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## ESTABLISHING ‘LOSS OF POSSESSION’ IN MARINE INSURANCE CLAIMS

### ABSTRACT

*To what extent should insureds expect compensation on interruption to their voyage by loss of possession or free use or disposal of their property where it remains undamaged? Marine insurance does not compensate for partial losses occasioned by delay. Recent authority (Masefield v Amlin Corporate Member<sup>1</sup>) confirmed an insured could not recover for an actual total loss following capture where pirates would accept ransom then release the property. Property was not an actual total loss even after condemnation by a foreign tribunal (Panamanian Oriental Steamship Corporation v Wright<sup>2</sup>), although condemnation might establish constructive total loss. Where the voyage becomes impossible by detention or embargo, the insured’s right to abandon to insurers for constructive total loss may be unpredictable (eg after one year’s duration in The Bamburi<sup>3</sup>). In each scenario, insurers are excused making prompt payments, and from dealing themselves with the consequences of the peril. In each the insured is either uncompensated, or at best must wait.*

*These authorities document an evolution; historically, English and American laws allowed the insured to abandon and recover for a total loss while these perils lasted, ignoring ongoing hopes of recovery. This thesis argues that a presumption of total loss still applies to all perils causing loss of possession. This appeared first in Continental treatises and was later applied in English law. No universal test of total loss applies equally to all marine perils. Instead, situations of loss of possession should be governed by peril-specific rules, including the presumption of total loss for perils causing loss of possession.*

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<sup>1</sup> [2011] EWCA Civ 24, [2010] EWHC 280 (Comm)

<sup>2</sup> [1970] 2 Lloyd’s Rep 365; *KAC v KIC* [1996] 1 Lloyd’s Rep 664

<sup>3</sup> [1982] 1 Lloyd’s Rep 312

# ESTABLISHING 'LOSS OF POSSESSION' IN MARINE INSURANCE CLAIMS

OR

A THESIS CONCERNING RESTRICTIONS ON TOTAL  
LOSS CLAIMS FOLLOWING LOSS OF POSSESSION OR FREE  
USE AND DISPOSAL ON MARINE INSURANCE POLICIES  
SUBJECT TO THE LAWS OF ENGLAND AND WALES

BY

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for the degree of Doctor of Philosophy, in 2016

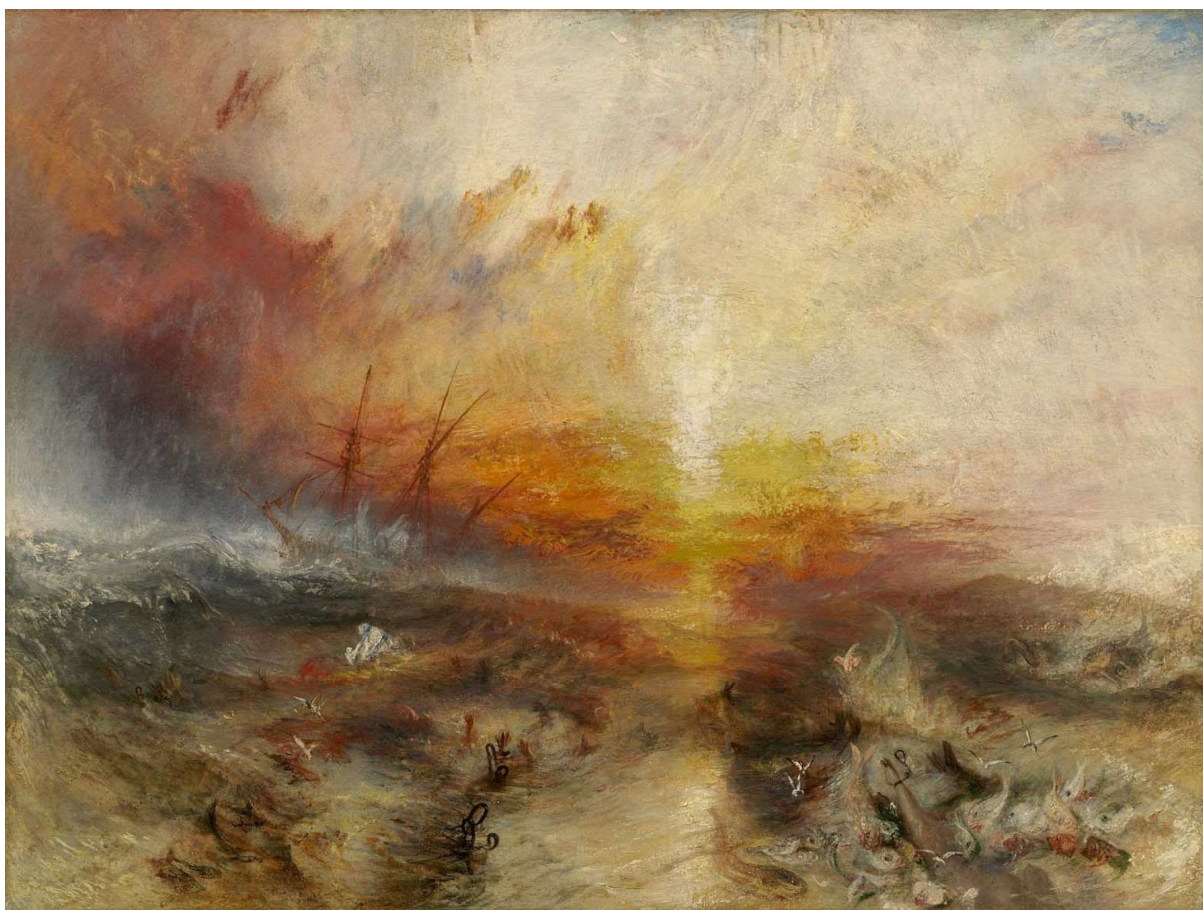
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J M W Turner

