

7, 1939

In the Privy Council.

No.....of 1938.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC.

IN THE MATTER OF THE COMPANIES WINDING UP ACT,
being Chapter 198, R. S. N. S., 1923

—AND—

IN THE MATTER OF THE WINDING UP OF UNUS SHIPPING COMPANY,
LIMITED

—AND—

IN THE MATTER of a Certain Claim filed by VITA FOOD PRODUCTS INC.,
a Body Corporate (Claimant)
Appellant.

—AGAINST—

UNUS SHIPPING COMPANY, LIMITED, IN LIQUIDATION *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council

No. of 1938.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

IN THE MATTER OF THE COMPANIES WINDING UP ACT,
being Chapter 198, R. S. N. S., 1923

AND

IN THE MATTER of THE WINDING UP OF UNUS SHIPPING
COMPANY, LIMITED

AND

IN THE MATTER of A Certain Claim Filed by VITA FOOD
PRODUCTS INC., a Body Corporate (Claimant)
Appellant

AGAINST

UNUS SHIPPING COMPANY, LIMITED,
IN LIQUIDATION Respondent

Records of Proceedings

No. 1

AMENDED STATEMENT OF CLAIM

(Amended pursuant to Order of His Lordship, the Chief Justice,
granted herein the 30th day of October, 1936.)

Claim filed March 2nd, 1936.

(1) The Claimant, Vita Food Products Inc., is a Body Corporate,
incorporated under and by virtue of the Laws of the State of New York,
having its Head Office and chief place of business at 644 Greenwich Street,
New York City;

10 (2) Unus Shipping Company Limited (hereinafter called the "Com-
pany") is a Body Corporate, incorporated under the Laws of the Prov-
ince of Nova Scotia, having its Head Office at Halifax, N. S., and on or
about the 20th day of December, A. D. 1935, the Company passed an Ex-
traordinary Resolution under The Companies' Winding Up Act, being
Chapter 198, R. S. N. S., 1923, for its voluntary Winding-up under the
said Act, and by the said Resolution appointed W. N. Wickwire and Frank
B. Zink, Liquidators therefor;

(3) At all times hereinafter mentioned the Company was the owner
of 64 shares of the M. V. "Hurry On", a Motor Vessel of British Registry,
which was at all times material to this claim registered at Halifax aforesaid;

*In The
Supreme
Court of
Nova Scotia*

No. 1
Amended
Statement
of Claim,
24th June,
1936.

In The
Supreme
Court of
Nova Scotia.

No. 1
Amended
Statement
of Claim,
24th June,
1936.

—continued

(4) During the month of January, 1935, the Company operated the said M. V. "Hurry On" as a common carrier, or in the alternative a carrier for hire on a voyage from various points in and about Bay of Islands, Newfoundland, including Middle Arm, to New York, and while the said M.V. "Hurry On" was being operated as aforesaid, 1,806 barrels of Scotch Cured Herring, 133 barrels of Round Herring and 37 half-barrels of Scotch Cured Herring, all in good order and condition, were delivered by M. G. Basha to the Company and loaded on the said M.V. "Hurry On" at Middle Arm aforesaid for carriage and delivery at a freight of \$1.60 per barrel to the Claimant at New York; 10

(5) The Claimant was the owner of the said herring and all of them at all times material to this claim;

(6) On or about the 16th day of January aforesaid, the said M. V. "Hurry On" proceeded from Bay of Islands on her said voyage, but on or about the 18th day of January aforesaid, the said M. V. "Hurry On" stranded at Grady's Point on the coast of Nova Scotia and threatened to become a total loss, together with the said herring and all other cargo on board, but the said herring and other cargo were subsequently salvaged and the said herring were delivered by the Company to the Claimant in New York in a seriously damaged condition on or about the 15th day of March, 20 1935;

(7) As a result of the stranding of the said M. V. "Hurry On" as aforesaid, this Claimant made certain expenditures in connection with the salvaging of the said herring and this Claimant was also forced to incur certain other expenses before delivery of the said herring could be obtained in New York;

7A. The said stranding and the said loss or damage was due among other things to the neglect or default of the master and/or mariner and/or servants of the carrier in the navigation and/or management of the said Motor Boat "Hurry On". 30

(8) This Claimant claims the sum of \$16,342.89 damages, particulars of which are as follows:

| | |
|---|-------------|
| Damage to herring as aforesaid | \$11,327.00 |
| Claim for Salvage Expenditure | 4,711.78 |
| Other Expenses necessarily incurred | 304.11 |
| | \$16,342.89 |

DATED at Halifax, N. S., this 24th day of June, A.D. 1936.

E. C. PHINNEY, K.C., of
50 Sackville Street, Halifax, N. S.
Solicitor for Claimant
VITA FOOD PRODUCTS INC. 40

To: J. A. WALKER, K.C.,
Solicitor for UNUS SHIPPING COMPANY LIMITED.

AMENDED DEFENCE

*In The
Supreme
Court of
Nova Scotia.*

No. 2
Amended
Defence,
22nd June,
1936.

(Amended and delivered pursuant to the Order made by His Lordship the Chief Justice of Nova Scotia and dated the 22nd day of June, A.D. 1936).

1. Unus Shipping Company Limited (hereinafter called "the Company") admits the allegations contained in Paragraphs 1, 2 and 3 of the Statement of Claim.

2. The Company admits the allegations contained in Paragraph 4 of the Statement of Claim, save only that it does not admit but specifically denies that it operated the said motor vessel "Hurry On" as a common carrier and also specifically denies that at any time pertinent to this proceeding the said "Hurry On" was or was operated as a common carrier.

3. The Company specifically denies each and every allegation contained in Paragraph 5 of the Statement of Claim.

4. As to Paragraph 6 of the Statement of Claim the Company admits that on or about the 16th day of January, 1935, said motor vessel "Hurry On" proceeded from Bay of Islands on her said voyage and that on or about the 18th day of January, 1935, the said "Hurry On" stranded at Grady's Point on the coast of Nova Scotia, but the Company denies that the said vessel and/or her cargo, or any part thereof, threatened to become or were in danger of becoming a total loss; and the Company admits that the said herring and other cargo were salvaged and that said herring were delivered to the Claimant in New York, but specifically denies that the said herring, or any part thereof, were at the time of such delivery in a seriously damaged condition or in any damaged condition whatsoever.

5. As to Paragraph 7 of the Statement of Claim the Company specifically denies each and every allegation therein contained, and further says that the damages claimed or as set forth in Paragraph 8 of the Statement of Claim, if actually suffered or paid, (all of which is denied) were not the result of and did not arise or flow from any act or omission whatsoever on the part of the Company, its servants or agents, for which the Company is or may be liable to the Claimant.

5A. The Company specifically denies each and every allegation of fact contained in Paragraph 7A of the Amended Statement of Claim.

6. As to the whole of the Statement of Claim herein the Company says:

(a) That if the said herring referred to in Paragraph 4 of the Statement of Claim were loaded on the said motor vessel "Hurry On" for carriage to and delivery at New York, as alleged or at all, the whole of the Contract between the parties for such loading, carriage and delivery and the terms and conditions governing the same were contained in a certain document in writing dated January 12th, 1935, signed by one J. Poole, for Agents, purporting to be a Bill of Lading for the receipt and carriage of the said herring, and on the hearing of this proceeding the Company craves leave to refer to the said Bill of Lading for the particulars thereof. The said Bill of Lading was delivered to the Claimant or its agent and was 10 accepted by it as the Contract covering the carriage and delivery of the said herring.

(b) The said Bill of Lading was made and executed in the Dominion of Newfoundland and the making of the Contract therein contained was and is subject to the law of the said Dominion of Newfoundland.

(c) In and by Clause 7 of the said Bill of Lading it was provided inter alia as follows:

"The Company is not in any event to be liable for any damage
"to any merchandise or cargo however caused which is capable of
"being covered by insurance; nor for any loss or injury arising 20
"from or occasioned by or from any act or omission, negligence, de-
"fault or error in judgment of the pilots, masters, mariners, engineers,
"stevedores, workmen or other persons in the service of the Company
"or otherwise whether in or on board the said ship or other-
"wise howsoever for whose acts it would otherwise be liable or by
"unseaworthiness of the ship at or after the commencement of the voy-
"age, provided all reasonable means have been taken to provide against
"such unseaworthiness";

And in and by Clause 22 of the said Bill of Lading it was provided as follows: 30

"22. No claim whatever for loss or damage to goods will be ad-
"mitted or considered unless it be made in writing with full particulars
"to the Company or its agents within fifteen days after the delivery
"of or failure to deliver the goods".

(d) All the damage alleged to have been suffered and claimed for in this proceeding was capable of being covered by insurance and was in fact covered by insurance, and the Claimant before the commencement of this proceeding was compensated in full for all such damage by the Marine Underwriters carrying such insurance, and by reason thereof and by reason also of the provisions of said Clause 7 of the Bill of Lading hereinbefore 40 set forth the Company is not liable for any of the damage alleged and claimed for herein.

(e) The Company, its master, agents and servants, took all reasonable means to provide against unseaworthiness of the said vessel and exercised all due diligence to insure that the said vessel should be in all respects seaworthy before starting on the said voyage, and the said vessel was in fact at all times pertinent to this proceeding perfectly seaworthy and the loss or damage claimed for herein was not caused or occasioned by any unseaworthiness of the said vessel or by any act or omission, negligence, default or error in judgment of the master, mariners or other persons on board the said vessel, but solely by reason of matters and things excepted in the said Bill of Lading, namely, perils and dangers of the seas and other navigable waters and/or by reason of reasonable deviation due to perils and dangers of the seas and other navigable waters; and by reason thereof and by reason also of the provisions of the said Clause 7 of the Bill of Lading hereinbefore set forth the Company is not liable for any of the damage alleged and sued for herein.

(f) No claim whatsoever in respect of the damage alleged and claimed for herein was made to the Company or its agent or agents within fifteen days after the delivery of or failure to deliver the said goods and by reason thereof and by reason also of the provisions of Clause 22 of the said Bill of Lading above set forth the claim of the Claimant herein is absolutely barred.

IN THE ALTERNATIVE

7. As to the whole of the Statement of Claim herein the Company says:

(a) That the whole of the contract between the parties hereto for the loading, carriage and delivery of the cargo of herrings referred to in the Statement of Claim was made in the Dominion of Newfoundland and was a contract for the carriage of goods by sea in a ship carrying goods from a port in the Dominion of Newfoundland to a port outside the said Dominion and the said cargo of herrings was loaded on the said ship in the said Dominion of Newfoundland.

(b) That the said contract was subject to and governed by The Carriage of Goods by Sea Act 1932, being Chapter XVIII of the Statutes of the Dominion of Newfoundland for the year 1932 (Second Session) and the Rules therein contained, and the rights and liabilities of the parties in connection with the loading, carriage and delivery of the said cargo of herrings was fixed and determined by the said Act and Rules therein contained.

(c) By Article II of the Rules contained in the said Act it is provided as follows:

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Defence
22nd June,
1936.*

—continued

*In The
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—
No. 2
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22nd June,
1936.
—continued.

“Subject to the provisions of Article VI, under every contract of carriage of goods by sea 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 rights and immunities hereinafter set forth”.

(d) By Article IV of the said Rules it is provided in part as follows:

“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” 10

“2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

“(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.

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

“(q) Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier” 20

(e) Prior to and at the commencement of the voyage above referred to, the Company by itself and its agents and servants employed all due diligence to make the said ship in every respect seaworthy and to secure that the said ship was properly manned, equipped and supplied, and the Company is, therefore, entitled to the exemptions from liability contained in the Rules hereinbefore set forth.

(f) The damage alleged and sued for herein did not result from any unseaworthiness of the said ship and rose without the actual fault or privity of the Company or without the fault or neglect of the servants or agents of the Company, or any of them. 30

(g) The damage alleged and claimed for herein, if suffered at all which is denied, arose or resulted from perils excepted by law, namely:

A. Perils, dangers and accidents of the sea or other navigable waters; or alternatively

B. Act, neglect or default of the master, mariner, pilot or the servants of the Company in the navigation or in the management of the ship; or alternatively

C. A cause arising without the actual fault or privity of the Company or without the fault or neglect of the agents or servants of the Company, or any of them;

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and by reason of the provisions of the said Rules hereinbefore referred to, the Company is not liable for any of the damage alleged and claimed for herein.

No. 2
Amended
Defence
22nd June,
1936.

—continues

(h) By Sub-Section (6) of Article III of the said Rules it is provided in part as follows:

10 “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 goods should have
“been delivered”.

(i) All of the said goods constituting the said cargo and in respect of which this proceeding is brought were delivered to the Claimant on or before the 9th day of March, A.D., 1935, and no suit in respect of the loss or damage was brought within one year after the delivery of the goods, and the Company is, therefore, discharged from all liability whatsoever in respect of the loss or damage alleged.

IN THE FURTHER ALTERNATIVE:

20 8. As to the whole Statement of Claim the Company says:

(a) That the Claimant herein was fully paid all damages alleged and sought to be recovered herein by the Marine Underwriters with whom it had insured the said herring and brings this proceeding as nominal claimant only for the benefit of the said Underwriters who claim to be subrogated to the rights of the Claimant.

(b) That the said Claimant is not entitled to recover herein either in his own right or on behalf of the said Underwriters, or any of them, by reason of the following matters and things, namely:

30 (1) Because after the stranding of the said vessel by agreement of
all the parties interested, and to which agreement the Claimant and the said Underwriters as well as the Company and its Underwriters were parties, a General Average and Salvage Adjustment was made by Boyd, Phillips & Company Limited, Average Adjusters of Montreal who determined both in law and in fact the respective amounts to be paid by the Claimant and other consignees of the said cargo and their respective Underwriters, on the one hand, and the Company and its Underwriters, on the other, in respect to all loss and damage caused by or arising out of the said stranding and the salving of the said vessel and cargo, and in accordance with the said agree-

*In The
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Nova Scotia.*

No. 2
Amended
Defence
22nd June,
1936.
—continued.

ment upon the said respective amounts being so determined by said Boyd, Phillips & Company Limited the Claimant and its Underwriters as well as the other consignees of the said cargo and their respective Underwriters and the Claimant and its Underwriters each paid the respective proportions of the total loss and damage caused by or arising out of the said stranding and the said salving of the said vessel and cargo so determined to be payable by them respectively in full settlement, accord and satisfaction of all claims and demands whatsoever which any of the said parties had or might have had against any of the other parties including any and all claims which the Claimant and/or its Underwriters had or might have had against the Company and in particular including the claim which is the subject of this proceeding. 10

(2) Because by reason of the matters and things hereinbefore set forth any right of action which the Claimant might otherwise have had against the Company in respect to the matters set forth in the Statement of Claim was extinguished and consequently the Claimant's Underwriters cannot be subrogated to any such right.

(3) Because the amounts claimed for in the Statement of Claim herein are in reality not damages caused by or arising out of the said stranding, but are amounts voluntarily paid by the Claimant and/or its Agents and Underwriters by virtue of the agreement hereinbefore referred to, or alternatively paid by them under mistake of law. 20

DATED AND DELIVERED at Halifax, N. S., this 22nd day of June, A.D., 1936.

J. A. WALKER,
50 Sackville Street, Halifax, N. S.,
Solicitor for the Company.

To: E. C. PHINNEY, Esq., K.C.,
Solicitor for the Claimant.

AMENDED REPLY

*In The
Supreme
Court of
Nova Scotia.*

No. 3

(Amended pursuant to Order of his Lordship, the Chief Justice, Sir Joseph Chisholm, granted herein the 12th day of December, A.D., 1936.)

Amended
Reply,
14th December
1936.

(1) The Claimant joins issue with the Company on Paragraphs 2, 3, 4 and 5 of the Amended Defence, save insofar as the same consists of admissions;

(2) As to Paragraph 6 (a) of the Amended Defence, the Claimant says that the said herring were loaded on the said M. V. "Hurry On" for carriage and delivery to the order of the Claimant at New York, and that the said documents in writing, dated the 12th day of June, 1935, purported to be Bills of Lading for the receipt and carriage of the said herring and that the said documents were signed by one J. Poole, agent of the Company, and that the said J. Poole was in fact the agent of the Company, and that the Claimant was the owner of the said herring and all of them at all times material to this action, but the Claimant denies that the said Bills of Lading, or any of them, were accepted by it as the contract, or any contract for the carriage and delivery of the said herring, or that the said documents contained the whole or any contract for the loading, carriage or delivery of the said herring, in that the said documents and all of them were Bills of Lading or similar documents of title, and were made and executed and issued by the Company in the Dominion of Newfoundland, and are and were illegal, null and void under the laws of Newfoundland, because contrary to the provisions of Section 3 of "The Carriage of Goods by Sea Act" being Chapter 18 of The Acts of the Parliament of Newfoundland for 1932, none of the said Bills of Lading contained an express statement or any statement that the same were to have effect, subject to the provisions of the Rules as applied by the said "The Carriage of Goods by Sea Act, 1932";

(3) The Claimant admits Paragraph 6 (b) of the Amended Defence;

(4) The Claimant joins issue with the Company on Paragraph 6 (c) to 6 (f) both inclusive of the Amended Defence;

(5) In the alternative, as to the whole of Paragraph 6 of the Amended Defence, the Claimant repeats Paragraphs 2 and 3 hereof and says, with respect to Paragraphs 6 (c) to 6 (f) both inclusive, that if the documents referred to in Paragraph 6 of the Company's Defence, or any of them, contained the contract between the Claimant and the Company, which the Claimant does not admit, but denies, that the said documents were, at all times material to this action, Bills of Lading or similar documents of title, and were made and executed and issued by the Company in the Dominion

*In The
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Court of
Nova Scotia.*

No. 3

Amended
Reply,
14th December,
1936.

—continued.

of Newfoundland, and are and were subject to the provisions of the said “The Carriage of Goods by Sea Act” and the Rules enacted therewith, and the Claimant says that the said Clause 7 and the said Clause 22 of the said Bills of Lading and both of them, are and were illegal, null and void, and of no effect, because the said clauses were clauses in Bills of Lading made and executed and issued by the Company in the Dominion of Newfoundland, and were in the said Dominion illegal, null and void, by reason of Rule 8 of Article III of the said “The Carriage of Goods by Sea Act” in that the said clauses relieved the Company from liability for loss or damage to or in connection with goods, arising from the negligence, fault or failure in the duties and obligations provided in the said Article III of the said Rules (the said Clause 22 being a benefit of insurance clause, which by the provisions of the said Rule 8 is deeded to relieve the Company from liability), or in the alternative that the said clauses lessened such liability otherwise than as provided in the said Rules; 10

(6) The Claimant admits Paragraphs 7 (a), 7 (c), 7 (d) and 7 (h) of the Amended Defence;

(7) As to Paragraph 7 (b) of the Amended Defence, the Claimant repeats Paragraph 2 hereof and says that the contract for the carriage of the said herring, and all of them, was an implied contract of carriage, arising from the payment of freight and no more, and as such that the said contract was not subject to the said “The Carriage of Goods by Sea Act, 1932”, or any part thereof; 20

(8) The Claimant joins issue with the Company on each and every allegation contained in paragraphs 7 (e), 7 (f), 7 (g) and 7 (i) of the Amended Defence;

(9) In the alternative, with respect to the whole of Paragraph 7 of the Amended Defence the Claimant says that the Company, as common carrier, or in the alternative as carrier of the said herring, can not take advantage of any of the rights and immunities from liability provided by the said Act, or any of the Rules referred to therein, because the Company failed, as aforesaid, to comply with the Statutory obligations imposed upon it by Section 3 of the said Act, or to otherwise incorporate the said Act or the Rules referred to therein in the said Bills of Lading, or any of them; 30

(10) The Claimant joins issue with the Company on each and every allegation contained in Paragraph 8 of the Amended Defence.

DELIVERED at Halifax, N. S., this 14th day of December, A.D., 1936.

E. C. PHINNEY, K.C.,
of 50 Sackville St., Halifax, N. S.,
Solicitor for the Claimant. 40

To: J. A. WALKER, K.C.,
of 50 Sackville St., Halifax, N. S.,
Solicitor for the Company.

MINUTES OF EVIDENCE

HALIFAX, MONDAY, APRIL 6th, 1936, 2.30 P.M.

*In The
Supreme
Court of
Nova Scotia.*

BEFORE THE CHIEF JUSTICE

| | | |
|----------------------|---|--|
| G. McL. DALEY, K.C., | } | for the Claimants. |
| E. C. PHINNEY, K.C. | | |
| J. A. WALKER, K.C., | } | for the Unus Shipping Co., Ltd., in liquidation. |
| C. B. SMITH, K.C. | | |
| W. M. ROGERS, | | holding watching brief for Protection and Indemnity Insurers. |

10 MR. SMITH: moves for an order, with consent of Mr. Daley, amending the defence by adding a tenth paragraph as follows:

“In the further alternative,—

10. As to the whole of the Statement of Claim herein:

The Company repeats sub-sections (a), (c), (d) and (f) of paragraph 6 of this defence and says that the contract for the carriage and delivery of the said herring was made and entered into in the Dominion of Newfoundland for the carriage of the said cargo in a British ship and that whether the proper law of the said contract be Newfoundland law or English law or Canadian law the claim of the claimant herein is barred by reason of the matters and things set out in sub-sections (c), (d) and (f) of said paragraph 6 of this defence”.

Mr. Smith
Amends
Defence,
6th April,
1936.

No. 4

Evidence of John H. Willis

JOHN H. WILLIS, being called and duly sworn, testified as follows:

Examined by MR. PHINNEY:

- Q. You reside in Halifax? A. Yes.
- Q. I understand you are leaving Nova Scotia tonight going to Newfoundland? A. That is right.
- Q. And do not expect to be back all summer? A. That is right.
- 30 Q. What is your occupation? A. Going to sea as navigator.
- Q. What experience have you had in this occupation? A. About eighteen years sea time.
- Q. Tell me briefly what your experience has consisted of. A. I have been going to sea as A.B. quite a while, six years in fact.

Claimant's
Evidence.

No. 4
John H. Willis.
Examination.

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Supreme
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Nova Scotia.*

Claimant's
Evidence.

No. 4

John H. Willis.
Examination.
—continued.

Q. Was that the start of your seafaring life? A. Four years in the navy; master and mate of schooners, sailing ships, and mate of steamboats the last five or six years, sailing out of Halifax and out of St. John's, N. F.

Q. All coastwise? A. Foreign going part time.

Q. What qualifications have you? A. Mate's deep water certificate.

Q. How long have you had that? A. Four years.

Q. Is it correct to say that you have been going to sea pretty steadily the last sixteen or eighteen years in these various capacities? A. Yes.

Q. This past season, 1935, what were you doing? A. Employed by Interprovincial Steamships. 10

Q. In what capacity? A. Second officer and chief officer. Second of the "Ulva", and chief officer of the "Delia".

Q. How long chief officer of the "Delia"? A. About three months.

Q. You signed on the M.V. "Hurry On" early in January, 1935? A. Yes.

Q. In what capacity? A. Chief officer.

Q. How long were you on the "Hurry On"? A. From the time she left here until we left her in Guysboro,—about a month; close on a month.

Q. Do you recall the day you signed on the "Hurry On" for that trip? A. About the 3rd or 4th of January. 20

Q. You were on that ship as chief officer during the voyage which she made to Bay of Islands? A. Yes.

Q. And on the return until she stranded? A. Yes.

Q. At Grady's Point. A. Yes.

Q. Where were the engines located on the "Hurry On"? A. In the after end of the ship.

Q. Where was the bridge located? A. Just about amidships.

Q. What kind of steering equipment did the "Hurry On" have? A. She had steam and hand gear in the lower wheel house, and a wheel on the top bridge, steered by steam alone; and she had a hand steering gear aft. 30

Q. When you speak of the wheel house you refer to the bridge? A. Yes, the lower bridge.

Q. Describe more fully the apparatus which you had on the lower bridge for steering? A. It is a steam steering gear, and puts it in hand gear by a clutch, and if the steam does not work properly, or the engine won't function by steam, there is a clutch that can be pulled out or put in position, to put the steering gear in hand.

Q. That is, if for any reason it is desirable to throw the steering gear from steam into hand gear, you simply pull the clutch and that engages the meshes of the wheels, and the ship is steered by hand from the lower bridge,—is that right? A. Yes. 40

Q. How large is the steering wheel on the lower bridge? A. It is quite a large wheel, I don't know exactly the size; I should say about six feet across, between five and six.

Q. How large is the steering wheel on the flying bridge? A. About eighteen inches, I imagine.

Q. When you change the steering gear on the main bridge from steam to hand, do you have to get more revolutions to put your ship hard aport or hard a-starboard than if she was in steam? A. Quite a lot more.

Q. Why is that? A. Because it takes so long to turn the wheel and the gear is so small.

By MR. SMITH:

Q. Speaking of the main wheel or wheel on top of the chart house?

A. From the wheelhouse, the main wheel.

10 By MR. PHINNEY:

Q. That is the lower bridge? A. Yes.

Q. In other words, the meshing wheels that operate when the wheel is operated by hand are smaller than the wheels which operate when it is operated by steam? A. I could not say that, but it takes longer to turn the wheel by hand than steam; it might have been the same size mesh, but it takes longer, of course.

Q. Why? A. Well, the steam acts on the engine and turns it faster, and by hand you can't go very fast, you have to haul the wheel around and it takes two men when it is stormy to handle the wheel, and you can't turn
20 it very fast when it is stormy, there is a big pressure on the rudder.

Q. In other words, if I understand you correctly, it is a matter of power applied to the wheel? A. That is right.

Q. How does the steam reach the wheel from the engine room? A. A pipe leads along the deck outside the hatch combing on the main deck, on top of the deck.

Q. Is that pipe protected in any way? A. Nothing whatever.

Q. How long would that pipe be, on the main deck? A. About sixty-five feet, I guess.

Q. So that on the main bridge you could steer your ship by steam or
30 hand power? A. Yes.

Q. On the flying bridge you could steer only by steam? A. Yes.

Q. And where was the other wheel? A. Aft.

Q. You could steer only by— A. By hand.

Q. What would you say, from your experience, as to the efficiency of steering a ship by the steam gear? A. She would respond more quickly by steam than by hand.

Q. Did she respond more quickly by steam? A. Not at that time. All the way up the coast we could not keep her on her course; in fact, by steam she would come up two or three points to the wind, and heaving the
40 wheel over to go back to amidships, the ship would go off either side.

Q. As to the rapidity of response under steam, did she respond quickly? A. Not too quickly, no; not what you would expect of a steamboat; some are slower than others; this one was exceptionally slow.

Q. What do you say as to her response when steered by hand? A. You could not very well handle her at all.

Q. How long would it take to put her from hard a-starboard to hard a-port?

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MR. SMITH: Under what conditions?

Q. Give us the varying conditions. Say on a calm day? A. About 1½ minutes.

Q. And you were steering by hand. A. About a minute from hard a-port to hard a-starboard, but in rough weather anywheres from 1½ to 2 minutes.

Q. What do you mean by rough weather? A. Stormy weather, blowing hard and heavy sea running.

Q. What would you describe as blowing hard—how many miles? A. From 30, 40, 50 miles, blowing a gale. 10

Q. You say it would take up to two minutes from hard a-port to hard a-starboard? A. At times.

Q. How long would it take under these same conditions you have described from hard a-port to hard a-starboard by steam? A. About ½ a minute, or ¾ of a minute.

Q. That is, when it is rough? A. Yes.

Q. And heavy weather? A. Yes.

Q. What kind of weather did you encounter after the "Hurry On" left Halifax on the way to Bay of Islands? A. Fair weather until we got down to the Newfoundland coast, around Cape Ray, then we had it pretty strong from the N.W., 20

Q. How did the engines work on that trip to Bay of Islands? A. They were breaking down every once in a while; 25 or 30 minutes they would break down.

Q. The break down would last that time? A. Ten or fifteen minutes, sometimes we would get them fixed up in ten minutes.

Q. How many break downs do you recall you had on that part of the voyage? A. I could not say; but from Halifax to Egg Island, three times.

Q. And Egg Island is how far from Halifax? A. About thirty miles from the Inner Automatic. 30

Q. Did you have any break downs after you passed Egg Island on the way to Bay of Islands? A. Yes, we had another.

Q. And were they all practically the same insofar as time is concerned to fix them up? A. Sometimes longer.

Q. Roughly how many break downs did you have from Halifax to Bay of Islands in the engine room? A. I could not say, I was not on watch all the time.

Q. When you were on watch? A. Six or seven, I imagine.

Q. And you eventually arrived at Bay of Islands and took on a load of herring there? A. Yes. 40

Q. And cleared for where? A. New York.

Q. The day of your clearance? A. About the 16th January, I guess.

Q. Were you on the bridge of the "Hurry On" leaving Bay of Islands? A. Yes.

Q. What experience did you have leaving that port? A. She broke down as we got clear of the wharf down there, and we had to haul up until

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the engines were repaired; then she broke down again between there and Frenchmen's Head; we took the stevedores over there to land them.

Q. Where is Frenchmen's Head? A. Going in towards Curling or Corner Brook, in that direction.

Q. In the same area as Bay of Islands? A. Yes, we had to detour around Wood's Island; she broke down again off South Head going out of Bay of Islands, and again off Louisburg, I believe. I was not on watch at the time.

Q. Speak only of what you know. Do these cover the number of
10 break downs while you were on the bridge? A. Yes.

Q. I assume you mean by break downs stoppages in the engine room? A. Yes.

Q. Were these break downs of long duration? A. About twenty minutes.

Q. What was the weather when you left Bay of Islands on this trip?
A. Cold and clear.

Q. Was the ship iced up at all? A. Quite a bit.

Q. You had a barometer on the ship? A. Yes.

Q. In the bridge house? A. In the chart room.

20 Q. Have wireless equipment? A. No, just a radio, small radio.

Q. Where was that? A. In the master's room.

Q. Did that belong to the ship? A. I believe so, yes.

Q. What was that used for? A. Sometimes for weather reports,
but it was not functioning all the time.

Q. How would you get your weather reports? A. That is the only way, and by watching the barometer, and conditions of the sky, the way the wind was acting.

Q. And when you could use the radio? A. Yes.

Q. Do you recall the morning of the day of January 18th? A. Yes.

30 Q. That is the day the "Hurry On" stranded? A. Yes, at Grady's Point.

Q. What time that day did you go on watch? A. Eight in the morning.

Q. How long were you on watch? A. Until she stranded — until 12 o'clock my watch ended, but I didn't leave the bridge.

Q. She stranded some time after your watch concluded? A. Shortly after.

Q. You were on the bridge until the stranding took place? A. Yes.

Q. Who came on the regular watch to relieve you? A. The second officer.

40 Q. Was the captain on the bridge at any time during that morning?
A. All the time; all the while I was there.

Q. What was the weather that morning when you came on watch?
A. Blowing up quite a strong breeze and hazy.

Q. How strong a breeze? A. About 10 or 15 miles, I guess, an hour; and becoming thick and hazy all the time.

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Q. Caused by what? A. By the wind, I suppose, and snow; it began to snow then, shortly after I came on watch.

Q. Was there fog? A. Kind of low fog, haze we call it.

Q. When you came on watch how much visibility did you have? A. About two miles.

Q. What was your position at that time? A. I could not say for sure, but somewhere off Canso.

Q. Have you any idea how far you would be off Canso? From your recollection of the log or what not? A. Our course should take us about ten miles off. 10

Q. That is where you should have been? A. Yes.

By Mr. SMITH:

Q. Ten miles east of Canso light? A. Yes; yes, about S.E. of Canso light; the course would take her that far off.

By Mr. PHINNEY:

Q. Are you prepared to say more or less definitely exactly what your position was? A. I could not say.

Q. Could you see land? A. No.

Q. You had a look out? A. Yes.

Q. What course were you steering at that time? A. I can't just re- 20 member the course, but I should say about W.S.W.

Q. How was the sea? A. It was about abeam.

Q. And the wind was coming from what direction? A. From east,— S.E.,

Q. And was it a heavy or light sea? A. The sea was making all the time; quite a heavy sea running.

Q. Were the decks awash at that time? A. Yes.

Q. Iced up at all? A. Quite a bit of ice on deck, on the hatches.

Q. It was cold enough to be continuously freezing? A. Well, no, it was not real cold, but there was slob ice around. 30

Q. Was the ice freezing on deck? A. Not then.

Q. Was there ice on deck at that time? A. There was ice on deck.

Q. How were you steering the ship, or how was it being steered when you came on watch? A. She was in steam gear, and every once in a while she would stop, they could not make any use of the steering engine at all, so we decided to put her in hand steering gear, we could not manage it with steam at all.

Q. Had that situation happened before on that same voyage? A. Yes.

Q. Following your going on the bridge on your watch at 8 o'clock on the 18th January, what happened in respect to weather conditions and 40 sea immediately following that? A. Well, it was getting rougher, and the wind was rising continually; and the ship was awash all the time, and we tried to keep her up, but she would not keep up to the wind, but fell off broadside in the trough of the sea, and continually awash; decks full of water all the time.

Q. During any of this time were you steering by steam? A. Part time we tried it, but it would not work.

Q. What did you do then? A. We still kept to the hand gear.

Q. How many men had you on the steering wheel? A. Two men continuously.

Q. How long did you maintain the course you were on when you came on watch? A. I could not say; about 1½ or 2 hours, I guess.

Q. What did you do then? A. We altered course to run for the open bay, Chedabucto Bay.

10 Q. What did you do that for? A. We were in danger of going ashore on Canso ledges if we had gone further; the ship was making leeway and would not keep up to the sea, steering badly, and if we had kept on we might have gone ashore on Canso ledges; she could not have kept clear.

Q. Could you not steer the ship away from Canso ledges? A. That was the only way to keep away from it, going into the bay.

Q. Why didn't you run her into the wind? A. We tried that, and she would not keep up.

Q. Why? A. She used to fall off all the time in the trough of the sea.

20 Q. You mean she was drifting? A. Yes.

Q. Could you see the coast line at that time? A. No.

Q. Why not? A. Too thick; snow and haze.

Q. What made you think, when you changed your course, if you didn't do so you would run into Canso ledges? Know the approximate direction of the ledges at that time? A. Yes.

Q. How did you know that? A. By the speed of the ship going along, and time it took her to come up from when we altered at Scatarie, steer by the coast, that would bring her up about off Canso; I don't know the exact time.

30 Q. I understand that is the reason why you changed course at that time? A. Part of the reason, yes.

Q. What happened after that? A. We ran into Chedabucto Bay to try to make shelter, and the ship was steering very badly, going two or three points on each side of her course; we could not keep her on a steady course at all, and we got in the bay so far, and we thought it was time to haul her up to the northward on the course for Eddy point.

Q. Before you did that, did you cast anchor? A. Oh, no.

Q. You changed your course again and went in the Bay? A. Yes.

Q. To where? A. To north to go around Eddy Point.

40 Q. That is right in the Gut of Canso? A. Yes.

Q. If you had been able to carry out that manoeuvre successfully and go where you were heading for, you would have arrived in the Gut of Canso? A. Yes.

