. This is the essential difference between this and the preceding sixteen exceptions. In those exceptions the carrier must show how the goods were damaged and that the cause of the damage was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. But in the catch-all exception he must also show affirmatively absence of negligence, fault or privity on the part of himself or his servants. Thus the Superior Court held regarding clause (q) in the 'Lady Drake' (e) that

> "....the burden resting upon the carrier under

(e) Canadian National Steamships v Bayliss (1937) 1 DLR 545; SCR.

this clause is a very heavy one. He has to show that neither the actual fault nor privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given."

In Peterson SS Ltd. v Canadian Co-operative Wheat Producers (f), it was questioned whether the carrier could invoke this clause unless the case was first brought within one of the specific exceptions set out in the earlier part of the rule. It was said that:

"If these general words were to be read irrespective of the particular exceptions which precede them in the section, it is difficult to see why these particular exceptions are stated at all: the general words would suffice to cover by themselves every case in which the shipowner could claim exemption from liability for any loss due to excepted perils."

It is respectfully submitted that this observation is wrong. As has been pointed out a difference exists between this and the sixteen preceding exceptions in that the burden of proving absence of negligence is, in clause (q), upon the carrier, whereas it is not in exceptions (a) to (p).

(f) supra.

Among those for whose negligence the carrier is responsible are the servants of an independent stevedore employed by the shipowner and a fortiorari, the stevedore himself who are considered to be the carrier's agents within the meaning of the immunity. Thus the carrier is liable for pilferage by the stevedores men while they are engaged in discharging the cargo (g). In Heyn v Ocean Steamships Co. (h), where goods were stolen from a ship when she lay moored alongside a wharf at Shanghai, the carrier was held liable because he failed to disprove the complicity of the servants of the independent stevedore employed to discharge the ship. These decisions are based on the contractual duties of the owner, who remains responsible for the due performance of the contract even though he delegates discharging and loading to an independent sub-contractor. Where, on the other hand, a parcel of yarn had been discharged into a lighter and was then damaged by sea water, neither the carrier, his agents or servants are liable. Nor is the owner of a seagoing freight vessel liable for loss of cargo due to a fault of navigation on the part of the captain of a tug who is towing the vessel (i).

In Coast Cement Co. v Navigacione Libera Triestina (j) a barge was moored alongside the ship to

(g) Haurani v Harrison (supra).
(h) 27 Ll. L.R. 334.
(i) Alex McFee & Co. v Montreal Transportation Co. 42 DLR 714.
(j) (1930) 4 DLR 847 (B.C.C.S.) per McDonald J.

complete loading on the barge of a cargo of cement which was being discharged, when it listed toward the ship and sank within a few minutes with consequent loss of the cargo. It was held that there was no negligence on the part of the stevedores employed by the carrier in mooring the barge alongside the vessel. The carrier, through its stevedores was in charge of the barge to the extent that it owed a duty to the cargo-owners to take reasonable care, which duty was discharged. The court distinguished this case from that of N.Y. & Hastings SS Co. v Teno (k) where a scow in the same position got 'hung up' on the propeller and in order to release it, the stevedores negligently shifted the cargo - which was the immediate cause of the loss and rendered the carrier liable.

The benefit of the immunity appears not to be conditional upon the carrier being able to show precisely when and how the loss happened. It is sufficient to give general proof of care with regard to the management of ship and cargo, together with particular proof of care in relation to the known circumstances of the loss.

ARTICLE IV, Rule 3:

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

(k) 1929 Am.Mar.Cas. 1472.

This rule contains one of the shippers expressed rights: that he shall not be liable for any damage sustained by the carrier unless he or his agents have been at fault and the loss was directly attributable to that fault. Since Article V states that the shipper cannot surrender his rights this rule will apply to all bills of lading.

ARTICLE IV, Rule 4:

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

The principle of law which the courts have evolved with respect to deviation are so comprehensive and have been dealt with so fully and at length by the authorities (l) that it is proposed, in this thesis, to restrict all commentary thereon to a brief outline of the rule and some of the problems which have been raised in recent jurisprudence.

Prior to the adoption of the Hague Rules, there existed an implied contract between the shipowner and the shipper that the master would navigate the ship from one port to another along the usual and customary course without any unjustifiable deviation (m).

(l) Carver, Scrutton, for the English point of view especially, Poor and Knauth for the American.
(m) Davis v Garrett (1830) 6 Bing. 725.

Moreover, damage to cargo, occurring during an unjustifiable deviation, will be held to be directly due to such deviation, unless the shipowner can prove that the loss must have happened even if no deviation whatever had taken place (n). When the carrier had unjustifiably deviated from the route specified in the contract of affreightment, he became an insurer against all damage in any way traceable to the deviation, even when exemptions in the contract covered the predominating cause of the loss (o).

In virtue of the Rules, the carrier is exonerated from liability for loss or damage to the cargo resulting from a deviation in saving life or property at sea or from any reasonable deviation. In other words, the rules broaden the meaning of justifiable deviation by extending it to reasonable deviation. The problem arises in construing the word 'reasonable'.

In a contract of carriage, the shipowner agrees that he will either proceed from the loading port to the port of discharge by the customary or usual route and without unreasonable delay or by the route stipulated in the contract, if that differs from the contract route. The ship may call at any intermediate port at which it is customary to call but no others. If, however, the bill contains a 'liberty to call clause', the ship may call

(n) ibid.
(o) Thorley Ltd. v Orchis SS Co. Ltd. (1906) 23 TLR 89; Maghee v The Camden & Amboy Ry 45 NY 514.

at any port within the scope of this clause. The parties remain free to determine whatever contractual route they wish to follow, but if the ship unreasonably departs from the contractual route, that departure is considered unjustifiable or unreasonable deviation.

Thus in Stag Line Ltd. v Foscolo Mango & Co. Ltd. (p) a cargo of coal was loaded under a bill of lading which gave the carrier 'liberty to call at any port....for bunkering or other purpose'. It was understood that one of the other purposes contemplated was the discharge at one specific port of two engineers who were taken on board to test the engines. The test was delayed and the ship deviated to discharge the engineers at St Ives. While the ship was off route, it stranded and the cargo was lost. It was contended that this was a reasonable deviation, but it was held that it was unreasonable. In determining whether the deviation was reasonable or not, Lord Atkin observed that: "the true test seems to be what departure from the contract of voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract, and the interest of all parties concerned, but without obligation to consider the interests of anyone as conclusive."