*The Slave Ship; Slavers Throwing Overboard the Dead and Dying, Typhoon coming on* (1840), inspired by the circumstances of *Gregson v Gilbert (The Zong)*,<sup>4</sup> an early English authority excluding liability for losses proximately caused by delay.

---

<sup>4</sup> (1783) 3 Doug KB 232



## 1 A PRESUMPTION OF TOTAL LOSS

Where a marine voyage is interrupted by marine perils causing loss of possession, when will a policy holder be compensated by their insurer? When will their losses be deemed to flow from delay, and be unrecoverable? Where an insured's property is ultimately restored, will the losses inevitably be deemed to flow from delay? Do the same rules apply to perils engaged by losses of possession as to stranding or other marine perils, or perils of the sea? This thesis argues that before 1906 a presumption of total loss provided that constructive total loss occurred at the moment possession was lost by a marine peril. It suggests the presumption remains arguable, and is not overruled in English law by statutory change, or judicial authority.

### 1.1 Issues arising on Loss of 'Possession' or 'Free Use and Disposal'

Marine insurance law<sup>1</sup> informs the interpretation of a policy. It should give effect to the parties' intention when fixing the policy, and meet their expectations when a claim is made. Where insureds claim loss of possession of the *specie*, recent authorities adopt an ostensibly pragmatic commercial approach and restrict total loss claims. In *Masefield v Amlin Corporate Member*<sup>2</sup> no actual or constructive total loss was found when pirates held the vessel on which insured cargo was laden to ransom, since it was foreseeable the vessel's release following a ransom payment was probable within a few months of capture. In *Fooks v Smith (the Stambul)*<sup>3</sup> no actual total loss occurred where insured cargo was laden on a vessel restrained by a hostile government in anticipation of war, and subsequently sold after hostilities were declared. In *Panamanian Oriental Steamship Corporation v Wright*,<sup>4</sup> there was no actual total loss where the vessel was confiscated and condemned by a military tribunal. In each situation, the insured was held not to have been 'irretrievably deprived' of their property by the initial and ongoing loss of possession. Given these strict results, it appears 'irretrievable deprivation' now has little meaning in context of actual total loss claim following dispossession.<sup>5</sup>

*In the Bamburi*<sup>6</sup> a constructive total loss arose on detention exceeding one year, but other authorities illustrate no constructive loss arose on a capture lasting about one month<sup>7</sup> or three