Q. What was the condition of the sea and wind at that time? A. Blowing quite strong and heavy sea heaving us.

Q. Which way was the wind? A. About S.E. then.

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Q. Do you recall how strong it was? A. I should say between 40 and 45 miles an hour.

Q. You are giving that as an opinion? A. Yes.

Q. You had no gauge to measure it? A. No.

Q. Why didn't you anchor in the bay? A. We could not anchor in the bay.

Q. Why? A. I didn't think there would be any chance of holding the ship in such a sea; we might lose the anchors, or tear the windlass out of her, and cause a lot of damage, and the ship might sink there; it was too rough to anchor. 10

Q. That was your judgment? A. Yes.

Q. And you didn't anchor? A. No.

Q. What happened after you changed course and headed for Eddy Point? A. We kept a good look out watching for land.

Q. Had you not seen land up to that time? A. No; we saw land right ahead about 500 feet, I imagine; it was very thick; and immediately after we saw the breakers: And the master was nearest to the wheelhouse and he ran in and gave an order, and helped to turn the wheel hard a-port, at the same time reversing the engines.

Q. Who was on watch officially when land was sighted? A. Second 20 officer.

Q. But you and the captain were both on the bridge? A. Yes.

Q. You saw breakers about 500 feet in front of you? A. No, the land.

Q. When did you first observe breakers? A. Just about the same time.

Q. What about visibility? A. It was very thick; you could not see more than five or six hundred feet.

Q. What was done then on the bridge? A. Well, the order was given to reverse the engines, and haul the wheel hard a-port.

Q. Were the engines immediately reversed? A. It would take about 30 1½ minutes, but as quickly as possible they were put in reverse, but she didn't respond, she kept on heading for the land.

Q. She didn't respond to reversed engines? A. She didn't, and the wheel was hard a-port.

Q. How was she being steered at that time? A. By hand.

Q. Two men still on the steering wheel? A. Yes.

Q. On the lower bridge? A. Yes.

Q. How much headway did she have about the time you sighted land? A. She was going dead slow with the engine; I could not say for sure; she might have been doing three or four knots. 40

Q. And she had some sea way? A. Yes.

Q. In your experience, with that ship, did she have enough sea way to permit her to respond to the wheel? A. If we had the steam steering gear she might have come clear.

Q. What did actually happen, did she come about at all? A. She started to keep off, and we thought she might make it, but she struck.

Q. Side or head on? A. About 45°, I guess.
 Q. And did she stay aground? A. Yes.
 Q. From your experience in handling the "Hurry On" from the bridge, what do you say would have happened if you had had steam steering gear at that time?

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MR. SMITH: I submit he cannot tell what would have happened—it is speculation.

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MR. PHINNEY: He had experience from the bridge.

MR. SMITH: Not in like conditions.

10 A. She would have responded more quickly.
 Q. In your opinion would she have come about under those conditions?

MR. SMITH: objects.

A. I think she would have cleared the point with steam steering gear, which would have answered quickly, and the rudder would come over to port more quickly.

Q. Is that the main reason for your answer? A. Yes.

Q. Do you know how long the "Hurry On" remained aground at that point? A. No, I could not say; three or four days.

Q. You stayed by her? A. Yes.

20 Q. How did she eventually get off? A. She was towed off by the "Robert Cann".

Q. Where was she taken from there? A. To Guysboro.

Q. To discharge her cargo? A. Yes.

Q. Was any of the cargo discharged before she went to Guysboro?

A. Yes, quite a lot.

Q. Where was that discharged? A. Into a motor vessel, "Nova II" or "Nova III"; I am not sure.

Q. That came alongside the "Hurry On"? A. Yes.

30 Q. And then she went to Guysboro and discharged the balance of her cargo? A. Yes.

Q. What was the name of the place where the ship grounded? A. Gradys Point.

Cross Examined by MR. SMITH:

Q. What size vessel was the "Hurry On"? A. I don't know her tonnage rightly.

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examination.

Q. Roughly? A. About 500 tons, I guess.

Q. Nett? A. Yes.

Q. Registered? A. About that.

Q. You don't know the gross tonnage? A. No.

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- Q. Know her overall length? A. I don't know that to be sure.
- Q. Or her beam? A. About 150 long, or 170.
- Q. Her beam? What was her construction, steel or wood? A. Steel.
- Q. And her engines? A. They were of foreign make, I don't know the name; diesel engines.
- Q. They were not steam engines? A. No.
- Q. And they were not ordinary gasoline engines? A. No.
- Q. How many engines did she have? A. One main engine.
- Q. And what else? A. Quite a number of auxiliaries; I don't know much about the engine room. 10
- Q. Know anything about the engine that drove the steam steering gear? A. She had a donkey boiler.
- Q. Was that fired and operated on deck or in the engine room? A. A place clear of the engine room off the main deck.
- Q. Below the main deck? A. Below the poop deck.
- Q. When did you first sign on, on the "Hurry On"? A. A day or two before she sailed; the day before she sailed, I guess.
- Q. Had you been aboard her prior to that? A. One day, about twenty minutes, that is all.
- Q. How long before? A. About a week before that. 20
- Q. Is it not a fact that the hand steering gear in the wheel house was the main steering gear on that vessel? A. It was.
- Q. And the steam gear to which you have referred was the auxiliary gear? A. Yes, you could shift it to hand gear.
- Q. But originally, until shortly before the trip on which you signed, they were entirely separate? A. I don't know.
- Q. As a matter of fact, the standard steering gear on that vessel was the hand steering gear? A. She was fitted for steam steering gear, that is why the both was there.
- Q. Was that the auxiliary gear, or do you know? A. I would not say; I guess it was; steam steering gear, that is what we call it. 30
- Q. Answer the question; do you know whether the main steering gear on that vessel when she was built and when she was brought to Halifax and when she was classified, was a hand steering gear or steam steering gear? A. I don't know that; when I went aboard her she had steam steering gear, and hand.
- Q. And they were interchangeable by throwing out a lever? A. A clutch.
- Q. The hand steering gear was perfectly efficient to steer that ship, was it not? A. It didn't prove so. 40
- Q. It was sufficient, was it not, to shift the rudder; to swing the rudder to the full scope to which the rudder could be swung by a steam steering gear? A. After a time. yes.
- Q. Answer the questions, please: and we will come to the question of time. It was efficient, was it not, to swing the rudder? A. Yes.
- Q. To the full arc to which the rudder could go? A. Yes.

Q. And apart from the time in which it took to swing that rudder, the hand gear was as efficient as any steam gear could be,—apart from the time? A. I don't know; we didn't have her in hand steering gear until the storm came on; that is the only experience I had with it.

Q. You had considerable experience with hand steering gear before you went on this vessel? A. Yes.

Q. You were brought up to them? A. Yes.

Q. And they are efficient, are they not? A. Absolutely.

Q. You are not prepared to say a ship 170 feet long is not seaworthy because she has not steam steering gear? A. No.

Q. As a matter of fact, even the majority of vessels from 150 down have not steam steering gear at all—the majority of vessels you have had to do with? A. Yes.

Q. They are all hand steering gear? A. Um-um.

Q. You would not say a 150 feet schooner was not seaworthy because she didn't have steam steering gear? A. No.

Q. Would you say this boat was not seaworthy if she had no steam steering gear at all? A. I am not saying she was not seaworthy, but she did not answer the helm as she should have done.

20 Q. The helm was brought around in course of time? A. Yes.

Q. The fact she didn't answer it would not be the effect of the steering gear than the rudder? A. She would answer all right given lots of time.

Q. The rudder would come around? A. Yes.

Q. Just as efficiently if not as quickly with hand steering gear as steam? A. I don't know as quickly.

Q. Not as quickly, but as efficiently? A. It will come over eventually.

Q. The only advantage in the steam gear over the hand gear would be the speed with which you could alter course? A. Um-um; yes.

30 Q. So far as keeping the vessel on her course the hand gear should be and would be as efficient as the steam gear? A. Yes, it should be.

Q. And if a vessel fitted with the proper hand gear was not steering properly you would look to some other cause, would you not—if the rudder was answering the wheel you would look to some cause other than defect in the steering gear itself? A. Yes.

Q. Did you examine the propellers of that vessel after she struck? A. Yes; they were out of water.

Q. How soon after? A. The next day; we were out in the boat.

40 Q. What did you find? A. The rudder was all right; the wheel was all right—the propeller.

Q. Didn't you find some blades knocked off? A. No, there was a piece off one.

Q. You don't know where that was knocked off? A. No.

Q. If that blade had been knocked off twelve hours before she struck that might well account for the fact you would have difficulty in steering the vessel? A. Well, it would not have much to do with it.

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Q. Do you say a broken propeller would not have much to do with the vessel being difficult to steer in a storm? A. Not much to do with it, no; it would slacken her speed a bit, that is all.

Q. And have no effect of making it difficult to keep her on her course in a storm? A. No.

Q. You say that from your experience as a mariner? A. Yes.

Q. The vessel was pitching very heavily on the morning before she struck? A. Yes.

Q. And when you decided to put back into Chedabucto Bay there was a heavy storm? A. A big storm. 10

Q. Quite a gale? A. Yes.

Q. Are you familiar with the Beaufort scale? A. Yes, about eight,— between 30 and 40 miles a hour.

Q. What time? A. About 10 or 11, around there.

Q. When did you decide to put back into Chedabucto Bay? A. About 10 approximately! I don't know for sure.

Q. You were then on a lee coast? A. Yes.

Q. Were you fully laden? A. Not quite full; there was room for more cargo in No. 1.

Q. Were you in ballast for the balance? A. Yes, she had her tanks 20 full of oil, ballast tanks.

Q. Have any water ballast? A. No.

Q. Was the ship fully laden or partially laden? A. Partially laden.

Q. That to some extent would account for bad steering? A. No.

Q. Do you mean to say a boat partially laden is as easy to handle as one fully laden? A. Sure.

Q. That is your experience as a seaman; what about a boat dead light? A. She would have—

Q. Answer that; is a boat dead light as easy to handle as one fully laden? A. Not in stormy weather. 30

Q. Where does the dividing line come? A. A ship in good ballast she is not down to her marks and has more freeboard and the ship would not go over and ship so much as if loaded.

Q. On the other hand she has not the same hold in the water? A. No, she would handle herself much better in good ballast than loaded in a heavy sea.

Q. In any event, did you decide to return to Chedabucto Bay after consultation with the captain? A. Yes.

Q. Did you agree with him that was the proper manoeuvre to take? A. That was the only chance open, to go into Chedabucto Bay. 40

Q. A thirty mile breeze is not a heavy breeze? A. She could not keep up to it.

Q. As a matter of fact, there was a very heavy sea running? A. Quite a sea running.

Q. And you and the master considered the ship was in danger if you didn't put back into Chedabucto Bay? A. Yes.

Q. And you did put back into Chedabucto Bay? A. Yes.

MR. PHINNEY: Not back; they were not in there before.

Q. You turned back on your course? A. Yes.

Q. And put into the bay for shelter? A. Yes.

Q. Do you say, from your experience as a mariner, that was the proper thing to do at that time under the circumstances? A. Yes.

Q. You had no difficulty in swinging the ship to get her headed for Chedabucto Bay? A. She took quite a time, but she got there eventually.

Q. How much had you to change her course for that purpose? A. 10 About right angles, I guess.

Q. Let us get this: to shew how bad the steering gear was. How were you heading at the time, and how you altered your course to get into Chedabucto Bay; just a rough sketch, the way you were and how you changed. A. This would be the course by the shore that we were steering; the wind was blowing this way.

Q. What is this—east? A. East—about S.E.,

Q. When you speak of E. and S.E. you speak of magnetic? A. Yes.

Q. Not true? A. E. to S.E. it was all the time.

Q. Put the north point on there; and the wind was coming from E. to S.E. direction? A. Yes.

Q. Which was your first course? A. This one marked "A" is the course up the coast.

Q. And which you were on at the time you determined to put back into Chedabucto Bay? A. Yes. Then we were heading up to the sea.

Q. You put the wheel hard a-port? A. Yes, heading into the sea.

Q. You were heading first in a westerly direction? A. Yes.

Q. When you determined to go into the bay; then you swung at an angle of 45° or more, which would bring you heading in an easterly or southeasterly direction? A. Yes, up to the wind; that is where she is heading into the bay; after we decided to run in the bay, she was heading right into the bay.

Q. You made a complete swing? A. No, around the other way; she could not come up that way.

Q. You swung around— A. This would be the course up the shore; we had to bring her up to the wind; she was heading up to the wind, but she would not keep up that way; we were drifting all the time, and then we decided—

Q. You swung around that way? A. Yes.

Q. And changed her head that way? A. Yes.

Q. "B" is the course which you swung her to the east which would be out to sea? A. Yes.

Q. After that you swung her around again to starboard until you headed her as shewn in "C" which was heading into the bay? A. Yes.

Q. You felt you were getting near Canso ledges and put the helm hard a-port? A. Hard a-starboard to go into the bay.

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—continued.

Q. But first? A. Yes.

Q. Hard a-port? A. Yes.

Q. That was done with hand steering gear? A. Yes.

Q. And swung the vessel around up towards the wind? A. Yes.

Q. She came up all right? A. She would come up so far and then fall off again in the trough of the sea.

Q. It was not the fault of the steering gear she would not keep up, the rudder was around the same as steam steering gear would bring it?

A. Yes.

Q. There was no more advantage except getting it around quickly? 10

A. Yes.

Q. The fact she didn't stay up to the wind was not the fault of the steering gear? A. No.

Q. When you found she would not stay to the wind it was then you changed your tactics and put your steering gear hard a-starboard?

A. Yes.

Q. And swung her around in a circle? A. Practically.

Q. Wide circle? A. Yes.

Q. Headed in for Chedabucto Bay? A. Yes.

Q. As a result of that manoeuvre, when you finished that manoeuvre, 20 your ship was heading in just the opposite direction from which she was heading after you brought her up to the wind? A. Yes.

Q. And that was all done with the hand steering gear? A. Yes.

Q. You then proceeded into Chedabucto Bay? How did you know your position? You had no sights? A. By dead reckoning.

Q. And the position actually turned out to be pretty much as you anticipated it would be? A. Yes.

Q. As you were going into the bay you were practically running before the wind? A. Yes.

Q. Your engines were going, however? A. Yes, I don't know what 30 speed; about $\frac{1}{2}$ or $\frac{1}{4}$ speed, I guess.

Q. Were you heading for any particular place? A. Yes, we were trying to get around Eddy Point.

Q. Where is that? A. Going through the Gut of Canso, on the starboard side; Cape Breton side.

Q. Which side is it on? A. Between Cape Breton and Nova Scotia.

Q. The strait is,—on which side is Eddy Point? A. On the Nova Scotia side.

Q. As you went into this Gut of Canso you were proceeding almost 40 fairly before a strong S.E. wind? A. Yes.

Q. And the engines were on, whether slow or not; at least they may have been half speed? A. Yes.

Q. Did you have the mechanical log out? A. Yes, part of the time.

Q. Did you check your speed on the log? A. We did, but we could not tell; it got frozen up all the time.

Q. You made a fair estimate? What estimate did you make as to the speed you were travelling five minutes before you sighted land? A. With the wind and speed of the ship I guess three or four miles an hour.

Q. What was the speed of the wind—the velocity? A. About eight, Beaufort scale; 40 to 45 miles an hour.

Q. Almost due astern? A. Dead astern.

Q. And the engines turning over at half speed and only making under those circumstances three knots? A. Half or quarter speed.

10 Q. With that sea that was running and the wind that was behind you, would you not make three knots without your engines going at all? A. I guess we would.

Q. How was the current? A. I could not say.

Q. You don't know if with you or against you? A. No.

Q. You would know quickly if it was against you? A. Yes.

Q. You would know when that sea was rushing into the Gut of Canso if it was against you: you would have known immediately? A. Yes.

Q. So it was with you? A. I don't know that; it was very rough.

20 Q. With a rough east wind going into the Gut of Canso, if the current is coming down to meet you, it is not difficult to feel it under your bottom; you would know it immediately? A. We would know all right.

Q. So there was no indication it was against you; it was either still water as far as the tide went, or the tide was with you? A. I could not say for sure; it was very rough; confused sea; the tide might have been against us.

Q. To a mariner of your experience, going through places like the Gut of Canso or the Bras d'Or lakes, where there is a heavy running tide at certain times, there is no difficulty in ascertaining when wind and tide are working together? A. No.

30 Q. So you are not prepared to say that the tide was against you? A. No; we were not on that side of the bay, where the tide would affect her.

Q. So the tide was either with you or still water? A. Or not tide at all.

Q. Are you prepared to say that under those circumstances that your vessel was not proceeding at four knots an hour or more? A. She might have been doing more.

Q. A schooner with bare poles under those circumstances would make more than four knots an hour? A. Yes.

40 Q. So with the engines aiding the wind and no current against you I suggest your speed was not less than five or six knots? A. I could not say exactly what it would be.

Q. It was more than three or four? A. It must have been.

Q. When you first sighted the land—how long after you turned the ship and headed her for the Gut of Canso before you sighted the land—how long elapsed? A. I could not say for sure.

Q. Approximately? A. About an hour I guess.

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Q. During that time you saw no land until just before you struck?

A. No.

Q. And I think you said you saw land 500 feet ahead? A. Yes.

Q. How far were the breakers off? A. Immediately after we saw the land we saw breakers.

Q. How far were the breakers from the land? A. Close on the land.

Q. 100 yards or so? A. May have been,—no, not 100; 50 or 60 yards; there was not much sea around the land at that time, it was more beach.

Q. Approximately 135 yards from the time you saw land—that was the distance you saw land, and the breakers were between you and the 10 land? A. Yes.

Q. And the vessel was then proceeding, as you have indicated, whatever speed that may be; but as soon as the captain saw the land he rang the engines to be reversed? A. Yes.

Q. The immediate effect of the reversing of the engine would be to kill the way on the vessel? A. Yes.

Q. And the quicker the way came off by the reversing of the engines the more difficult it would be to get a response to the steering? A. Well,—

Q. Is that not so from your experience? There is a certain speed 20 the vessel must have, varying with each vessel under different conditions, before she has steerage way? A. That is right.

Q. When you are proceeding—assuming you are proceeding at five knots, and suddenly the engines are reversed, the immediate effect of that is to kill her way forward before she starts to come back, and as you kill her way forward you are automatically taking away her steerage speed.—steerage way? A. Yes.

Q. That is so? A. Yes.

Q. So the very fact, under the circumstances that arose, the master was bound in the exercise of good judgment to reverse his engines, and by 30 that very act he was reducing the steerage way on his ship and making it more difficult to steer,—is that so? A. I guess so, yes.

Q. In order to have escaped the land after he saw it—by the way, she was heading right for it? A. Yes.

Q. And there would be two ways of preventing her striking after land was discovered? One, to stop her way and back her up, if time permitted to do that? A. Yes.

Q. And that would be to swing her clear either to starboard or port? A. To port.

Q. That was the only way? A. Yes.

Q. In order to swing her clear most efficiently was it not necessary 40 steerage way should be kept on the vessel? A. In a time like that—

Q. I quite agree; I don't by any means suggest the captain used bad seamanship; the reverse is my contention, but the two means of escape from the accident could not very well be operated together—to keep her from going head on you had to slacken speed? A. Yes.

Q. In order to swing around you had to increase speed? A. Yes.

Q. That was the dilemma the captain was in? A. Yes.

Q. Naturally he did the thing a man would try to do, he tried to stop his vessel going ashore, but the mere fact of stopping her rendered it less difficult to swing her to port; is that not so? A. Yes.

Q. Render it more difficult to swing her to port? A. Yes, that is quite natural.

10 Q. Even if she had steam steering gear, and it was working, and if she had the most perfect gear ever invented, no man can say under the circumstances, and under the way she was steering generally, whether she could have been swung clear to port or not with the engines hard astern; is that not so? A. With the engines going full astern it has the tendency to throw her stern to starboard, and the wheel hard a-port would swing—
throw her head to port.

Q. The wheel hard a-port would only throw her head to port so long as she was going ahead; the moment that the reverse engines overcame her way, and started her backward; the action of the rudder would be different. A. It would throw her stern to starboard going astern, that would cant her head to port.

20 Q. You are not prepared to say that even with the most perfect steering gear that that vessel with reverse engines could have been swung clear? A. I think she would have come clear.

Q. It is your opinion? A. Yes.

Q. Even with engines reversed? A. Yes.

Q. Would she not have had a much better chance to get clear if the engines were not reversed? A. No, she was headed right for the beach.

Q. There was no room to swing her full ahead? A. No.

30 Q. Your suggestion is, that you would have to take her way off by putting the engines astern, and still be able to swing her by use of steam steering gear? A. Yes.

Q. Will you explain what the steam steering gear would do under the circumstances that a hand gear could not do? A. It would make the rudder respond more quickly.

Q. It would swing the rudder over more quickly? A. Yes.

Q. How would that affect it? A. It would take a great effect on the ship.

Q. On a ship going not more than a knot or two? A. Yes, it would answer more quickly.

40 Q. And how much more quickly? — how effectively quickly? A. I could not say.

Q. Is it not a fact that the effect of reversing the engines and taking what steerage way the vessel had, made her practically unsteerable before she struck? A. With the engines going astern would throw her head to starboard and stern to port.

Q. Did the fact of reversing the engines take the steerage way off that ship? A. Yes.

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Q. And render her difficult to steer under any conditions? A. The idea was—

Q. I am asking the fact,—is that a fact? A. Yes.

Q. And if the engines continued in reverse long enough they would eventually stop that ship altogether and she would have no steerage way at all? A. That is right.

Q. And absolutely at the mercy of the elements—is that so? A. She would go astern, yes; she would have cleared the place; if she had answered her helm at the time she would have cleared that point by — the engines full astern and the wheel hard a-port. 10

Q. That is your opinion—that she would have? A. Yes.

Q. Why didn't she? Didn't you get the wheel hard a-port? A. Not fast enough with hand steering gear.

Q. What was the time between the time you first sighted land and the time she first took the ground? A. I could not say.

Q. According to the protest the land was sighted at 12.25 and at 12.30 she struck. According to what you have already told us, it would take two minutes at most to take the rudder from hard a-port to hard a-starboard? A. Yes.

Q. With the hand steering gear? A. Yes. 20

Q. I assume it would take half that time, or less than half, to take the rudder from amidships to hard a-port? A. Um-um.

Q. So that one minute at the outside it would take to change the rudder from the position in which it was at the time when you first sighted the land to hard a-port; so that on that reckoning the rudder was hard a-port at least four minutes before the vessel struck? A. Yes.

Q. If you had had steam steering gear I think you said it would take from $\frac{1}{2}$ to $\frac{3}{4}$ of a minute to get the rudder from hard a-starboard to hard a-port? A. It would be less than that, I guess.

Q. You already said from $\frac{1}{2}$ to $\frac{3}{4}$. A. About half a minute. 30

Q. It would take half that time or less to get it from amidships to hard a-port? A. Yes.

Q. So at best the saving of time in having steam steering gear after land was sighted would have been half a minute in getting the rudder hard a-port? A. About that time, yes.

Q. So that, to briefly recapitulate, if the time is correct that there was five minutes between the time land was sighted and the time she struck, with the hand steering gear the rudder was hard a-port four minutes before she struck, and would have been four and a half if there had been steam steering gear. And you say that half minute was the thing that caused the disaster? A. I am not saying that half minute caused it, only my idea is if we had the steam steering gear we might have cleared it. 40

Q. Might have? A. Yes.

Q. But you are not at all sure you would have cleared it? A. No.

Q. When the ship finally took the ground and struck, how far was it from where she stranded to land? A. I don't know; about half her length.

Q. The crew were taken off in boats? A. We tried to get a boat out, but we didn't manage it; the boat sank at the side of the ship.

Q. From the bow of the ship to the beach how far was it? A. About fifty or sixty feet, at low water.

Q. Have you sailed steam before you sailed in this vessel? A. Yes.

Q. And you had sailed in sailing ships as well? A. Yes.

Q. Were all the sailing ships in which you sailed hand steering gear? A. Yes.

Q. You never sailed in one with steam steering gear? A. No.

Q. Up to what size sailing ships have you been in? A. Up to 400 tons.

Q. Deep sea going vessels? A. Yes.

Q. None of them had steam steering gear? A. No.

Q. I suppose it was not unusual in vessels of that size, and larger ones, in cases of storm, to have two men on the wheel? A. No.

Q. And sometimes more if necessary? A. Yes.

Q. I take it you took about the same time to get the rudder from hard a-starboard to hard a-port on these large sailing vessels—up to two minutes? A. They were rigged a little different; yes.

Q. And in the mechanics of the hand steering gear there was not much difference between the "Hurry On" and sailing vessels on which you sailed? A. Yes, quite a difference; the wheel aft was about the same as on the sailing ship; it has a worm.

Q. Most of these sailing ships you speak of were with the wheel right aft? A. Yes.

Q. On the "Hurry On" there was a wheel right aft—another auxiliary gear right aft with a worm? A. Yes.

Q. Where these large ships have line and chain—yoke line? A. No.

Q. The "Hurry On" had? A. Yes, chain.

Q. But it works on the principle of the yoke line? A. Yes.

Q. Would it take longer to swing the rudder with the yoke line than with worm? A. No.

Q. It would be quicker, as a matter of fact; it would be quicker to swing with gear such as on the "Hurry On" than with the worm? A. The worm would be quicker.

Q. If the worm would be quicker it would be harder? A. No, it works pretty easy.

Q. How long to swing the rudder from port to starboard on the larger sailing ships you were on? A. Two or three seconds; spin the wheel with your finger.

Q. In a heavy sea? A. No.

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Q. We are speaking of heavy sea—at the time of the stranding. A. 15 or 20 seconds.

Q. Have you ever sailed in steamers with hand steering gear?
 A. Yes.

Q. What size? A. Quite large steamers; they all carry hand steering gear.

Q. In which the hand steering gear was the one usually used? A. No.

Q. On most of the steamers you have sailed there has been the constant steering gear with steam, and auxiliary hand? A. Yes. 10

Q. I suppose in most the hand steering gear is aft? A. Yes, mostly aft.

Q. The pipes that lead from the steering engine to the wheel house, I think you said they came along on deck close by the hatch combings?
 A. Yes.

Q. They were housed? A. No.

Q. Was there packing or covering over them? A. No, they were open to the water.

Q. For what portion of their length—the whole way? A. Yes, pretty near the whole way. 20

Q. Are you sure of that? A. Yes.

Q. What distance was that? A. About 50 or 60 feet, from the boiler room to the wheel house.

Q. And you say they were open and uncased or boxed, when the vessel left Halifax for Newfoundland? A. There was no casing on those pipes.

Q. Or no packing of any kind? A. None.

Q. With regard to the engines, you spoke of a number of break downs.
 A. On the engines.

Q. I suppose by break down you mean stoppage of the engine? A. Yes. 30

Q. You don't know if it was a break down or what the cause was?
 A. No.

Q. Whether it was trouble with the fuel, or trouble with the condenser, or trouble with ignition, or anything of that kind? A. I don't know.

Q. By break down you don't mean the actual breaking down of the engine, you mean shut down? A. Shut down, yes.

Q. In the evidence in which you said break downs from time to time I take it you mean stoppage of the ship due to shutting down the engine?
 A. Yes. 40

Q. And you don't know the cause, whether it lay in the engine or in the fuel or in some other cause? A. No.

Q. There was no break down in the engines at any time after you turned the vessel into Chedabucto Bay? A. Not to my knowledge.

Q. And the engines were working, so far as you know, and from the time you changed course and headed into the bay there was no sign of the engine breaking down? A. Not to my knowledge.

Q. As far as you know, they were working perfectly and there was no break down? A. In the steering gear.

Q. In the hand steering gear the only defect you would say was that the rudder would not respond as quickly as with steam gear? A. Yes.

Q. Otherwise there is no other defect you could suggest in that? A. No.

10 Q. Did you have anything to do with the landing of the cargo? A. No; I helped to take some out.

Q. You don't know about the insurance on the cargo or hull, or whether there was a general average adjustment or anything of that kind? A. No.

Re-Examined by Mr. PHINNEY:

Q. When you were officer in charge on the bridge and the engines stopped, did you find out the cause from the engine room? A. They would let us know that they were going to stop the engines, or if the engine had stopped on its own, they would come up and let us know.

20 Q. They told you the conditions under which the engines were stopped each time? A. Yes.

Q. What did they tell you during these stoppages that occurred on this voyage? A. One cause was—

Mr. SMITH: I submit the cause cannot be proved in this way.

Mr. PHINNEY: Very possibly it cannot.

Q. But you did have reports from the engine room as to the cause of the stoppage in each case? A. Yes.

Q. So that you did know the cause of the stoppage? A. The water cooling system—

30 HIS LORDSHIP: He knew what they told him.

Q. Are you prepared to say what effect the cold water would have coming on this steam pipe leading to the wheel house, as far as the steering gear was concerned?

Mr. SMITH: I asked no questions about that.

Mr. PHINNEY: He examined some time about this pipe running on deck.

Mr. SMITH: I asked if there was any casing on it.

Mr. PHINNEY: That is whether there was protection on it; that would go to the effect cold might have on it.

Mr. SMITH: I don't suppose it is important.

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MR. PHINNEY: It is not very material, if my learned friend insists on it, I will let it go: other witnesses can give the evidence.

Q. Where was the steering engine located? A. On the lower bridge over the saloon.

Q. Is that the wheel house you have been talking about? A. Yes.

Q. In the wheel house? A. Yes.

Q. I think you told my learned friend you examined the propeller of this ship when it was out of water? A. Yes.

Q. How big a piece was off this blade? A. Not very big.

Q. How big? A. About six inches off the tip. 10

Q. Off the tip of the blade? A. Yes.

Q. How long was the blade? A. I could not say.

Q. About how long? A. About 3½ feet.

Q. How much empty space had this ship in her hold when she went aground? A. There was room for about 300 barrels more in No. 1.

Q. Is that all? A. That is all.

Q. Was the ship well trimmed? A. Yes.

Q. Are you familiar with the currents and tides in Chedabucto Bay? A. Not very much, no.

Q. Know if there is any particular current at any time in which you were? A. Not in that part of the bay; in the Gut of Canso there would be. 20

Q. The part of Chedabucto Bay you were in, is there any current running in or out of that? Y. Yes, sometimes with the rising of the tide.

Q. How much current would there be? A. About—

Q. This is Chedabucto Bay. A. About half a knot.

Q. Are you suggesting that a current of half a knot would be perceptible in a 30 or 40 mile gale? A. No.

Q. Would you say as a navigator that time is an element of great importance when you were proceeding about four knots heading for land which is about 500 feet away? A. Yes. 30

Q. Is time an element of great importance how that ship is manoeuvred at that time? A. Yes.

Q. Is it not the major element? A. Yes.

Q. And every second counts? A. Yes.

Q. Have you any idea at all of the time which elapsed from the moment when you first sighted land to the moment when you struck land—struck bottom? A. Somewhere in the vicinity of five minutes, I guess.

Q. How do you arrive at five minutes; have a watch and look at it? A. No. 40

Q. Know the time you sighted the land by a clock? A. That was all in the log book; the second mate took that down; I can't remember it.

Q. So I take it, as a matter of fact you don't know what the time was between those two moments? A. No.

AND THEN THE WITNESS WITHDREW.

Evidence of Capt. James W. Carter

Taken at Sydney, N. S., July 17th, 1936, before A. D. Muggah, Esq. Commissioner.

G. McL. DALEY, K.C.,
appearing for Plaintiff.

C. B. SMITH, K.C.,
appearing for Defendant.

CAPTAIN JAMES W. CARTER, sworn.

10 Examined by MR. DALEY :

- Q. What is your occupation? A. Master Mariner.
 Q. You hold a certificate? A. Yes.
 Q. What certificate? A. Master Mariner.
 Q. Board of Trade? A. Board of Trade, England, 1927.
 Q. How long have you been going to sea? A. Twenty-three years.
 Q. Started in what capacity? A. Apprentice.
 Q. I suppose you served in each of the various offices until you got to be captain? A. Yes.
 20 Q. You are on the S.S. "John Cabot" at the present time? A. Yes.
 Q. She is in North Sydney? A. Yes.
 Q. Leaving tomorrow for Newfoundland? A. Yes.
 Q. You don't know when you will return? A. No.
 Q. Did you ever see the M.V. "Hurry On"? A. Yes.
 Q. Under what circumstances? A. I was Master of her.
 Q. When did you first join her? A. 2nd of January, I think it was.
 Q. What year? A. 1935.
 Q. Where did you join her? A. Halifax, N. S.
 Q. Did you sail from Halifax on the "Hurry On"? A. Yes.
 Q. Where bound for? A. Newfoundland.
 30 Q. What part? A. Woods Island, in the Bay of Islands.
 Q. You went down to load herring? A. Yes.
 Q. What was the tonnage of the "Hurry On"? A. 960 dead weight.
 Q. How was she powered? A.
 Q. On the trip from Halifax to the Bay of Islands did you have any trouble with the engine? A. Yes. Motor engine.
 Q. What was the trouble? A. I could not tell you the trouble. She was stopped on several occasions.
 Q. For long periods of time? A. An hour sometimes.
 Q. Where was the bridge on the "Hurry On"? A. Amidships.
 40 Q. Diesel engine? A. Yes.

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- Q. Just one? A. One engine.
- Q. What kind of steering equipment did the "Hurry On" have? A. Steering hand.
- Q. Tell us how many wheels were on the hand equipment? A. One.
- Q. Where? A. On the bridge.
- Q. How many for the steam equipment? A. One.
- Q. Where was that? A. On the bridge.
- Q. Any steering equipment on the flying bridge? A. Yes.
- Q. What kind? A. Steam.
- Q. So that you could steer the "Hurry On" with the steam equipment 10
from either the flying bridge or the bridge? A. Yes.
- Q. And with the hand equipment from the bridge? A. Yes.
- Q. How was the rudder changed from the steam to the hand equip-
ment? A. By a clutch.
- Q. Where was the clutch? A. On the steering engine.
- Q. Where was the steering engine? A. On the bridge.
- Q. How was the steering engine operated? A. By steam.
- Q. Where was the boiler? A. Aft.
- Q. In the engine room? A. Approximate to the engine room.
- Q. I suppose you don't know the capacity of the boiler? A. No. 20
- Q. How did the steam reach the engine from the boiler? A. Pipes
along the deck.
- Q. Which part of the deck? A. After deck.
- Q. Were the pipes covered? A. No.
- Q. Exposed to the water? A. Exposed.
- Q. Were you ever on a steamer with that type of equipment before,
with the pipes leading along the deck? A. Not from aft to amidships, no.
- Q. Going down from Halifax to the Bay of Islands did you have any
trouble with the steering? A. No.
- Q. What kind of weather did you have on the trip down from Halifax 30
to Bay of Islands? A. Moderate.
- Q. Was the ship loaded or light? A. Light.
- Q. Do you remember when you arrived at the Bay of Islands? A. 5th
or 6th of January.
- Q. Then you proceeded to do what? A. Load herring.
- Q. Did you load herring at different ports in the Bay of Islands, or
only one? A. The same port, but two different docks.
- Q. What port was that? Woods Island or Curling? A. No, Middle
Island, it is all small coves there.
- Q. You loaded from different consignees? A. Yes. 40
- Q. How long did you stay around the Bay of Islands? A. Some-
where about ten days.
- Q. When did you sail from the Bay of Islands? A. 16th.
- Q. Did any unusual incident happen from the time you left Bay of
Islands until you got off the coast of Nova Scotia? A. No, I can't say
there did.
- Q. What was the weather like? A. Moderate.