(p) 1932 AC 329.

He distinctly disagreed with Scrutton L.J., who in "The Teutonia" (q) had confined reasonable deviations to deviations made to avoid some imminent peril and with the opinion given by Wright L.J. in Foremans & Ellams Ltd. v Federal Steam Navigation Co. (r) that "reasonable deviation is such a deviation which would be contemplated reasonably by both cargo-owner and shipowner." These definitions are too limitative since deviation may be caused by fortuitous events never contemplated by the original parties to the contract.

If there is more than one usual and recognized route and the bill of lading does not stipulate a particular route, the shipowner may follow any usual and recognized route (s). A voluntary departure from the route or any unreasonable or wilful delay constitutes a deviation, where, however, the captain set a wrong course through negligence caused by ill health it was held to be no deviation (t) but in Hain Steamship Co. Ltd. v Tate & Lyle (u) where the captain sailed for a port other than the port of discharge owing to the owners failure to transmit order, the deviation was deemed unreasonable.

(q) L.R. 4 PC 171.
(r) (1928) 2 KB 424.
(s) Reardon Smith Line Ltd. v Black Sea & Baltic General Insurance Co. Ltd. (1937) 42 Com.Cas. 332.
(t) Rio Tinto Co. v Seed Shipping Co. 1934 LT 764.
(u) (1936) 2 All E.R. 597.

Liberty to call clauses afford no protection where the ship changes the order of calling at Ports (v). Nor does it afford protection where the ship calls at a port off the usual route as in the Stag Line Case (w). Moreover it has been held that the owner is not protected when the vessel takes a route which is unreasonably long (x). However, the parties are at liberty under the Rules to draw the clause in terms broad enough to protect the shipowner (y). If the clause states that the ship is at liberty to call at any port in any order, the only limitation would appear to be the customary order. If the words 'in order' are omitted, the ship must call at the ports in their geographical order and if the customary order differs from the geographical order the shipowner may adopt the former unless it is unreasonable (z). This clause does not mean that the ship is at liberty to call at any port in the world - it must be reasonable and is, therefore, construed as referring to ports in the route of the voyage which would ordinarily be ports of call.

Deviation was deemed to be reasonable in the following cases:

i Where the ship cannot safely keep to her course owing to stress of weather, or where she is attempting to avoid imminent danger (a) and it is immaterial that

(v) U.S.Shipping Bd. v Rosenberg 12 F(2d) 721.
(w) The Dunbeth (1897) p.133.
(x) The Willdamino 47 Sup.Ct. (US) 261.
(y) Hadji Ali Albor & Sons v Anglo-Arabian Co. 22 TLR 600.
(z) Arnould "Marine Insurance" 11th Ed. p.394.
(a) Abbott; p.255.

the necessity for the deviation arises from the unseaworthiness of the ship (b).

ii Imminent danger of capture by the enemies of the country to which the ship belongs or by pirates (c).

iii Imminent danger from icebergs (d).

iv Deviation to procure fresh hands in case of sickness, unless the sickness was due to the ship being insufficiently provided with medicines (e).

v Deviation to effect necessary repairs (f).

Any deviation may also be justified although the danger affects the ship only and not the goods. In the case of a storm at sea she may resort to a port of refuge, either for shelter or repairs or for avoiding danger but she must not remain there any longer than is necessary.

Whether a deviation is justifiably reasonable is an inference of fact from the relevant circumstances of the case. As Lord Russel of Kilowen said "Whether deviation was or was not reasonable appears to me to be a question of fact to be determined in each case upon the facts of each case" (g).

Unless a departure from the ordinary or contractual route can be justified as reasonable, a deviation precludes the carrier from relying on any exceptions in Article IV and renders him liable for any loss or damage

(b) Kish v Taylor 1912 AC 604.
(c) The Teutonia supra.
(d) ibid.
(e) Woolf v Clagett (1800) 3 Esq. 257.
(f) Phelps, James Co. v Hill & Co. (1891) 1 QB 605.
(g) In Stag Line v Foscolo Mango & Co. Ltd. 1932 AC 329.

to the cargo. This is the principle effect of unreasonable deviation but it raises several questions as to the other effects which result from deviation.

Firstly, does an unreasonable deviation abrogate the entire contract of carriage? This is important for if it does, any losses subsequent to the deviation and after the resumption of the proper route is subject to the common law liability of the carrier. If it does not, then the carrier is absolutely liable only while the ship is unjustifiably off course.

In Thorley v Orchis SS Co. (h) a ship deviated from the proper course. On arrival at its destination, the goods were damaged by stevedores during discharge. It was held that the deviation deprived the carrier of the exemption from liability for negligence of his agents. Once it is determined that the deviation constitutes a material breach of the contract of shipment, it is considered unnecessary that the loss be traced to the deviation. This opinion is shared by the author of Carvers "Carriage of Goods by Sea". This view was also expressed by Lord Atkin in Hain v Tate & Lyle; who declared that the principle was that a deviation is a breach of a fundamental condition of the contract of carriage which entitles the other party to treat the contract as repudiated and it is immaterial that the loss or damage was not due to deviation or whether it occurs during the deviation or after it has ceased.

(h) supra.

In Robin Hood Mills Ltd. v Patterson SS Ltd. (i) the decision of the Privy Council did not rest on this question, nevertheless the remarks of Lord Roche are interesting. He said that:

"Deviation had nothing to do with the loss of or damage to the cargo now in question. At the time of stranding, any deviation was over and past and (the ship) was at a place and on a course proper for her voyage from Port Arthur to Montreal."

This dicta appears to be contrary to the decision in the Thorley Case, and has had the effect of making it uncertain whether the entire contract is abrogated by deviation. The suggestion that the improper deviation by the carrier only renders the contract voidable at the option of the shipper is probably correct. The shipper can still treat it as binding if he chooses and therefore the contract is not abrogated.