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<sup>1</sup> "Most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy. We have all got into the mental habit of thinking of it as substantive law..." *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, [34] (Scott LJ)

<sup>2</sup> [2011] EWCA Civ 24, [2011] 3 All ER 554; [2010] EWHC 280 (Comm), [2010] 2 All ER 593

<sup>3</sup> [1924] 2 KB 508

<sup>4</sup> [1970] 2 Lloyd's Rep 365, [1971] 2 All ER 1028

<sup>5</sup> eg Rubina Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' 25 JMLC 95 (1994) 95, 97-98

<sup>6</sup> [1982] 1 Lloyd's Rep 312

<sup>7</sup> *Masefield* [2010] EWHC 280 (Comm), [2010] 2 All ER 593; [2011] EWCA Civ 24, [2011] 3 All ER 554

months.<sup>8</sup> Academic commentary indicates a more permissive approach to total loss claims: “It is far from unknown for a court to adjudge that a vessel was a CTL even though, by the time of trial, the vessel had been repaired and was again trading... Indeed, in seizure cases this may apply also to an ATL”.<sup>9</sup> No recent reported authority suggests periods of dispossession shorter than a year could justify a total loss claim. Prima facie, total losses, actual or constructive, only arise after a long period of dispossession, perhaps lasting a year or more. These results appear to protect insurers, while more permissive *dicta* recognising potential compensation after property was returned might suggest shorter periods of time justify abandonment. The recent authorities do not clearly answer an insured’s fundamental concerns: (i) when does the law regard my property as lost; and (ii) when am I entitled to compensation?

Consideration of these results against the variety of possible loss of possession scenarios highlights commercially significant issues. When are losses following loss of possession, potentially falling within the defined perils of ‘capture’, ‘seizure’, ‘arrest’, ‘restraint’ or ‘detention’, potentially causing a ‘loss of the voyage’, recoverable? When are such losses excluded from recovery as being proximately caused by ‘delay’? Further, is insurance law sufficiently consistent in the extent of its cover across different perils, and fair to both insureds and insurer? Does the contemporary law assist parties to fix policies that properly reflect their legitimate expectations? Is the law on this area sufficiently certain?

Compensation for loss of possession or interruption to a planned voyage is commercially significant. This issue was highlighted by piracy incidents between 2008 and 2014, frequently involving hostage and ransom negotiations.<sup>10</sup> Somali piracy may now be suppressed,<sup>11</sup> but piracy and barratry remain ever-present perils. Similar issues following loss of possession or free use or disposal of property arise in a wider variety of contexts, such as capture or seizure in conventional warfare, requisition of vessels by the insured’s government, enemy or neutral blockade or embargo in port, from unconventional terrorist attacks,<sup>12</sup> and potentially from infringement, with or without the barratrous knowledge of the vessel’s crew, of a state’s anti-

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<sup>8</sup> *Marstrand Fishing Co Ltd v Beer (the Girl Pat)* [1937] 1 All ER 158 (KB)

<sup>9</sup> Referring to *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] 2 All ER (Comm) 190, where aircraft were lost on seizure in conflict, and recovered by the time of action; Robert Merkin and Kate Lewins, ‘Case Note: *Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua; Piracy Ransom and Marine Insurance*’ (2011) 35 Melb UL Rev 717, 728 fn 89

<sup>10</sup> \$135m paid to Somali pirates in 2011, House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia; Tenth Report of Session 2010–12* (HC1318, 2012), 15, 55

<sup>11</sup> The European Naval Force Operation Atlanta recorded about 170 reported attacks annually in 2010 and 2011, falling to 2 in 2014, ‘European Union Naval Force—Somalia, Key Facts and Figures’ <http://eunavfor.eu/key-facts-and-figures> (accessed 26.06.2015)

<sup>12</sup> For a summary of the variety and regularity of incidents that have led to litigation on these issues throughout the twentieth century to the present, see Keith Michael, *War, Terror and Carriage by Sea* (2004 Informa), Ch 1

narcotics or customs laws. Insureds should know the likely interpretation of the terms fixed when agreeing cover, and when and to what extent they might recover. In each situation, the physical *specie* may remain undamaged. Yet in each the vessel is taken from the control of the owner or charterer. Owner, charterer and cargo interests alike are prevented, for a time, from dealing with or disposing of their property. In each situation the insured's business is disrupted, and the time when their property may be released – and the voyage resumed – may be unknown. Their potential claims will be for 'loss of possession'. What principles apply to govern their entitlement to compensation?