Q. When you got off the coast of Nova Scotia, or Cape Breton Island, what was the weather like? A. Conditions were getting worse, falling barometer, wind bearing south east, strong wind.

Q. What was the sea like? A. Rough.

Q. Would you care to say what the force of the wind was after you came by Scatarie? A. About five to six.

Q. What date would that be? A. That would be late on the 17th, the night of the 17th.

Q. Was the vessel shipping water? A. Yes.

10 Q. Did you have any trouble with the vessel at that time? A. No, not then exactly.

Q. After you proceeded down the coast towards Halifax? A. I had a little trouble with the steering gear.

Q. What time was that? A. Early morning of the 18th about three o'clock.

Q. Did you stop your engine as a result of that? A. Yes. I stopped on two or three occasions.

Q. What for? A. To see if we could do anything with the steam steering gear.

20 Q. Do you remember when you first stopped your engine that night? A. Must have been about six in the morning of the 18th. I can't give it to you accurately.

Q. You made a Notarial Protest after the accident? A. Yes.

Q. I notice that the engine was stopped around 12:25 A.M. on the 18th? A. Yes, that may be.

Q. What would that be caused by? Steering trouble? A. Probably.

Q. Just tell us how the steam steering gear was acting at that time? A. It was condensing coming along the deck lines.

Q. Was she iced up pretty well? A. Yes, she was getting the ice.

30 Q. How did the trouble with the steering gear manifest itself? A. By jamming all the time, the wheel jamming.

Q. Would not cause the rudder to respond? A. No.

Q. What did you do when that happened? A. That is when I stopped to see if I could do anything with it.

Q. Did you ask any assistance? A. The Chief Engineer was around most of the time.

Q. Did you examine the head of steam to see if you had sufficient head? A. Yes.

Q. What did you find? A. About 95 lbs.

40 Q. Was that sufficient? A. Yes.

Q. I understood you to say that the weather was increasing in violence all the time in the early part of the 18th? A. Yes.

Q. And the vessel shipping water? A. Yes.

Q. Why did you not make for shelter at that time? A. I could not rely on the steering gear.

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Q. Was there any shelter available? A. Louisburg was the nearest place at that time.

Q. Were you within easy distance of Louisburg? A. Yes.

Q. Did you see Louisburg light or fair way buoy? A. I could see the buoy, or the light on the buoy.

Q. You have said you would have gone in to Louisburg but for the trouble with the steering gear? Why did you not go in to Louisburg? A. I could not rely on my ship turning quick enough.

Q. Is there a sharp turn? A. Yes, two.

Q. How wide is the channel at the sharp turns? A. About 500 yds. 10
I think, between the rock and shore.

Q. What were you afraid of? A. That she would not answer to the helm quick enough.

Q. Then you proceeded down the coast? A. Yes.

Q. Did you have any further trouble? A. Still having trouble with the steering gear.

Q. Was the storm increasing? A. Yes.

Q. You finally abandoned the steam steering gear? A. Yes, about 7 o'clock, I think.

Q. And put it in hand gear? A. Yes. 20

Q. How did she steer when you got in hand gear? A. Very badly.

Q. Tell us what the trouble was? A. She did not answer quick enough, the wind would blow her off and the man at the wheel could not haul her over quick enough to counteract it.

Q. How many points would she fall off? A. Three or four points. Three or four each side of her course.

Q. How many men did you have on the steering wheel at that time? A. Two.

Q. What speed were you making? A. About 4 knots; the engine was in half speed. 30

Q. This was after seven in the morning? A. Yes.

Q. What did you do, under these circumstances, in the early forenoon of January 18th? A. Sighted Canso buoy.

Q. Sighted it on which side of the ship? A. On the port side.

Q. What did you do? A. I was going to haul out, but she would not hold up against it.

Q. Why would she not? A. I could not depend on the steering gear, she would fall off, and I was scared of going on the Canso Shoals.

Q. You attempted to go out in the open? A. Yes, but she would not hold her head into it. 40

Q. So you brought her around? A. Yes.

Q. What did you do then? A. My idea was to try and make Queensport.

Q. Did you do that? A. I ran into ice shortly after.

Q. This a Chart of the Gulf of St. Lawrence, and the Island of Cape Breton—British Admiralty—

Chart marked B/A.

Mark roughly on B/A the course you were steering from the time you came off Cape Breton Island until you made up your mind to turn? A. I don't just rightly remember the distance.

Q. What did you do? A. I picked up this buoy on the port side—

Q. But your line would be in here—A. You asked for a course line.

Q. The course you were steering is marked by the line A-B? A. Yes.

Q. Show us the course the ship was on when you first sighted the Canso Buoy? The position of the ship at the time you first sighted the
10 Canso Buoy? A. The position of the ship would be about here—"C"

Q. "C" is the position of the ship when you sighted Canso Buoy?
A. Yes.

Q. You had been set in from your course some distance by the wind?

A. Yes, by wind and sea and bad steering.

Q. Was there any tide to set you in? A. I could not really tell you the condition of the tide when I was there.

Q. Was there any current at that point? A. Tidal current.

Q. What was the visibility at the time you saw this buoy? A. About a quarter of a mile, I should say.

20 Q. How did visibility continue? A. About the same.

Q. Was there snow? A. Heavy snow.

Q. After you started to make for Queensport did you continue in your decision? A. I turned around when I saw the buoy to try to get out, and she was still dragging back, so I came back into the Bay.

Q. Intending to make for Queensport? A. Yes.

Q. Did you pursue your decision and make for Queensport? A. Until we met ice.

Q. Then what did you do? A. Turned her out to the Gut of Canso, Eddy Point.

30 Q. Mark that on the chart? A. "E".

Q. Did you reach Eddy Point? A. No.

Q. Tell us what happened? A. We met the land, that is all.

Q. At what point? A. Grady Point I think it is called. I don't think it is marked.

Q. Near Oyster Pond? A. Yes. "F".

Q. When you first saw the land at Grady Point how far was the "Hurry On" out from the land? A. I don't think she would be more than 1000 ft, maybe less or more. At that time I wasn't thinking about measuring distance.

40 Q. Where was the surf? How far from the land was the surf? A. There is a ledge very close to the land.

Q. What did you do when you saw it? A. I cut the helm hard aport, ordered it hard aport.

Q. How many men were on the wheel at that time? A. Three.

Q. When did you put the third man on? A. When I got out in the Gut of Canso.

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- Q. You ordered the wheel hard aport? A. Yes.
- Q. Did you do anything else? A. Put the engines full astern. She was answering very slowly the wheel.
- Q. Which way does the propeller revolve? A. This is a motor and she revolves opposite to steam. Left to right on the upper turn of the propeller, and that has a tendency to send the ship hard aport—the quickest way to bring her around.
- Q. Did she respond to that? Did she respond to that manoeuvre promptly? A. Apparently not quick enough.
- Q. With the result that? A. We struck on the ledge. 10
- Q. The storm was very bad that afternoon, was it not? A. Yes.
- Q. How did you get your first message to shore? A. By means of a rocket line.
- Q. Did you think the ship was in danger of breaking up then? A. No.
- Q. She was in a perilous position? A. Yes.
- Q. What would you say about the difference between the steam steering equipment and the hand equipment, was there any difference between the two? A. Yes.
- Q. What was the difference? A. Steam steering gear is much quicker 20 than hand gear.
- Q. Would it have made any difference if you had had her in steam gear at that time, in avoiding the ledge? A. Yes, I should probably have cleared the ledge if I had steam steering gear.
- Q. Why do you say that? A. Judging by the distance we were from the edge of the shoal when I sounded afterwards.
- Q. And because it was quicker, I suppose? A. Yes.
- Q. In your opinion what speed were you making at the time you went on the shore? A. I was making about four knots.
- Q. Is that taking into consideration the condition of the wind and 30 tide? A. I really could not say. I could not keep a log out on account of ice.
- Q. Would the ice cut the log off? A. I hauled it in.
- Q. Because of drift ice? A. Yes.
- Q. It would have cut it off? A. It would have, yes.
- Q. In an emergency of that kind is time an element of importance, time in the steering gear? A. Yes.
- Q. Would the reversing of the engine take steerage way from the ship, the manoeuvre you were making? A. No, it would turn you quicker.
- Q. Hasten the action? A. Yes, a stern engine has a tendency to 40 send the ship's head to port.
- Q. Was it very cold on the night of the 17th? A. Yes.
- Q. Zero weather? A. Yes.
- Q. Was it cold on the day of the 18th? A. Continued cold.
- Q. Also zero weather? A. Yes.
- Q. What time did the ship go aground, do you know? Around noon wasn't it? A. 12:30, about.

Cross-Examined by MR. SMITH:

Q. Was there a log book on the ship? A. Yes, sir.

Q. Mate's log and Fair Log? A. Yes.

Q. What became of that, do you know? A. They were handed to Mr. Walker, I think.

Q. The "Hurry On" was 960 tons dead weight, her registered tonnage was approximately 300? A. Three something.

Q. You say on the trip from Halifax to Bay of Islands you had trouble with the engines and also on the return journey you had some trouble with the engines necessitating certain stops? A. The steering engine.

Q. No trouble with the main engine? A. Not that I can recall.

Q. There was no trouble until you were returning from Bay of Islands? The steering equipment, as I understand it, was a quadrant and rudder-head? A. Yes.

Q. Chain and rod carried to the wheel house? A. Chain and rod from the engine.

Q. From the rudder itself did you not have a chain and rod to the barrel of the wheel? A. Yes.

Q. And the chain went around the barrel of the main steering gear in the wheel house? A. Yes.

Q. The only difference in the operation of the rudder between the manuel and the steam steering gear was that when the steam steering engine was on the barrel of the wheel was rotated by steam, and when the clutch was thrown and the vessel was in hand gear, the wheel was handled by man power? A. Yes.

Q. The steering gear from barrel to rudder-head was exactly the same whether operated by steam or by hand? A. Yes.

Q. In addition to that you also had a worm steering gear aft? There was a steering gear aft, wasn't there? A. No.

Q. Do you mean to say there was no steering gear right aft working on a worm? A. No, sir.

Q. Are you sure about that Captain? A. Not that I recollect.

Q. Will you say that to the best of your recollection there was no emergency or auxilliary steering gear aft, working on a worm? Did you ever see a vessel the size of the "Hurry On" that did not have one? A. I can't figure out that steering wheel aft.

Q. According to your recollection there was no steering gear aft? A. I don't recollect it.

Q. Then will you answer my other question—did you ever know a vessel the size of the "Hurry On" that did not have an emergency or auxilliary steering gear aft? A. I would not like to swear to that at all. I don't know.

Q. There was another wheel on the flying bridge? A. Yes.

Q. Operated by the steering engine? A. Yes.

Q. Steam steering gear? That wheel could not be used manually?

A. No, it was too small.

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Q. That would be the only reason? It would not give enough leverage? A. I think it is connected direct to the engine.

Q. So far as steering the vessel by the wheel on the bridge, the difference between steering the ship by hand or by steam gear would only be a question of the speed with which the wheel could be rotated? A. Yes.

Q. They work on the same chains and rods, the same quadrant and the same rudder? A. Yes.

Q. The only difference would be the speed with which the rudder could be shifted? A. Yes.

Q. I think you said the trouble with the steam steering gear was 10 caused by condensation in the pipes? A. Yes.

Q. And that was brought about by the cold water and ice on the deck coming in contact with the pipes? A. Yes.

Q. Did you yourself examine the pipes of the steering engine to ascertain the effect of this condensation? A. Yes.

Q. Was the effect that there would be short periods where you would not get any pressure, the pressure would soften for a moment and then come on? A. If the water left the deck it got a chance to heat the pipes.

Q. Did the engine lose power or was it intermittant? A. Lost its 20 power.

Q. And would not rotate the wheel? A. Yes.

Q. How did you arrive at that conclusion? A. By trying the wheel myself.

Q. Trying to steer with the steam? A. Yes.

Q. I assume you are neither a stationary nor marine engineer? A. No, sir.

Q. You only know the result—that you could not get any response from the wheel using the steam gear? A. Exactly.

Q. You spoke about the wheel jamming, what did you mean by that? A. Jamming—like when you get water in a cylinder. 30

Q. Did the wheel itself jam? There was nothing wrong with the wheel itself? A. No, certainly not.

Q. No jamming of the wheel, you mean you were not getting power to turn the wheel? A. Yes.

Q. No actual jamming of the wheel? A. No, not between the wheel and the rudder.

Q. When did you take your log in? A. I don't recollect.

Q. Before you passed Louisburg? A. No, after, I think.

Q. Did you make a log book entry of it? A. Most probably.

Q. You don't know how long after you passed Louisburg you took 40 your log in? A. No, sir.

Q. From the time you took in your log until you sighted Canso light you were sailing on dead reckoning? A. Yes.

Q. And estimating your speed? A. Yes.

Q. You were not sailing by any observation? A. No.

Q. Would not an accurate knowledge of your speed be an essential in finding your position by dead reckoning? A. How do you mean?

Q. In order to know even approximately your position you would have to know how fast you were moving from a given point? A. Yes.

Q. And if you took in your log your ability to navigate by dead reckoning with any degree of accuracy would be gone would it not? A. I really can't explain it, but you get used to the motor on a ship.

Q. As soon as your log was in you had to estimate or guess the speed? A. Estimate.

Q. Or guess? A. Yes.

Q. And if you were inaccurate in your estimate as to the speed you could not get the correct position of the ship at any time? A. No not without observation.

Q. Proceeding by dead reckoning? A. Yes.

Q. And in dead reckoning too you had to make an estimate for the tide? A. Yes.

Q. And any wind and wave conditions that might take you off what you laid as the ship's course? A. Yes.

Q. As a matter of fact from the time you set your course—where was the last observation on Cape Breton? A. Louisburg.

Q. You set a course from Scatarie? A. Yes.

20 Q. That is the line B-A? A. Yes.

Q. That carries you out well clear of the Canso ledges and the Guysborough coast? A. Yes.

Q. About how long had you thought you were proceeding on that course until you sighted the light on the port bow? A. I can't recollect, you would have to get it from the log book.

Q. It would be a question of hours? A. Yes.

Q. And you were off the course you thought you were on? A. Yes, set in.

30 Q. You were inside your course by approximately how much. A. I don't know.

Q. You could make an estimate? A. 15 miles.

Q. You were 15 miles west of where you thought you were? A. North and west.

Q. Up until the time that you sighted Canso light on your port bow you had no intention of going in to the gut of Canso for shelter? A. Not at that time.

Q. And it was a fact that you found yourself in that particular position that induced you to go to Eddy Point? A. To Queensport.

40 Q. Take the morning of the 18th, about what time did the wind shift around to east south east? A. It was about 9.30 in the morning.

Q. Prior to that at 7 o'clock you had shifted from steam gear into hand? A. Yes.

Q. About 9 o'clock you said the wind shifted? A. Yes.

Q. At about what speed was it blowing at 9 or 9.30 on the morning of the 18th? A. 6 or 7.

Q. Beaufort Scale? A. Moderate gale.

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Q. Did it increase after that? A. It seemed to be increasing all the time.

Q. At the time you were stranded, what would you say? A. About 6 or 7.

Q. Did it get higher than 7 at any time? A. I would not like to say.

Q. High seas? A. High seas.

Q. The vessel was taking water all over, wasn't she? A. Yes.

Q. For some four or five hours before you sighted the light at Canso the vessel was being steered by hand? A. Yes.

Q. You had no resort to the auxilliary aft if there was one? A. I 10 don't recollect of their being one.

Q. Are you familiar with the ordinary form of worm steering gear? A. Yes.

Q. They operate very quickly, don't they? A. No, I would not say so. The hand gear we were using was on the same drum as the steam.

Q. I am speaking of the one you don't remember? A. I know what you mean. I would not say they are quick.

Q. Have you had experience with vessels of a similar size to the "Hurry On"? A. No.

Q. Do you know whether such vessels are steered without the use of 20 steam steering gear at all? A. Quite possibly.

Q. Do you know? A. I haven't had much to do with small ships.

Q. In a sea-faring life you have come to know quite a lot about ships of various sizes? A. A little.

Q. Don't you know it is quite common for vessels of that size not to have steam steering gear at all? A. I have heard of them.

Q. When did you take soundings? Did you take soundings before you sighted the Canso light? A. No.

Q. What soundings did you take after that? A. I took soundings in 30 the morning. We passed the buoy about 11.30.

Q. Do you remember when you took the last soundings prior to striking? A. That was the last one I took.

Q. At the time you struck, Mr. Willis, your First Mate, was on the bridge with you? A. Yes.

Q. I am reading to you from his evidence—

"Q. What happened after you changed your course and headed for Eddy Point? A. We kept a good lookout watching for land.

Q. Had you not seen land up to that time? A. No, we saw land right ahead, about 500 ft. It was very thick, and immediately after we saw the breakers. The Master was nearest and he ran in and gave 40 the order to turn the wheel hard aport, at the same time reversing the engine."

There seems to be a difference between your estimate and Mr. Willis's as to the distance? A. At that time it wasn't a case of measuring distances.

Q. Visibility was very low? A. Very low.

- Q. And it is quite possible that it was only 500 ft. A. Possible.
- Q. You previously said the visibility was about a quarter of a mile that morning? A. About a quarter of a mile. 1000 ft.
- Q. Give me the best estimate you can as to the visibility at the time she struck? A. I would say about 1000 ft, more or less.
- Q. You think it was more than 500 ft. A. I should imagine a little more, just taking it as I can see it now.
- Q. At the time you struck you were proceeding up Chedabucto Bay? A. Yes, up towards the entrance to the Gut of Canso.
- 10 Q. Pretty near the entrance? A. Yes.
- Q. And the wind was following? A. Yes.
- Q. And the sea was following? A. Yes, wind and sea in the same direction.
- Q. And you don't know about the tide? A. No, I can't just tell that.
- Q. Your engine was going half speed? A. Yes.
- Q. About what speed do the engines generate at half speed? Assuming smooth water and no wind? A. I haven't tried it in smooth water.
- Q. I think the evidence of Mr. Willis was about 4 knots? A. Only doing 7 full.
- 20 Q. At 7 knots full 4 or 4½ would not be unusual? Half is always a little more than half or full? A. Maybe 3 or 3½ knots.
- Q. I refer again to the evidence of Mr. Willis describing the conditions just before the accident—
- “Q. What was the velocity of the wind? A. About 8 Beaufort Scale—40 or 45.”
- Q. Do you agree with that? A. Quite possible.
- Q. “Almost due astern? A. Dead astern.”
- Q. Do you agree with that? A. Yes.
- Q. Just before she struck? A. Yes, about.
- 30 “Q. With the sea that was running and the wind that was behind you, would you not make three knots without your engines going at all? A. I guess we would.”
- Q. Do you agree with that? A. No.
- Q. You don't? A. No.
- Q. What do you estimate you would have made without your engines going at all? A. If you had the wind and sea aft and the engines stopped you would come beam to.
- Q. Assuming that she was steered in a course dead before the wind? A. You could not steer without your engines.
- 40 Q. Was not the force of wind and wave sufficient to carry you to lee-ward at a speed of practically three knots? A. No, sir.
- Q. What speed would it give? A. A mile would be the most.
- Q. Supposing she came broad side to the wind and sea? A. It would have the same effect.
- Q. Do you think she would go as fast? A. Equally.
- Q. That is your opinion? A. Yes.

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Q. In view of the wind and other conditions existing at the time, and the speed at which the engine was turning, what do you estimate your actual speed was at the time you first sighted the land? A. I would say about four knots.

Q. Notwithstanding the fact that the wind and sea were behind you and the engines going at half speed? A. Yes.

Q. My learned friend asked you if the effect of reversing the engine would not be to render it more difficult to sheer off from the shoal? A. Not to port.

Q. When you first saw the land and breakers ahead you were coming 10 at it head on? A. Yes.

Q. Where was your clear water? A. Port side.

Q. In towards Chedabucto Bay? A. Yes.

Q. And you ordered the rudder hard aport? A. Yes.

Q. And at the same time you ordered your engines into reverse? A. Yes.

Q. I put it to you that the effect of those two orders would be to neutralize each other? A. No, assist each other in a motor ship.

Q. In order that the rudder may act you must have a certain amount of steerage way? A. Yes. 20

Q. And the slower the speed the less direct effect you get from the rudder? Up to a certain point you have no steerage way? A. Yes.

Q. And up to 6—8—12 knots the rapidity with which one turns the ship by the rudder depends on the speed? A. Yes.

Q. So that anything that slackens the speed has a tendency to make the vessel respond more slowly to the rudder? A. Not necessarily. When you reverse your engine you have already your ship turning to port.

Q. I am asking you about stopping? A. Actual stopping, yes.

Q. Supposing you had not reversed the stopping would have a tendency to lessen the speed with which the vessel would respond to her 30 helm? A. Yes.

Q. And if the vessel came to a dead stop, or down to a certain speed she would have no steerage way and would not respond to her helm at all? A. No.

Q. Before she gets in to reverse, before she actually starts to go astern the effect would be to take off her headway and bring her to a stop and start her in reverse? A. Yes.

Q. So that so far as the effect of reversing the engines—you would take the steerage way off her? A. You have your ship canting. She is already on the move and you reverse your engine and the beat of the propeller assists you which ever way you are sailing, as long as she is not 40 stopped.

Q. As long as she has not slowed down beyond effective steerage way? A. Yes.

Q. You said, I think that if the steam gear had been working you could probably have cleared the ledge. I assume that is a mere guess. A. I am still saying that I most probably would have cleared it.

Q. The only effect of having the steam steering gear would be that the rudder would have responded more quickly? A. Absolutely.

Q. From dead centre to hard aport, assuming that when you gave the order—there were three men at the rudder at that time — how long would it take three men to swing that rudder hard aport? A. I would say at least a minute.

Q. How quickly could they do it having effective steam gear? A. Half that speed, maybe less.

Q. The speed with which the chain would wind around the barrel? A. Yes, exactly.

MR. DALEY:

Q. At any time after you gave the order to reverse the engine was the "Hurry On" slowed down beyond effective steering way? A. Not until she struck.

Q. So that the effect of reversing the engine was beneficial at all times? A. I considered it so.

AND THEN THE WITNESS WITHDREW.

Halifax, Tuesday, December 22, 1936, 10 a.m.

Before THE CHIEF JUSTICE.

20 C. B. SMITH, K.C. }
 J. A. WALKER, K.C. } for the Unus Shipping Company, Ltd.
 G. McL. DALEY, K.C., for the claimant.

MR. DALEY: I want to ask permission to make an amendment to the Statement of Claim concerning which I have spoken to Mr. Smith; paragraph 7a,—“The said stranding and the said loss or damage was due, among other things, to the neglect or default of the master and/or mariner and/or servants of the carriers in the navigation and or management of the said motor boat ‘Hurry On’.”

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Re-
examination.

Mr. Daley
Amends the
Statement of
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30 MR. SMITH: I have no objection to that subject that it be taken that it puts the matter in issue. I don't think there is any necessity of filing an amended defence. I think I have alternatively pleaded: on the understanding the matter is in issue I am quite content.

MR. DALEY: I also want to put in evidence at this time certain admissions which have been jointly made by my learned friend, Mr. Smith, and myself, as to a number of facts. (Marked E/18).

I also want to put in certain other admissions which Mr. Walker has made in this matter. (Marked E/19).

40 I also want to tender the evidence of John T. Cruickshanks, Jacob Poole, W. A. Shaw, James W. Carter and John H. Willis: they were all examined before your lordship, with the exception of Carter, who was examined on commission in Sydney.

No. 6

Evidence of Melville H. Bloomer

MELVILLE H. BLOCMER, being called and duly sworn, testified as follows:

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Examined by MR. DALEY:

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Examination.

Q. What is your occupation? A. Master mariner.

Q. Would you mind, in order to save me asking a number of questions, giving me your experience at sea,—a short history of your experience at sea: when you first went to sea, and trace it down to the present time. A. My early training was started on His Majesty's Training Ship "Worcester"; then I spent five years in sail; then I spent five years in His Majesty's navy; since when I have been in command of cable ships belonging to the Western Union Telegraph Company. 10

Q. How long in command of cable ships belonging to that company?

A. Thirteen years, I think.

Q. What certificate, if any, do you hold? A. Master Mariner's O.C., that is a Master Mariner's certificate which permits you to take to sea any type of vessel, deep sea, shallow water, or anything.

Q. Is that issued by the Board of Trade? A. Board of Trade, London. 20

Q. What are you doing at the present time? A. In command of the "Lord Kelvin".

Q. During your experience on the sea, have you ever had any experience on small steamers? A. Yes.

Q. What size steamers? A. Around about 140 or 150 feet long.

Q. I am shewing you a plan, marked E/20: that is a plan of a ship; you notice from that plan the type of ship. A. Yes.

Q. Have you ever been on a ship the size of the ship shewn in that plan, or approximately? A. 145 would be considered approximately the same as that; 145 feet long. I am going back twenty years for that type of vessel. 30

Q. In what capacity were you on that ship? A. I was in command.

Q. Have you ever been on a ship with both hand and steam steering gear on the bridge? A. Yes.

Q. Was the ship that you speak of one of that type. A. Yes.

Q. What was her name? A. There were two or three; it was during the war; they were used as mine sweepers: I think the nearest approach would be His Majesty's mine sweeper "Macbeth".

Q. Where was the steering engine? A. On the bridge.

Q. Explain the type of steering engine on that ship: there was hand steering gear, and how else was the ship steered? 40

MR. SMITH: I have no idea of the relevancy of this evidence at the moment; perhaps he will tie it in. The steering gear on ships of 140 feet has nothing to do with the steering gear on this vessel.

Q. What was the type—steam? A. Steam and hand on the bridge, with emergency wheel aft.

Q. Is that the general type of steering equipment for a ship of that size? A. Yes.

Q. Can you tell me, what is the purpose of the two types of steering gear on the bridge, hand and steam? A. Well, the reason for having the
10 two types is, the steam to be connected up when you require quick action, such as manoeuvring a vessel in port or in shallow water, or approaching the land; and I should say the other one was generally adopted for economical purposes under say ideal conditions.

Q. What is the other one? A. Hand steering gear.

Q. Accordingly when is the hand steering gear generally used when there are two types—

MR. SMITH: I submit this cannot be; if he wants to ask the witness whether a vessel that—

MR. DALEY: I am asking the general use of this type of steering gear;
20 I consider it of the utmost importance. A. It would not be used unless you were in the open sea, open waters.

Q. Why would it be used then? A. For economy.

Q. What do you mean by economy? A. Saving steam.

Q. And consequently saving fuel? A. Oh, yes, obviously.

Q. What do you say from your experience as a master mariner as to the efficiency of these two types of steering gear, hand and steam? A. The steam steering gear is efficient, and the hand steering gear is efficient under the before mentioned ideal conditions.

Q. And how do the two types compare in approaching shore or in
30 fact in confined waters, which is the proper type to use? A. Of course, the steam steering gear is obviously quicker in putting the helm hard over, which you would do in shallow waters, because you are in touch with shipping, navigation dangers, and you require quicker action and would obviously use steam.

Q. What do you say about the resistance in turning the rudder in a steamer going say at four knots, is there any great resistance in turning the rudder in a steamer? A. Considerable.

Q. Explain why that is. A. Well, as soon as you put the rudder out
40 of the fore and aft line, or the centre line of the ship, you are meeting a stream line advance of water which gives you that force which is necessary to turn a vessel's head one way or the other.

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Q. Is that force acting with or against the rudder? A. It is acting against the rudder.

Q. Does that force vary as the rudder goes over from amidships position to hard astarboard or to hard aport? A. It increases as you reach the maximum.

Q. Is that force greater on a steamer than a schooner or vice versa? That resistance of the rudder? A. Are you referring to a schooner with a propeller?

Q. No, without a propeller. A. That is a little difficult to answer; it becomes too technical to give a clear answer to that. 10

Q. How do these two types of steering gear—can you compare the speeds between steam steering gear and ordinary hand steering gear on deck, assuming they are both connected with the same chain, the same barrel, leading to the quadrant of the ship,—can you compare the speeds of operation of these two different devices of steam and hand? A. If they are both set up for their normal practice, what is their relative speed one with the other,—I think steam is $2\frac{1}{2}$ times as fast as hand.

Q. In making that answer you are assuming the wheel is properly manned? A. I am assuming the ship is in all respects fit for sea.

Q. In what conditions at sea, fine or stormy? A. Hand steering gear would be very much longer in stormy weather. 20

Q. Than steam? A. Yes.

Q. What do you say about ordinary weather at sea, not smooth but not real stormy, how about the speeds of the two steering devices under such circumstances? A. I think $2\frac{1}{2}$ times as fast under the conditions I have referred to; steam would be $2\frac{1}{2}$ times as fast.

Q. I will put a hypothetical question to you: I am shewing you a chart here, B/A,—that is a chart of the Gulf of St. Lawrence and Cape Breton island, No. 2727; that chart shews Chedabucto Bay; the point here marked X is Grady's Point, I understand: I have already shewn you a plan, E/20, of this ship: assuming that a ship was approaching land at this point, with a speed of four knots, and the wind blowing dead astern at thirty miles per hour, and she was coming on land, directly on land, stem first, what would be the proper manoeuvre—and there was 500 feet between the stem of the ship—between the bow of the ship and land, what would be the proper manoeuvre in your opinion in order to save that ship from grounding, if going head on to land? A. What is the length of this vessel? 30

Q. 175 feet. A. The speed is four knots, wind thirty miles blowing dead astern—visibility 500 feet— 40

Q. Land is 500 feet ahead and breakers 50 feet from the land, and she is under steam steering—that you have steam steering gear working— A. Everything working normally, full speed head on—

Q. And clear water is to the port of the ship. A. I would put the wheel hard to port, full speed ahead.

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Q. Under circumstances of that kind do you think you would have a reasonable chance to clear the land? A. I think there is a reasonable chance.

Q. Assuming the same set of circumstances, and assume that you have not your steam steering equipment working, with only the hand equipment on the bridge, what do you say would be the proper manoeuvre under those circumstances? A. The steam steering gear out of commission?

Q. Yes, it is not connected up; the clutch has been thrown out and the hand gear is alone functioning? A. That alters the manoeuvre entirely; the only thing is to go full speed astern.

Q. What, with her rudder? A. I am not quite familiar with what her screw is.

Q. Assume it is opposite from steam. A. Wheel hard aport, as soon as she loses her way, put the wheel amidships.

Q. Under those circumstances do you think that you could have saved the ship from grounding? A. What was the force of the wind?

Q. Thirty miles, blowing full astern. A. I would think it was extremely unlikely.

Q. How many feet are there in a knot? A. 6,080, assuming you are dealing with the ordinary practice of mariners.

Q. How long would it take a ship going four knots to travel 500 feet? Have you worked that out? A. I can do.

Q. You need not bother. It is a matter of calculation? I will shew you this chart again. Can you tell me the distance—perhaps you have measured already—from Canso buoy here, to Grady's Point. A. I think about 12 miles, as far as I remember.

Q. Assume that the speed of the "Hurry On", the normal speed, apart from action of the wind and tide, were at half speed, say $3\frac{1}{2}$ knots, aside from action of wind and tide, how much do you say a wind of 30 miles an hour blowing dead astern would affect the speed of the ship? A. I don't think it would increase the engine's speed—

Q. The speed of the ship? A. I don't think the ship would go through the water at much more than half a knot more, eliminating tide of course.

Q. Are you in a position to say whether or not a tide on the south side, we will call it, of Chedabucto Bay, would have very much effect? A. The general influence of the tides on the Cape Breton coast is influenced by the wind and it might be different from one day to another; you might, from a south-east wind—I think you would expect a little set towards the land.

Q. How much would that account for in your opinion? A. I should think half a knot.

Q. In addition to the wind? A. Yes.

Q. A total of a knot? A. A vessel going $3\frac{1}{2}$ by log would, I think, give $4\frac{1}{2}$ knots.

Q. Assume that a mariner were going into this bay under conditions such as I have spoken of—assume a ship going into this bay under con-

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ditions such as I have spoken of, with a visibility due to snow or fog of about between 500 and one thousand feet, no log is out: what steps should be taken in your opinion to navigate that ship with safety, aside from keeping the speed at a reasonably low— A. A reasonable watch on the bridge, an extra watch on the forecastle head, or some other place forward, a careful look-out on all parts, a reduction in speed, and constant sounding.

Q. What do you mean by constant sounding? A. Using such apparatus as they have to determine the depth of water underneath the bottom of the ship. 10

Q. How frequent? A. The frequency would increase as you approached the land or as the soundings diminished

Q. Is it possible in Chedabucto Bay to tell your approximate location by soundings? A. The soundings are the only thing to tell you the proximity of land.

Q. Visibility would, too, if you could see? A. You told me you could only see 500 to a thousand feet.

Q. How frequently under those circumstances after you passed Canso buoy and going to Chedabucto Bay—how frequent do you think soundings should be taken? A. May I see the chart? 20

Q. Yes. A. After passing Canso buoy, at four knots, that is, a knot in fifteen minutes—I say in every fifteen minutes, — until I pick up the thirty fathom line,—

Q. How far is that line from the shore approximately? A. I suppose it is about three or four miles from the shore: having picked that up, the next half hour—every quarter of an hour would be enough; that should bring me into twenty fathoms; if I got less than that I should take them continuously from now onwards, because I am getting pretty close to the land; of course, when, when you get ten fathoms you are only a mile off the land. 30

Q. What would be the proper thing to do under those circumstances? A. Double your vigilance.

Q. Pursue the same course? A. Yes, I should haul out.

Q. Assume that under those circumstances that I have described, a sounding was taken an hour before this ship grounded, would you consider that sufficient? A. No.

Q. Would you consider that efficient navigation? A. No.

Q. Careful navigation? A. No.

Q. Would you consider that the master was negligent in having failed to take these soundings during that period? A. Yes. 40

Q. Explain why. A. Why the master was negligent?

Q. Yes. A. Well, because—this may sound a little funny,—because he has not carried out my ideas of navigation.

MR. SMITH: If it is in issue it is a matter for the Court.

CROSS EXAMINED BY MR. SMITH:

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Q. I think you told my learned friend that there were a certain number of feet in a knot, that is not technically correct—a knot is a measure of speed rather than distance? A. A knot is the distance travelled in an hour—is the distance travelled per hour.

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Q. When you told my learned friend there were a certain number of feet in a knot, you meant in a nautical mile? A. I assumed a layman—a lay court would understand that.