Secondly, during deviation is the shipowner's responsibility that of a common carrier or of an insurer? It has been said (j) that he must be treated as a common carrier, but this would not appear to be strictly correct, since a common carrier is not liable for loss or damage due to an act of God, the King's Enemies or an inherent defect in the things themselves, whereas a shipowner whose ship has deviated without reasonable cause can only

(i) (1937) 3 DLR 1 (PC).
(j) Atlantic Coast Line R. Co. Hinley-Stephens Co. 60 So. 749.

escape liability on the ground that the deviation was involuntary. In view of Lord Atkin's words above, it is clear that the carrier is in the position of an insurer while the ship is unjustifiably off course. But despite Lord Atkin, it is not clear whether he is in that position if the damage has no connection with the deviation and occurs either before or after it. An example of this situation would occur where the ship unjustifiably deviated and having done so, ran into a storm and was struck by lightning which started a fire which destroyed the cargo. If the carrier is treated as a common carrier, he is protected since lightning is an act of God. There is, however, no reason for treating him thus, for it was due to the deviation that the loss occurred. Therefore, he is treated as an insurer of the cargo and is liable for all losses (k).

Much uncertainty still exists in the field of deviation - uncertainty which the courts have not always been prepared to clarify. Many of the factors which led to a ship's departing from its course in the age of sail no longer exist in the age of steam and oil, and it is possible to decide a case before the question of improper deviation arises. Thus the shipper will prove his loss and the carrier will rely on an immunity; the shipper must

(k) Including pecuniary losses owing to the prolongation of the voyage owing to deviation - US Shipping Board v Bunge 31 Comm.Cas. 118.

then establish a deviation which the carrier is then bound to prove was reasonable if he is to exculpate himself. Seldom, at present, do the cases go further than this, since the interpretation of reasonableness has generally permitted the carrier to exonerate himself. Furthermore the act allows any extension of the liberty to deviate to be inserted in the bill of lading and carriers generlly take advantage of this provision to insert broad "liberty to call" clauses in bills of lading.

As a result of these various factors - and the conflicting decisions - no satisfactory answer can be given to the question of how much of the bill of lading remains effective after deviation.

ARTICLE IV, Rule 5:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be

fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

This rule, procedural as it is, needs little comment. The first paragraph of the rule prohibits the carrier from placing a valuation of less than $500.00 on each package. In order to limit his liability to a lesser sum. Prior to the adoption of the Rules it was not uncommon for carriers to place an extremely low valuation on each article and thereby removing, in the event of loss, through negligence, the possibility of a heavy claim. If the article is worth more than $500.00, the full excess value must be stated in the bill of lading. Thus a shipper is precluded from placing a partial excess value on the goods in order to escape both the statutory limitation of liability in the event of loss and the extra freight charged for valuable goods. Even if the goods have been given an excess value (1) the carrier may, in the event of a loss, dispute the value.

The words 'in any event' appear to mean that the carrier's liability is limited regardless of the cause of the loss or damage. Even if the ship has deviated

(1) Section 7 of the Water Carriage of Goods Act.

unreasonably and the Rules no longer apply, if the cargo is lost the limitation of liability remains (m).

The last paragraph means that if the shipper knowingly mistakes the value of the goods, in order to obtain a lower freight rate, the carrier is relieved from liability for the loss of those goods no matter how that loss arose. The reason for this is that if a low valuation is placed on the goods the carrier may be inclined to take less care of them than if he were aware of the true value.

In the American Act, recovery is limited to actual loss. This was an effort to negative the decisions in numerous cases which held that a carrier's liability for goods damaged in transit, through negligence must be computed on the value of the goods plus loss of profit. Canadian jurisprudence has been constant in holding that the value must be computed on the market value of the goods at the point of discharge - less accruing freight (n).

ARTICLE IV, Rule 6:

Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or

(m) Rodecanachi Sons & Co. v Milburn Bros. (1886) 18 QBD 67; followed in Scales v Clarke SS Co. (1937) 2 DLR 420; see also Dominion Textile Co.Ltd. v C.S.L. Ltd 460 DLR 255 contra Montreal Cotton & Wood Waste Co. v C.S.L. Ltd. (1920) 55 DLR 634 (SCC).

(n) ibid.

agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

This rule does not differ materially from sections 456 and 457 of the Canada Shipping Act, the provision of which are not affected by the Rule (o).

(o) Contra Bueger v Cunard SS Co. (1925) 2 KB 646 where it was held that having substantially deviated, a carrier cannot claim the benefit of a provision limiting his liability. However, this case was decided on a bill of lading issued on a shipment made prior to the adoption of the Rules and the word 'on any event' were not in issue.

SURRENDER OF RIGHTS AND SPECIAL CONDITIONS

ARTICLE V:

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

The carrier may surrender any of the rights and immunities which have been given to him the the preceding article. Obviously he would only be interested in doing so in return for a higher rate. If he does surrender any rights, such surrender must be clearly stated in the bill of lading and it is not to be inferred from the unnecessary repetition of another immunity (p). It has often been stated that the shipper cannot surrender any of his rights. There is a sound basis for this opinion for if he were allowed to do so, the situation would quickly revert to that which existed before the Rules were adopted (q).

(p) The Touraine 1928 p.58.
(q) See Cap. I.

The shipper may only allow the diminuation of his rights if the shipment falls within the venue of Article VI which permits special conditions for non-commercial shipments other than those made in the ordinary course of trade.

The only question in this article which would seem to raise some doubts is the statement that the Rules shall not apply to charterparties unless a bill of lading is issued on the shipment of goods on a ship under a charter-party. This would seem to mean that if a shipper charters the whole ship for the transport of his cargo the Rules do not apply to the memorandum of charterparty, but if the charterer in turn leases part of the ship to a shipper, the parties to the lease of the ship - or more properly the contract of affreightment - must comply with the Rules. Scrutton (r) suggests that the draftsmen intended that the shipper, whether charterer or not, could demand a bill of lading in the form prescribed in Article III, Rule 3 and that this Article was intended to provide that where any bill of lading whatsoever was issued, it should be in the form prescribed by Article III, Rule 3, so that when (if ever) it became the document regulating the relations of the parties, it should bind the carrier to the terms of the Rules either under the Act if sued on in a country which had adopted the Act or by a contract if sued on in another jurisdiction.