## 1.2 Voyage or Time Insured; Compensation for Delay Excluded

### i. *Nature of the Policy*

Why might mere interruption to a voyage justify compensation for a total loss, when insured property is neither destroyed nor damaged? What is the nature of such loss? Marine insurance covers not only the physical safety of subject matter, but also contemplates that a voyage be performed to a destination port, or the insured subject matter remain safe for a specified period of time. In 1782 Mansfield LCJ recognised that on voyage policies, *'The point of the insurance is not the ship alone, but her arrival'*.<sup>13</sup> In a dispute concerning a policy on linseed for a voyage to Germany, abandoned by British owners after the outbreak of war in 1914, the bare insured value of the cargo was recognised as *"...only part of its description or designation or identification. Its full description, as shown by the policy itself, is, linseed... shipped on board this vessel to be transported on a voyage at or from a port on the River Plate to Hamburg"*.<sup>14</sup> Significantly this aspect of the description:

*"...connotes rights and characteristics attached by the insurance law to goods so placed, one of which is this, that they may be treated as constructively totally lost if, by one of the perils insured against as the proximate cause, the adventure of taking them to their destination be destroyed"*.<sup>15</sup>

When does interruption to this voyage by an insured peril, causing, for a time, a loss of possession, amount to a loss for which the insured may be compensated? What constitutes a total loss of this 'adventure of taking goods to their destination'? How does an interruption to the voyage interact with the rules excluding recovery for losses caused by delay?

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<sup>13</sup> *Manning v Newnham* Trin 1782, report recorded in *Wilson v Royal Exchange* (1811) 2 Camp 682

<sup>14</sup> *Sanday v British and Foreign Marine Insurance Company* [1916] 1 AC 650, 664

<sup>15</sup> *ibid*, 664; cf *Fooks v Smith* [1924] 2 KB 508, 513

## ***ii. Compensation for Delay Excluded***

Where after loss of possession the *specie* is released or recovered, the contemplated voyage may be completed, albeit late. Total loss payments following loss of possession potentially operate as exceptions to the rule excluding losses proximately caused by delay,<sup>16</sup> now codified by s 55(2)(b) of the 1906 Act: '*the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against*'. The Act is silent as to freight, but the Institute Freight Clauses now exclude '*any claim consequent on loss of time whether arising from a peril of the sea or otherwise*',<sup>17</sup> so a similar exclusion often applies in practice. The exclusion evolved concurrently to decisions finding total loss of the property, despite ongoing hopes of restoration to the insured (a "*spes recuperandi*"). The chronology establishing this exclusion is important to understanding the persuasiveness of loss of possession cases.

### **1.3 Total Loss Claims**

Arguably, total loss claims were formerly successful in circumstances that resolved the tension between cover for the voyage and exclusion for ordinary delay in a way that did justice to the needs of both insurers and insureds. Total loss claims were successful where possession had been lost by the insured, and so long as the abandonment was made quickly, they would be successful if made while the peril lasted.

## ***i. Total and Partial Losses***

Total loss provides an 'extreme' remedy allowing recovery from the underwriter for the full value of the *specie* insured,<sup>18</sup> relative to partial losses reimbursing an insured for specific recoverable losses, for example damage. Recovery for total loss matters to insureds since recovery for partial losses may be restricted by the exclusion of compensation for losses caused by delay. After restoration, any partial loss would be characterised as by delay. Consequently, an insured, in a loss of possession situation without damage, conceivably recovers for total loss or not at all, as recovery for a total loss effectively avoids the exclusion. Even where payments are available these might provide inadequate compensation for the

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<sup>16</sup> Originally a common-law rule; e.g. losses for delay during repairs following a collision were not recoverable in *Shelbourne v Law Investment Corp*n (1898) 2 QB 629; Chalmers and Owen, *The Marine Insurance Act 1906* (1<sup>st</sup> edn, 1907), 73