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10 Q. Technically you were not correct; a knot is the measure of speed rather than the measure of distance? A. Technically, yes; it is distance run: but, of course, that is not technically correct. If you want to be technically correct, I must ask what latitude we are in; it varies with latitude.

Q. You know latitude on the chart. A. I thought you wanted me to be technically correct.

Q. Have you had any experience in merchant marine? A. Yes.

Q. How long in the merchant marine? A. Five years.

Q. In what trade? A. All over the world.

Q. Large or small vessels? A. Vessels up to about 1,500 tons.

20 Q. Were you ever in a merchant vessel of approximately the size of the "Hurry On"? A. These vessels I referred to, these mine sweepers were merchant vessels taken over by the Admiralty during the war.

Q. Did you ever when in the merchant marine, except in time of war, have any experience of merchant vessels of approximately the size of the "Hurry On"? A. In the merchant service, no.

Q. These vessels on which you served as mine sweepers during the war were in the North Sea? A. Yes.

Q. Were they converted trawlers? A. No.

30 Q. Specially built boats? A. No, they were ordinary trawlers adapted to mine sweeping.

Q. And had been adapted to mine sweeping? A. Some had, and some specially built for the Admiralty; there were quite a lot during the war.

Q. These boats were specially fitted? A. Not as far as steering equipment was concerned.

Q. You know the Grimsby trawlers? A. I do.

Q. Of approximately 160 to 190 feet? A. Yes; it is rather on the high side.

Q. From 130 to 160 or 170 feet? A. Yes.

40 Q. Those boats are not ordinarily fitted with steam steering gear? A. The ones I saw all had.

Q. During the war? A. Yes.

Q. Do you know if that equipment was specially fitted to them for war time service? A. I could not definitely say, because I was not on them.

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Q. You don't know what their equipment was prior to the war?
A. No; I can't imagine what a steam steering engine would be there for unless for the steering purpose.

Q. Was it not specially put in for the purpose of war purposes?
A. It would be a structural alteration.

Q. Do you know if it was or not? A. I could not definitely say because I was not there before.

Q. You don't know if the steam steering gear that was installed in the vessels in which you served during the war was a special installation or not? A. In some cases I cannot definitely say so, and in some cases, 10
yes, that it was put there when built.

Q. Do you know anything about classification of vessels by the various classification societies, such Lloyds, British Corporation and others?

A. A personal intimate knowledge?

Q. Do you know the requirements with regard to steering gear on vessels up to say 170 or 180 feet in length? A. To ask me to answer that question in detail I should have to have Lloyds book of rules.

Q. Then you would be merely reading from the rules? A. The same as Lloyds surveyor does.

Q. Explain that answer. A. It is so complicated— 20

Q. Just as Lloyds surveyor does—explain that. A. That Lloyds is controlled by a book of rules laid down by Lloyds society.

Q. You have no knowledge of the requirements for classification yourself with regard to steam steering gear? A. Insofar as the master is always responsible for his vessel, he must know his ship from stem to stern. Lloyds are a classification society. The master is in supreme command, and Lloyds are not allowed to influence his judgment, and if he considers anything wrong it is up to the master of the vessel to decide, not Lloyds.

Q. What has that to do with the requirements for classification of a vessel of say 170 feet in length, over all length, whether to be classified by 30
the classification associations she requires steam steering gear or not? A. I don't know what Lloyds requirements are; I don't know what they demand; I am not interested; I am a master mariner.

Q. Have you had any experience with merchant ships 170, 160 to 180 feet over all length, outside your experience in the navy? A. No, I can't say exactly; 20 feet in a ship is nothing.

Q. You don't know if merchant vessels between that size, 150 to 180 feet over all are ordinarily equipped with a steam steering gear in addition to hand steering gear? A. I would rather have the name of a specific vessel under discussion than make a specific statement. 40

Q. The "Hurry On"; she was 174 feet I think in length. A. I have not been on a vessel of 174 feet in length.

Q. 172.7. A. I have not been on a vessel of that length.

Q. Have you ever been on a vessel—she is 172.7 feet, if the .7 makes any difference as to the size of the ship you have been on,—have you ever

been on a merchant ship of approximately 150 feet in length outside the war
— A. What do you mean by approximately?

Q. I will say 150 to 170? A. Twenty feet in the length of a ship—

Q. I am asking for a definite answer; have you ever had experience
on such a vessel? A. As far as I know, no.

Q. Have you ever had any experience on a vessel of approximately 160
to 180 feet? A. You are asking me now to go through some twenty or
thirty ships, and I would rather look it up; I cannot remember the lengths
of every vessel I have been in: would it save time to make a general
10 statement?

Q. It would save time to answer my questions instead of arguing
with me.

MR. DALEY: I don't think the captain is arguing.

Q. Can you say whether or not you have had experience of a vessel
between 160 and 180 feet? A. To the best of my belief, no.

Q. Outside the navy experience? A. To the best of my belief, no.

Q. On a vessel from 170 to 190? A. No.

Q. Would you be prepared to say that any vessel of 175 over all
length was unseaworthy simply because she was not—

20 MR. DALEY: That is not a fair question; that is the issue here, whether
she was seaworthy or not. If my learned friend asks that question he must
define the legal meaning of seaworthiness.

MR. SMITH: This witness is called as an expert and I ask him now if
in his opinion he is prepared to say a vessel of 175 feet over all length
would be unseaworthy simply because she was not equipped with steam
steering gear.

MR. DALEY: The question of unseaworthiness is in issue.

MR. SMITH: The question of due diligence cannot arise until it is first
established the ship is unseaworthy.

30 MR. DALEY: You have to explain to the witness what unseaworthiness
is. Ask questions of fact from which the question of seaworthiness or
unseaworthiness may be drawn by the court.

MR. SMITH: This witness does not know a blessed thing about the
"Hurry On". He has been called to give evidence on a hypothetical case.
If giving evidence as an expert, surely the standard we have to take in
regard to the equipment of our vessel must be the recognized standard, if
we have one; I am not asking the seaworthiness of this particular ship,—
if in his opinion any vessel of a definite length not equipped with steam

steering gear would be in his opinion unseaworthy. In duty to my clients as I conceive it, I must put the question and if your lordship rules against me, I must accept it, but I cannot voluntarily refrain from putting the question to the witness.

HIS LORDSHIP: I will have to rule that question out.

MR. SMITH: Under the circumstances I cannot proceed with the cross examination of this witness and I have no further questions to submit to him.

MR. DALEY: I tender my exhibits.

PLAINTIFF RESTS.

10

COMPANY'S EVIDENCE

MR. SMITH: I tender the evidence of Sydney Thomas, an expert engineer, which was taken before the prothonotary under authority of your Lordship; the cover was wrongly intituled as the claim of James Richardson & Sons, Limited, but it should be in the claim of Vita Foods Products, Incorporated. I tender that evidence as part of our case. (Marked E/A).

No. 7

Evidence of John Patterson

JOHN PATTERSON, being called and duly sworn, testified as follows:

Examined by MR. SMITH:

20

Q. What is your occupations? A. Superintendent, Halifax Ship-yards.

Q. And your trade or occupation? A. Marine engineer.

Q. What experience have you had as a marine engineer; where did you learn your trade, and your experience? A. I had four year apprenticeship, shop, in Scotland; two years in drawing office, designing vessels; give years at sea as marine engineer; about two years abroad installing marine machinery; five years engineer manager at Swan Hunter's, England, in the dry dock department—

Q. They are one of the largest shipbuilding firms? A. In England, 30 yes; two years experience here in Ontario; I built two ship for the Merchant Marine; and then about fifteen years here in Halifax in charge of the shipyard in Dartmouth.

Q. I understand you are also one of the shareholders in the Unus Shipping Company? A. I was.

Q. And director of the company? A. I was.

Q. Do you remember the occasion on which the "Hurry On" left in January, 1935, to pick up a cargo of herring in Bay of Islands, Newfoundland? A. Yes.

Q. Prior to the vessel sailing on that trip, did you have occasion to see repairs that had been effected to her? A. I personally supervised the repairs.

Q. Detail the circumstances under which the repairs were done, and what repairs were done. A. At that time the vessel came under special
10 survey, the classification.

Q. When was the vessel acquired by—purchased by the Unus Shipping Company? A. I can't remember that; I am sorry.

Q. When did you first know the vessel? A. I am afraid I cannot give dates, really my memory wont carry on.

Q. How long before the departure for Newfoundland for the herring cargo was the vessel overhauled and repaired? A. Just immediately prior to leaving for Newfoundland.

Q. Was she put on the marine railway in Dartmouth? A. Yes, completely overhauled.

20 Q. Tell us what was done, roughly. A. It is rather a long story: we really overhauled the ship fore and aft; everything was done. What I mean by that,—she came under special survey, which demands that everything be opened up, machinery, auxiliary machinery, steering gear, winches, cargo holds, tanks, and all compartments, to be opened up for survey.

Q. What about plates? A. Her shell plates were tested.

Q. Was that work done under your personal supervision? A. Under my personal supervision.

Q. How long did they occupy? A. If I remember rightly it took about three or four weeks.

30 Q. And this vessel was launched—how long before sailing on the herring trip so-called were these repairs completed? A. They were really waiting for us to complete repairs to get the trip commenced.

Q. She came off the railway— A. She lay at our wharf a week or so previous to sailing, and from there she proceeded to sea.

Q. After the repairs were completed were they subject to inspection? A. Yes.

Q. Were they inspected? A. Yes.

Q. By whom? A. British Corporation surveyor, Thomas Laurie.

40 Q. And during the period the repairs were being effected was Mr. Laurie present? A. He was there about every second day, checking up as we went along; we opened up the steering gear; when that was all apart I had to call him in and he made a survey of each of the internal parts, and he recommended the renewal or overhaul of the various parts of the equipment.

Q. With regard to the steering gear on this vessel, what steering gear did she have: just describe it— when acquired by the Unus Shipping Com-

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pany. A. She had a steam and hand gear in the wheelhouse amidships; and then a steam controlled wheel on the upper bridge; and a hand steering gear aft, emergency gear.

Q. Worm gear aft? A. A right and left gear.

Q. And the steam steering gear and the hand steering gear in the wheelhouse operated on the same barrel? A. On the same barrel, yes; and changed over.

Q. The change over from one to the other was effected by a clutch? A. Yes.

Q. Was that changed during the course of the repairs? A. No, just 10
taken apart and thoroughly overhauled; the engine was taken out of the ship altogether, the steering engine: the whole steering equipment was removed ashore, and then it was thoroughly overhauled in the machine shop, and then it was tried out under compressed air: if a machine is defective it will show up under compressed air, so we tried it out under compressed air. The test was witnessed by myself and Mr. Laurie. And then the engine was re-installed aboard the ship and tested out aboard under steam.

Q. From your experience as a marine engineer and shipbuilder, is it customary for vessels of the size of the "Hurry On", or having a length of approximately 172 feet to be equipped with steam steering gear at all? 20
A. Some are equipped with it, and some are not. In Scotland where a lot of these vessels about the same size operate on the coast, I should say about one out of every three have steam steering gear; they mostly operate with hand steering gear on the different trawlers.

BY THE COURT:

Q. All trawlers? A. Not all trawlers; fishing trawlers; all trawlers working on the banks here operate with hand steering gear, and they are that size.

BY MR. SMITH:

Q. From your experience of the "Hurry On", what do you say, from 30
an engineering point of view, of the sufficiency of the hand steering gear to steer the ship? A. Well, the "Hurry On" was fitted with a large hand steering wheel so that two men could operate it, and my foreman and myself, we operated that gear hard over port and starboard quite a few times before she left the wharf and we found we got a good quick helm.

Q. Naturally you would get a quicker helm at the wharf. A. The matter was under dispute at the time; we figured that the captain should try and do more hand steering work, and we tried it out and found the gear to work very efficiently: that is the hand gear.

Q. When the vessel left for Bay of Islands would you say she was 40
staunch and fit in every way? A. Every way I could possibly make her; I could do no better.

Q. And fit to undertake the voyage? A. I should say so.

Q. Is there anything you could suggest you could have done that would make her more fit or safer for the voyage? A. No, I could not think; the only think that we thought could be done, and I made an alteration in conjunction with Mr. Laurie,— the steering gear sheaths, they were of a half round section, the chain resting in the half round: so we condemned all these sheaths and fitted new sheaths throughout the ship with a groove in them so that the chain would always work on the one level: that was the only alteration we made.

10 Q. When the "Hurry On" left for Newfoundland you considered her fit and safe for the voyage? A. Yes.

Q. Again, from your experience as a marine engineer, if the vessel was fit for the voyage when she left Halifax, apart from any accident such as collision or stranding, would she also be in fit condition to make a voyage from Bay of Islands to New York? A. Well, I should say so.

Q. Is there any reason why a vessel mechanically fit to make a voyage from Halifax to Bay of Islands would not also be mechanically fit to make a voyage from Bay of Islands to New York? A. I cannot see why she would not. The power is there and the equipment is right.

20 Q. To your knowledge are there any shipyards or repair plants at or near Bay of Islands, Newfoundland? A. I don't know.

Q. With regard to the engines, they are a form of diesel engine? A. Yes, Sulzer.

Q. And for the purpose of overhauling these engines did you employ a man whom you considered to be an expert? A. Oh, yes.

Q. Who was that? A. The chap Thomas.

Q. He has already given evidence as to his own qualifications: was he employed by the Halifax Shipyards or the Unus Shipping Co., A. I just really forget now for the moment; we put the work under his hand; he was more or less responsible to me for carrying the work out.

30 Cross-Examined by MR. DALEY:

Q. Can you remember who the directors were of Unus Shipping Co., at that time in December, 1934, and January, 1935, besides yourself? A. One minute please! My memory is none too good.

HIS LORDSHIP: Is it important?

MR. DALEY: It may be.

(Witness continues) There was Mr. Cecil Zink.

Q. Was Captain Cruickshanks a director at that time? A. I don't think he was.

40 Q. He was superintendent of the company? A. He was sort of manager.

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Q. I suppose that in matters concerning the ship, you being a director of the company, they left the technical management of the construction of the ship and equipment largely to you? A. Oh, yes.

Q. In other words, you had complete charge of that on behalf of the company? A. Oh, yes.

Q. That is of Unus Shipping Company? A. Yes.

Q. Had you heard at this time, when the ship was being surveyed in the dock, in December, 1934, had you heard that the steam steering equipment had not worked under certain conditions prior to that? A. Yes.

Q. You knew whenever the deck became flooded the steam equipment 10 went out of order? A. Yes; I would not say it went out of order; it was held up, it didn't properly function.

Q. You knew that when the ship was in dry dock in December, 1934? A. Yes.

Q. That is one of the reasons you took the engine out and carefully went over it? A. Oh, no.

Q. You would have done that anyway? A. Yes.

Q. You have told us that in connection with ships of this size, that it was very common not to have any steam steering gear at all? A. Yes.

Q. And it is also common to have the two types of steering gear; 20 there is a class of ship that have both steam and hand steering gear? A. I would not say there is a class that have it; some do, and some don't; but it is not compulsory.

Q. When they have the two types of steering gear, the hand gear is used for navigating in open waters? A. Yes.

Q. Where there is lots of seaway? A. Yes.

Q. And they use the steam for enclosed and confined waters and near shore? A. Yes.

Q. And as a matter of fact, is that not the purpose of the steam steering gear on the ship, for navigation in closed and confined waters? A. 30 Yes.

Q. Otherwise it would be much cheaper to have only the hand gear? A. Yes.

Q. What is the advantage of the steam steering equipment over hand equipment? A. It is faster.

Q. How much faster? A. And you can do with one man: with hand steering gear on that boat you would have to have two men in heavy weather.

Q. And you would have to have a larger crew to navigate the ship? A. I would not say that. 40

Q. In stormy weather if you had two men on each watch for steering alone that would mean you would have to increase the size of the crew?

A. No, you arrange your watches.

Q. Have more frequent watches? Is it not true that the physical effort in steering a ship by hand is rather strenuous? A. Yes, it is.

Q. In stormy weather? A. Yes.

Q. Are you of opinion that two men by reversing—that four men by taking their watches every two hours could steer the ship under those circumstances in stormy weather—would they not be over exhausted? A. No, they do it every day on the trawlers sailing out of Halifax.

Q. Those trawlers are smaller? A. Not much.

Q. About 130 feet? A. Yes, 140.

Q. And the "Hurry On" 175? A. The "Pictou County" is larger than the "Hurry On" and she has no steam steering gear.

10 Q. Is the effort in steering the "Hurry On" not considerably greater than a ship 130 feet long? A. That depends on the type of ship.

Q. On conditions? A. The rudder area of the "Hurry On" is not any larger than the area of a trawler.

Q. Therefore in getting the ship ready for sea, you were concerned to see that the hand steering equipment was working properly, and you were not so much concerned with the steam? A. Absolutely, the steam steering gear was what I was concerned with,—everything.

20 Q. What did you do to remedy the situation that you knew existed in the "Hurry On", concerning the inefficiency of the steam steering gear under the conditions when the deck became awash? A. We fitted drain pipes.

Q. Exhibit E/20: here is a red line— A. It is already drawn in there.

Q. What is the red line representing from the after deck to the bridge? A. It represents two lines of steam pipes, one steam and one exhaust.

Q. Tell us how these steam pipes went along the deck; the boiler was aft? A. Yes.

Q. These red lines on the deck plan, exhibit E/20, indicate the manner in which the pipes came along the deck from the boiler to the engine? A. Yes.

30 Q. What length would those pipes be? From the boiler to the engine? A. There is a hatch about 27 feet long,—about 55 or 60 feet of pipe before it rises up to the bridge.

Q. And after it rises up to the bridge, how much more would be added to that? A. About 16 feet.

Q. Will you mark with the letter A just where you put your drain cocks in. A. They are shewn there; I put them in there.

Q. Were those two drain cocks marked A at the bottom of the drop from the boiler to the deck? A. Yes, they were at the lowest point of that pipe line aft.

40 Q. What other drain cocks, if any, were installed? A. No others were installed. There were already drain cocks down here.

Q. Mark that by— A. I would not remember to a few inches.

Q. Approximately is good enough. A. There was one here,—about there, and there. That is as near as I can remember; and there were two others alongside the hatch here,— there and there.

Q. Mark them C. Will you be good enough to tell me the sizes of these drain cocks; what sizes they were? A. I am afraid I cannot commit my-

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self to that: they would be—the ones we put in, about $\frac{3}{4}$ " , I think: the steam was $\frac{3}{4}$ and the exhaust was inch.

Q. You think the steam pipe was $\frac{3}{4}$ " diameter? A. No, the drain from the steam pipe was $\frac{3}{4}$, and the other about an inch, the exhaust.

Q. Those are the two you put in, and you put in the two at A; the others were already in? A. Yes; when we got the ship those were fitted to her.

Q. What would you say that the size of the drain cocks at C and B were? A. They would be about $\frac{1}{2}$ " or thereabouts.

Q. What was the size of the pipe? A. I think the steam steering gear 10 pipe led off the winch steam pipe, and the winch steam pipe would be about $1\frac{1}{2}$ " , and exhaust about 2".

Q. How thick would the pipe be—what gauge? A. I figured may be 8 or 10 gauge.

Q. That would mean how thick? A. About one-sixteenth inch or may be three-thirtyseconds.

Q. And the pipe, steam pipe, leading along the starboard or port side of the ship also supplied the forward winch? A. Yes.

Q. The same pipe? A. Yes.

Q. And the after winch too? A. Yes, they were shut off; master 20 valves for forward deck; master valves in front of the steering gear connection. And previous to the ship leaving port we ground those master valves in thoroughly to make sure there was no possibility of leakage.

Q. You told us that you knew that the "Hurry On"—that the steam steering gear didn't properly function when the deck became flooded with water? A. Yes.

Q. Prior to the time she went on the dock in December? A. Yes.

Q. What did you attribute the reason for that to? A. The water going on the pipes condensing the steam.

Q. What steps did you take to rectify that? A. We lagged the pipes; 30 covered them over with asbestos lagging and canvas from end to end, and painted that, and then we fitted these drains.

Q. You know that on this trip that they met with some trouble in December? A. I heard that.

Q. And again you remember there was evidence given when the ship went down they met with the same trouble again that day? A. I heard that.

Q. To what do you attribute that circumstance? A. Well, I don't know exactly. It is possible a drain might have been left closed; there were stop cocks in this drain; I don't know if left closed or open. 40

Q. Assume they were left closed, would that be sufficient to cause that difficulty? A. Yes.

Q. Should not the installation have been sufficient to prevent the condensation in the pipe? A. No.

Q. It should not in your opinion have been sufficient? A. It was not sufficient.

Q. They would have to be opened? A. Yes, the drain in my opinion should be opened.

Q. Did you give instructions to the master or members of the crew to see they were left open? A. No, the engineers were there to see the whole installation, and Mr. Thomas worked with me, but we don't go around and tell each member of the crew just what to open and shut on a voyage; the man is competent; he is assumed to be competent.

Q. It is rather an unusual type of steam equipment to have such a length of steam pipe in a ship as was in this ship? A. There is no other
10 method of fitting that steam pipe in that type of vessel.

Q. The type of vessel is a little unusual? A. No, there are a lot of these vessels sailing out of Scotland.

Q. On this side of the water? A. Not on this side of the water.

Q. On this side of the water? A. Not that I know; there are not so many vessels.

Q. This is an unusual type on this side of the water? A. It is rather a peculiar question; I can't quite appreciate what you mean.

Q. Is it a usual thing on this side of the water with the boiler aft of the engine and the steering engine amidships? A. I would have to go
20 over the names of vessels.

Q. You have had a lot of experience? A. The "Pictou County" is the only one similar to that, and she has no steam at all.

Q. Then it is not usual? A. Every vessel is fitted out in a different way. There is not one you could call usual. You can't term one as usual to a type. They don't build them that way; on this coast it is all wooden vessels, a different type altogether.

Q. Would you think a diesel engineer would appreciate the necessity of opening the steam valve? A. Oh, yes.

Q. Assuming these valves were open, how do you account for the en-
30 gine failing to function on these other occasions? A. I don't know; it is very difficult to account for a thing happening at sea. We may overhaul a vessel—

Q. It happened on two occasions after this. A. We have heard that. As to the reason, we would have to go to sea in the ship to find out. It depends on the efficiency of your men: when the ship leaves dock she is in the hands of the captain and engineers.

Q. How much of this pipe—because there is evidence by both the captain and first mate on this occasion, that these steam pipes were bare—will you tell me how much was insulated. A. We insulated from here
40 right up to there, and up to the top of this hoist on both sides, steam and exhaust.

Q. What with? A. Asbestos rope, what used to be on her; there was some on her before, but it had gone out of shape a bit, and we fitted that rope to the pipe as far as it would go, and renewed the rest, put in new rope, and put canvas over it and painted the canvas.

Q. Would that make the pipes watertight in your opinion? A. No, it is impossible to do that.

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Q. Could you not have made these pipes watertight by enclosing them in boxes? A. No.

Q. Why not? A. I cannot see how it could be done. If you put that pipe in a box, there are flanges and joints which you must of necessity have access to from time to time.

Q. You could put a cover on the box? A. How would you fasten it? All things are possible, but that is something new to me,—a possibility of building a water tight box.

Q. If that deck was continually awash and that pipe was not properly —was not watertight, that insulation of itself would be very little good to 10 check condensation because there would be a continuous wet blanket around the pipe. A. The heat of the pipe, instead of being the exact temperature of the sea water, it would be higher on account of the insulation.

Q. Somewhat higher. A. A great deal higher with the water continuously washing over it.

Q. It depends how much water you get on the deck. A. Yes; with asbestos rope, with hot steam pipes on deck, I have sailed with them; I know when a vessel is shipping water, when the sea runs from the pipes you see the steam rise up, which shews that the temperature of the pipes is much higher. We just fitted out a similar vessel, the "Liverpool Rover", 20 last winter under similar conditions.

Q. How was the boiler heated, by waste heat? A. No, direct oil fired boiler.

Q. What was the make of the steering engine? A. I don't know; it was made over on the continent.

Q. And the hand gear was fitted to the engine by means of—how was it fitted? How was it fitted to the barrel? A. There was a heavy barrel carrying the steering chain, with a gear wheel on it; that gear wheel was operated by a secondary shaft; this shaft was operated by a hand steering wheel. 30

Q. Which also had a wheel which meshed into the bigger gear? A. It meshed into the gear on the barrel.

Q. It is the usual type of hand steering gear on deck? A. Yes.

Q. It had two steering wheels on the bridge? A. Two in the wheel-house and one on the top.

Q. One for steam and one for hand? A. Yes.

Q. Do you know how large a crew the "Hurry On" carried—about eleven? A. About that.

Q. Captain and two mates? A. I would not like to say that.

Q. How did the propeller work— as I understand it, it worked — 40 turned in the opposite direction from the usual steam propeller? A. Left handed propeller.

Q. Left or right going forward, or right to left? A. You are on the top, it goes anti-clockwise.

Q. To reverse you would have to go right to left? A. Yes.

Q. And the effect of reversing the propeller would be to swing the

stern to starboard, under certain conditions? A. I guess so.

Q. I ask you this question: is it usual, or is it in boats of this size—is the steam pipe ever put under deck—the steam pipe that goes from the boiler to the engine ever put under deck to avoid condensation which results from water going over it? A. That can be done in some types of vessel. In a freighter it is rather difficult because when the steam pipe is under deck any leakage or heat coming from the pipe is liable to damage the cargo; that is why it is not put there in this type of vessel.

10 Q. Is it ever put there in this type of vessel? A. Not that I know of, for that reason.

Q. It works efficiently on this type of vessel, that type of steering gear can be made to work efficiently? A. To have the pipes in the hold?

Q. No, constructed as they were on the “Hurry On”, along the deck, that type of steering gear can be made to efficiently—that type of steam steering engine can be made to efficiently operate the rudder with the boiler aft and the engine on the bridge amidships? A. Yes, we did that.

20 Q. When she broke down on two different occasions you cannot say you succeeded in doing that after you had accomplished these changes? A. When a ship leaves the dock she is in the hand of the captain and the engineers and under their guidance; it is for them to work efficiently; until she leaves the dock it is my job.

Q. And your opinion is, if they worked it efficiently the gear would function efficiently? A. I don’t know, I was not there; I know it would function.

Q. If they worked it efficiently? A. Yes.

Q. So any trouble must have been in the engineer or captain failing to properly work these valves? A. I should say so.

30 Q. In your opinion the condensation which would take place in that pipe would not be sufficient to cause the engine to fail to function? A. It could be looked after, yes.

Q. Do you know if the rudder was lifted when this boat was on the dock? A. Yes.

Q. Did you examine the pintles? A. Yes. The hand steering gear was taken off and brought to the shop and everything put back.

Q. And the shoe on which the rudder rests— A. The raising plate was adjusted.

Re-Examined by MR. SMITH :

Q. What size vessel is the “Liverpool Rover” approximately? A. She is a vessel about two or three thousand tons, about 200 feet long.

40 Q. Has she steam steering gear arranged in a manner similar to that on the “Hurry On”, in regard to the conduct of the pipes? A. Yes, the pipes are laid into the well deck.

AND THEN THE WITNESS WITHDREW.

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Evidence of Thomas Laurie

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THOMAS LAURIE, being called and duly sworn, testified as follows:

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Thomas Laurie
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Examined by Mr. SMITH:

Q. You are the surveyor for the British Corporation? A. Yes.

Q. Located now at Halifax? A. Yes.

Q. What is your experience as a marine engineer? A. I served five years apprenticeship; six years at sea; and have a Board of Trade First Class certificate: left sea and went in a drawing office two years; two years assistant works manager at the Fairfield Shipbuilding Co., from 10 where I joined the British Corporation 19½ years ago.

Q. You have been a surveyor for the British Corporation how long?
A. 19½ years.

Q. I suppose in that period you have had to conduct surveys on a good many ships of all classes? A. Yes, all classes.

Q. That has been your principle business or main business for twenty years? A. Yes.

Q. And supervising repairs? A. Yes, and new work, and construction.

Q. Did you have occasion to survey the "Hurry On"—the motor ship "Hurry On"? A. Yes. 20

Q. Some time about December, 1934, or January, 1935? A. Yes, I surveyed the vessel.

Q. Did you make a report? A. I made a report, full report, to our head office, and provisional report was handed to the owners of the ship, Unus Shipping Co.,

Q. Have you a copy of the report that you made to your head office at that time? A. Yes, I have.

Q. That report was made by you at the time? A. On the completion of that survey in the Dartmouth dry dock, within a few days.

Q. Did you make notes for the report as you went along? A. Yes, 30 the major items; quite a number of minor items we don't report.

Q. From your recollection, and refreshing your memory from the report if necessary, give roughly the nature of the repairs that were carried out as a result of your report. A. May I refer to that report now to refresh my memory?

Q. Yes. A. The machinery you would like?

Q. What did you do with regard to the hull and machinery? A. It is rather a long winded affair. There was a damage report just before that, which is referred to in this report. I don't suppose you want more than the main items? 40

Q. The main items? A. One of the first is the steering gear, chains, rods and sheaves. I found those were in need of attention, and the follow-

ing work was done: steering chains renewed; steering rods lined up in the well deck; four pulley supports fitted for supporting horizontal rods; and sheaves renewed with pins and fitted with grease cups: hold covers and tarpaulins—are you interested in them? If I read everything it will take all morning. One thing I would like to put in is the extra freeing port, port and starboard sides.

Q. They are really openings— A. To allow the water to go out, the after end of the well deck being the lowest part.

Q. How many were put in? A. We had quite a number before; well
10 in excess of any classification requirements; being the lowest part, it was to remove water from that location. All air and sounding pipes were re-conditioned where necessary.

Q. To shorten the matter, was all the work found by you on your survey to be necessary actually carried out by the repairers? A. Yes, all recommendations made by myself were carried out satisfactorily; in fact there was more work done than even I would have asked for.

Q. When the repairs were completed and the vessel came off the railway, were you satisfied with the manner in which the repairs had been done, and that the vessel was fit to send to sea? A. Yes, or our certificate
20 would not have been issued.

Q. You did actually issue the certificate to the owners? A. Yes, I gave the owners a certificate on completion, certifying that special survey No. 3 had been completed; that was just before the vessel sailed.

Q. During the time the repairs were being effected at the Halifax Shipyards you attended from day to day? A. Very often, yes; never missing more than a day now and again.

Q. You personally saw — A. Everything that was recommended; everything was done properly.

Q. When the vessel came off the railway you were satisfied that all
30 necessary repairs and reconditioning had been effected? A. Yes.

Q. And you gave a certificate to that effect? A. I reported to our head office that the ship was in first class condition.

Q. And she was thereupon passed? A. Yes, the highest class in the society.

Q. That was very shortly before she left on the herring trip? A. This report is the 4th January, 1935.

Q. Assuming—I want an answer to this from your experience as a surveyor and marine engineer—if this vessel was seaworthy as to hull and machinery when she left Halifax on or about the 5th January, is there any
40 reason, barring an accident, why she should not be seaworthy on the 16th January or thereabouts, when she left Bay of Islands? A. None at all in my opinion.

Q. With regard to the steam steering gear, is it a requirement of the British Corporation, or of other classification societies, that vessels of the size of the “Hurry On” should be equipped with steam steering gear? A. It is not compulsory from Lloyds, ourselves, or any other classification,—

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Bureau Veritas or any, to fit steam steering gear on a vessel of 174 feet; it is additional if the steam steering gear is fitted.

Q. From your experience as a marine engineer and surveyor, would you consider a vessel as being fit for— a vessel of say 175 feet extreme length, suited for the coastal trade and trading in North Atlantic waters, if she were not fitted with steam steering gear? A. We could not say anything else: that ship has already made trips across the Atlantic; I was familiar with that vessel on the Pacific, in Vancouver; she didn't use steam steering gear there for economy reasons.

Q. So far as getting the best classification from the British Corporation would this vessel have received the first class classification if she had no steam steering gear at all? A. Quite; it is additional in a vessel of that size. 10

Q. I think Captain Bloomer said that the hand steering gear was efficient—would be efficient to steer a vessel of this kind under ideal conditions: what do you say as to that? A. There is such a leverage in the hand steering gear, it can be man worked in any type of weather.

Q. I think Captain Bloomer also said that the steam steering gear was used in shallow water where quick manoeuvring would be necessary.—Under those conditions,—under such conditions would you expect — 20 under the conditions mentioned by Captain Bloomer would you expect the decks of a vessel such as the "Hurry On" to be covered with ice and ice water — under the conditions in which Captain Bloomer said the steam steering gear would be likely used—A. Do I understand you to say that the effectiveness of the steam steering gear at that moment owing to ice on deck—

Q. What I gathered from Captain Bloomer was, he said that the hand steering gear would be used at sea, where it would be effective, for economy reasons it would be used at sea, and when they got in shallow water or places where they had to manoeuvre quickly, that the steam steering gear 30 would be used, although more expensive,—under the conditions described by Captain Bloomer would you expect to find the decks awash? A. There is some reason for decks awash; fast turning in heavy weather she would possibly ship water. I agree in regard to the quicker moving of the steam steering gear; it is more effective and much quicker.

Q. And that the steam steering gear will shift the position of the rudder more quickly than the hand steering gear,—that is simply because the engine will turn the barrel more quickly than it can be done by hand power? A. Yes.

Q. The same barrel is being turned in either case? A. Depending 40 which steering gear you are handling. There is one aft which is direct driven; the other actuates the rudder through chains and rods, being controlled from the bridge.

Q. Before the vessel sailed about January 5th, 1935, for Bay of Islands, was there anything you could have suggested, that you felt you should suggest, that could be done to make her more fit for the trip?

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A. Mr. Patterson went in excess of everything I would recommend; everything was done for that vessel; there was not one item anybody could ask for; it was 100%: there was not a better fitted ship, structurally or any way you like to take it.

Q. In connection with the pipes—steam pipes—leading from the boiler to the steering engine, before the vessel sailed were those pipes covered or not? A. They were covered as far as I remember. There is a demarkation line for classification; we don't report all minor items, but the covering was quite effective, rope covered, asbestos rope covered, protected by canvas.

Q. With regard to the manner in which, or the location in which pipes on various vessels are carried from the engine to the—from the boiler to the steering engine, in your experience as a surveyor have you noticed—have you come in contact with any number of ships that have had the steam pipes carried in the holds? A. I have a dim recollection of one vessel in nineteen years, and it was covered and boxed in to keep the heat from affecting the cargo — or condensation damaging the cargo. There might be others, but I have only run across one.

Q. Then the reason for carrying the steam pipes on deck is to prevent damage occurring to the cargo? A. Partly, and it is the most practical way; it is common usage. Nine vessels out of ten are done in that way on that type of vessel.

Cross Examined by MR. DALEY:

Q. What are the names of some of the vessels—the names of three vessels that were fixed that way? A. I could not do it, not just now; but I can certainly get them for you if you care for them.