This intention, as the editors state, has not

(r) 15th Ed. p.473.

been effected, since this was to be done by means of the clause paramount, but because that section "only applies where the bill of lading is the regulating document and where it is not the regulating document there seems to be no provision that it shall contain any express statement."

It might be added that the intention of the draftsmen have also been negated by the decision of the Privy Council in the Vita Foods case (s) where it was held that a bill of lading was valid even if the clause paramount was omitted.

ARTICLE VI:

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

(s) Supra Cap II.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

The previous article provided that the carrier could assume greater liability, but that the shipper could not voluntarily lessen his rights. This Article allows him to do so where special circumstances exist.

This Article has, as far as the writer is aware, never been discussed by the courts although the decision in Montreal Trust Co. v Canadian Surety Co. (t) contains several points which bear upon particular facets of the article. This case is discussed in some detail below.

In Canada, as well as in England, the coasting trade is permitted to avoid compliance with the rules (u) in virtue of the extension of this Article in Section 4. Section 4 states that this Article shall include goods of any class, and that it applies even to ordinary commercial shipments made in the ordinary course of trade wherever a

(t) (1939) 4 DLR 614.
(u) Due, undoubtedly to the additional hazards that exist, in Canada at least, for ships engaged in that trade.

ship is sailing from one port in Canada to another. Section 4 does not appear in the American Act, and consequently the equivalent article (v) in the American Act would appear to be limited to special non-commercial shipments such as polar expeditions, supplying hospitals on distant shores, and so forth (w).

In order to exclude the application of the rules to the specified types of shipments "no bill of lading shall be issued and the terms of the contract of affreightment" shall be embodied in a non-negotiable document marked as such. This would appear to mean that if a contract is issued which, in form and substance, complies with the stipulations of Article III, Rule 3, that contract shall not be deemed a bill of lading but rather a receipt which shall be non-negotiable and must be marked as such.

The Rules, as Article I(b) clearly states, only apply to contracts of carriage covered by a bill of lading or similar document of title. The two articles can be reconciled by construing 'contracts of carriage covered by a bill of lading' in Article I(b) as meaning contracts of carriage under which the shipper is entitled to demand a bill of lading evidencing the contract (x). If the shipper is not, by express or implied agreement or usage of the trade, entitled to demand a bill of lading,

(v) Section 6.
(w) Knauth p.163.
(x) Harland & Wollf v Burns & Laird Lines Ltd. 1931 SC 722; Vita Foods Case (supra)

Article IV will have no application and it will not be necessary to issue this receipt.

The meaning of the words non-negotiable document are not too clear, but the expression was evidently intended to remove documents of title issued in virtue of Article VI from the operation of the Bills of Lading Act and, therefore, transfer of title to the goods cannot be effected by negotiation of the document.

In the case of Montreal Trust Co. v Canadian Surety Co. (y) where a barge loaded with timber had sunk, it was pleaded, inter alia, that the Act of 1910 applied since a bill of lading was issued after sailing which made the Act applicable even though timber was being carried. The barge had been found to be unseaworthy and if the Act did not apply, the carrier was liable as a common carrier, if it did, the owners could claim that they exercised due diligence. It was held that if the Act was to apply to shipments of timber, that stipulations must be clearly and formally expressed and since the bill of lading issued only amounted to a shipping order the Act did not apply here and the carrier was subject to common law liability. This case is applicable to the present Act since both acts state that exclusion of certain types of cargoes ie. deck cargoes, is at the option of the parties.

Bond J., distinguished between a bill of lading and a shipping order; and found that the document issued was not a bill of lading because it was not signed and

(y) supra.

although headed 'Bill of Lading' was in fact a shipping order or a 'Received for shipment' bill of lading (z). That is, it was merely a record of cargo.

In Crooks & Co. v Allan (a), Lush J. observed that "a bill of lading is not a contract, and it does not follow that a person who accepts a bill of lading which the shipowner hands him, necessarily and without regard to circumstances binds himself to bide by all its stipulations. If a shipper of goods is not aware when he ships them or has not been informed in the course of the shipment that the bill of lading which will be tendered to him will not contain such a clause, he has a right to suppose that his goods are received on the usual terms and to require a bill of lading which will express those terms."

This case does not, of course, apply to the provision of Article VI. The words of Lush J., do, however, serve to point out that if the parties opt to exclude a shipment of goods on a coastal ship from the application of the Rules, they must not issue a bill of lading as defined in Article III, Rule 3 on which, if complying with that Article is not clearly marked to the effect that it is a received for shipment order. If the order is held to be a true bill of lading, the court is obliged to read the Rules into the bill.

(z) Temperley 3rd Ed. p.7.
(a) (1879) 5 QBD 38.

ARTICLE VII:

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by water.

This article reaffirms the provision of Article I(b) which limits the application of the Rules to the period from loading to discharge, and permits the parties to enter into any agreements covering the periods from receipt of the goods to loading and from discharge to delivery.

ARTICLE VIII:

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of vessels.

The Act does not alter the existing law respecting the liability of carriers by water as contained in Sections 649 to 658 of the Canada Shipping Act of 1934. Nor does it alter the provisions with respect to the stipulations as to Compulsory Pilotage and the liability resulting therefrom are not affected.

THE EFFECT OF THE RULES AND THE ACTS

I

In dealing with the historical background of the Rules in Chapter I, great stress was placed on the intentions of those who had struggled and finally succeeded in obtaining, in 1924, some degree of internation approval of a standard bill of lading. It was said that their aim was the development of a universal uniform bill of lading through the enactment by each maritime state of legislation decreeing that the Rules should be law within their jurisdictions. It was also pointed out that the movement towards uniformity had been far from unanimous amongst the seafaring nations of the world. Only a few, apart from those which were members of the British Commonwealth had in fact implemented the obligation of advancing the principle of universal uniformity, which they had undertaken at the Convention. It may be said that the movement is still in its nonage - for more maritime nations have failed to adopt the rules than have done so. Much need remains, therefore, for the effective adherence by legislation of more states to the principles to which they subscribed at Brussels.