<sup>17</sup> Institute Time Clauses Freight, cl 15; Voyage Clause Freight, cl 11

<sup>18</sup> ie the sum fixed by a valued policy or the insurable value of the *specie* on an unvalued policy; *Guidon de la Mer*, Ch 7, [1]; Emerigon XVII, II; *Lidgett v Secretan* (1871) LR 6 CP 616; s 68 of the 1906 Act; Arnould (17<sup>th</sup> ed 2008), [28-01]

losses actually sustained from the peril's effect on underlying transactions. Total losses include both 'actual' and 'constructive' total loss, unless the policy specifies otherwise.

## ii. *Historic Presumptions of Total Loss*

Early modern English authorities provide simply that whenever the voyage was interrupted by an insured peril causing loss of possession, as insureds lost the free use and disposal of their property, they could recover at once for a total loss while that peril lasted, whatever the predicted duration of the peril. Both *specie* and the voyage were considered lost. In *Rodocanachi and others v Elliot* it was accepted that a total loss occurred on any capture, arrest or embargo:

*"In Goss v Withers, Lord Mansfield says: 'I cannot find a single book, ancient or modern, which does not say that, 'in case of a ship being taken, the insured may demand as for a total loss, and abandon'. And what proves the proposition most strongly is, that, by the general law, he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy'".*<sup>19</sup>

*Goss v Withers (the David and Rebeccah)*,<sup>20</sup> the first English decision on capture on a valued policy, permitted a total loss on capture despite strong hopes of recapture and restoration. The right to claim was 'not suspended', allowing an instant right to abandon on capture.<sup>21</sup> Similarly, where vessels were kept in port by embargo there might be recovery, even when later released, as in *Fowler and another v The English and Scottish Marine Insurance Company (the Ernest Jacob)*.<sup>22</sup> These authorities followed a presumption of total loss established in Continental treatises which was regularly applied in English decisions until after the Marine Insurance Act 1906:

*"Capture by an enemy or a pirate, or an arrest of princes, or even an embargo, is prima facie total loss; and immediately upon the capture, or upon a mere arrest, or at any time while the ship continues under detention, the insured may elect to abandon, and give notice to the insurer of his intention so to do; and thus enable himself to claim as for a total loss from the insurer".*<sup>23</sup>

This presumption of total loss was founded on pragmatic commercial considerations:

*"...from the moment of the capture, the owners lose their power over their ship and cargo, and are deprived of the free disposal of them; and, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, is equivalent to*

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<sup>19</sup> (1874) LR 9 CP 518, [1874-80] All ER Rep 618, 667-8

<sup>20</sup> (1758) 2 Keny 325, (1758) 2 Burr 683, (1758) 96 ER 1198

<sup>21</sup> (1758) 2 Burr 683, 696

<sup>22</sup> (1865) 2 Mar Law Rep 202, (1865) The New Reports 66

<sup>23</sup> *Goss v Withers*; Marshall (1802), 483-4; Emerigon, *Traite des Assurances et des Contrats a la Grosse* (Mossy 1783)

*a total deprivation. It would therefore be unreasonable to oblige the insured to wait the event of capture, detention, or embargo”.*<sup>24</sup>

This was never a test of ‘uncertainty’ capable of being later modified by the 1906 Act in England to a test of ‘unlikelihood’. This presumption has apparently not survived into the modern law, as *Panamanian* and *Masefield* illustrate. How and why was this right to instant compensation lost?