Q. Is it not true that in the majority of ships of this type, the boiler is underneath the engine, where the engine is on the bridge, the boiler is amidships? Is that not true as a general rule? A. I have never seen a boiler amidships.

Q. It is certainly not aft? A. Some are: what are you referring to?

Q. I am referring to steamships first: the engine room generally slightly aft the bridge in a steamship? A. The stokehold is aft of the bridge.

Q. And therefore the boiler would be as a general rule—it is not on the very after part of the ship, as it was on the "Hurry On"? A. That answer was for a steam vessel, when I said stokehold.

Q. You are apparently not clear as to what I mean: as I understand it, in the majority of ships, the engine room is not away aft like on the "Hurry On"? A. All engines are aft.

Q. Not away aft in the stern of the ship? A. Yanker type, yes.

Q. They are nearer the bridge than on the "Hurry On", is that correct? A. You put that in a clearer way.

Q. You know what I mean. A. I don't know what you mean.

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Q. The usual type is not the type of the "Hurry On"? A. The three island shape, forecastle, bridge and poop, is that what you mean? This is the three island ship.

Q. On the usual type of ship, the engine is just slightly aft the bridge?

A. Yes, and a long line of shafting.

Q. So there is not on the usual ship a long length of steam pipe line going from the boiler to the steering engine as on the "Hurry On"?

A. Yes, these ships I refer to, the larger ships have long lengths of deck pipes leading to the steering engine.

Q. Are those pipes in a position where they will be continually exposed to water washing over them? A. Yes, protected by covering plates on the side of the hatches; that is common practice.

Q. Were there covering plates on the "Hurry On"? A. Yes, there were.

Q. How were they made? A. Flanged on to the side stiffener of the hatch and bolted to the deck.

Q. Are you sure of that? A. Yes, I have seen them taken off.

Q. Was that put on again? A. Yes.

Q. Are you sure when you say that the pipes on the "Hurry On" were insulated—did you see them done? A. I actually saw them when they were finished.

Q. Would you know if there was asbestos rope under the canvas? A. I saw it.

Q. Under the canvas? A. Yes.

Q. Was the canvas sewed on? A. I don't know if sewed or wrapped.

Q. If wrapped it might have come off? A. It is quite effective wrapped, if wrapped properly.

Q. You say in your opinion—would you have given a certificate of seaworthiness to the "Hurry On" if you had know her steam equipment was not properly functioning? A. I would not have given a certificate if I had known anything was wrong with the steam installation.

Q. You would not have given a certificate had it been reported to you that the "Hurry On", whenever seas washed over her deck, that the steam equipment had gone out of commission? A. No, it had not been reported to me officially,—excuse me,—before the docking in December? Yes, it was.

Q. It was reported seas had washed over her deck? A. Causing condensation, yes.

Q. Assume that it also—you have also heard it said, that following the wrapping of this pipe in the manner indicated, and the changes indicated, that the same thing happened again that happened in January, and had also happened when the ship went down in December. How do you account for that? A. It may be the personal element on board, not opening the drains.

Q. Whose duty is that? A. You have to decide that with the owners. It is an engineers fitting and he should look after the pipes.

Q. If the engineer didn't open the cocks he would be at fault? A. It is unreasonable not to have opened them, they being there for that purpose.

Q. How often should they have been opened? A. Whenever any water accumulated.

Q. When the steam steering gear was functioning should you have left the cocks open? A. If the engine was shewing signs of water through the drain cocks, or glands.

Q. They should have been left open all the time? A. You cannot leave them open all the time.

10 Q. Have you any idea of the amount of condensation in that pipe, assuming that the temperature of the water which was washing it was 40°? A. No, it would not be any more than a $\frac{3}{4}$ pipe would deal with easily.

Q. You don't know? A. I can't tell you off hand; I can't calculate an affair like that now.

Q. Would you be surprised to know that the decks of that ship, the after deck especially, knowing the type of ship, that it can be continually awash in stormy weather when the ship was pretty well loaded? A. When listed?

20 Q. No, pretty well loaded. A. She could not hold water; it is impossible to be filled up there.

Q. When the waves were breaking over her she was constantly awash. A. I don't believe it; it is impossible.

Q. Even though testified under oath? A. Yes, because we put channels, freeing ports, on the bulwarks on both sides; one extra one being fitted at the after end where the water accumulated.

Q. I suppose your functions as a Lloyds surveyor are not to make a detailed examination of every part of the ship? A. Yes, make a detailed survey; but we don't report details.

30 Q. When they took down the main engine, the diesel engine, did you make a detailed examination? A. Yes, every part of it.

Q. Would you be surprised to know the diesel engine continuously broke down after they left Halifax? A. It is possible, if the engine broke down; it is liable to happen to any officer.

Q. And that the dynamo didn't function properly? A. I have not heard that.

Q. Would you be surprised if that were so? A. I would, yes.

Q. These freeing ports (E/20)—are those freeing ports not above the pipe, they are shewn on the plan above. A. No, they are down within 3" of the deck.

40 Q. A portion of these pipes run along the deck? A. They run here along the deck alongside the hatches, but here is where the freeing ports are, on the bulwarks here.

Q. The freeing ports are above the level of the deck? A. Yes, they must be; you don't want to cut away the ground angle or you would have nothing to hold on.

Q. Therefore the pipes as they ran along the deck were below the level

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—continued.

of the freeing ports? A. No; those pipes were about a foot above the bottom of the freeing ports. I will shew you. (demonstrates).

Q. Are they on the deck or on the hatch coaming? A. Alongside the hatch coaming. They are clipped on.

Q. There is some distance between the after part of No. 2 hatch coaming and the boiler, they must run along the floor of the deck? A. They cut into the boiler room.

Q. They are under the deck at that point? A. They go under cover here to the lower part, you have to get the profile to find out where the lowest part is; that is where the drains have been taken from; that is the 10 lowest part here.

Q. The lowest part marked at Y: you say that the pipes are about a foot above the level of the deck? A. I am taking amidships, the middle of the hatch; at the end of the hatch they go down about within 3 to 4" of the deck, which is still above the bottom of the freeing ports.

AND THEN THE WITNESS WITHDREW.

No. 9

Evidence of George S. Moulton

GEORGE S. MOULTON, being called and duly sworn, testified as follows:

Examined by Mr. SMITH:

20

Q. You were the chief engineer of the "Hurry On" on the trip from Bay of Islands to New York in which she stranded at Grady's Point? A. I was.

Q. When did you join the vessel? A. Some time around the first part of January, I don't know the exact date.

Q. You had experience as a diesel engineer? A. Five years in the Imperial Oil.

Q. You had nothing to do with the repairs to the vessel or supervising the repairs to the engine just before the trip? A. Nothing at all.

Q. The engines, whatever repairs were done, and whatever testing was done, was done before you took over? A. Everything was closed up when I got there. 30

Q. Did you sail on the 5th January as chief engineer? A. I did.

Q. During the trip from Halifax to Bay of Islands there were certain stoppages of the engines? A. Yes, quite a few stoppages.

Q. To what did you ascribe those stoppages? Know the cause? A. It has always been my experience with diesels after laying up a while, coming out of dry dock, you always get a certain amount of scale in the pipes; this blocks up the water system, so it is necessary to stop to clear all that scale; if you don't, you are liable to do some serious damage. 40

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- Q. Did you stop from time to time on that trip? A. Yes.
- Q. And clear the scale? A. Yes.
- Q. And the vessel proceeded again? A. Yes, she proceeded on.
- Q. How did you clear the scale? A. It meant you had to take the large door off the back of the engine and take out the pipes, piston cooling pipes, and either blow them out with air, or clean them with a wire.
- Q. Did these stoppages have anything to do with the design or set up of the engines? A. I would say not.
- 10 Q. When you got to Bay of Islands did you do anything yourself to the engines? A. I did.
- Q. What did you do? A. Took the water system down, cooling water system; cleaned them all out; cleaned all the sea strainers; adjusted all the bottom ends and closed the engine up again.
- Q. Did you satisfy yourself at that time that the engine was in condition? A. I did.
- Q. And safe to proceed on the voyage to New York? A. Yes.
- Q. When you left from Bay of Islands until the time the vessel stranded did you have any serious trouble with the engines? A. No, I 20 just don't recall; I think I had one stoppage the night previous to running ashore.
- Q. Remember the cause of that stop? A. I think a sort of knock in one of the cylinders, which seemed like a fuel knock.
- Q. Did you stop? A. Yes.
- Q. For the purpose of fixing it? A. To examine the engines to see if anything wrong.
- Q. Did you find anything? A. No, and I started up again.
- Q. Up to the time of the stranding how were the engines working? A. O.K.
- 30 Q. With regard to the steam steering gear, you heard the evidence given as to the drain cocks in the pipe line, steam line and exhaust line—particularly the exhaust line; whose duty was it on board the ship to see to the opening and closing of those cocks? A. Well, now, it was always my experience going to any warmer weather, you never bother them; your steering engine is using enough steam to keep condensation from taking place: well, now, in cold weather I was accustomed to drain that line, just occasionally.
- Q. To open— A. Just open the valve and give it a blow through to see if any water in there, and as soon as the steam comes to close it.
- 40 Q. Was that done from time to time on the "Hurry On"? A. That was done there, after we hit the Cape Breton coast, when the weather started to get cold, until such time we could not get near them.
- Q. What time was that? A. Some time early in the morning.
- Q. When she struck? A. Before she struck; it was before she struck.
- Q. On the morning before she struck? A. That was the morning she did strike.
- Q. The morning of the day she did strike? A. Yes.

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—continued.*

Q. What was the condition of the decks at that time? A. When the captain reported to me that the steering engine would not work I was in the engine room and I came up with him; in order for me to get along to the bridge I had to jump over the hatches and climb over the winches and get up that way, as I could not get on the main deck because it was flooded with water.

Q. What was the nature of the sea at that time? A. It was pretty rough; heavy sea.

Q. What about ice? A. There was quite a bit of ice around, too.

Q. At the time the captain reported the steam steering gear was not working, was it possible to get at the drain cocks? A. It was not. 10

Q. I think you told me that at the time the vessel struck, and prior thereto, the engines had been working all right? A. They were.

Cross-Examined by MR. DALEY:

Q. What time did the captain first call you, approximately, and tell you the steam steering gear was out of order on the day of the casualty? A. I can not recall the exact time.

Q. About? A. I would say it was around 6 a.m. approximately.

Q. They were still steering with steam at that time? A. I could not say to that. 20

Q. I think he said he finally threw out the steam around 7, but it was not working satisfactorily? A. No, it was not working satisfactorily.

Q. You said it was impossible to get at the cocks; were not some of the drain cocks underneath the deck—were any under deck? A. No.

Q. I understood Mr. Laurie to say they were. Here is the drain cock, Y, on plan E/20; where is that cock? A. Back here.

Q. Is that on the deck? A. That is out on the deck; the bulkhead came down here, and the steam pipes came out here, on the lowest point was the cock; and another one along here.

Q. At point B, was that on deck, too? They were all on the main deck, but you could not get at them? A. No. 30

Q. Would they be so every time a severe storm came up? A. I could not say; that was the first storm I had been in her and we could not get at them. It would be unsafe.

Q. And be washed overboard? A. Probably.

Q. How did the engine act when you were trying to get her started: get a few spurts of steam and then stop—the steering engine? A. Just went dead.

Q. On the day of the accident? A. She would not move at all; just dead; and the pipes were just stone cold. 40

Q. Did it continue that way the whole morning, the steering engine—the whole morning of the 18th? A. That was the first report I had, and after that, when the pipes were full of water they just turned right over to the hand gear.

- Q. Could they have got the steam gear to work after that? A. No, not with the sea that was going.
- Q. What was the speed of the engine—of the ship,—H.P. of the engines? A. I think 400.
- Q. What speed was the ship when going full speed, seven knots? A. Nearly eight I think we got one time; around 7 or $7\frac{1}{2}$.
- Q. What was half speed,— $3\frac{1}{2}$? A. $3\frac{1}{2}$ or 4 knots.
- Q. How long would it take you to reverse the engine after you got an order to reverse? A. I just could not say.
- 10 Q. Make an estimate—half a minute? A. Yes, you could do it in half a minute I would say.
- Q. From full speed ahead to full astern? A. Yes.
- Q. Or half speed ahead to half speed astern? A. Yes.
- Q. What pressure of steam did you have on the boiler: I think the log says 115. A. From 110 to 115.
- Q. Before you abandoned the steam line? A. Before.
- Q. That is on the morning of the accident. Going down to Bay of Islands have any other trouble besides trouble with the engines? A. I had trouble with the auxiliary gear pump and generator.
- 20 Q. Did that work? A. It did work.
- Q. Did it work satisfactorily? A. Yes.
- Q. It did? A. Yes.
- Q. Eventually— A. Eventually when coming back it was working all right.
- Q. Going down was it working? A. It was not working so good going down.
- Q. Have water in the engine room? A. I did.
- Q. How much? Up to your knees? A. Very near it.
- Q. On the way down from Halifax to Bay of Islands? A. Leaving,
- 30 outside Halifax.
- Q. Was the pump not working? A. I think the bilge line was blocked up.
- Q. You got that cleared out? A. I took a new piece of pipe out of the deck wash line.
- Q. You didn't have that trouble on the way back from Bay of Islands? A. No trouble.
- Q. Know when the steam steering gear first started to give trouble the day of the 18th January? A. No, it was some time early in the morning.
- 40 Q. Were you on duty at that time? A. I was.
- Q. You operated under difficulties for about three hours before it finally stopped? A. I did.
- Q. Was water blowing out of the exhaust? A. Not a great deal of water, because she was not hitting seas, not shipping seas.
- Q. As soon as she began to ship seas— A. She went out altogether.

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MR. SMITH: The exact figures are in the log when the steam steering gear started to give trouble.

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Q. Steam steering gear started to give trouble at 3.02 a.m. A. Yes, and changed over around 7.20.

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Q. You changed from steam to hand because the steam steering gear refused to function. A. Yes.

Cross-
examination.
—continued.

Q. Regarding the scale in the engine,—if that engine had been properly set off and taken down in the shipyard would you have that scale?

A. Just the same.

Q. Even when overhauled a week before? A. Yes.

10

AND THEN THE WITNESS WITHDREW.

MR. SMITH: Among the admissions is an agreement that all documents and proceedings in connection with the winding up of the company on file in the office of the prothonotary of this court at Halifax which are relevant to this claim are deemed to be evidence in this proceeding, and wherever the date of filing or issue of any such document or proceeding is material, the same shall be deemed to be conclusively established by the date of issue or filing stamped on such document by the prothonotary.

I want to refer your Lordship to the claim which is in evidence, first—it is part of the file in this action,—and particularly to a letter written by Mr. Daley, I think it is,—or by his firm, Daley, Phinney, Outhit & Clarke, dated February 29th, 1936, to Frank B. Zink and William N. Wickwire, liquidators of Unus Shipping Company, Limited: and also to an affidavit of Mr. Daley, dated 6th March, 1936, and all exhibits attached to that affidavit. Some are not relevant to this particular claim. I might say that we have agreed upon the record going in: the things we consider important would be the letter from Mr. Daley to the executors; the affidavit of Mr. Daley; the order permitting the claim to be filed; and the claim itself.

In connection with that I ask Mr. Daley to admit, the only claim delivered to the liquidators would be contained in the letter of 29th February: I want to establish that there was no claim filed in accordance with the notice in the Unus Shipping Company case: or there was no claim filed with the liquidators other than the claims on file with the prothonotary now.

MR. DALEY: That is the only file, yes: we are dealing with the Vita Food Products only, and the other cases follow whatever is decided in this.

MR. SMITH: I tender my exhibits.

MR. DALEY tenders the Newfoundland Carriage of Goods by Sea Act, Exhibit E/21; that goes in by agreement. Also, the Newfoundland Interpretation Act; and the Bills of Lading Act.

40

MR. SMITH: They can be considered as in; they have to be proved as facts; I am content they shall be considered as taken: any book in the library shall be deemed to be part of the evidence, particularly the Interpretation Act and Bills of Lading Act.

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No. 10

Evidence of Sydney Thomas

BEFORE R. V. HARRIS, K.C., Commissioner.

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No. 10
Sydney
Thomas
Examination.

G. McL. DALEY, for the claimant.
J. A. WALKER, K.C., for the Unus Shipping Co., Ltd.,
10 C. B. SMITH, K.C., for the United Kingdom & Mutual Insee. Co.,

SYDNEY THOMAS, being called and duly sworn, testified as follows:

Examined by MR. WALKER:

Q. What is your occupation? A. Marine engineer.

Q. Will you just tell the court your experience in marine engineering.

A. Well, first I served an apprenticeship, five years, in Liverpool, England; and then for a while I was working with the Cunard Steamship Company; I went out to Australia; in Australia I was working with various steamship companies; also building engines and ships.

Q. Where did you have experience in building engines? A. Ade-
20 laide, Melbourne, and Sydney, N.S.W., and during that time I was also
teaching at technical school at Melbourne, engineering.

Q. How long since you have been in Canada. A. Nearly seven years.

Q. During the time you have been in Canada what has been your work?

A. Practically diesel engineering.

Q. For what companies have you worked in Canada? A. Imperial
Oil Company at Halifax; away at sea on the ships; Halifax Shipyards,
Dartmouth and Halifax; W. & A. Moir; also been away on some of the
various boats around about.

Q. During that time have any teaching experience? A. I have been
30 teaching at Technical School, Halifax, two years, diesel engineering.

Q. You knew the motor ship "Hurry On"? A. Yes.

Q. You had something to do with looking after her engines? A. Yes.

Q. Your first experience with the "Hurry On" was? A. I went away
on her—I went three trips as chief engineer.

Q. Tell us when you went away first. A. Just for the moment I
forget the date; I went up to Montreal to bring her down.

Q. What year? A. Two years ago.

Q. 1934. A. It will be three years now; it is two years since she was lost.

Q. A year last September. A. Then it is two years.

Q. You went up what time of the year? A. It was September or October.

Q. Tell us what your experience was. A. What I found during the time I was on her? She was a very fine boat; she was the finest sea boat I have ever been on in my life, and I have been on large and small; the engines were just as I would like them, perfect, and nothing wrong with them. 10

Q. Where did you go as chief engineer—you went to Montreal? A. Came to Halifax, and went up the lakes, and came back here, and went up for a load of gypsum to Dingwall, and went to Montreal, and back here via Sydney.

Q. When you completed that what time of the year was that? A. It would be getting on for December.

Q. Were you in her the last trip she made up the lakes that fall? A. Yes.

Q. After you had finished the lake trips that fall, did you have anything further to do with the "Hurry On"? A. Yes, completely over- 20 hauled the machinery.

Q. Who were you employed by then? A. Halifax Shipyards, at Dartmouth.

Q. I shew you E/1 (25/6/36) that is your signature on that document? A. Yes.

Q. When did you give that certificate? or report? Do you remember? A. I could not say as to dates.

Q. Was it after you had finished the work at the Halifax Shipyards in Dartmouth? A. Yes.

Q. Shortly after? A. Yes. 30

MR. DALEY: I object; don't lead.

Q. Was it before she sailed on what we call the herring trip? A. Yes, it was before she sailed on that.

Q. This is the list of the repairs that you personally supervised? A. Yes, at the time.

Q. What do you say about the condition of the engines at the time she left Halifax for Bay of Islands? A. They were perfect; nothing wrong whatsoever.

Q. Will you give the court a general idea of what was done in the way of overhauling? A. The main engines had all the pistons out; and 40 there were two that were faulty and they were replaced with new ones; one liner was cracked, and a new one was put in its place; and all the valves and all the bearings were all thoroughly examined; water cooling system for pistons; also for cylinder heads. The pumps were overhauled; and

the air pump, air compressor, and everything was left in practically perfect condition.

Q. What do you call this particular type of engine that was in this boat? A. Air injection; Sulzer air injection.

Q. Had you any experience with Sulzer engines before? A. Yes, I have been away several years with them; also working at the Sulzer factory in Switzerland.

Q. Where is the factory? A. Winterthun.

Q. How long did you remain there? A. About three months.

10 Q. What doing there? A. Just working on all the different types of machinery they were building.

Cross-Examined by MR. DALEY :

Q. When did you take your training as a marine engineer? A. 1906, in England, served five years.

Q. Your training was largely with steam engines at the time? A. For the first few years.

Q. Diesel engines were not developed? A. Yes, they were then.

Q. But not to the present state of efficiency? A. Diesel engines have been developed since 1870.

20 Q. But not used extensively until comparatively recent years? A. Perhaps the last twenty years.

Q. In marine jobs? A. Yes.

Q. Have they been used for twenty years in marine jobs? A. Yes.

Q. Extensively? A. Not as extensively as at the present time.

Q. Only in the last ten years extensively in marine jobs? A. More than ten years.

Q. In your experience in Australia it was largely with steam engines? A. And diesel.

Q. What type of diesel? A. Burmeister & Wain.

30 Q. Is that English manufacture? A. Danish,—Copenhagen.

Q. The Sulzer is German manufacture? A. Swiss.

Q. Was not this particular engine in the "Hurry On" manufactured in Germany? A. It might have been under license of Sulzer.

Q. You don't know where this particular engine was manufactured? A. Just for the moment I would not say whether Switzerland or Germany.

Q. What time in the year was it that you overhauled this engine last? A. December, finished in January.

40 Q. When did you finish it? A. About a week before she sailed in January.

Q. With a diesel engine, as I understand it, the power is derived through burning rather than through combustion? A. Through burning of the oil.

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Q. Under high compression? A. Yes.

Q. Heat developed by high compression? A. Yes.

Q. How does the oil get into the cylinder heads? A. It is blown in.

Q. On this particular engine? A. Blown in.

Q. Through what process? A. Through the valve, high pressure air, and it is blown into the cylinder through a valve.

Q. And that valve sprays the air in the different cylinders? A. The air sprays the fuel.

Q. Is each cylinder in a separate compartment? A. Yes, each cylinder is separate. 10

Q. So each cylinder works in a separate air tight compartment? A. Oh, no, not inside; each cylinder is separate, just the same as a gasoline engine, each cylinder is independent of the other.

Q. Is each cylinder in a separate compartment in the engine in the interior of the engine or are they all in the same compartment? A. The connecting rods you can see inside.

Q. In a gasoline engine, as I understand it, the cylinders are all in the same compartment and they are fired by the ignition of the spark. A. Yes.

Q. In a diesel engine are they all in the same compartment in the same way as a gasoline engine, or is each cylinder in an independent compartment? A. In this particular case all in one block. 20

Q. And not in independent compartments in this particular engine? A. No.

Q. Was this a two or four cycle engine? A. Two.

Q. Normally what heat would you expect to be generated by the different cylinders when the engine was properly functioning? A. Which way do you mean?

Q. There is a test for testing the degree of compression of the engine by means of heat? A. You don't get the compression by heat; the compression is through the indicator. 30

Q. What do they call it? A. Just indicator.

Q. Is this engine equipped with a pyrometer? A. That is for testing exhaust gas temperature.

Q. By means of the pyrometer you are able to ascertain whether or not each cylinder is functioning with some degree of accuracy? A. Yes.

Q. But not accurately? A. Not accurately, no.

Q. The pyrometer indicates the heat under which each cylinder is operating? A. It indicates the exhaust gas.

Q. The heat of the exhaust gas? A. Yes, from each individual cylinder. 40

Q. I am asking you, what the heat of the exhaust gas should be in this particular engine, from each particular cylinder. A. About 600 to 650 degrees Fahrenheit.

Q. How do you ascertain that? A. By the pyrometer.

Q. When you say 600 to 650 degrees, how do you arrive at that conclusion? A. That is the conclusion that all engine builders go on.

Q. Does not the degree of that heat vary with different factors? Such as the placing of the pyrometer and position? A. It does not matter where the pyrometer is, it makes no difference.

Q. Different types of engines? A. All act the same way.

Q. Ought the heat from the exhaust in each cylinder to register on the pyrometer around 600 to 650 degrees irrespective of the make of engine and the type of engine? A. Yes, irrespective of the make; the temperature is all practically the same irrespective of the type of engine; on an average that is.

Q. In order to develop the maximum efficiency of a diesel engine, each cylinder must take its share of the load? A. Yes.

Q. What was the H.P. of this particular engine? A. 410.

Q. How many cylinders did it have? A. Four.

Q. How many cycle? A. Two.

Q. Therefore each cylinder should develop 105 H.P.? A. 102½.

Q. And would you tell me, after you completed this job of repairs in December, 1934, what steps, if any, you took to see these cylinders were each developing their required H.P. A. Took indicator cards.

Q. Where did you take the indicator cards? A. While at the wharf; that would not indicate her full horse power while tied up.

Q. What did you get—have you those cards? A. No, they are in the indicator, wherever that is.

Q. The indicator is a machine entirely separate from the ship? A. It is carried in a little box.

Q. It is not part of the ship's equipment? A. One is supposed to be supplied with every engine.

Q. Was this particular indicator part of the equipment? A. There were two, one belonged to the ship, and I had one I brought from the technical school; I used both.

Q. So you took a test with the one from the technical school? A. Yes.

Q. Would the test still be in the indicator? A. No, they were separate cards; they were all in the ship's indicator.

Q. What did you do with the ones in your indicator? A. Left them with the ship.

Q. What were the readings—what readings did these cards indicate while the ship was lying at the wharf? A. As far as I can remember, about 70 or 80 H.P. per cylinder.

Q. Did all the cylinders indicate the same? A. No, there may be one or two different.

Q. What variation? A. Perhaps — it may be three horse power, which is very accurate for a diesel engine.

Q. Can you tell me what causes rust in an engine? A. If an engine is laid up, dampness in the air would cause it.

Q. How long would you have to lay an engine up to cause dampness?

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A. You could stop the engine today and leave the covers off tomorrow and find rust, especially weather like this, or cold weather.

Q. Any quantity of it? A. Just the beginning.

Q. Not enough to do any harm? A. No.

Q. How long for enough rust to accumulate to do harm—in a week?

A. Yes.

Q. If lying up? A. Yes.

Q. It might? A. Yes.

Q. You might reasonably expect then, that a ship that had been lying up a week and not in operation, to have accumulated sufficient rust to make the engine inefficient? A. That is if it is neglected. 10

Q. Suppose it is laying up without an engineer, and no one to look after it for a week? A. You are liable to get rust that will do damage.

Q. And impair the efficiency in that time? A. Yes.

Q. You told us you supervised the tearing down of this engine—were you there at all times? A. I was working there personally at all times.

Q. Who were you assisted by? A. There were several men over in the shipyards, I cannot remember their names,—Campbell—men working at the shipyards at the time.

Q. Was Mr. Osborne? He used to be the engineer on the “Hurry On”? A. Yes. 20

Q. Was he engineer at that time on the “Hurry On”? A. No, I don't think he was working there at that time; he was with another ship at New York; he went to join another ship.

Q. Did he assist you tearing down and rebuilding these engines? A. No, he had gone away.

Q. How long did it take you to tear these engines down and rebuild them? This engine, rather? A. From December; I should say five or six weeks.

Q. You were working on the engine five or six weeks? A. Yes. 30

Q. During that time do anything else but work on the diesel engine?

A. All the machinery in the engine room.

Q. The question I asked—how long it took you to repair the diesel engine—tear it down and rebuild it, or set it up again? A. Say about three weeks, the time she was on the slip; in comparison with that three weeks there were a few days she was up on the slip and it was very cold and I would not put the new liner in, I didn't want to take any risk of cracking.

Q. Did you take the plugs out under the piston, piston plugs, bottom of the piston, engine plugs? A. Yes, they were all out.

Q. Find them rusted? A. Oh, no, they were all in good condition. 40

Q. When you took this engine down, find any evidence of rust in it at all? A. I found a little rust and sand which you expect in any diesel around the linings.

Q. Did you find the piston crowns rusty, or intake or outlet pipes in the cooling system? A. The crown or top of the piston was quite clean, apart from a little soot or carbon.

Q. What about the cooling pipes, intake and outlet pipes, water cooling pipes? A. They were all right; they were brass and won't rust.

Q. What about the engine block itself—engine head—any indication of rust there? A. No.

Q. When you took this engine down the ship had been operating for a considerable time? A. Yes.

Q. Did you begin to overhaul right after the operation? A. When we arrived back from Montreal, or from Sydney.

Q. You have told us that you might reasonably expect rust sufficient
10 to cause—to make the engine inefficient, to accumulate within the period of a week if the engine was laid up? A. If it was neglected.

Q. What do you mean by neglected? A. If parts were failed to be lubricated properly.

Q. During what period? A. From the time she stopped running; if you don't give them a coat of oil you would expect rust.

Q. I suppose you gave them a good coat? A. Yes.

Q. When? A. When she stopped running they were all oiled.

Q. What would you consider the cause, if you knew that rust was found in this engine on her first trip after this? A. Well, the time I
20 left the ship there was no sign of rust, but after that—

Q. If rust were found on the trip, on the first trip which took place about a week after you completed your overhaul, what would you say was the cause of it? A. Well, I would not like to say; there would be so many different conditions that might happen.

Q. Give us some that might happen that would cause rust to develop. A. If it was heavy weather and she took water through anywhere and it dropped on the engine.

Q. The first day out—if it developed the first day the ship was out? A. Whereabouts did it develop?

30 Q. Assuming the rust were found—

MR. WALKER: He ought to be told where; I object to the form of the question; this man ought to be told where rust was found in order to give a proper answer.

Q. Assuming the engine—the cylinders were found to be over-heating and the intake pipes were taken out and found to be full of rust and had to be cleaned with wire— A. Intake pipes?

Q. Yes. A. Which intake pipes?

Q. The cooling system; water intake pipes, found to be full of rust and had to be cleaned with wire, and that happened every three or four
40 hours the first day out? A. I don't quite understand the intake pipes of the cooling system.

Q. There are pipes in the circulating system whereby water flows in to cool the engine, the water circulates through the cooling system? A. Yes.

Q. If there is rust, the rust is likely to get—if there are scales of rust on any part of the engine they will break off? A. Yes.

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Thomas
Cross-
examination.
—continued.*

Q. And become clogged in part of the cooling system? A. Little portions might.

Q. Which might eventually clog the pipes? A. Yes.

Q. How big are these pipes? A. The small pipe where it goes into the piston, the hole at the end, you might just get a match through; naturally in a brand new engine a little bit of dirt might choke it, but you might anticipate it.

Q. You would expect the first day, when you took this engine that had just been overhauled—the first day at sea you would expect it to break down for three or four hours? A. I don't say break down. 10

MR. SMITH: Argument with the witness is not permitted.

Q. If the cylinder in the engine became overheated, what would you do,—would you continue to operate the engine? A. Well, if necessary I would just slow it down.

Q. And if it still continued to be overheated? A. I would stop.

Q. One of the first things you do is to test the water cooling system? A. To find the cause of the trouble.

Q. You have spoken of these little pipes that go into the pistons—two in each piston? A. One is an internal pipe—one inside the other.

Q. With a bore about as big as a match? A. That is the inlet pipe, 20 that the water goes in, cold water.

Q. Would you take that pipe out and examine it? A. Certainly.

Q. Could you do that with the engine running? A. No.

Q. Would you expect after a week to find rust in that pipe? A. That is passed through from the sea, from the pipes in the sea certainly, even on a new ship.

Q. Would you expect that to continue on all the various pipes in the ship? A. It might continue for a year.

Q. And necessitate— A. Stopping the engines.

Q. Periodically? A. Yes. 30

Q. Every three or four hours? A. I won't say every three or four hours, but if necessary certainly.

Q. What would that be caused by? A. Well, it is caused through action of the pipe, especially an old ship, you cannot stop it.

Q. I am referring to rust; it would be caused by rust getting into these pipes? A. Rust caused in the pipes by the action of the sea.

Q. And that would continue perhaps for some days intermittently before it can be got rid of? A. It might continue for a year.

BY THE COMMISSIONER:

Q. Does the operation of the engine, when there is rust inside the 40 pipes—does the operation of the engine tend to remove the rust? A. The circulation of the water; it always moves it towards the engine, to an open space.

BY MR. DALEY :

Q. After you continue to operate the engine for a time the tendency is for the rust to disappear? A. Yes, disappear.

Q. So if you wanted to be particularly sure that you would not find rust, it would be the sensible thing to run the engine for 24 hours before you undertake a voyage after a ship has been laid up? A. I don't say that; even then you might not find the rust, it might not break away from the pipes.

10 Q. Did you examine the pipe lines connecting the pumps and the bilges? A. We had water through them.

Q. And found no evidence of being corroded? A. Not as far as we could see.

Q. Are there electric starters on the pumps? A. On which pumps?

Q. On any of the pumps? A. Not the main engine pumps?

Q. Are there on any? A. On the two electric pumps.

Q. Did you take them down and examine them? A. The electrician from the shipyard had a look at them.

Q. You didn't personally? A. No.

20 A. Did you find anything wrong with the auxiliary lubricating pump? A. It was taken out and overhauled.

Q. Had it been giving trouble? A. It just wanted the valves adjusting.

Q. And you adjusted the valves? A. They took it up to the shipyard and gave it an overhauling.

Q. You don't know personally? A. I know it was all right; it worked on the pump; when it works it must go right; I had to test it.

Q. Know whether the engine room bilge was cleaned out while you were on board? A. That is one thing I always see is kept clean.

Q. That is when you were engineer on board. A. Yes.

30 Q. Were you engineer of the ship at the time you supervised overhauling? A. I had been on the ship three trips.

Q. Did you overhaul the steam boiler? A. Yes.

Q. Clean all the tubes? A. She was all thoroughly cleaned and tested.

Q. Your report says you took down the steering engine. A. That was taken ashore.

Q. And thoroughly rebuilt? A. Rebuilt.

Q. Did you supervise the rebuilding of that? A. No; Mr. Patterson was there.

40 Q. When you say the steering engine was taken down and thoroughly rebuilt, that is something you have no personal knowledge of? A. When the machine was put back it was in perfect condition.

Q. I didn't ask that; you don't know— A. When I was up in the shop I saw what was being done, and I went up in the shop occasionally.

Q. Why was that steering engine rebuilt? A. It was old; and just wanted new parts.

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Q. Was there not another reason besides that—was the steam steering equipment working properly? A. I made three trips on her and she was all right.

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Q. As far as you know? A. As an old engine, yes.

Q. How old was it? A. I don't know if that was the age of the ship or another put in.

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examination.

Q. Are you aware of whether or not they had any difficulty steering the ship while you were engineer? A. We used to have a little trouble for a minute or two occasionally—just the steam—

Q. That is the real reason the engine was taken out and fixed up? 10
A. Oh, no.

Q. It had nothing to do with it, the fact you had trouble with the steam steering gear? A. It was to overhaul the engine.

Q. What was the little trouble you had occasionally with the steam equipment? A. Heavy water — heavy weather, and cold weather causing the steam to condense; the result is you would have a little hydraulic action in the engine; she would still work.

Q. You could not get prompt response? A. When you turned the steam on she would work all right.

Q. You have told us you had trouble with the steam, when steering 20
with the steam. A. That engine would slow down just until it got rid of the water.