While, as we know, the movement has been slow to be adopted on an international scale, the question remains as to how far the principle of universal uniformity has advanced in those states which have enacted the rules as the law governing the relationship of shippers and carriers

by sea within their jurisdiction. In short, how binding are the Hague Rules? This question can only be considered in the light of the judicial decisions which followed upon the Vita Foods Case (b) in which the courts have held that the issuance of a bill of lading is not imperative and if one is not issued, the provisions of the Act do not apply. It is not the purpose of this chapter to review those decisions in full nor to show how they have limited the application of the Rules within the jurisdiction of those countries which have adopted them, but rather to examine the trend of judicial thought on this point in order to determine their effect on the Act.

The Canadian courts will, of course, give the fullest effect to a bill of lading issued in Canada covering a shipment made from a Canadian port. They will also give full effect to the Rules if the bill of lading is issued in another jurisdiction where the Rules apply if the bill of lading contains reference to the Act. Thus in Canadian National Steamships v Bayliss (c), the Lady Drake when returning from the Barbados to Halifax encountered a heavy storm which caused several heavy barrels of molasses to break. The bill of lading contained a reference to the Barbados Ordinance which gave legal effect to the Convention. Although the loss occurred prior to the enactment of the Act of 1936, the Supreme Court applied the Barbados Ordinance.

(b) Canada & Dominion Sugar Co. Ltd. v Canadian National (W.I.) SS Ltd. 1947 AC 46.
(c) (1937) 1 DLR; 1937 SCR 261.

When, however, the bill of lading is issued in a jurisdiction where the Rules apply but does not contain a reference to the Act, in contravention of the rule to do so, what will the Canadian Courts do? It is clear, following the Vita Foods case, that if there is a reference to another law, say that of England, the Canadian Courts will follow the law of England and in doing so must inevitably conclude that a bill of lading covering a shipment from, say Barbados, to Canada is a valid bill regardless of the fact that it would be illegal by Barbados' law.

What is the situation where a bill of lading is issued in that jurisdiction, but contains neither reference to the Act or to a foreign law? What law will the Canadian Courts then apply? In the Tormi (d) the Court of Appeal was faced with a problem similar to that which subsequently arose in the Vita Foods case and decided that where the bill of lading did not contain the required reference but did contain a reference to the law of England, the law of England must be applied and the courts decided that by the law of England the reference must be read into the bill of lading. This decision was subsequently overruled, but the case is nevertheless important, for both the trial court and the Court of Appeal attempted to solve the basic problem of whether, had there been no reference to English law, the court could give effect to the Rules. Would the bill of lading be deemed invalid by the English Court if invalid

(d) 1932 P.27 & 78.

by the law of the country of issue, although valid by English law? Neither of the courts were able to reach any conclusion and question still remains unanswered.

The question is one, of course, of conflict of laws. By the law of Palestine, where the bill of lading in the Torni was issued, the bill was involved because it did not contain a reference to The Palestinian Ordinance giving effect to the Hague Rules. The only legal effect following upon such non-compliance with the Palestinian Ordinance would be the invalidity of the whole contract, but would the Court of England or Canada - enforce the sanction when by their own laws no misdemeanour is committed by failure to comply with a Palestinian Ordinance? In short, if the non-compliance resulted in any penalty, would the courts of England enforce Palestinian Criminal Law - an enforcement contrary to the principles of International Law - especially when the non-compliance did not have any penal effects in England. This is the problem which confronts the movement for uniformity and a most difficult one it is to solve. In The Torni, Slessor J. observed that if the Hague Rules are to function effectively the courts of each of the countries concerned should give effect to the legislation of other countries. But, how, in view of the principles which have been outlined can the courts do so?

It is suggested that the problem lies in the historical fact that the Rules resulted from a Convention

and that it was originally intended that nations should accede to the Convention and in doing so would recognize the international uniformity of the Rules. They envisaged a situation similar to the International Convention on Collisions-at-sea or the International Convention on Rules of the Road at Sea. They felt that the importance of the 'Clause Paramount' lay in the fact that it made the Rules applicable to all contracts, in all countries, whatever the proper law of the contract might be, and that this would be best accomplished by international treaty. This situation did not materialize, and each country proceeded to give legislative effect to the rules and in doing so partially removed the convention from international to a national sphere. The water Carriage of Goods Act has no greater nor no less force in Canada than the Weights and Measures Act and both have the same probative force without Canada - none. That is the reason why it is possible to contract out of the Act. Both Acts are enforceable only in Canadian Courts unless the parties agree when contracting that they intend to be governed by the Canadian Act. Then, of course, they would be effective beyond the jurisdiction of Canada or - at least - in those countries which recognize English conflict rules. Since the Hague Rules are of the utmost importance to the world's mercantile community, some movement must be made to render it impossible to contract out of their provision. If contracting out is made possible through faulty phraseology contained in the Water Carriage of Goods Act, it should be amended.

II

What is the effect of the Rules on bills of lading in general? In pointing out the essential weakness of the Acts incorporating the Rules, it has been shown that where the Rules are deemed not to apply-as in the Vita Foods case - the bill of lading issued is a valid instrument and the bill in whatever form and regardless of how contrary its stipulations are to the Hague Rules, it must be given full and complete effect as the only instrument evidencing the contract of affreightment. What is the situation where the Rules are properly referred to in a bill of lading?

In general, bills of lading are very long and complete documents containing innumerable conditions covering every forseeable incident from the time the carrier takes possession of the goods until he delivers them to the consignee. They cover service to the named port of transshipment (if any), service after arrival at the port of transhipment or loading until arrival at the port of discharge and service after arrival at the port of discharge. It is only after the commencement of loading and before final discharge that the Rules apply, consequently for some period of time the goods are subject to separate conditions. Conditions may also exist with respect to the cargo while it is aboard ship. Thus a clause may permit the carrier to stow goods 'in poop, forecastle, deckhouse, shelter deck, passenger space, or any other covered-in space commonly used in the trade and suitable for the

carriage of goods, and when so stowed shall be deemed for all purposes to be stowed under deck. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased rate.'