Q. That would affect the action of the rudder? A. Very little.

Q. But it would affect it? A. A little; very little.

Q. That was caused by the cold water striking the steam pipes which led from the boiler to the engine, which I understand was under the bridge?
A. Yes, on the steam to the engine.

Q. From the boiler to the bridge? A. There would be.

Q. That causes hydraulic action causing a pocket which would prevent the steam getting full pressure? A. Just for that moment, yes. 30

Q. What other ships have you been on equipped with Sulzer engines?
A. A vessel called the "Vita" from England; she ran coasting; twin screw.

Q. How long on her? A. Two years.

Q. What model engine did she have? A. Airless injection.

Q. Was this an airless injection? A. No, air injection.

Q. Was she a four or two cycle engine? A. Two.

Q. The engine on the "Vita" was two? A. Yes.

Q. What horse power? A. Two three-hundred, twin screw.

Q. What year? A. About 1927.

Q. A more recent model than the "Hurry On"? A. Yes. 40

Q. Ever have any other experience? A. "Vancolite", Imperial Oil Company.

Q. How long on her? A. Six months.

Q. What type had she? A. Air injection, Sulzer.

Q. What model or year? A. I forget how old she is; about 1925 or 1926.

Re-Examined by MR. WALKER:

Q. You told my learned friend that you tested out this engine when the boat was at the wharf when you had assembled everything. A. Yes.

Q. As to the H.P. that each cylinder would develop? A. Yes.

Q. I state that correctly? A. Yes, I tested that.

Q. Would that take you some time? Would you have to run the engine some time- A. Oh, yes, for hours at a time.

Q. When ascertaining that— A. And keep the engine thoroughly warmed up.

10 Q. I think you told my learned that each cylinder developed between 70 and 80 H.P. A. 80.

Q. What would that indicate to you would be their development under load going out? A. When the ship would be running free that would shew something about 100 H.P.

Q. Do you ascertain that by some formula? A. Yes.

Q. If she is developing 70 or 80 standing still, running free — A. Just by experience.

Q. When you had finished your work and tested it, did somebody take over the engine from you, was there a chief engineer put aboard to
20 take over? A. Yes, he joined her and went away with her.

Q. You handed the engines and everything over to him? A. He was there and saw them running and was satisfied they were running all right.

Q. Was he there some time with you? A. Two or three days.

Q. You handed the engines over to him? A. Yes.

Q. He stayed on the ship and you left? A. Yes.

Q. A week or so before she sailed? A. A few days before; I forget how long.

Re-Cross-Examined by MR. DALEY:

30 Q. Who was the chief engineer you handed over to? A. I just forget his name at the present moment; he used to be in the Imperial Oil Company.

Q. Not Moulton? A. No.

Q. Service? A. Service.

Q. You don't know how long he stayed there? A. No.

Q. It was the same fellow that took her to sea?

MR. SMITH: There is no such thing as re-cross-examination.

MR. DALEY: Something new.

Q. Answer it?

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By MR. WALKER:

Q. Are you sure of the name of the man that took the engines over from you? Do you know the fellow that went on that trip as chief engineer? A. I don't know; he was there; I don't know if he actually went away to Newfoundland; I think she went up there; he might have only been there a day or two and left; I went to New York.

Q. You mean the man to whom you handed over the ship? A. Yes.

Q. You are not sure whether that man took her to sea? A. I am not sure he went away to sea; there was one man, Service, he was there the first; of course, I might have made a mistake in the name.

10

AND THEN THE WITNESS WITHDREW.

CLAIMANT'S EVIDENCE IN REBUTTAL

No. 11

Evidence of Seton Montgomery

SETON MONTGOMERY, being called and duly sworn, testified as follows:

Examined by MR. DALEY:

Q. What is your occupation? A. Professor of Mechanical Engineering, Nova Scotia Technical College.

Q. Are you also a marine engineer? A. Yes.

Q. Tell us what your qualifications are: what certificates you hold and your experience, both as professor in mechanical engineering and as marine engineer. A. Five years indentured apprenticeship with Hawthornes Shipbuilding Works in Leith, Scotland; about 4½ years at sea, as engineer: first class marine engineer's certificate, Board of Trade, London.

20

Q. In various steamers? A. Yes; five years in the army during the war; two years with H. M. Dockyard, Rosyth, on the engineering staff; five years as plant engineer with Canada Founders & Forgings; three years field engineer superintendent with the Ford Motor Company of Canada; and seven years as professor of mechanical engineering at the Technical College.

30

Q. As part of your duties as professor, or as part of your study, have you studied the effects of heat and heat values? A. Yes.

Q. I shew you plan marked E/20: you will notice this red line marked from a round object, boiler leading to steering engine, of this ship: that line represents the steam steering line. You have been in court this morning and heard the evidence of Mr. Patterson? A. Yes.

Q. And also the evidence of Mr Laurie? A. Yes.

Q. You have heard how that pipe line was insulated? A. Yes.

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Q. According to their evidence, — and you have heard how it was drained? A. Yes.

Q. And manner of drain cocks: I want to ask you if in your opinion the insulation of that pipe line would be sufficient to protect the pipe so that it could carry steam from the boiler to the engine, if the water—if the deck of the ship was awash with water? A. Not if it was awash with water, no.

Q. Tell us why? A. The heat conduction through a copper pipe which is immersed in water is affected by the velocity of the water over
10 the surface of the pipe, and is enormous: it is also directly affected by the difference in temperature between the steam in the pipe and the water on the outside of the pipe. If I might refer to the steam tables I could give you those figures. Might I again ask what the pressure was?

Q. The evidence is the pressure was 115 lbs. on the boiler. A. The temperature corresponding to 115 lbs. gauge pressure is 347.31° Fah. and if I remember, you said the temperature of the water was 40° Fah.

Q. Assuming it was—it was a zero day, and ice floating around in the water,—assume it was 40° Fah.

MR. SMITH: It was much colder than that.

Q. We will say 40°. A. Then the temperature difference between the
20 steam and the water would be the difference between those two, or approximately 307°. With bare pipe immersed in water the heat lost runs up to 2500 and sometimes 3000 B.T.U's., per square foot per hour per degree temperature difference. It sounds rather long and involved.

MR. SMITH: I don't think there can be any question—if I may interfere for a moment—that in this particular case the pipes didn't prove efficient.

Q. Go on from that: What conclusion do you arrive at from that?
A. The pipe is a small one, 1½" copper pipe. Might I refer to another
30 book? A copper pipe, diameter 1½", is 1.9" outside, 1.6" inside diameter. 1.6" inside diameter gives us an area of just approximately 2",—two square inches. That means that one foot of pipe would carry just 24 cubic inches of steam in volume. The volume of one pound of steam is 3.45 cubic feet per pound: but it must be understood here, that from the time steam begins to condense back to the water form, until it has totally condensed to the water form, there is no change of temperature whatever in pipe, and the removal of only 872.4 B.T.U's from one pound of steam will reduce it to the water form. I would say that with water surrounding the pipe on the deck, and in probably quite violent motion, that the heat lost there would be sufficient
40 almost to prevent steam from getting to the engine.

Q. At all? A. Yes.

Q. Supposing it had been possible to open the valve cocks—that is on the assumption there was no insulation—or that there is insulation—as you

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heard Mr. Patterson state— A. The insulation—the efficiency of asbestos rope insulation is approximately 50%; that would mean it would cut down the heat losses from bare pipe by roughly half.

Q. Even if wet? A. Yes, even if it was wet.

Q. Supposing it could have been kept dry, what would it have done?

A. In still air there is a very small leakage from pipe because of the surrounding air forming a blanket on the pipe.

Q. Are you of the opinion that if—that with this pipe insulated as it was, the valves would have been sufficient to have drained the pipe off if it could have been opened so that the steam steering gear could have been worked under the conditions and decks covered with water at a temperature of 40°? A. I think probably the water would have still continued to be in the pipe and have been carried along to the steering engine: if that is what I understand. 10

Q. So even if the valves could have been opened and the pipe drained are you still of the opinion that the pipe was insufficiently insulated to allow the steam to go from the boiler to the engine? A. So long as water surrounded the pipes, yes.

Q. Could that pipe have been constructed on the deck in such a way as to have made it efficient to carry the steam from the boiler to the engine, under all conditions or under conditions of this kind? A. If the pipe had been enclosed in a box it would have—well, it would have minimized the heat loss and I should say have allowed the steam to get along sufficiently well to keep the engine in operation. 20

Q. Even with the decks awash? A. Yes, because as I said, the heat loss is directly influenced by the velocity of water over these heat surfaces.

Q. Is there any reason why such a box—why it would not be practical to construct such a box to protect the pipe? A. No, I cannot see why not. From my experience of steam pipes running on deck, they are carried along on small flat iron cradles, just above the deck, so that the flanges will clear the deck, and on top of the same carriages is bolted a flat plate; in many ships that is also enclosed by plates down the side, which forms a protection to the copper pipes. 30

Q. Are those water proof? A. No, not to my knowledge: I am only talking of pipe supplying steam winches.

Q. Is there a difference in principle—of course, with steam winches in operation the ship is in port? A. Yes.

Q. And the deck would not be awash? A. No.

Q. If these drain cocks could have been opened, would opening them periodically be sufficient in your opinion under circumstances where they were continuously covered by water? A. No; I think condensation would be so rapid as to require them to be practically—well, perhaps half, or even more, open all the time. 40

Q. Would it be practical to leave them half open all the time? A. Yes, it may have been; I would not be sure of that.

Q. Would not sufficient steam have escaped, with cocks of that size, to prevent the engine from working efficiently? A. With a cock $\frac{3}{4}$ " in diameter, and another one $\frac{1}{2}$ ", I hardly think a donkey boiler would supply enough steam to get in through to the engine with those open.

Cross-Examined by MR. SMITH:

Q. In your experience when at sea, or with ships, have you ever come across a steam line from the boiler to the steering engine passing along the deck of a vessel and boxed in? A. No, I have not had any experience, except with very large steamers where our steering engine was actually in
10 the after end of the engine room.

Q. I suppose you would not like to express any opinion as to the practicability of having the steam and exhaust pipes from the boiler to the steering engine in this particular vessel covered, — the "Hurry On" — whether it would be practical or not to do so? A. I think it would be practical, yes.

Q. Would it not be necessary to have access to these pipes? A. Yes; the plate which either Mr. Laurie or Mr. Patterson mentioned which is always along the top of copper steam pipes on deck is just to safeguard against these pipes being crushed by any load, and that is easily re-
20 movable.

Q. Would such a plate prevent water getting to the pipes? A. No, the plate and the other two sides would have formed a box section there which would be quite easily removed for getting at the flanges.

Q. In cases where you found box plating in that form and boxed as indicated, were the steam pipes also lagged? A. They were always lagged.

AND THEN THE WITNESS WITHDREW.

No. 12

Evidence of Alexander Craigie

ALEXANDER CRAIGIE, being called and duly sworn testified as follows:

30 Examined by MR. DALEY:

Q. What is your occupation? A. Marine engineer.

Q. Tell us what your qualifications are? A. My whole history?

Q. Your experience briefly? A. Five years apprenticeship as engineer, some little time as journeyman engineer, before I went to sea; probably 27 years sea experience, in different grades from junior to chief engineer.

Q. In steam? A. At sea.

Q. In steam? A. Yes; afterwards several years, I should think three years, on shore in the north of England as superintendent engineer
40 and inspector of new buildings for the Elder, Dempster Line.

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Q. And then? A. From there to Montreal, superintendent engineer for the Elder, Dempster Lines two services, running from Montreal to Mexico, and Montreal to the Cape of Good Hope.

Q. And then after that? A. Superintendent for the Royal Mail Steam Packet Company during the whole time they were here.

Q. Do you hold a marine engineer's certificate? A. Yes, I hold an extra first class engineer's certificate, Board of Trade.

Q. You live in Halifax? A. Yes.

Q. I am shewing you E/20, a plan of the motor ship "Hurry On". This line—you are a little deaf? A. Yes. 10

Q. Have you heard the evidence this morning? A. Not very much of it.

Q. This red line represents the steam line that runs from the boiler to the engine. A. Yes, to the steering engine.

Q. And the evidence that has been given here this morning was that that line was insulated with a 1/2" asbestos rope covered with canvas. A. Yes.

Q. That there were three sets of drain cocks in them, at points A, C & B. A. Yes.

Q. That the line was 1 1/2" in diameter made of copper. A. Yes. 20

Q. In your opinion would that be sufficient insulation to make that line efficient to carry steam from the boiler to the engine, on the assumption that the decks were awash with water at a temperature of 40° Fah. A. No, I don't consider it efficient.

Q. Why? A. Well, 1/2"—I think that was the size—1/2" asbestos rope is not sufficient insulation for a steam pipe running to so vital a piece of machinery as a steering engine, and it was not protected from the sea as far as I gather other than by a canvas covering—to my mind that is not sufficient.

Q. What do you think should have been done? A. It should have been enclosed also. 30

Q. How? A. By a channel shaped—iron channel shaped box with a cover; it need not have been watertight entirely, but sufficient to protect the pipe from the constant rush of the water.

Q. In your opinion would it be practical to build such a box A. Easy; practical, yes.

Q. Had that been done would it in your opinion be sufficient? A. I think so; I would rather have had a thicker insulation; 1/2" to my mind is not very thick.

Q. For conditions which a boat may meet in this weather? A. That is what I mean, yes. 40

Q. It was inch rope,—would that alter your opinion? A. To a little extent, not entirely.

Q. Do you think it should be enclosed in a box? A. Yes, to protect it from the rush of the sea, the contact with sea water.

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Q. In such a pipe would you expect to find condensation so great as to effect the efficiency of the steering engine if the pipe were not enclosed?

A. Yes, at times I do think.

Q. And the deck awash? A. Yes, certainly.

Cross-Examined by MR. SMITH:

Q. Have you sailed in many ships that were enclosed, had their pipe lines enclosed in that way? A. I was never in a ship that had a similar system, where they had to carry the pipe for the steering engine a long distance along—

10 Q. You never had much to do with small vessels anyway? A. Not so small as that.

Q. I suppose you don't know anything about the efficiency of the boiler, or the boiler which supplied the steam for the steering engine? A. In this particular ship?

Q. Yes. A. No, I don't know anything about that.

Q. Nor the efficiency of the steering engine itself? A. No, I don't know the engine; I have not been told the type or shewn the type, but I presume it was efficient, otherwise the Corporation would not pass it.

20 Q. You say that you presume that the engine was efficient, otherwise the Corporation would not have passed it? A. They would not have passed that make of engine.

Q. Does your assumption go so far as to say that the steam line was efficient or the corporation would not have passed it? A. No, it does not go so far as that; I speak only of the engine; and it would probably have to be passed by the head office.

Q. Would you expect from your experience that the steam steering engine, when there was also a hand steering engine, would be used in rough weather at sea, or would you expect it to be used only in or about harbours? A. Oh, well, some people might prefer to use it all the time.

30 Q. From the point of view of efficiency and economy? A. Efficiency would make no difference, but economically, yes, and discard the steam at sea.

Q. And use the steam— A. In close waters.

Q. In smooth waters and harbours? A. Enclosed waters,—that is the steam.

Q. And you would not expect the decks to be awash with ice cold water during the periods when the vessel was in close waters? A. No, I would not expect it naturally.

By MR. DALEY:

40 Q. Might you not expect very rough water—very rough weather close to the shore? A. Very often there is very rough weather close to shore.

AND THEN THE WITNESS WITHDREW.

No. 13

EXHIBITS OMITTED TO BE PRINTED

No. 13
Exhibits
Omitted to
be Printed.

1. E/1 to E/5 inclusive are Bills of Lading in form similar to Exhibit E/6. These Bills of Lading cover shipments from Bay of Islands to New York of 1,806 barrels of Scotch cured herring, 133 barrels of round herring and 37 half-barrels of Scotch cured herring;

2. Clauses 1, 4, 5, 6 and 10 to 19 inclusive are omitted by consent from Exhibit E/6;

3. E/7 to E/17 inclusive are Bills of Lading covering herring shipped by other claimants, but have nothing to do with this claim; 10

4. Paragraphs (4) to (11) inclusive of Exhibit E/18 are omitted from this Exhibit by consent;

5. E/20 is a Plan of the ship;

6. E/21 is a Chart showing the location of the stranding of the "Hurry On";

No. 14
Exhibit E/6,
Bill of Lading
15, 1935.

No. 14

EXHIBIT E/6

Form B3—Bill of Lading.

W. A. SHAW

Hereinafter called the "Company"—Head Office, Halifax, N. S. 20

Received on board in apparent good order and condition, except as noted herein, the following merchandise or cargo marked and numbered by the shipper as set forth hereunder, from M. G. Basha, contents and condition of contents unknown, the same to be held at shipper's risk of fire, flood, pilferage, theft, collapse of dock or superstructure or any other damage or loss of whatsoever nature or kind which occurs or is occasioned while on dock pending loading on board ship for carriage on board the steamship or vessel M. V. "Hurry On" (with privilege to substitute, tranship, forward and/or other privileges as herein provided) intended to sail from Woods Island, with destination New York, N. Y., said merchandise or cargo to be conveyed and delivered subject to the terms and conditions stated in this Bill of Lading which constitutes the contract between the shipper and the Company, in the like apparent good order and condition, from the ship's deck (where the Company's responsibility shall for all purposes cease) either into lighter or on to the quay at Master's option at the port of New York, N. Y., (or so near thereunto as the vessel may 30

safely get), unto order Commercial National Bank and Trust Co., notify Vita Foods Products, 99 Hudson Street, New York, N. Y., or to his or their assigns.

Freight charges and/or Primage payable at New York, N. Y.

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No. 14
Exhibit E/6,
Bill of Lading
15, 1935.

—continued

SHIPPER'S DESCRIPTION OF MERCHANDISE OR CARGO

(Company's responsibility for description being restricted to shipper's description as follows)

| Marks and Numbers | Number of Packages and Contents | Weight or Measurement | Rate | Freight |
|-------------------|---------------------------------|-----------------------|------|----------------|
| 10 Menzel & Co. | 18 bbls. S. C. Herring.... | | 1.60 | 28.80 |
| | 4 bbls Round Herring.. | | 1.60 | 6.40 |
| | Canadian Funds. | Freight, Collect..... | | 35.20 |
| | | Charges..... | | |
| | | Wharfage..... | | |
| | | Total..... | | <u>\$35.20</u> |

In accepting this Bill of Lading the Shippers, Owner and Consignee of the Merchandise or Cargo, and the Holder of the Bill of Lading agree to be bound by its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, 20 Consignee and Holder.

IN WITNESS WHEREOF the master or agent of the said ship hath affirmed two Bills of Lading all of this tenor and date, one of which Bills of Lading being accomplished, the others to stand void.

Notwithstanding anything to the contrary that may be printed herein all freights collectable under this Bill of Lading, including any short paid freights, are to be paid in Canadian currency, or its equivalent in the currency of the Country of the port of discharge at the current rate of exchange on the date of vessel's entry at the Customs House at the port of discharge, unless otherwise written into this Bill of Lading.

30. Dated at Middle Arm, 15, 1935,

.W. A. SHAW.

(Herein called the Company)

J. POOLE, for Agents

TERMS AND CONDITIONS OF THIS CONTRACT BILL OF LADING WHICH ARE HEREBY MUTUALLY AGREED UPON AS FOLLOWS:

(NOTE: Numbers 1, 4, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the terms and conditions are not relevant to the matters in issue, and have been omitted by consent.)

2. The Company shall not be liable for any loss, injury or damage arising from the Act of God, the King's Enemies, Pirates, Restraint of Princes and Rulers, or process of law, barratry of Master or Mariners, Fire at Sea or on shore, effects of climate, Accidents from Machinery, Boilers, Steam, or any other accidents of the Seas, Rivers and Streams, navigation of whatsoever nature and kind and the Master is always at liberty to sail with or without Pilots and/or Tugs. 10

3. Weights, measures, guage, quality, brands, contents, conditions and value unknown. Each package must be specially marked by the Shippers before shipment with the name of the port and/or place of destination in letters not less than two inches long, in default of which the Company is not to be liable for incorrect delivery. The Company is not answerable for leakage, breakage, rust, heat of holds, sweating, chaffing, decay, smell and evaporation from the within merchandise or cargo or any other merchandise or cargo contamination, or for damage arising from frost, rats or other vermin or from the perishable nature of the goods, or from loss, injury, or damage arising from or due to explosion, heat, fire, at any time or place whatsoever, or from any process of disinfection from the merchandise or cargo being shipped in the rain or snow, for insufficiency in the strength of packages, nor for any loss or damage caused by the prolongation of the voyage or for damages to or loss of live stock. Expenses of whatever nature and kind consequent on quarantine regulations, to be paid by the Consignee of the merchandise or cargo. 20

7. The Company is not in any event to be liable for any damage to any merchandise or cargo however caused, which is capable of being covered by insurance; nor for Gold, Silver, Bullion, Specie, Documents, Jewellery, Pictures, Embroideries, Perfumeries, Works of Arts, Silks, Furs, China, Glass, Porcelain, Watches or Clocks, in any respect; nor for goods of any description whatever above the value of \$5 per cubic foot, and in no case is the Company to be liable for merchandise or cargo the value of which is beyond \$50 per package, unless Bills of Lading are signed therefor, with the value therein expressed, and a special agreement is made, nor for any claim, notice of which is not given before the removal of the merchandise or cargo; nor for any loss or injury arising from or occasioned by, or from any act or omission, negligence, default or error in judgment of the pilots, masters, mariners, engineers, stevedores, workmen or other persons in the service of the Company or otherwise, whether in, or on board the ship or any ship belonging to or chartered by it or otherwise, howsoever for whose acts it would otherwise be liable, or by unseaworthiness of the ship at or after the commencement of the voyage, provided all reasonable means have been taken to provide against such unseawor- 30 40

thiness; nor for claims for damage or detention of merchandise or cargo under through Bills of Lading, where the damage is done or detention occurs when the merchandise or cargo are not in the possession of the Company; nor in any case for more than the invoice or declared value of the merchandise or cargo, whichever shall be the least. This Contract shall be governed by English law. General Average shall be settled according to York/Antwerp Rules 1924 and adjusted in the country selected by the Company.

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8. If the Company shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster, resulting from an accident or fault or errors in navigation, or in the management of the steamer or from any latent and/or other defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the defect or the unseaworthiness was not discovered by the exercise of due diligence), the Shippers, Consignees or Owners of the merchandise or cargo shall nevertheless pay salvage, and any special charges incurred in respect to the merchandise or cargo, and shall contribute, with the ship in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such accident, danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent or other defect or unseaworthiness.

9. In case of General Average the Consignees may be required to sign General Average Bond and deposit such provisional payment of General Average and salvage charges as may be fixed by the Company or its Agents.

20. In respect of goods loaded in United States of America the Act of Congress No. 57 of 1893 (Harter Act) is to apply to the contract contained in this Bill of Lading, the Carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act as applied to the goods mentioned in this section, and if anything herein contained be inconsistent therewith it shall, to the extent of such inconsistency and no further, be null and void.

21. Saving as in Section 20 this Bill of Lading is subject to all the terms and provisions of and exemptions from liability contained in the Act of Parliament of Canada, 9-10 Edward VII, Chap. 61, and the following Section is incorporated in this Bill of Lading as required by said Act:

Section 4. Where any Bill of Lading or similar document of title to goods contains any clause, covenant or agreement whereby—

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(a) the owner, charterer, master or agent of any ship, or the ship itself is relieved from liability for loss or damage to goods arising from negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship, or,

(b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip and supply the ship and make and keep the ship seaworthy and make and keep the ship's hold, 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 are in any wise lessened, weakened or avoided, or, 10

(c) the obligations of the master, officers, agents or servants of any ship to carefully handle and stow goods and to care for, preserve and properly deliver them are in any wise lessened, weakened or avoided such clause, covenant or agreement shall be illegal, null and void and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act.

22. No claim whatever for loss or damage to goods will be admitted or considered unless it be made in writing with full particulars to the Company or its Agents within fifteen days after the delivery of, or failure 20 to deliver the goods.

No. 15

EXHIBIT E/18

No. 15
Exhibit E/18
Admissions
Dec. 11th, 1936

FOR the purpose of these proceedings only, UNUS SHIPPING COMPANY, LIMITED, and VITA FOOD PRODUCTS INC. make the following admissions, namely:—

1. THAT all Bills of Lading in question herein were issued in Newfoundland on or before the 17th day of January, A.D. 1935.

2. THAT The Carriage of Goods by Sea Act, 1932 (Newfoundland) as contained in a pamphlet issued by the King's Printer for Newfoundland, being Chapter 18 of 22 George V, is and was at all times material 30 to this action in full force and effect in the Dominion of Newfoundland, and was and is the only Statute of the said Dominion of Newfoundland defining the rights and liabilities of carriers of goods by sea.

3. THAT prior to and at the time of the departure of the Motor Vessel "Hurry On" from Bay of Islands, Newfoundland, on the voyage referred to in Paragraph (4) of the Statement of Claim, the Owners of the

said Motor Vessel "Hurry On", by themselves, their servants and agents, exercised due diligence to properly man, supply and provision the said Motor Vessel, and also exercised due diligence to make the Ship seaworthy in so far as stowage of cargo is concerned.

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—continued.

12. THAT the herring referred to in Paragraphs (4), (5) and (6) of the Statement of Claim were delivered to the Claimant upon presentation of the said bills of lading in New York in a damaged condition between the 6th and 8th days of March, A.D. 1935, delivery being completed on the said 8th day of March, A.D. 1935.

10 13. THAT all documents and proceedings in connection with the winding up of the Company on file in the office of the Prothonotary of this Honourable Court at Halifax which are relevant to this claim are deemed to be evidence in this proceeding, and wherever the date of filing or issue of any such document or proceeding is material, the same shall be deemed to be conclusively established by the date of issue or filing stamped on such document by the Prothonotary.

Dated at Halifax, N. S., this 11th day of December, A.D. 1936.

(Sgd.) E. C. PHINNEY,
(Sgd.) G. McL. DALEY,
Solicitor for the Claimant.

20

(Sgd.) J. A. WALKER,
Solicitor for the Company.

NOTE: Admissions 4 to 11 inclusive are omitted by consent.

No. 16

EXHIBIT E/19

FOR the purpose of these Proceedings only UNUS SHIPPING COMPANY LIMITED makes the following admissions, namely,—

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Admissions.
Dec. 12th, 1936

30 (1) That the Claimant, Vita Food Products Inc., purchased the herring referred to in the Statement of Claim herein and all of them, from M. G. Basha of Curling, Newfoundland, prior to the 12th day of January, 1935.

(2) That the purchase price of the said herring and all of them, was paid to the said M. G. Basha on or before the 17th day of January, 1935, by The Bank of Montreal, at Curling aforesaid from funds made availa-

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ble at the said Bank by the said Claimant who established a credit for that purpose with the said Bank by means of a letter of credit issued by the Commercial National Bank and Trust Company of New York;

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Exhibit E/19.
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(3) That at the time of the said payment the said M. G. Basha delivered the Bills of Lading covering the said herring and all of them (Exhibits E/1 to E/6 both inclusive herein) to the said Bank of Montreal at Curling aforesaid;

(4) That upon delivery of the said Bills of Lading by the said M. G. Basha to the said Bank, the said Bills of Lading and all of them were immediately mailed by the said Bank of Montreal to the said Commercial National Bank and Trust Company at New York, who, upon the receipt of the same endorsed and delivered the same and all of them, to the said Claimant and charged to the account of the said Claimant, the amount paid by the Bank of Montreal as aforesaid to the said M. G. Basha for the said herring; 10

(5) That the said amount was charged to the account of the said Claimant by the said Commercial National Bank and Trust Company and the said Bills of Lading and all of them, were endorsed and delivered to the said Claimant by the said Commercial National Bank and Trust Company on or before the 28th day of February, 1935; 20

(6) That the said Bills of Lading and all of them were made to the order of the said Commercial National Bank and Trust Company notify Vita Food Products Inc. for the purpose of securing the said Commercial National Bank and Trust Company against the issue of the said letter of credit and that Vita Food Products Inc. was at all times material to this action the owner of the said herring and all of them;

(7) That the said herring were damaged as a result of the stranding of the said ship, and that the Claimant incurred certain salvage and other expenses as a result of the said stranding; 30

(8) That Edward Barry of Curling, Newfoundland, in or about the latter part of December, A.D., 1934, and the early part of January, A.D., 1935, advised all the herring shippers in and about Bay of Islands, Newfoundland, that a ship was coming to Bay of Islands in the early part of January to carry any herring offering in and about Bay of Islands to New York;

(9) That the ship to which the said Edward Barry referred in so advising the said shippers as aforesaid was the M.V. "Hurry On" which arrived at Bay of Islands on or about January 5th, A.D., 1935, and sailed from Bay of Islands on January 16th, A.D., 1935; 40

(10) That the M.V. "Hurry On" between the 5th day of January, A.D., 1935, and the 16th day of January, A.D., 1935, loaded all herring offering in and about Bay of Islands for New York;

(11) That no herring shipper who desired to ship on the M.V. "Hurry On" was refused any quantity offered for shipment;

(1) That no preference was shown to any shipper and that all shippers paid the same rate;

(13) That the usual method of advertising herring shipped from Bay of Islands to New York for by personal canvass only;

10 (14) That all herring shippers in and about Bay of Islands were personally canvassed for the said shipments of herring by the said Edward Barry who advised these shippers of the approximate date the ship would sail.

DATED at Halifax, N. S., this 12th day of December, A.D., 1936.

(Sgd.)

J. A. WALKER

Solicitor for the Company.

No. 17

DECISION OF THE CHIEF JUSTICE SIR JOSEPH CHISHOLM

20 CHISHOLM, C. J.:

The shipper, the Vita Food Products, Inc., is a body corporate, incorporated under the laws of the State of New York, and the Unus Shipping Company, Limited, is a body corporate, incorporated under the laws of the Province of Nova Scotia, and is now being wound up under the provisions of the Companies' Winding Up Act, chapter 198 of the Revised Statutes of Nova Scotia, 1923. The Unus Co. was at all the material times concerned herein the owner of 64 shares of the motor vessel "Hurry On", which was registered at Halifax, Nova Scotia. In the month of January 1935, the "Hurry On" received at points in Newfoundland for delivery in New York 30 1806 barrels of Scotch Cured herring, 133 barrels of round herring and 37 half barrels of Scotch Cured herring. On or about the 16th day of January 1935, the "Hurry On" proceeded on her intended voyage, and two days later, in bad weather, she was stranded at Grady's Point on the Coast of Nova Scotia with the said cargo of herring on board. The cargo was damaged, salvaged and re-conditioned and was delivered to the Vita Food

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Products Co. upon presentation of the Bills of Lading, hereinafter mentioned, in New York in a damaged condition between the 6th and 8th days of March 1935, the delivery having been completed on the last mentioned day. The present claim is made by the shipper to recover damages for the failure of the "Hurry On" to deliver the said cargo of herring in New York in like condition as received, and to recover money expended in salvaging the cargo. The shipper alleges that the "Hurry On" was operated as a common carrier or in the alternative as a carrier for hire on the said voyage, and as such carrier was required in law to deliver the cargo in New York in like condition as it had been received—in other words, that the Unus Shipping Co. was an insurer of the safe delivery of the cargo. 10

The shipper claims \$16,342.89, which is set forth in the Statement of Claim as follows:

| | |
|---|-------------|
| Damage to herring..... | \$11,327.00 |
| Salvage Expenditure..... | 4,711.78 |
| Other expenses necessarily incurred | 304.11 |
| | \$16,342.89 |

In addition to denials that it was a common carrier, the Unus Shipping Co. invokes as excusing it from all liability the terms of the bills of lading and in the alternative the provisions of the Newfoundland Carriage of Goods by Sea Act, 1932, being Chapter 18 of 22 George V. It claims that the contract was made in Newfoundland and must be construed according to the laws of that Dominion. This point, that of construction of the contract, admits of no dispute; it is disputed that the Newfoundland Statute mentioned applies to the transaction. Admissions have been signed and filed by the parties. It is admitted among other things that the owners of the "Hurry On" exercised due diligence to properly man, supply and provision the vessel and also exercised due diligence to make her seaworthy in so far as the stowage of the cargo is concerned, the dispute as to her unseaworthiness arising only as to her equipment in the way of steering appliances. As to hull and engines the uncontradicted evidence is that they were in excellent condition. 20 30

The Bills of Lading issued upon receipt of the cargo were delivered to one M. G. Basha and they come by endorsement to the Vita Food Products Co. The master of the "Hurry On" borrowed printed forms and in issuing them he failed to include in them the Paramount Clause as directed by the Newfoundland Statute, Section 3, which enacts

3. Every bill of lading, or similar document of title, issued in this Dominion which contains or is evidence of any contract to which the

Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

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And assuming the Bills of Lading to be the effective contract between the parties, and the Newfoundland statute to apply, notwithstanding the omission of the Paramount Clause, the shipper claims to be relieved from liability because of clause 7 of the Bills of Lading, the material portions of which provide that:

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10 The Company is not in any event to be liable for any damage to any merchandise or cargo however caused, which is capable of being covered by insurance; . . . nor for any loss or injury arising from or occasioned by or from any act or omission, negligence, default or error in judgment of the pilots, masters, mariners, engineers, stevedores, workmen or other persons in the service of the Company or otherwise whether in or on board the said ship . . . or otherwise howsoever for whose acts it would otherwise be liable or by unseaworthiness of the ship at or after the commencement of the voyage, provided all reasonable means have been taken to provide against such unseaworthiness.

Aid is also sought from Clause 22 of the Bills of Lading which provides:

20 22. No claim whatever for loss or damage to goods will be admitted or considered unless it be made in writing with full particulars to the Company or its agents within fifteen days after delivery of or failure to deliver the goods.

30 The shipper alleges that it took all reasonable means to provide against unseaworthiness, and that the loss or damage claimed for was solely by reason of matters and things excepted in the said Bills of Lading namely, perils and dangers of the sea and other navigable waters, or by reason of reasonable deviation due to perils and dangers of the seas and other navigable waters; and it also claims that no notice was given within fifteen days as required by Clause 22 above recited.

In the alternative the Unus Co. calls in the aid of the Newfoundland Statute and the Rules therein contained; whereby, it asserts, the rights and liabilities of the parties are fixed and determined. The Articles of the Rules relevant to this contention are:

Article 2. Subject to the provisions of Article VI., under every contract of carriage of goods by sea, the carrier, in relation to the loading, handling, stowage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

And Article IV in part provides :

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.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:—

(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. 10

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

(q) Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier.

The damage alleged, it is urged, did not result from unseaworthiness of the ship and arose without the actual fault, neglect or privity of the Company, its servants and agents; but if it arose at all, it arose from the perils of the sea. The shipper also invokes Sub-section (6) of Article III wherein is 20 provided:

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.

It is strongly contended that this Sub-section was not complied with.

The Claimant in reply denies that the Bills of Lading were accepted as the contract between the parties, and it submits that the same are null and of no effect for non-compliance with Section 3 of the Newfoundland statute which requires the Paramount Clause to be included. It contends also that, 30 apart from the bills of lading, there is an implied contract of carriage arising from the payment of the freight, and that such implied contract was not in any way subject to the terms of the Newfoundland statute. There is a further point urged by the shipper, namely, that independently of any contract, the law imposed a duty on the carrier, as a common carrier, to deliver the cargo in New York in the condition in which it was received, and that by its failure to do so, it became liable in an action of tort. The rights and liabilities of the parties in this case must necessarily be founded upon a contract for the carriage of the goods. If there was no contract express

or implied, no duty could have arisen as to the transport of the cargo. The existence of a contract is a fact that cannot be ignored.

The first question that emerges from the facts is whether the carrier is answerable in tort on the proved facts of the case. In the Common Law Procedure Act of 1852, a tort is described as "a wrong independent of contract," which I take to be an act which has not the elements of a contract or breach of contract. Sir Frederick Pollock says that the first factor necessary to constitute a tort is that there must be some act or omission on the part of the person committing the tort, unauthorized by law and not being a breach of some duty undertaken by contract. If the claim is to be tried by this test, the shipper has no claim in tort. I am not unmindful of the suggestion made in some of the cases that the obligation assumed by the carrier is independent of the contract, and failure to perform it is a tort: 4 Halsbury 13.

In *Bryant v. Herbert*, 3 C.P.D. 389, the action was for the return of a picture, and the Court held that there was no contract between the parties and the wrongful detention must necessarily have been a tort.

In *Taylor v. M.S. & L. Ry. Co.* (1895) 1 Q. B. D. 134 and *Kelly v. Metropolitan Ry. Co.*, (1895) 1 Q.B.D. 944, the plaintiff's claims were held to be in tort. In the first named a railway passenger had his thumb crushed through the negligence of the defendant's servant in closing the compartment door and it was held that the action was founded upon tort and not upon contract. If the injury had occurred from the negligence of a fellow passenger in so closing the door, the plaintiff would have an action against the fellow passenger in tort, so the case is not conclusive of the point in issue in the case at bar. If the carrier had wantonly thrown the shipper's goods overboard, or had disposed of them to some third party, an action in tort would be the appropriate remedy for the trespasser or the conversion. The basis of an action in such cases is not against the carrier, as carrier but as the party who had committed a wrong independent altogether of any contract that may have subsisted between the parties.

Taking the view that there must have been a contract between the parties, the question then arises, what is the contract. Such a contract may be by word of mouth; it does not necessarily have to be in writing. "An oral contract of carriage," says Williston on Contracts, "has the same legal contractual validity as a bill of lading." A Contract of Carriage need not necessarily be in a bill of lading; it may be constituted by a charter party or it may be contained in correspondence passing between the parties as in the case of *Harland & Wolff, Ltd. v. Burns & Land Lines Ltd.*, 40 Lloyd's List Reports, (1931).

But the contract may arise from the issue of the bill of lading. In support of the contention that a bill of lading is not the contract, I am referred to *Scrutton on Charter Parties* (13th ed.) pp. 9 and 10, where it is stated:

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A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms in which the goods were delivered to and received by the ship. It is not the contract, for that has been made before the bill of lading was signed and delivered, but it is excellent evidence of the terms of the contract.

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This statement of the law is based on the words of Lord Brammell in *Sewell v. Burdick*, 10 A.C. at 105 where he says :

“There is, I think, another inaccuracy in the statute, which indeed is unusual. It speaks of the contract contained in the bill of lading. To 10
my mind there no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of their terms, but it is not the contract.

That has been made before the bill of lading was given.”
Bateson, J., however, in *The St. Joseph* (1933) Probate at page 128, uses this language :

What is the contract between the plaintiffs and defendants? It is made by the plaintiff offering the bill of lading to the defendants and getting delivery of the goods covered by the bill of lading. That is the only contract. 20

In *Pollard v. Vinton*, 105 N.S., at page 8 Mr. Justice Miller observes :

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and the right to receive said property at the place of delivery . . . It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no good are actually received, there can be no valid contract to carry or to deliver. 30

Mr. Williston in his well-known work on *Contracts*, Vol. 4, Section 1081, gives a definition of a bill of lading as follows :

A bill of lading is a written receipt given by a carrier to a shipper acknowledging that goods have been received for transportation to a special value. It ordinarily contains the name of the person from whom the goods have been received and to whom they are to be delivered, as well as a statement, partial or complete, of the terms and

conditions upon which the carrier agrees to transport the goods. It thus often repeats the terms of a charter party, if one had previously been entered into between the shipper and carrier.

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And in Section 1088 after quoting the words of Lord Brammell in *Sewell v. Burdick*, Mr. Williston proceeds to say:

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10 It is submitted, however, that a paper which states the terms on which goods have been delivered and received, if those terms require action by the bailee as is the case with the terms of a bill of lading, involves a promise to perform those terms and, therefore, is a contract. It would be possible, doubtless, for a writing to contain a recital of what previously had been agreed, and not a statement of present agreement; and this seems to be the view expressed in the quotation above, but the ordinary bill of lading is rather to be interpreted as stating what the parties agree to at the time of shipment, than as reciting a previous contract made by them." . . .

In spite, therefore, of the statement quoted above, it seems clear that a bill of lading is not simply a receipt, but a written contract, and the Courts have so held.

20 On the authorities cited, it seems clear that the bill of lading may contain all the terms of the contract. In all contracts there are usually previous conversations or negotiations before the contract is made, and the carrier's willingness to accept the shipment at a stated freight was no doubt ascertained. This was followed by the preparation and delivery of the bill of lading; and this writing in my opinion merged the prior oral conversations and was intended to be a complete integration of them in a written document. There is authority that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration whether they are oral or written. The final document is de-
30 signed to be a repository and evidence of their final intentions. In this case there is no other document dealing with the shipment. It is quite conceivable, as already pointed out, that there may be cases where the bill of lading is not intended to be the complete contract and where its terms are to be governed by the terms of another document, but in this case it is the sole document of the parties. Considering the circumstances of this case, and there being no charter party or other writing relating to the shipment, I have come to the conclusion that the bill of lading must be taken to be what the parties intended to be the sole contract between them.

40 The next question that presents itself is the effect upon the bill of lading of the omission from it of an express statement that it is to have effect subject to the Rules as required by Section 3 of the Newfoundland

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statute. Does this omission render the bill of lading wholly illegal or illegal only 56 part? Is it illegal only as against the carrier and not as against the shipper? The latter contends that the omission makes the bill of lading wholly void and of no effect, that the carrier cannot claim relief under the exemptions contained in the Rules, and that its liability is that of a common carrier at common law. The carrier urges that if the bill of lading is void no action can arise out of it. *Ex maleficio non oritur contractus*. Failure to insert the paramount clause, says Temperley on Carriage of Goods by Sea Act, 1924 (3rd Ed.) p. 33, will presumably render the whole document an illegal one and render all persons who are privy to its issue liable to be prosecuted as for a misdemeanour. And on page 82 the statement is elaborated: 10

Section 3 of the Act and Article V are clearly commands of the Legislature and nothing else, and therefore if a bill of lading was issued in England in a case to which the Rules applied without a paramount clause as required by Section 3 of the Act . . . it would appear that the persons who consented to its issue would be criminally liable as above stated; that the carrier, at any rate, could not sue in an English Court for his freight or demurrage, and any holder who was privy to its issue could not sue for loss of or damage to his goods. 20

If this is to be taken as an exact statement of the law and of the results flowing from the omission of the Clause Paramount the claim of the shipper fails. But was it the intention of the Legislature to nullify the whole transaction where the parties failed to insert the clause? The primary intention of the Legislature was to give effect to the unanimous recommendations of the International Conference on Maritime Law held at Brussels in October, 1922, which had in view the unification of certain rules relating to bills of lading, as amended at the meeting held at Brussels in October, 1923. These Rules were mainly designed to make uniform and to fix definitely the responsibilities, rights and immunities attaching to carriers under bills of lading. The important condition to be sought was to give the Rules effect rather than to have inserted in the bill of lading a statement that the Rules should be applied; and it is consistent with the intention of the Legislature that Section 3 should be read as suggested in Temperley's work on the Carriage of Goods by Sea Act, 1924, as if the words "shall contain" were the words "shall be deemed to contain" the Clause Paramount. 30

In Section 3 there is no express prohibition or any statement that the bill of lading shall be void by reason of the non-inclusion of the clause. 40 It simply states that the bill of lading "shall contain" the clause, without any indication as to the consequences of non-inclusion. There are no negative or nullifying words. The Lord Chancellor in *Liverpool Borough, Bank v. Turner*, 2 DeG. F. & J. 505, observed:

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.

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And in *Victoria D.S.L. v. Dott* (1905, 2 Cr 624, dealing with the case of an unregistered money-lender, Buckley, J., said:

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10 There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. . . . If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal.

Here there is no express prohibition and it is not clear that there is an implied prohibition. The omission to add the clause is not evil or immoral or forbidden by positive law. It does not belong to the class of criminal and wicked things which ought not to be permitted by the law of civilized nations. It would, I think, be more reasonable to hold that the section is directory and that full effect can be given to the intention of its framers, by so considering its import and by construing the section as meaning that the bill of lading shall be deemed to contain the Clause Paramount.

20 If then, the section may properly be so construed, the question of the seaworthiness of the ship has next to be considered. The only ground urged as to her unseaworthiness was in relation to her steering gear. She was equipped with two sets of hand steering gear and a steam steering gear. It is not disputed that the hand sets were in good working order: the contention is that the steam steering gear was not and that in consequence the ship was unseaworthy at the time. A great deal of evidence was taken touching the steering apparatus; and as to the necessity of there being good steam steering gear the men of experience who were called as witnesses differed in opinion. To sustain the shipper's claim on this point, it must be shown that a steam steering gear was necessary in a
30 vessel of the type of the "Hurry On", in order that she might be seaworthy. If only hand steering gear was required, it then makes little difference whether the steam steering gear was efficient or not. I do not consider it necessary to review the evidence above mentioned, in detail as I have come to the conclusion that for such a vessel as the "Hurry On" steam steering gear, however convenient it might be found in some circumstances, was not really necessary, and that the carrier exercised due diligence to make the vessel seaworthy, and that the vessel was in fact seaworthy at the commencement of the voyage. If that view is correct, the carrier is then entitled to the immunities mentioned in Article IV. of
40 the Schedule of the Newfoundland Carriage of Goods by Sea Act, already mentioned, the first Rule of which Article enacts that 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

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carrier to make the ship seaworthy. And the carrier is further entitled to the immunity mentioned in Rule 2 of the same Article, which frees the carrier and ship from loss or damage arising or resulting from (a) the act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship; or from (c) the perils, dangers and accidents of the sea or other navigable waters; or (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agent or servants of the carrier. The same is true of the immunity mentioned in Rule 3.

There may have been bad navigation on the part of the master. The 10 mishap was caused either by the negligence of the master or by the perils of the sea, or by both combined. It does not matter which for in any case the Rules referred to excuse the carrier and ship from responsibility. Another bar to the shipper's recovery is the provision in Article III, Rule 6, which provides that:

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.

It is admitted that the delivery of the cargo in New York was completed 20 on the 8th day of March, 1935. The Unus Shipping Company went into liquidation on the 20th day of December, 1935; and by the provisions of the Companies' Winding Up Act no action, suit or other proceeding could be instituted or continued against the company except with the leave of the Court and subject to such terms as the Court might impose. The question then is: did the shipper bring suit within one year from the 8th day of March 1935? It is argued that it was impossible for the shipper to bring a suit. It was possible to bring suit between the 8th day of March and the 20th day of December without any leave of the Court; and it was possible in the remaining part of the year beginning from March 8th, to apply to 30 the Court for leave to bring suit. This was not done. It is urged, however, that "suit" does not in the Newfoundland statute mean a proceeding in Court; that it means the seeking of redress out of Court by entreaty, solicitation or the like. I am unable to accept that view of the term. Rather, I think, while it is a comprehensive term, it means in the statute a proceeding in a Court of Justice in which the plaintiff or claimant pursues in such Court the remedy which the law affords him for the recovery of a right. The writing of a letter, making a demand does not in my opinion constitute a suit. If instead of a letter, the shipper had filed a claim, verified as required by the winding-up order of the Court, a plausible argument could 40 be made that suit was brought within the year.

I do not consider it necessary to discuss the defences that may arise under the clauses of the bills of lading. If I am right in thinking that the

Rules of the statute apply, it is not necessary to consider the terms of the bills of lading; if I am in error, the bills of lading fall with the Rules.

To sum up, then, I find the "Hury On" to have been a common carrier at all times relevant to this proceeding, and as such common carrier she is liable as an insurer by the rule of law long established in the English Courts, unless her owners have contracted themselves out of such liability. I have come to the conclusion that the shippers claim is founded on contract and not in tort; that the contract is wholly embodied in the bills of lading; that notwithstanding the non-inclusion of the Paramount Clause in the bills of lading, the bills of lading are effective documents to which are incident the freedom from liability prescribed in the Rules already recited or referred to; and also that suit was not brought within one year of the completion of the delivery of the cargo in New York. For these reasons I think the claim fails.

On the question of the effect of the omission of the Paramount Clause, one cannot, by reason of the wording of the sections and in the absence of so little aid from the decided cases, feel confident of any opinion he arrives at, and it is hard to free oneself from doubt in coming to any definite opinion.

20
Halifax, N. S.,
July 5th, 1937.

(Sgd.) JOSEPH CHISHOLM, C.J.

No. 18

ORDER FOR JUDGMENT

30 THE CLAIM of VITA FOOD PRODUCTS INC., a body corporate, to rank as a creditor of UNUS SHIPPING COMPANY LIMITED, IN LIQUIDATION, in amounts aggregating the sum of \$16,342.89 having been duly set down for hearing and having come on for trial before His Lordship the Chief Justice of Nova Scotia at Halifax on the 16th day of March, the 7th day of April and the 22nd day of December in the year 1936, and the learned Chief Justice after hearing the evidence adduced and what was alleged by Counsel as well for the Claimant as for the said Company, having been pleased to reserve his decision herein and subsequently, to wit on or about the 5th day of July, 1937, having been pleased to deliver his decision herein dismissing the said claim;

NOW upon hearing Counsel on behalf of the Company and on behalf of the Claimant;

AND ON MOTION:

40 IT IS ORDERED that the Claimant do take nothing by its said claim, but that the same be and it is hereby dismissed with costs.

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No. 17
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IT IS FURTHER ORDERED that judgment be entered herein for Unus Shipping Company, Limited in Liquidation against the Claimant for said costs when taxed.

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Order for
Judgment.
July 8th, 1937.
—continued.

DATED at Halifax, N. S., this 8th day of July, A.D., 1937.

BY THE COURT

As to form.

(Sgd.) G. McL. DALEY.

(Sgd.) REGINALD V. HARRIS,
Prothonotary.

No. 19

NOTICE OF APPEAL

No. 19
Notice of
Appeal to
Supreme Court
of Nova Scotia
en Banc
July 14th, 1937

TAKE NOTICE that the above named VITA FOOD PRODUCTS INC., a Body Corporate, intends to appeal and does hereby appeal to the Supreme Court of Nova Scotia En Banc from the whole of the Decision or Judgment of His Lordship, the Chief Justice of Nova Scotia, filed herein on or about the 5th day of July, A.D., 1937, and from the whole of the Order for Judgment based thereon and dated the 8th day of July, A.D., 1937; 10

AND FURTHER TAKE NOTICE of the Hearing of the said Appeal before the said Supreme Court of Nova Scotia En Banc on Tuesday, the 16th day of November, A.D., 1937, at the hour of 10:00 o'clock in the forenoon, or so soon thereafter as Counsel can be heard; 20

AND FURTHER TAKE NOTICE that on the Hearing of the said Appeal the said Supreme Court of Nova Scotia En Banc will be moved for an Order allowing the said Appeal and allowing the claim herein of the above named (Claimant) Appellant VITA FOOD PRODUCTS INC., with Costs.

DATED at Halifax, N. S., this 14th day of July, A.D. 1937.

E. C. PHINNEY, of
50 Sackville Street,
Halifax, N. S.,
Solicitor for
VITA FOOD PRODUCTS INC. 30

To: J. A. WALKER, K.C.,
of 50 Sackville Street,
Halifax, N. S.,
Solicitor for
UNUS SHIPPING COMPANY IN
LIQUIDATION.

**REASONS FOR JUDGMENT OF THE SUPREME COURT OF
NOVA SCOTIA**

OPINION OF GRAHAM J.

*In The
Supreme
Court of
Nova Scotia*

No. 20
Reasons for
Judgment.

Opinion of
Graham J.,
February 12th,
1938.

GRAHAM J.:

The first impression from perusal of Sects. (1) and (4) of the Acts is, that Sect. (1) was intended to provide that the rule was to be given effect in all but excepted contracts of carriage, and that Sect. (4) was intended to implement Sect. (1) by requiring an express statement of that fact to be put in the contract; but, if that had been the intention, it would have been easier to have said so plainly; and in light of the opinions given in "The Torni" (1932) P. 78, "it would seem not to be the effect of the Sections."

Accordingly, I agree with the conclusions of my brothers, Hall and Doull; but I wish to deal briefly with the main contention presented by Mr. Daley in his able argument to the Court. I agree that there is only one contract, i.e., that integrated in the Bill of Lading; that the Bill of Lading was illegal because it omitted the statement that the contract it contained was subject to the rules of the Newfoundland Statute. On that point the opinion of Greer, L. J., in the "Torni" case at p. 88, is clear. I also agree that it cannot be deemed to contain the omitted clause; that, because it is illegal, an action cannot be maintained on the contract set out in it; that Basha was plaintiff's agent, and that plaintiff is therefore charged with the illegality. All these things were either admitted or not seriously disputed.

The goods were plaintiff's when Basha shipped them; and its interest in them, at least in the circumstances of this case, carried the right to get them from defendant. Plaintiff did get them. The question is—whether or not its right was to get them undamaged, as they were when shipped?

The Bill of Lading contained provisions, which, but for its illegality would have protected the defendant from plaintiff's claim, plaintiff, taking advantage of the fact that the Bill of Lading was illegal and its protecting clauses therefore void, claims the right, which it would have had if there had been no Bill of Lading and no contract. It founds its claim without reference to the contract set out in the Bill of Lading, upon the breach by defendant of a common law duty to carry the goods safely, for which breach, in a proper case, an action in tort will lie.

The relationship of the parties, under which that duty arises, is brought about by reason of some expressed or implied agreement (See per Collins, L. J., in *Turner vs. Stallibras*, (1898) 1 Q.B. at p. 59). Here it arose, if it arose at all, by reason of the illegal contract in the Bill of Lading.

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I assume that if there had been no Bill of Lading or other contract exempting the defendant from liability, the duty alleged would be binding upon it and it would be liable for damages resulting from breach of the duty; but, if the relationship between the parties had been brought about by fraud; I think it is clear upon the principle acted upon in *Austin vs. G. W. Ry.* (1867) 2 Q.B., that the duty relied upon would not arise. (Lord Blackburn at p. 446). That logically must also be the result when the contract is illegal. The defendant could not claim freight and the relationship on which the duty is based could not arise.

Apart from the duty specifically relied upon, the defendant, having taken possession of the plaintiff's goods, was bound as a bailee not to injure them by any wilful or negligent malfeasance; but it was not seriously contended—and upon the evidence it could not be—that there was such conduct. 10

The result entails no hardship to plaintiff, because the Bill of Lading to which it agreed, if legal, would have protected defendant; but it would be a hardship to defendant if plaintiff were able, by reason of the illegality of the contract to which it was a party, to fix upon it a liability which neither of them ever intended that defendant was to assume.

I agree that the appeal should be dismissed. 20

OPINION OF HALL J.

Concurred in by Archibald J.

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1938.

HALL J.:

An appeal from the decision of the learned Chief Justice, who dismissed the action. In his decision he sets forth the facts as follows:

“The shipper, the Vita Food Products, Inc., is a body corporate, incorporated under the laws of the State of New York, and the Unus Shipping Company, Limited, is a body corporate, incorporated under the laws of the Province of Nova Scotia, and is now being wound up under the provisions of the Companies' Winding Up Act, Chapter 193 of the Revised Statutes of Nova Scotia, 1923. The Unus Co. was at all the material times concerned herein the owner of 64 shares of the motor vessel “Hurry On”, which was registered at Halifax, Nova Scotia. In the month of January, 1935, the “Hurry On” received at points in Newfoundland for delivery in New York 1806 barrels of Scotch Cured herring, 133 barrels of round herring and 37 half barrels of Scotch Cured herring. On or about the 16th day of January, 1935, the “Hurry On”, proceeded on her intended voyage, and two days later, in bad weather, she was stranded at Grady's Point on the Coast of 30

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Hall J.,
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10 Nova Scotia with the said cargo of herring on board. The cargo was damaged, salvaged and re-conditioned and was delivered to the Vita Food Products Co. upon presentation of the Bills of Lading, hereinafter mentioned, in New York in a damaged condition between the 6th and 8th days of March, 1935, the delivery having been completed on the last mentioned day. The present claim is made by the shipper to recover damages for the failure of the "Hurry On" to deliver the said cargo of herring in New York in like condition as received, and to recover money expended in salvaging the cargo. The shipper alleges that the "Hurry On" was operated as a common carrier or in the alternative as a carrier for hire on the said voyage, and as such carrier was required in law to deliver the cargo in New York in like condition as it had been received—in other words, that the Unus Shipping Co. was an insurer of the safe delivery of the cargo.

The shipper claims \$16,342.89, which is set forth in the Statement of Claim as follows,—

| | |
|--|-------------|
| Damage to herring..... | \$11,327.00 |
| Salvage Expenditure..... | 4,711.78 |
| Other expenses necessarily incurred..... | 304.11 |
| | <hr/> |
| | \$16,342.89 |

20

30 In addition to denials that it was a common carrier, the Unus Shipping Co. invokes as excusing it from all liability the terms of the bills of lading and in the alternative the provisions of the Newfoundland Carriage of Goods by Sea Act, 1932, being Chapter 18 of 22 George V. It claims that the contract was made in Newfoundland and must be construed according to the laws of that Dominion. This point, that of construction of the contract, admits of no dispute; it is disputed that the Newfoundland Statute mentioned applies to the transaction. Admissions have been signed and filed by the parties. It is admitted among other things that the owners of the "Hurry On" exercised due diligence to properly man, supply and provision the vessel and also exercised due diligence to make her seaworthy in so far as the stowage of the cargo is concerned, the dispute as to her unseaworthiness arising only as to her equipment in the way of steering appliances. As to hull and engines the uncontradicted evidence is that they were in excellent condition.

40 The Bills of Lading issued upon receipt of the cargo were delivered to one M. G. Basha and they come by endorsement to the Vita Food Products Inc. Co. The master of the "Hurry On" borrowed printed forms and in issuing them he failed to include in them the Paramount Clause as directed by the Newfoundland Statute, Section 3. And assuming the Bills of Lading to be the effective contract between the

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parties, and the Newfoundland Statute to apply, notwithstanding the omission of the Paramount Clause, the shipper claims to be relieved from liability because of Clauses 7 and 22 of the Bills of Lading. The shipper alleges that it took all reasonable means to provide against unseaworthiness, and that the loss or damage claimed for was solely by reason of matters and things excepted in the said Bills of Lading namely, perils and dangers of the sea and other navigable waters, or by reason of reasonable deviation due to perils and dangers of the seas and other navigable waters; and it also claims that no notice was given within fifteen days as required by Clause 22. 10

In the alternative the Unus Co. calls in the aid of the Newfoundland Statute and the Rules therein contained; whereby, it asserts, the rights and liabilities of the parties are fixed and determined. The damage alleged, it is urged, did not result from unseaworthiness of the ship and arose without the actual fault, neglect or privity of the Company, its servants and agents; but if it arose at all, it arose from the perils of the sea.’

After exhaustive discussion of the authorities, the learned trial Judge thus summarized his findings:

“To sum up, then, I find the “Hurry On” to have been a common carrier at all times relevant to this proceeding, and as such common carrier she is liable as an insurer by the rule of law long established in the English Courts, unless her owners have contracted themselves out of such liability. I have come to the conclusion that the shippers claim is founded on contract and not in tort; that the contract is wholly embodied in the bills of lading; that notwithstanding the non-inclusion of the Paramount Clause in the bills of lading, the bills of lading are effective documents to which are incident the freedom from liability prescribed in the Rules already recited or referred to; and also that suit was not brought within one year of the completion of the delivery of the cargo in New York. For these reasons I think the claim fails.” 20 30

At the hearing on appeal, the claim of unseaworthiness was abandoned. It is common ground that if the Bills of Lading are legal and valid in Newfoundland, the claimant can not recover.

The appellant contends that the respondent was a common carrier and as such was liable, by the custom of the realm, as an insurer of the cargo and that this liability exists independent of any contract; and further, that the respondent could not avail itself of the exceptions contained in the Bills of Lading, or The Carriage of Goods by Sea Act, 1932, to escape this common law liability, because the Bills of Lading were illegal, null and void due to the failure of the respondent to comply with the imperative provisions of Section 3 of the Act. 40

It is convenient to consider first the effect of the non-inclusion of the Paramount Clause in the Bills of Lading.

The Newfoundland Carriage of Goods by Sea Act, 1932, has this preamble:

10 “WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading:

 AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference:

 AND WHEREAS it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act, (in this Act referred to as “the Rules”) should, subject to the provisions of this Act, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading.”

20 The reference is to an International Convention for the unification of certain Rules of Law relative to Bills of Lading held at Brussels. Article 10 of that Convention, which draws up a Code of Rules to be embodied in Bills of Lading, is as follows: “The provisions of this Convention shall apply to all Bills of Lading issued in any of the contracting States.” Article 12 provides: “Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels.” His Britannic Majesty, under a provision contained in Article 13, affixed a reservation to his signature: “I further declare that my signature applies only to Great Britain and Northern
30 Ireland. I reserve the right of each of the British Dominions, Colonies . . . , to accede to this Convention under Article 13.” England adopted the Rules by the Carriage of Goods by Sea Act, 1924, and Newfoundland acceded to the Convention and adopted the Rules by its Act in 1932.

The first section of the Act is general in its nature;

 “1. Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.”

40 “Subject to the provisions of this Act,” is a qualifying clause, which narrows materially the scope of the general clause. For instance, nothing in Section 1 limits application of the Act only to Contracts of Carriage cov-

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ered by a bill of lading or any similar document of title. The rules themselves express this limitation and the Courts have held that the general scope of the similar English Act is thus restricted. In *Harland & Wolfe vs. Burns & Laird Lines, Limited*, (1931) S.C. 722, Lord Blackburn said:

“After repeated consideration of the Act, I am unable to hold that its purpose extends beyond the protection of those whose title of goods depends upon holding of a Bill of Lading.”

and the other Judges agreed with this conclusion. Both Sections 4 and 5 of the Act provide for a modification of the Rules and Section 6 has saving clauses. Section 1 therefore must be read “Subject to the provisions of” Sections 4, 5, and 6 and I think also “Subject to the provisions of” Section 3. 10

Williamson and Payne in their work on the Carriage of Goods by Sea Act, 1924, say at p. 11;

“Sect. 1, in its opening, states: ‘Subject to the provisions of this Act,’ and Sec. 3 is clearly within the meaning of these words, which can, therefore, be read as ‘Subject to the provisions of ‘Section 3 and the remainder of this Act.’”

Adopting the construction that the Rules shall have effect subject to the provisions of Section 3 of the Act, it becomes necessary to consider 20 whether Section 3 is to be construed as absolute or directory.

The difference between an absolute and a directory enactment as explained by Lord Coleridge, C.J., in *Woodward vs. Sarsons*, L. R. 10 C. P. at 746, is that “an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.” This statement is adopted in *Craies on Statute Law* (4th ed. at p. 231) and the author proceeds: “i.e., that the Act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory, it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not.” The learned trial Judge has imported into the section words not found there and has construed the words “shall contain” as “shall be deemed to contain”—the Clause Paramount. 30

He says:

“The primary intention of the Legislature was to give effect to the unanimous recommendations of the International Conference on Maritime Law held at Brussels in October, 1922, which had in view the unification of certain rules relating to bills of lading, as amended at the meeting held at Brussels in October, 1923. These Rules were 40

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mainly designed to make uniform and to fix definitely the responsibilities, rights and immunities attaching to carriers under bills of lading. The important condition to be sought was to give the Rules effect rather than to have inserted in the bill of lading a statement that the Rules should be applied; and it is consistent with the intention of the Legislature that Section 3 should be read as suggested in Temperley's work on the Carriage of Goods by Sea Act, 1924, as if the words "shall contain" were the words "shall be deemed to contain" the Clause Paramount."

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10 It is with great deference I express the view that the language of the section does not warrant this construction. The words "shall contain" are imperative in form. They are not ambiguous and should be given their natural meaning. Lord Mersey said in *Thompson vs. Goold*, 79 L.J. K.B. 911, "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do." And Lord Loreburn, L.C., in *Vickers vs. Evans*, (1910) A.C. at 445, said: "We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

20 But, in my view, an even more serious objection is that the suggested construction would defeat the very purpose of the Act. The intention of the Newfoundland Legislature is set forth in the Preamble. It was deemed expedient that the rules unanimously adopted by the Brussels Conference and designed for uniformity "should, *subject to the provisions of this Act*, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading."

The Act gives effect to the rules in relation to goods carried by sea from any port in Newfoundland to any other port whether in or outside Newfoundland. It follows naturally that in many, probably the majority,
30 of cases where litigation arises the Bills of Lading will be construed in Courts outside of Newfoundland. If there is hesitation between alternative constructions, the one should be adopted that will enable the Act to give the fullest effect to the Rules.

It is a general rule of English law that a contract is to be construed according to the law by which the parties intend to be bound. This general rule applies to Bills of Lading. If the intention is not expressed, it must be ascertained by implication, (*Scrutton on Charter Parties*, 13th ed., p. 20. This statement is quoted with approval in *Richardson vs. Burlington* (1931) S.C.R. at p. 78).

40 In a long list of cases from *Lloyd vs. Gilbert* (1865) L.R. 1 Q.B. 115 to the present time it has been held that the question for determination is "What was the law which the parties contemplated as being the law gov-

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erning this contract." (Lord Halsbury, L.C., in *Re Missouri Steamship Co.*, 42 Ch. D. at 336).

The cases are discussed exhaustively by Swinfen Eddy, J., in *British South Africa Co. vs. DeBeers*, (1910) 1 Ch. 354, in which he found that the parties intended the contract to be governed by English law instead of the Roman-Dutch law of Rhodesia where the contract was made and therefore English law applied. His judgment was affirmed by the Court of Appeal (1910) 2 Ch. 502, and though reversed on other grounds by the House of Lords ([1912] A.C.52), the contract was construed by their Lordships under English Law.

Brett, L. J., in *The Gaetano Maria* (1882) 7 P. D. at 148, said: "Upon the principle which arises from the mercantile transaction itself, it seems to me that whoever puts his goods upon a foreign ship puts them on board subject to be dealt with by the master according to the law of the country to which the ship belongs, unless that authority is limited by express stipulation between the parties at the time of the shipment."

In *Hamlyn & Co. vs. Tallisker Distillery*, ([1894] A.C. at 207), Lord Herschell said:

"It is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined."

It would appear that if the Bills of Lading in the present case did "contain an express statement that (they are) to have effect subject to the provisions of the said Rules as applied by this Act," as required by Section 3, this Court would find that the Bills of Lading so issued by the owner and delivered to the shipper had fixed beyond doubt the intention of the parties to be governed by the terms, provisions and conditions of the Newfoundland Carriage of Goods by Sea Act, 1932, and the schedule thereto, and if the foregoing statement of the law is correct, we would be compelled to give effect to the said Rules. Such statement was not included nor is there contained in the Bills of Lading one word to indicate any intention of the parties that the Newfoundland Rules would govern. On the contrary, each Bill of Lading expressly sets forth that: "This contract shall be governed by English Law." Further, sections 20 and 21 of the Bills of Lading provide that in the case of goods loaded in the United States of America, The Harter Act is to apply and, saving that exception, the Bills of Lading are subject to all the terms and provisions of and exemptions from liability contained in the Act of Parliament of Canada, 9—10 Edward VII., Chap. 61, and Section 4 of that Act is incorporated in the Bills of Lading. (These were issued prior to the passage of the Canadian Water Carriage of Goods Act, 1936).

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Following the same reasoning, if these Bills of Lading are valid and binding upon the parties, this Court must construe and give effect to them subject to the said Canadian Statute as applied by English law, and thus carry out the expressed intention of the parties.

10 The logical conclusion is that the provision of this Act set forth in Section 3 requiring that every bill of lading issued in Newfoundland to which the Rules apply "shall contain an express statement that it is to have effect subject to the provisions of the said Rules," is obligatory and not directory. Otherwise, the parties can contract themselves out of the Rules by omitting the Clause Paramount and expressing their intention to be governed by other rules and the intent and purpose of the Legislature, as expressed in the enactment, will be defeated.

We must consider next the effect upon the Bills of Lading of the non-inclusion of the Clause Paramount in disobedience to Section 3.

20 Maxwell (5th ed) p. 599 states: "Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust or inconvenient to enact a vigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature."

In *Re Missouri Steamship Company*, (L. R. 42 Ch. D. at 336) Lord Halsbury said:

"Where a contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract must be void all over the world and no civilized country would be called upon to enforce it."

30 This judgment is discussed by Slessor, L. J., in *The Torni*, *infra*. An illegal contract is defined as "one which is either illegal *stricto sensu* or immoral." This contract does not deal with a criminal or immoral act but is made in defiance of the absolute provision of section 3 and is "contrary to such positive law as would prohibit the making of such a contract at all." Mr. Temperley, in his work on the Carriage of Goods by Sea Act, 1924, (3rd ed. at p. 82) says that section 3 is clearly a command of the Legislature and therefore if a Bill of Lading was issued in England in a case to which the Rules applied, without a Clause Paramount, as required by Section 3, the persons who consented to its issue would be criminally liable.

40 In *Langton vs. Hughes*, (1813) 1 M. & S. 593, Ellenborough, C. J., lays down the rules: "It may be taken as a received rule of law that what is done in contravention of an Act of Parliament cannot be made the subject matter of an action." Williamson & Payne at p. 9 say:

"It is not possible to distinguish between an action brought upon a bill of lading omitting the Clause Paramount and a state of facts

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such as arose in *Mahmond vs. Ispahani*, (1921) 2 K.B. 716, for the only difference that can be found is that in this case the order imposed a penalty."

There Scrutton, L. J., said:

"In my opinion, the Court is bound, once it knows that a contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the guilty parties or outside sources. The Court does not sit to enforce illegal contracts. The contract was absolutely prohibited, and, in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition even though the person breaking the law relies upon his own illegality." 10

The decision in *Anderson Ltd. vs. Daniel*, (1924) 1 K.B. 138, is to the same effect. In these cases the statute provided a penalty but that was not the decisive factor. The particular contracts were held to be illegal for non-compliance with the commands of the Legislature.