Such clauses are frequent and, at the time the various acts were first adopted, very often conflicted with the Rules. With the years and the familiarity gained by experience, those who draft bills of lading have gradually evolved bills which are complete, leave no eventuality uncovered yet do not conflict with the provision of the Act. In case of conflict, the Hague Rules override any conflicting clause in the bill of lading. So where a bill of lading contains the following clause "The amount of loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the time and place of shipment" it was said in Montreal Cotton & Wool Waste Co. v C.S.L. (e) that it would be illegal if it had the effect of restricting or diminishing the liability of the carrier for it would be contrary to the Water Carriage of Goods Act.

The principle governing conflicting clauses in contract is well known: if the policy of the state is expressed in an enactment of that state, any private agreements which express conditions contrary to the enactment, then that agreement, or more generally, the clauses containing

(e) (1920) 55 DLR 634 (SCC) per Brodeur J: This case dealt with the Act of 1910 which would not effect the reasoning since the provisions are liability are similar. The point of conflict was not argued in the Supreme Court and Brodeur J's remarks are obiter.

the conditions are absolutely invalid as being against public policy.

III

A 'through bill of lading' has been defined as one which is made for the carriage of goods from one place to another by several shipowners or railway companies (f). Thus where goods are shipped overland and then by sea to the consignee, the conditions of transit are usually regulated in such cases by through bills of lading frequently signed by a servant of the railway company - the first carrier - who signs as agent for the several carriers but does not bind himself in respect of the whole transit. (g)

But the first carrier would be responsible for any losses occurring at any point in the carriage of goods, were it not for an express provision negativing such liability which is, as a rule, contained in a bill of lading. These clauses limit each carrier's liability to the loss occurring while the goods are in his possession, and very often take the following form:

"It is agreed that each of the carriers on the route shall be responsible for the goods whilst same are in its own personal custody. The arrangements for the through carriage are made for the convenience of shippers, and the responsibility of each carrier with regard to the carriage and storage by other means than its own vessels or other

(f) Scrutton 15th Ed. p. 79.
(g) The Missouri 5 TLR 438.

vehicles or stores or railway lines is to be that of forwarding agent only, and any claim for loss, damage or delay must be made only against the person or company in whose custody the goods actually were at the time when the loss, damage or delay was caused or arose."

Two questions arise with respect to through bills of lading: are they true bills of lading, and does the Act apply to a through bill of lading which covers transhipment at a point outside Canada to another ship for further carriage by sea? It is clear from the definition contained in Article I(b) that Rules do not apply where the through bill relates to the carriage of goods by land, but only where it relates to their carriage of sea. Where a through bill of lading was issued in Winnipeg for the transportation of goods to Cherbourg via Montreal, the bill would only be subject to the provision contained in the Act after the goods were loaded aboard the ship at Montreal.

The first question is whether the through bill is a bill of lading within the meaning of the Bills of Lading Act (h) and whether the owner of the cargo who receives the goods is entitled to a right of action upon it against the shipowner (in the absence of the exculpatory clauses cited above), or whether he must join the shipper with whom the contract of carriage was made? When the goods or part of them cannot be delivered, the shipowner may be in a position to say to the consignee: (a) that they have no right

(h) 1927 RSC 17.

of action and that he is answerable to the shipper alone (b) even if a right of action exists he disputes the authority of the railways' agent who signed the bill. The master did not sign the bill, therefore, neither the master nor, as a result, the carrier is personally responsible; (c) that shipment was never made. (This leaves the consignee in the difficult position of having to prove a shipment made in a foreign country - a most burdensome evidentary problem) or (d) that even if the consignee succeeds in proving shipment, the carrier is protected by all the clauses in the bill. The trend in jurisprudence casts considerable light on this problem.

In Canadian Atlantic Grain Co. Ltd. v The Red Barge Line Ltd. (i) it was held that the first carrier having been paid for the transportation of grain to a certain place, delivers the goods to a second carrier at another point, before reaching the first place, and gives him a portion of the freight, the second carrier is not responsible under the contract when no distinct contract has been made by the shipper with the second carrier or his representatives. This case stands for the rule that a through bill is not a true bill of lading within the meaning of the Act, since if it had been, the first carrier would have negotiated it to the second thereby dispossessing himself, in favour of the second carrier of all his rights and liabilities, a complete transfer of which is effect by negotiation of the bill.

(i) 38 R de J 303 per Demers J.

In Makins Produce Co. Inc. v Union SS Co. of New Zealand Ltd. (j) a case which was decided by the Privy Council, the board held that where goods arrive at their destination in a damaged condition after passing through the hands of more than one carrier, the first carrier cannot be made liable for the damage without more evidence than the mere inference that the damage was caused by his negligence to be drawn from the fact that a small part of the goods were admittedly damaged by his negligence. Leaving aside the question of relative liability for damage caused to the cargo, this case recognizes that negotiation, and consequent transfer of rights and liabilities, of a through bill was possible and that therefore it was a true bill (k).

In the recent case of Ferguson v Toronto, Hamilton & Buffalo Railway Co. (l) it was held that the consignee of goods shipped via rail carriers A and B both being named in the order bill of lading, may properly sue B for shortage in delivery where on paying a draft to which the bill of lading was attached, he surrendered the bill to B in order to get the goods and B accepted it and then failed to deliver the quantity shipped. The Court added, that having regard to the terms of the Bill of Lading Act (m) there was sufficient privity to justify the action.

(j) (1927) L DLR 97.
(k) It should be pointed out that the essential difference between a bill of lading and receipt of received for shipment bill of lading is that the former is, in virtue of the Bill of Lading Act, a negotiable instrument.
(l) 1950 OWN 105.
(m) Section 4 Bills of Lading Act.