Although the Carriage of Goods by Sea Act (1932) does not provide an express penalty for non-insertion of the Paramount Clause, it is submitted that the section contains a command as to a matter of public convenience and interest, and any person who disobeys the command is guilty of a misdemeanour and is liable to prosecution. In *Victorian Daylesford vs. Dott* (1905) 2 Ch. 624, Lord Wrenbury states: 20

"The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced."

The only reported case dealing directly with this section of the Carriage of Goods by Sea Act is *The Torni* ([1932] P. 78). This action was in respect of damage to oranges shipped at Jaffa for carriage to Hull. The Bill of Lading contained the following clause: "This bill of lading wherever signed is to be construed in accordance with English law." In 1926 30 Palestine adopted the Uniform Act of the Brussels Convention. Section 4 of its Ordinance is identical with section 3 of the Newfoundland Act plus the following words: "and shall be deemed to have effect subject thereto notwithstanding the omission of such express statement." The Bills of Lading did not contain the Clause Paramount.

Counsel for respondent urge that the observations of the learned Lord Justices of Appeal are obiter. This may be so, although it can be argued that the construction of the whole section was necessary to their decision. In any event, the opinion of such distinguished Judges is worthy of grave consideration. Greer, L. J., at p. 87, said: 40

10 “Now I read the Ordinance as meaning this: paragraph 4 (Newfoundland 3) in my judgment contains an imperative order to those who are making contracts for the shipment of goods from Palestine to this country to insert in a contract made by bill of lading, or similar document, an express statement that it is to have effect subject to the provisions of the Rules which are stated in the Ordinance, and any shipper and any master of a ship who contravenes that order is doing something which by the law of Palestine is illegal. But in order to prevent that illegality from having the effect of entirely destroying the contract of carriage between the parties, those who drew up this Ordinance wisely added a provision that, though there has been disobedience to the first part of para. 4 and the contract does not contain the express statement provided for, the contract shall be deemed, notwithstanding the omission of such express statement, to have effect subject to the Rules.”

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Further, in his judgment he discusses the Missouri Case and says:

20 “I regard the decision as meaning that if, in the country where the contract was made, the contract was illegal — not merely void and unenforceable, but illegal — then the Courts in this country would recognize the illegality and act in accordance with the law of the country where the contract was made.”

He expresses plainly his opinion that if the Palestine Ordinance stood as the Newfoundland Act stands, without the correcting clause, the contract would have been by the law of Palestine an illegal contract. Slessor, L. J., deals with counsel’s contention that the provision does not come within the meaning of Lord Halsbury’s observations in *re Missouri Steamship Co.* because there is no penalty attached to the mandatory provision. He cites Hawkins Pleas of the Crown, Book 2, Ch. 25, Sect. 4 and two of the cases in which the doctrine there laid down had been applied, (*The Queen vs. Price* [1840] 11 Ad. & El. 727 and *Reg. vs. Hall* (1890) 1 Q. B. 747), and concludes:

30 “Had the matter rested at the end of the first limb of cl. 4”—
(and that is where section 3 of the Newfoundland Act would leave it)
—“I think it is clear that the obligation is mandatory and express.”

It follows that the omission of the Clause Paramount renders the bills of Lading illegal and void—not merely nugatory,—and therefore they cannot be enforced. But there is no contract between the parties except as set out in the bills of lading. Apart from the question of illegality, the situation is precisely as described by Brett, L.J., in *Chartered Mercantile Bank of India vs. Netherlands India Steam Navigation Co.*, L. R. 10 Q.B.D. at 528;

40 “The contract is no doubt a contract of carriage but the contract has been by the consent of the parties reduced into the form of a bill

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of lading, and therefore the whole of that contract is contained in the bill of lading and no term of the contract outside of the bill of lading can be looked at."

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There is no evidence of an antecedent or other contract and I accept the conclusion of the learned trial Judge that "the bill of lading must be taken to be the sole contract between them." All previous negotiations, whether they had resulted in a binding agreement or not, were merged in the bills of lading, which contain all the terms of the contract. It follows, that no action lies in contract outside the bills of lading, and action on the bills of lading is barred by their illegality. The maxim *ex turpi causa non oritur actio* applies because "an illegal contract is a *turpi causa* within the meaning of this principle." 10

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Salmond and Winfield on Contracts, p. 149.

In order to circumvent this difficulty, the claimant has endeavoured to frame its action in tort and relies on these admissions:

1. The "Hurry On" was a common carrier.
(Deduction from admissions in Exhibit 19, sects. 8-12.)
2. The herring, all in good order and condition, were delivered to the respondent and loaded on the "Hurry On" for carriage at a freight of \$1.60 per bbl. and delivery to the claimant at New York. 20
3. The herring were damaged as a result of the stranding of the "Hurry On".
4. The herring were delivered to the claimant at New York in damaged condition.

The further allegation, that the said stranding and damage was due to the neglect or default of the master and crew in the navigation and management of the "Hurry On", is in issue. If an action lies in tort, the only obligation remaining upon the claimant is to prove damages.

But the respondent says: "This is not an action sounding in tort. You made a contract with us. This action is based on that contract. We deny negligence but if the master and crew were negligent, our liability is specifically excepted in the Bills of Lading." 30

In reply, the claimant says that the Bills of Lading were illegal, null and void under the laws of Newfoundland because the Clause Paramount was omitted from them.

Does such an action lie in tort, independently of the contract?

It is not suggested that it is immoral or illegal to ship herring from Newfoundland to New York. Until the bills of lading were issued, the parties were respectively bailor and bailee of the herring for a legal purpose.

Under Lord Holt's universally accepted classification in *Coggs vs. Bernard* (2 Lord Raymond 916), this was not a mere *depositum* but rather of the fifth class—when goods are delivered to the bailee to be carried for a reward to be paid by the bailor. The Newfoundland Carriage of Goods by Sea Act, 1932, did not apply for there was no bill of lading or similar document of title and the bailee's obligations at this stage are stated thus by Lord Wright in *Patterson S.S. Ltd. vs. Canadian Co-Operative Wheat Producers Ltd.*, (1934 L.J. P.C. at 170):

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- 10 “At common law he (the carrier) was called an insurer, that is, he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage by showing that the loss was due to the Act of God or the King's enemies,”

or he could contract out of this liability by stipulating he would not be liable for specific excepted perils. In this case he contracted out of liability for negligence. If the Bills of Lading are legal and valid, they give a complete answer to the action. What happens if they are illegal?

“Bailment” and “contract of bailment” are defined in Halsbury, Vol. 1, p. 724 & 725. The relevant parts of the definitions are:

- 20 “A bailment is a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered as soon as the condition on which they were bailed shall have been performed.”

“To constitute a contract of bailment, the possession of specific chattels must be transferred by the bailor to the bailee in order that the latter may perform some act in connection therewith for which such possession is necessary.”

- 30 Undoubtedly there was a contract of bailment here. The shipper transferred possession of his herring to the carrier in order that the latter would carry the herring to New York and redeliver them to the shipper. The claimant elects to ignore the contract and to sue for negligence during transport and consequent damage as a breach of the common law duty imposed on the carrier.

There is considerable authority that an action on bailment may sound in tort. I take the following paragraph from 4 Halsbury, p. 13, under the heading “Carriers of Goods”;

“This responsibility as an insurer is imposed upon a common carrier by the custom of the realm, and is independent of the contract between him and the owner of the goods (a). Failure on the part of

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the carrier to deliver the goods safely is a breach of a duty placed upon him by the common law; and therefore an action of tort lies against him for such breach, the owner not being bound to prove any contract (b).

The authorities noted are (a) *Forward vs. Pittard* (1785) 1 T.R. 27 and (b) *Pozzi vs. Shipton* (1838) 8 Ad. & El. 963.

In *Forward vs. Pittard*, Lord Mansfield, C.J., said:

“The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back, that there are events for which the carrier is liable independent of his contract. 10
By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King’s enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by His permission; every thing, by His knowledge. But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled, the law presumes 20
against the carrier, unless he shows it was done by the King’s enemies or by such act as could not happen by the intervention of man, as storms, lightning and tempests.

If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act 30
of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.”

Lord Dunedin in *London & North Western Railway Co. vs. Hudson*, ([1920] A.C. at 333), explains this Judgment:—

“Now Lord Mansfield in *Forward vs. Pittard* speaks of this obligation on the carrier’s part as an obligation independent of the contract. By that I understand it is not an adjected term to the contract as made, but is an obligation which attaches from the fact of the goods 40

being carried by a common carrier, in favour of the owner of the goods, whoever he may be.”

Forward vs. Pittard is distinguishable from the present case on this ground: the contract made no reference to loss of goods by fire. Under the common law he was liable and therefore an action arose from the tort entirely independent of contract.

10 Pozzi vs. Shipton was framed strictly as an action for tort. There was no allegation of or pointing to an express contract. No proof was given of a contract and no objection was taken. The Court upheld a verdict of liability under the custom of the realm but expressed doubt that the declaration could have been supported on special demurrer for want of some such averment.

These actions were followed by a number of others arising from a provision of the County Court Act whereby the costs of actions founded on tort were taxed on a higher scale than actions based on contract. It is difficult to harmonize all these cases but it is common ground that the Court shall not be bound by the form of the pleadings but “the substance of the matter is to be looked at”. (Bramwell, L. J., in Bryant vs. Herbert, 3 C.P.D. at 390).

20 Lord Phillimore, in Steljes vs. Ingram, (1903) 19 T.L.R. at p. 535, laid down the following general principle:

30 “Presumably Parliament, when fixing a lower scale of money value for actions of tort, was guided by the following reasons:— (1) An action of tort is often brought to establish an important right, the damages recoverable against the particular defendant being, nevertheless, small; (2) some actions of tort relate to personal matters and questions of feeling and character, where the amount of damages may be no measure of the importance of the case to the parties; (3) damages may be at large, or the greater portion may be at large, so that the plaintiff may not reasonably over-estimate the amount which the jury may give him. I can see no other reasons for the distinction; and none of these reasons apply to actions of tort founded on breach of duty in a relation originally established by contract”.

Lord Phillimore proceeds to discuss other cases under the County Court Act and says that the right rule was laid down in Bryant vs. Herbert (supra) and Fleming vs. Manchester Railway (4 Q.B.D. 81). In Bryant vs. Herbert, Lord Bramwell stated that,—

40 “the statute supposes all actions are founded either on contract or on tort. So that it is tort, if not contract, contract if not tort. There is no middle term.”

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In that case it was held that both on the pleadings (taking the statements of claim and defence together) and on the facts, the action was founded on tort.

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The Statement of Claim in Fleming vs. Manchester was similar to the one in this action. It alleged that the plaintiff delivered to the defendants, as common carriers for hire, goods to be carried for reward; that the defendants accepted the goods but negligently lost them. The defendants did not defend but paid money into Court unconditionally and plaintiff accepted the payment. The Court of Appeal held the action was founded on contract.

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In Elder Dempster vs. Patterson ([1924] A.C. 522), the plaintiffs sued for damages for the breach of a contract of carriage evidenced by the Bills of Lading or, alternatively, for negligence for breach of duty. They failed on both grounds. In dealing with the claim of tort, apart from the contract altogether, Lord Finlay said at p. 548:

“This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort.”

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And Lord Sumner, at p. 564, expressed these views:

“There was finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees quasi ex contractu, though the charterers and their agents were not. This fails, to my mind It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading Be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.”

30

The law appears to be settled that on contracts of carriage an action will not lie in tort unless the alleged wrongful act is entirely independent of the contract. It is thus stated in 7 Halsbury, par. 248:

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“No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it. Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such case the maxim *In pari delicto, potior est conditio defendentis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party.”

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10 In the present case, the negligence in navigation of the ship (if any) cannot be said to be a wrong apart from the contract itself. The statement of claim discloses that the herring were to be carried by the “Hurry On” from Newfoundland and delivered to the plaintiff at New York at a freight of \$1.60 per bbl. That shows a contract, and the plea of the defendant that the Bill of Lading specifically excepted liability for damage arising from negligence, furnishes a complete defence to the action. From this standpoint, it is immaterial whether the contract is valid or invalid. The plaintiff is forced to reply that the Bills of Lading are illegal and void and this
20 set forth by the authors of Salmond and Winfield on Contracts at p. 149-150 as a correct statement of the law. They say:

“A Contract which is void for illegality, and therefore not binding on either of the parties, may nevertheless be in fact performed in whole or in part by one or both of them. The question, therefore, arises as to the rights of the parties in respect of such acts of performance. In an illegal contract for the sale and purchase of goods the seller may deliver the goods. Is the buyer then bound to pay for them, or is the seller entitled to get the goods back if the buyer refuses to pay for them on the ground that the contract is void? In other words, what
30 right of *restitutio in integrum* exists as between the parties to an illegal contract? The general answer is that no such right exists. In this respect a contract void for illegality differs essentially from contracts void on any other ground. In cases other than illegality the law is prepared on certain conditions and with certain limitations to adjust the rights of the parties in respect of acts of performance done in the belief that the contract was binding. But not so with illegality. In this case the rights of the parties are governed by a special rule formulated in the maxim *ex turpi causa non oritur actio*. An illegal contract is a *turpis causa* within the meaning of this principle. The maxim does
40 not mean merely that a party to an illegal contract cannot bring an action for the enforcement of it, for this is equally true with respect to all contracts which are void for any reason. The maxim embodies a special and more far-reaching principle, applicable exclusively to cases of illegality. *It means that* no person can claim any right or remedy on the basis or ground that he has been a party to an illegal

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contract. If the illegal contract is an essential constituent of his cause of action he cannot succeed. In other words, illegality is a good plea for a defendant, but it is not a permissible allegation for a plaintiff. No plaintiff in formulating a cause of action will be heard to allege that the transaction on which he bases his claim was an illegal transaction to which he himself was a party. He cannot claim any right from his own wrongdoing. But a defendant will be heard to defend himself from a claim made against him by an allegation that the transaction out of which the claim arises was illegal, even though he himself was a party to it. It is for this reason that the maxim as to *turpis causa* is otherwise expressed in the saying, *in pari delicto potior est conditio defendentis*. If, for example, in an illegal contract for the sale of goods the seller were to deliver the goods and sue for the price. the buyer would be entitled to plead that the contract was illegal and void. So if the buyer had paid the price in advance and the seller refused to deliver the goods, the seller would be similarly entitled to the same plea. But if the seller, not being able to get the price, were to sue the buyer for the return of the goods, the buyer could plead that they were delivered to him under a contract of sale; and the only reply of the plaintiff would be that the contract could not be relied on by the buyer because it was illegal and therefore void. But this reply is excluded by the rule in question. The plaintiff will not be permitted to establish his claim by any such replication, for it amounts to a reliance on the illegality of a transaction to which he was a party The general consequence of the maxim *ex turpi causa non oritur actio* is that the right of *restitutio in integrum* is excluded in respect of all acts of performance of a contract void for illegality.”

To recapitulate briefly:

- (a) The sole contract between the parties is to be found in the bills of lading. 30
- (b) If the bills of lading are legal and valid, their terms provide a complete defence to the action.
- (c) If the bills of lading are illegal and void, the Plaintiff fails because:—
 1. The action is founded on a breach of duty in a relation originally established by contract.
 2. While both parties are *participes criminis*, the maxim *in pari delicto potior est conditio defendentis* enables the defendant to plead the contract.
 3. The Plaintiff in reply is forced to plead that the contract is 40 illegal, and therefore has no right to action.

The appeal should be dismissed with costs.

Archibald J. concurs.

OPINION OF DOULL J.

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DOULL J.:

The facts of this case are sufficiently set out in the decision of the learned Chief Justice, who heard the claim in the first instance, and in the opinion of Mr. Justice Hall.

There can be no doubt that before the M.V. "HURRY ON" arrived at Bay of Islands there was an intimation given to shippers of herring that a vessel would come to take cargo from that point to New York. When
10 the "HURRY ON" arrived, the shipment of herring, which is the subject of this claim, was put on board the vessel, apparently without any further negotiation. The bill of lading would ordinarily contain the whole contract between the shipper and carrier, for if there were prior negotiations or conversations, they would amount to no more than this; that the ship would take the goods at a fixed rate of freight upon the terms of the ship's usual bill of lading and in conformity with the law of Newfoundland.

It is probable that the form of bill of lading, which has caused the difficulty, was a simple mistake in using a wrong printed form, but nobody seems to have noticed the error until the bill of lading had gone through
20 the hands of several banks and the goods had been damaged and delivered in a damaged condition. The agent of the carrier issued the bill of lading and the shipper took it, negotiated it and finally obtained on it the goods which were shipped, although in a damaged condition.

The form used did not comply with the law of Newfoundland, where there is in force a "Carriage of Goods by Sea Act" similar to the English Act, which is referred to in the several text books on the subject.

The Newfoundland Act contains the following section:

Section 3. Every bill of lading or similar document of title issued
30 in this Dominion, which contains, or is evidence of, any contract to which the Rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

The bill of lading covering the goods in question was issued in the Dominion of Newfoundland and did not contain the required statements, which is known as the paramount clause.

The omission of this paramount clause may have two possible results, and text writers have not found it easy to indicate which of the results should follow.

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First, it may be that the only result is that the clause is read into the bill of lading in any case and the parties are placed in the same position as if the act were complied with. In other language, that the words of the statute "shall contain" are to be read as equivalent to "shall be deemed to contain".

The learned Chief Justice, who heard the claim, adopted this construction and applied the Rules to the contract with the result that he dismissed the claim.

There are, however, very serious difficulties in the way of reading the words in the manner suggested by the Chief Justice and in Temperley's work on "Carriage of Goods by Sea". Certainly the statute was intended to require the insertion of the clause as an integral part of every bill of lading. The reason of the provision was to provide that the so-called "Hague Rules" would be a part of every bill of lading and so there would be a uniformity whether the bill of lading should be construed by the law of the country where it had been issued or by that of any other country. I am unable to see that the words can mean "You must put the paramount clause in the bill of lading; but, whether you put it in or not, it will be deemed to be contained therein." The result of this construction would not be to provide the uniformity which was clearly the object of these various acts. The Palestine Act, which was considered in the *Torni Case* (1932) P. 78, used both phrases with the result that the bill of lading was valid, although the clause was omitted; but there is no suggestion in the case that the result would have been the same if the additional words of the Palestine Act were omitted. Whether, in the end, the wording of the Palestine Act will be found to give the result, which the International Conference considered desirable, I do not think that it was the intention that the result should be obtained in the way it was done in the *Torni Case*. The Conference wished uniformity in the bill of lading itself, not in the interpretation of it alone. Consequently I prefer the opinion that the section is an absolute command of the legislature requiring the paramount clause to be inserted in every bill of lading of outgoing freight and that a bill of lading issued in Newfoundland for outgoing freight (subject, of course, to the exceptions in the act), is illegal as being forbidden by the law of Newfoundland.

Having arrived at this point, the appellant argues that although the contract evidenced by the bill of lading is illegal, nevertheless there is outstanding the same contract as if the shipper had put the goods in question on board the ship with no contract whatever except such as is implied by the law when one person entrusts his goods to another and that in such a case the common law liability of the carrier is that of an insurer and consequently the carrier must make good the damage to the goods while in the carrier's custody.

I am of opinion, however, that it is impossible to separate the contract, which these parties made, into two contracts, one illegal and the other consisting of a common law bailment for carriage.

The contract, which the parties made for themselves, was one which involved the issue of a bill of lading. The present claimants bought the goods from Basha and in delivering them to the carrier demanded a bill of lading. They were given an illegal bill of lading, which they might have refused. They, however, took the bill of lading without protest, obtained funds on it for payment of the goods, took the bill of lading in course from the bank and obtained the goods. They elected to claim under the bill of lading, and seem to me to be as much parties to the illegality as are the respondents. The authorities are cited in the decision of Mr. Justice Hall and I agree with him in dismissing the appeal.

*In The
Supreme
Court of
Nova Scotia.*
No. 20
Reasons for
Judgment
Opinion of
Doull J.,
February 12th
1938.
—continued

CARROLL J. concurs.

No. 21

**RULE OR ORDER OF THE SUPREME COURT OF NOVA SCOTIA
EN BANC**

THE HONOURABLE MR. JUSTICE GRAHAM
THE HONOURABLE MR. JUSTICE CARROLL
THE HONOURABLE MR. JUSTICE HALL
THE HONOURABLE MR. JUSTICE DOULL
THE HONOURABLE MR. JUSTICE ARCHIBALD

No. 21
Rule or Order
of the
Supreme Cour
of Nova Scoti:
en banc
Dismissing
Appeal,
February 19th
1938.

20 (L.S.)

THIS APPEAL by the Claimant from the Decision of His Lordship the Chief Justice of Nova Scotia given herein on or about the 5th day of July, A.D. 1937, and from the Order for Judgment based thereon and dated the 8th day of July, A.D. 1937, having come on for hearing before this Honourable Court at the November 1937 Sittings thereof; and the Court after hearing Counsel as well on behalf of the Respondent as on behalf of the Appellant having been pleased to reserve Judgment herein and subsequently, to wit on the 12th day of February, A.D. 1938, having been pleased to deliver Judgment herein dismissing the Claimant's said appeal with costs;

NOW UPON HEARING Counsel on behalf of the Respondent and the Appellant;

AND UPON MOTION:

IT IS ORDERED that the Appellant's said appeal be and the same is hereby dismissed with costs to be taxed.

IT IS FURTHER ORDERED that the Respondent have execution for the said costs when taxed.

DATED at Halifax, N. S., this 19th day of February, A.D. 1938.

As to form.

BY THE COURT.

40

(Sgd.) E. C. PHINNEY,
Appellant's Solicitor.

(Sgd.) REGINALD V. HARRIS,
Prothonotary.

No. 22

**ORDER GRANTING CONDITIONAL LEAVE TO APPEAL
TO HIS MAJESTY IN COUNCIL.**

*In The
Supreme
Court of
Nova Scotia.*

PRESENT: THE HONOURABLE MR. JUSTICE GRAHAM
THE HONOURABLE MR. JUSTICE HALL
(L.S.) THE HONOURABLE MR. JUSTICE DOULL

UPON READING the Notice of Motion herein dated the 2nd day of March, A.D. 1938, and the Affidavit of Gordon McL. Daley, sworn herein the 2nd day of March, A.D. 1938, filed herein, and the other papers and proceedings on file herein; and upon hearing Mr. Daley, K.C., on behalf 10 of the above named Appellant, VITA FOOD PRODUCTS INC., and Mr. C. B. Smith, K.C., on behalf of the above named Respondent, and it being alleged on behalf of the Appellant that it is dissatisfied with and aggrieved by the Judgment given on Appeal herein; and it appearing to this Honourable Court that this is a proper case in which to grant leave to appeal to His Majesty-in-Council;

IT IS HEREBY ORDERED that upon due performance by Vita Food Products Inc., the above named Appellant of the conditions hereinafter mentioned, and subject to the final order of this Court upon the due performance thereof, leave to appeal to His Majesty-in-Council from the 20 Judgment filed or given herein on the 12th day of February, A.D. 1938, and the Order granted thereon on the 19th day of February, A.D. 1938, be and the same is hereby granted to the said Vita Food Products Inc., the above named Appellant;

AND IT IS FURTHER ORDERED that the said Appellant, Vita Food Products Inc., do within sixty days from the date hereof enter into good and sufficient security to the satisfaction of this Court in the sum of Five Hundred Pounds (£500) Sterling for the due prosecution of the said Appeal, and the payment of all such costs as may become payable to the 30 above named Respondent in the said Appeal in the event of Vita Food Products Inc., the Appellant in the said Appeal, not obtaining an Order granting it final leave to Appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Appellant in the said Appeal to pay the Respondent's costs of the Appeal;

AND IT IS FURTHER ORDERED that upon Vita Food Products Inc., the above named Appellant, entering into the security aforesaid, execution of the Judgment entered or to be entered herein in favour of Unus Shipping Company Limited, the above named Respondent, in accordance with the Decision of the Supreme Court of Nova Scotia En Banc be suspended pending the final determination of the proposed Appeal to His 40 Majesty-in-Council.

DATED at Halifax, N. S., this 2nd day of March, A.D. 1938.

(Sgd.) REGINALD V. HARRIS,
Prothonotary.

No. 22
Order Granting
Conditional
Leave to
Appeal to
His Majesty
in Council,
March 2nd,
1938.

**BOND OF ROYAL EXCHANGE ASSURANCE ON APPEAL OF
VITA FOOD PRODUCTS INC.**

*In The
Supreme
Court of
Nova Scotia.*

Approved. (Sgd.) C. B. S.

Bond No. 12569-38.

No. 23
Bond of Royal
Exchange
Assurance
on Appeal of
Vita Food
Products Inc.
to His Majesty
in Council,
April 7th,
1938.

10 KNOW ALL MEN BY THESE PRESENTS that ROYAL EX-
CHANGE ASSURANCE, whose Head Office for Canada is the City of
Montreal, a Body Corporate, authorized to carry on and carrying on busi-
ness in the Province of Nova Scotia, is held and firmly bound unto UNUS
SHIPPING COMPANY LIMITED IN LIQUIDATION of Halifax, in the
20 County of Halifax, a Body Corporate, organized and existing under the
Laws of the Province of Nova Scotia in the sum of Five Hundred Pounds
Sterling (£500) to be paid to the said UNUS SHIPPING COMPANY
LIMITED IN LIQUIDATION, its Successors and Assigns, for which pay-
ment to be made ROYAL EXCHANGE ASSURANCE binds itself in the
whole, its Successors and Assigns, by These Presents.

SEALED with its Seal and dated this 22nd day of March, A.D. 1938.

20 WHEREAS on or about the 20th day of December, A.D. 1935, UNUS
SHIPPING COMPANY LIMITED passed an Extraordinary Resolution
under the Companies' Winding Up Act, being Chapter 198, R.S.N.S., 1923,
for its voluntary winding-up under the said Act and by the said Resolution
appointed W. N. Wickwire of Halifax, in the County of Halifax and Frank
B. Zink, of Dartmouth, in the County of Halifax, Liquidators;

AND WHEREAS VITA FOOD PRODUCTS INC., a Body Corporate,
incorporated under and by virtue of the Laws of the State of New York did
file a claim against said UNUS SHIPPING COMPANY LIMITED IN
LIQUIDATION for the sum of Sixteen Thousand Three Hundred and
Forty-two Dollars and Eighty-nine Cents (\$16,342.89) which the said Liqui-
dators refused to pay;

30 AND WHEREAS the said claim having come on for hearing before
his Lordship, the Chief Justice of Nova Scotia, who was pleased to reserve
his Decision thereon until the 5th day of July, A.D. 1937, when he did file
his said Decision dismissing the said claim with costs;

AND WHEREAS the said VITA FOOD PRODUCTS INC. being dis-
satisfied with the said Decision and with the Order made thereon, appealed
therefrom to the Supreme Court of Nova Scotia En Banc;

AND WHEREAS the said Supreme Court of Nova Scotia En Banc
by its Decree dated the 19th day of February, A.D. 1938, dismissed the
said Appeal with Costs;

40 AND WHEREAS the said VITA FOOD PRODUCTS INC. being dis-
satisfied with the said Decision and Decree of the Supreme Court of Nova

*In The
Supreme
Court of
Nova Scotia.*

No. 23
Bond of Royal
Exchange
Assurance
on Appeal of
Vita Food
Products Inc.
to His Majesty
in Council,
April 7th,
1938.

—continued

Scotia En Banc, duly applied by motion to the said Supreme Court of Nova Scotia En Banc for leave to appeal from the said Decision and Decree of the said Supreme Court of Nova Scotia En Banc to his Majesty-in-Council and upon hearing the said motion the said Supreme Court of Nova Scotia En Banc gave leave to said VITA FOOD PRODUCTS INC. to appeal to his Majesty-in-Council on condition that the said VITA FOOD PRODUCTS INC. should enter into good and sufficient security to the satisfaction of the said Court in the sum of Five Hundred Pounds Sterling (£500) for the due prosecution of the said Appeal and the payment of all such Costs as might become payable to UNUS SHIPPING COMPANY LIMITED IN LIQUIDATION in the event of VITA FOOD PRODUCTS INC. not obtaining an Order granting it final Leave to Appeal or of the Appeal being dismissed for non-prosecution or of his Majesty-in-Council ordering the Appellant in said Appeal to pay the Respondent's Costs of the Appeal; 10

AND WHEREAS ROYAL EXCHANGE ASSURANCE at the request of the said VITA FOOD PRODUCTS INC., has agreed to enter in to the above written Obligation for the purpose aforesaid;

NOW THE CONDITION OF THIS OBLIGATION is such, that if the said VITA FOOD PRODUCTS INC. shall duly prosecute its said Appeal and pay all such Costs as may be come payable to UNUS SHIPPING COMPANY LIMITED IN LIQUIDATION in the event of said VITA FOOD PRODUCTS INC. not obtaining an Order granting it Final Leave to Appeal or if the said Appeal be dismissed for non-prosecution or if his Majesty-in-Council order the said VITA FOOD PRODUCTS INC. to pay the Respondent's costs of the said Appeal (as the case may be) then the said Obligation shall be void; otherwise it shall be and remain in full force and effect. 20

IN WITNESS WHEREOF ROYAL EXCHANGE ASSURANCE hath hereunto subscribed its Name and affixed its Corporate Seal, by the hands of its proper Officers duly authorized in that behalf. 30
Signed, Sealed and Delivered in the presence of

The official Seal of the ROYAL EXCHANGE ASSURANCE OF LONDON, ENGLAND, for the Dominion of Canada was hereto affixed at Montreal, this 7th day of April, 1938, in the presence of C. STUART MALCOLM, the officer (s) in the Dominion of Canada authorized for the purpose under the common seal of the Corporation. 40

ROYAL EXCHANGE ASSURANCE
OF LONDON, ENG.

(Sgd.) C. ARROL BROWN,
Authorized Representative.

(Sgd.) C. STUART MALCOLM

(L.S.)

CANADA
PROVINCE OF QUEBEC
COUNTY OF HOCHELAGA

*In The
Supreme
Court of
Nova Scotia.*

No. 23
Bond of Royal
Exchange
Assurance
on Appeal of
Vita Food
Products Inc.
to His Majesty
in Council,
April 7th,
1938.

—continued

I, Percy A. Tasker, of the City of Montreal, in the Province of Quebec,
....., make oath and say,—

- (1) That I was personally present and did see the annexed and foregoing Bond duly signed, sealed and executed by ROYAL EXCHANGE ASSURANCE, the Party thereto;
- (2) That the said Bond was so executed at the City of Montreal;
- 10 (3) That I know the officers who executed the said Bond to be the proper officers in that behalf of the said Royal Exchange Assurance.
- (4) That I am subscribing witness to the said Bond.

SWORN before me at the City of Montreal, in the County of Hochelaga, in the Province of Quebec, this 7th day of April, A.D. 1938.

(Sgd.) G. A. KEMP,
Commissioner of the Superior Court,
District of Montreal.

(Sgd. P. A. TASKER.

No. 24

20

**ORDER GRANTING FINAL LEAVE TO APPEAL TO
HIS MAJESTY IN COUNCIL**

THE HONOURABLE CHIEF JUSTICE SIR JOSEPH CHISHOLM
THE HONOURABLE MR. JUSTICE GRAHAM
THE HONOURABLE MR. JUSTICE HALL
THE HONOURABLE MR. JUSTICE DOULL
THE HONOURABLE MR. JUSTICE ARCHIBALD

No. 24
Order Granting
Final Leave
to Appeal to
His Majesty
in Council,
April 16th,
1938.

UPON HEARING the Order granting Conditional Leave to Appeal herein and the Bond hereinafter referred to and upon hearing Mr. Daley,
30 K.C., on behalf of the (Claimant) Appellant and Mr. Smith, K.C., on behalf of the Respondent, and upon motion,—

IT IS HEREBY ORDERED that a certain Bond in the sum of Five Hundred Pounds (£500) Sterling filed herein the 14th day of April, A.D.

*In The
Supreme
Court of
Nova Scotia*

1938, in which ROYAL EXCHANGE ASSURANCE, whose head office for Canada is in the City of Montreal, a Body Corporate, is Obligor and the above named UNUS SHIPPING COMPANY LIMITED IN LIQUIDATION is Obligee, as security for the due prosecution of the Appeal of VITA FOOD PRODUCTS INC. to his Majesty-in-Council and the payment of all such Costs as may become payable to UNUS SHIPPING COMPANY LIMITED IN LIQUIDATION, Respondent in the said Appeal, in the event of VITA FOOD PRODUCTS INC., the Appellant in the said Appeal, not obtaining an Order granting it Final Leave to Appeal, or of the Appeal being dismissed for non-prosecution, or of his Majesty-in-Council ordering the Appellant in said Appeal to pay the Respondent's Costs on Appeal (as the case may be) be and the same is hereby approved and allowed as good and sufficient security; 10

AND IT IS FURTHER ORDERED that Final Leave to Appeal to his Majesty-in-Council from the Decision of the Supreme Court of Nova Scotia En Banc given herein the 12th day of February, A.D. 1938 and from the Order granted therein the 19th day of February, A.D. 1938, be and the same is hereby granted to the said VITA FOOD PRODUCTS INC.

DATED at Halifax, N. S., this 16th day of April, A.D. 1938.

BY THE COURT

(Sgd.)

REGINALD V. HARRIS,
Prothonotary.

20

No. 25

LIST OF DOCUMENTS OMITTED TO BE PRINTED

1. E/1 to E/5 inclusive are Bills of Lading in form similar to Exhibit E/6. These Bills of Lading cover shipments from Bay of Islands to New York of 1,806 barrels of Scotch cured herring, 133 barrels of round herring and 37 half-barrels of Scotch cured herring; 30

2. Clauses 1, 4, 5, 6 and 10 to 19 inclusive are omitted by consent from Exhibit E/6;

3. E/7 to E/17 inclusive are Bills of Lading covering herring shipped by other claimants, but have nothing to do with this claim;

4. Paragraphs (4) to (11) inclusive of Exhibit E/18 are omitted from this Exhibit by consent;

5. E/20 is a Plan of the ship;

6. E/21 is a Chart showing the location of the stranding of the "Hurry On";

The above Exhibits and portions of Exhibits have been omitted by consent in this printed case. 40

No. 24
Order Granting
Final Leave
to Appeal to
His Majesty
in Council,
April 16th,
1938.

—continued

No. 25
List of
Documents
Omitted to be
Printed.

I, Reginald V. Harris, Prothonotary of the Supreme Court of Nova Scotia, at Halifax, do hereby certify the attached and foregoing printed record, initialled and sealed with the seal of the said Court by me, to be a true and compared copy of the original papers on file herein in the office of the said Court at Halifax.

Witness my hand and the seal of the said Court this 30th day of August, A.D. 1938.

(Sgd.) REGINALD V. HARRIS,
Prothonotary.