Thus the gradual trend has been towards the recognition of a through bill as a true bill of lading and the second carrier's possible defenses are negatived and, for protection, he is bound to rely upon the clauses in the bill of lading (n). This trend has not, however, become settled law and for this reason, the carrier must protect himself by inserting an exculpatory clause exonerating him if the goods are lost while in the possession of a succeeding carrier. The shipper has, if the through bill is a valid bill of lading, a negotiable document of title to the goods on which, with a policy of insurance attached, he can obtain advances of necessary, and if he negotiates them to a consignee or endorsee, the person who holds the documents of title will be able to bring an action upon them against the last named carrier, regardless of the number of times they have been transhipped.

The second question arising in connection with through bills of lading is whether the act applies after the goods, shipped originally in a ship sailing from Canada and therefore subject to the Rules, are transhipped aboard another vessel sailing from a port in a country where the Rules have no application.

It would appear from a reading of the Rules, that where goods are taken from the first ship and put on

(n) But a carrier who substitutes another ship for the one named in the bill of lading is precluded from relying on the clauses of the bill and his liability is that of a carrier in common law - even though the bill states that the Water Carriage of Goods will apply - Brown v Clarke SS Lines (1936) 42 Rl ns 236.

another in virtue of a transhipment clause in the bill of lading, that the clause, which relieves the first carrier of liability after transhipment, be voided by Rule 8 of Article III which states that any clause relieving the carrier from liability for loss of goods otherwise than as provided in the Rules, shall be null and void and of no effect. A transhipment clause would, in fact, relieve the carrier from his obligation and resultant liability to properly and carefully load, handle, care for and discharge the goods carried. Furthermore, transhipment would be prima facie deviation. The question, therefore, resolves itself into two problems: does the Act apply to transhipments and if it does is transhipment a breach of the Act and Rules?

The first problem is solved by giving a wide interpretation to Section 2 of the Act and applying the Rules to the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether inside or outside Canada. If this is done the application of the Rules is not limited to ships carrying goods from Canada but to 'the carriage of goods by water....from any port in Canada'. Regardless, therefore, of whether the goods are transhipped the Rules apply while the goods are being carried which is from the moment when they are loaded aboard a ship at the port of loading until they are finally unloaded at the port of discharge.

The second problem is solved, firstly with

regard to deviation by inserting in the bill of lading a transhipment clause which is so worded that the carrier is given full liberty to call and to tranship and the full exercise of those liberties would not be inconsistent with the proper carriage of goods. Secondly, with regard to the conflict between a transhipment clause and Article III, Rule 8, by issuing separate bills of lading. This last solution is, however, unsatisfactory and the custom has developed of inserting in the bill a transhipment clause in the form cited above, whereby the shipper agrees that after transhipment, any claim must be made against the carrier on whose possession the goods were at the time of loss. Thus, the clause will cover not only deviation but the provisions of Rule 8 of Article III if it is properly worded and, as pointed out, consistent with the proper carriage of goods.

IV

The Act and Rules speak only of claims and no procedure expressly exists for the arbitration of claims other than by a Court of Law. One of the early objections to the Rules was that their adoption would provide a pleasing bonus for maritime lawyers as a result of the increased litigation which the opponents of the Rules foresaw. No effort was made at the time to include an arbitration clause in the Rules or any of the Act and since then, fortunately litigation by shippers and carriers has not increased but on the contrary steadily decreased as the Rules have become better known to both merchants and shipowners. Still the question remains whether an arbitration

clause in a bill of lading is contrary to the Rules.

Although the Act concerns itself solely with lawsuits, there is nothing in any of the Rules which would preclude the insertion of an arbitration clause in a bill of lading, provided, of course, that the clause did not alter or contradict any of the provision regarding lawsuits, such as the notice required and the prescriptive period of one year. It is suprising that the shipping trade does not take advantage of the principle of arbitration. Perhaps, if litigation under the Act had increased, it might well have done so.

V

Article IX of the convention stated that:

"Les unites monetaires dont il s'agit dans la presente Convention s'entendent valeur or.", and that they shall be converted into National Currencies in round figures from the £100 Sterling valuation clause in Article IV, Rule 5. At the time the Convention was agreed to by the signatory nations, the greater number of these nations were on the Gold Standard. By 1936, the Gold Standard had become a thing of the past and Article IX of the Canadian Act merely states that:

"The monetary units mentioned in these Rules are to be taken to be the lawful money of Canada." No provision was made for devaulation the present extent of which it would have been most difficult to have foreseen. In practice the Canadian substitution would have made little difference had not the extreme devaluation of the Pound

Sterling occurred. At the present time £100 is worth but a little more than half the Canadian figure of $500.00, and the French limit of 8,000 francs is worth less than $24.00. The effect of this disparity is obvious, the shipper would prefer to choose a Canadian or American rather than an English or French Court, while the carrier would be in an ideal position in France especially. While it is true that in France the limit may be altered by decree to meet fluctuations in the international exchanges, it is to be noted that alterations have not kept pace with fluctuations.

It is not improbable that this Article will require amendment in the near future in order to remedy the lack of uniformity, which is contrary to the spirit of the Rules.

CONCLUSION

In examining the application and the effect of the International Convention on Carriage of Goods by Sea and the various acts which have given the convention legislative force, problems have repeatedly arisen for which the Judicial authorities have evolved no adequate solution. Where the jurisprudence is silent the authors have attempted to fill the lacunae with suggestions as to the probable solution or interpretation of particularly difficult points. To a modest extent this work has attempted to interpellate further suggestions which seem to be appropriate in view of the intentions of the draftsmen, the pre-existing law and the reasoned opinions of the English and American authors. Notwithstanding this attempt it has only been possible to obtain partially satisfactory answers to all the questions which have materialized as an inevitable result of having considered the Water Carriage of Goods Act and the Schedule of Rules in great detail.

Full consideration has been given in this thesis to the decisions of the Privy Council in the Vita Foods case as it affected the application of the Rules and their effect. This decision answered the question which had existed since the drafting of the rules, the question of what sanction exists for failure to insert the clause Paramount. None, held the Privy Council, when the action is heard in a jurisdiction foreign to that where the bill was issued. Not a very satisfactory answer, it is true,

since it ignored the desirable objective of universal uniformity, which had been the principle consideration for the adoption of the Rules.

This raises yet another question, perhaps more philosophical than legal; how far has uniformity been achieved? After years of arduous preparation the Rules were finally agreed upon at Brussels in 1924. In a fit of unexpected enthusiasm the United Kingdom - and most of the British Dominions and colonies - adopted the Rules by enacting similar legislation. The age of the standardized bill of lading appeared to be at hand. However, the other maritime nations of the world were apathetic towards the Rules when it came to adopting them, although they had been very anxious to sign the Convention. In particular, the United States was guilty of what is not an uncommon American Custom - enormous enthusiasm for an international agreement until the question of adherence to that agreement became a pressing reality, at which time American support conflicts with American self-interest and the support is invariably withdrawn (o). By 1939 only six nations apart from the British Commonwealth had given effect to the Rules. None have done so since the war and, as far as is known none have taken the initial steps to do so. A not very impressive total in view of the support which the

(o) In fairness it must be observed that these remarks are subject to much limitation in view of the present American activities on the International scene. Let it be hoped that this is not a transitory improvement.

Rules originally aroused. And not only has standardization been curtailed by the absence of unanimity amongst the Maritime nations, but also by the effect of the Vita Foods case, which permits contracting out of the Rules in those states which have shown some predilection towards universal uniformity.

Another problem to which there is no entirely satisfactory solution lies in attempting to determine how much the bill of lading remains effective after deviation. The jurisprudence is far from clear upon the point and it is still uncertain whether the contract is abrogated in its entirety (p). It was argued that, the more reasonable view was that the contract was only abrogated if the loss occurred during the period when the ship was unjustifiably off-course, but that in order to abrogate the contract when the damage had occurred after the deviation was ended and the proper route had been resumed, there must be some connection between the deviation and the damage. Whether this is correct is far from settled, nevertheless, it is submitted that the state of jurisprudence at the present time would seem to be in accordance with this opinion.

The position of the bill of lading when goods are transhipped still remains vague, although, as was pointed out in the previous chapter the Rules can be made to apply to such shipments where certain conditions are contained in the bill.

(p) See Chapter V.

The Vita Foods case decided among other things, thatit was not mandatory for the shipowner to issue a bill of lading but only bacame so when the shipper demanded one. What, then, is the shipper's right to demand a bill of lading? No definite conclusions can be drawn with regard to this right - if right there is.

What are the limits of the catch-all exception in Article IV, Rule 2(q)? It has been held to include breakage, pilfering, rust and rats - but does it cover vermin other than rats such as cockroaches, or excessive sweating of the stevedores in unloading the holds which causes damage? Where are the limitations of this exception? If there are none, then any and all damage which is not due to the fault or privity of the shipowner and the fault and neglect of his servants must be included in the exception. If this is not to be deemed the case, then a limit to the exception should be clearly defined.

These and the numerous other questions which have been considered and to some extent answered in these pages, render most difficult a wholly satisfactory examination of the Water Carriage of Goods Act - an Act which by its very nature should be clear and easily understood by merchants and shipowners alike. What can be done to remedy this situation?

The Rules put into operation for the first time on January 1st, 1925 - almost twenty-seven years ago. Since then, the courts have examined them at length and in detail, but certain difficulties still remain. The period of

experimentation should now be considered closed and another convention called to re-assess the value of the Rules. There can be little doubt that in doing so, the delegates must all recognize the utility of the Rules in accomplishing the universally desired standardization of bills of lading. Few would dispute the fact that the Rules are the means by which this end may be reached.

However, in re-assessing their value, as this work has to some extent done - the necessity for amendment would undoubtedly be realized. Where the Vita Foods case had destroyed, am amendments could reconstruct in order to give force to the original intentions of those who were instrumental in drawing up the Rules. Definitions - but a limited number it is hoped - might be inserted in the Rules. In particular the term 'carriage of goods' might be more clearly defined in order to prevent a repetition of decisions such as that in Goodwin v Lamport & Hold (q). For example the words 'from tackle to tackle', or a similar phrase, might well be added. No alteration need be made to the respective legal positions of carrier and shipper. The rights, immunities and liabilities as they exist at present need not be varied since as they presently stand they apportion the burden of responsibility upon each party.

But the principle purpose of a second convention would be to encourage more maritime states to adopt the Rules and apply them to all bills of lading issued within their jurisdictions. If the delegates of those states

(q) supra.

which have not adopted the Rules or, like the Netherlands, have adopted them but have no legislation making them obligatory, could, together with the delegates from the nations which now enforce them, assess the unquestionable value of the rules, those delegates would be in a position to recommend that their own countries adhere to the Brussels Convention of 1924, as amended by the proposed convention.

One cannot emphasize the salutory influence of such a convention in the movement towards the universal uniformity of bills of lading covering the carriage of goods by sea. It is not unreasonable to suggest that such a convention be held, nor to hope that it may be successful in furthering the unanimity of maritime nations in this field.

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2 Articles

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Smith	41: 423	44: 7, 442
Carriage of Goods by Sea Act, 1934	41: 65	
Contracting out of Hague Rules	55: 323	
	56: 320	
	61: 21	
	62: 176	
	26: 89	
Deviation		
Deviation, The Effects of, R.S.T.C.	51: 422	
	53: 299	
	38: 317	
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Liability of Shipowners at Common Law,	55: 323	

Management of a Ship 44: 133
Perils of the Sea, T.E.S. 3: 471
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Shipowners Liability 4: 51
Through Bills of Lading, Bateson, 5: 424

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3: 417
19: 124
25: 493
29: 85
34: 357
35: 250
37: 477
49: 7, 11, 19

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38: 28
36: 216
41: 528
26: 752
9: 152
10: 310, 381
20: 66, 325
29: 746
17: 277
29: 217, 550
21: 442
39: 647
40: 774
47: 518, 715
53: 792
51: 11, 38
54: 707

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36: 139

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11; 65, 135, 216, 295, 370.
1V; 386, 502, 584.
V; 532
V1; 516
XV111; 77

Revue du Barreau, 1947; 16