### **iii. Statutory Tests of Total Loss**

The statutory tests of total loss do not refer to named perils. Section 57 of the 1906 Act provides a general test of actual total loss:

*“(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof”.*<sup>25</sup>

This drafting reflected a long recognised reality, that matter can never be totally destroyed, ‘destruction’ or ‘damage’ here contemplating change in form. Arnould confirmed that the phrase ‘wholly destroyed or annihilated’ does not contemplate complete destruction, but an end of utility:

*“It is quite clear that these words cannot mean a change from entity into non-entity, as that is even a physical impossibility, and must, therefore, of course, be thrown out of consideration in treating of a contract of practical indemnity against substantial losses”.*<sup>26</sup>

Arnould continued, stating that there could be an actual total loss in the case of shipwreck, if it were not physically possible to recover the *specie*. The statutory test of irretrievable deprivation reflects his proposition:

*“...if the thing insured go in bulk to the bottom of the ocean, or be reduced by fire to a heap of ashes, though, in either case, its remains have an existence in natura rerum, yet the thing itself is practically, and, as a subject of insurance, wholly destroyed, so as to entitle the assured, without notice of abandonment, to claim a total loss”.*<sup>27</sup>

Section 60 of the 1906 Act defines a constructive total loss, so far as material, as:

*“(1) where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*

*(2) In particular, there is a constructive total loss: (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that*

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<sup>24</sup> *ibid*

<sup>25</sup> 1906 Ch 41 6 Edw 7

<sup>26</sup> Arnould (2<sup>nd</sup> edn, 1866), Vol II, 882

<sup>27</sup> *ibid*, 882

*he can recover the ship or goods, ... , or (b) the cost of recovering the ship or goods, ... , would exceed their value when recovered...'*

Where a loss may be claimed under s 60, s 61 permits an insured to elect whether to abandon:

*'Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss'.*

Accordingly, on a loss of possession, there will be actual total loss where the insured is 'irretrievably deprived', and may be constructive total loss where it 'appears to be unavoidable', or 'unlikely that he can recover' his property. To claim a constructive loss, an insured is not limited to s 60(2), but can rely on the general wording in s 60(1), as: *'The two sub-sections contain two separate definitions, applicable to different conditions of circumstances...'*<sup>28</sup> It was later clarified that: *'...the two sub-sections contain two separate definitions which may be applied to different conditions of fact. Thus an assured can base his claim on the terms of sub-s. 2, which give an objective criterion in each case, ship, goods or freight, not only more precise but substantially different from that in sub-s. 1. Sub-sect. 2, as compared with sub-s. 1 is thus cumulative, not merely illustrative'*.<sup>29</sup> Policy terms may limit an insured's right to claim under aspects of s 60. The Institute Cargo Clauses (A)<sup>30</sup> Cl 13 provides that:

*'no claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival'.*

These terms take priority over the statute, so that care must be taken when reviewing authority to question whether the losses were total or constructive, as the giving of notice may not be determinative. No authority before Steel J's judgment in *Masefield* restricted an insured from claiming under s 60(1). Arguably, an insured, on any peril, may claim under either sub-section, subject to the terms of the policy. Given the apparent completeness of this statutory test, it might be that it applied equally to all maritime perils. Arguably, however, caselaw on different factual classes of loss indicates that a different approach applies to each class.

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<sup>28</sup> *Robertson v Petros M Nomikos Ltd* [1939] AC 371

<sup>29</sup> *Rickards v Forestal Land, Timber and Railways Co Ltd; Robertson v Middows Ltd; Kann v W W Howard Brothers & Co Ltd* [1942] AC 50 (HL), [1941] 3 All ER 62, [1941] 1 KB 225 (CA), [1940] 4 All ER 395, reversing [1940] 4 All ER 96

<sup>30</sup> Clauses B and C exclude piracy claims under Cl 6, the 'War Risks Clause'

**iv. Diluting the Presumption**

The presumption of total loss recognised in *Rodocanachi* has not remained settled. Litigation arose where claims alleging loss of possession or of free use and disposal of the vessel were made but where the peril had ended before the insurers paid, and insurers relied on the quick change in circumstances. While it remained that on deprivation the insured did not have to demonstrate that there was no chance of recovery to claim on the policy, the simple position that any deprivation of possession justified an abandonment for a total loss appeared by 1917 to be diluted:

*“Mere temporary deprivation would not under any circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss”.*<sup>31</sup>

The test identified a middle ground between the clear situation where there was certainty that the loss would never end, and a clearly temporary obstruction which would not justify recovery. In the context of a claim on motor insurance, but relying on marine authorities, it was confirmed that it was never necessary for a claimant to prove that insured property was irrecoverable in all circumstances. While an insured was not entitled to ‘sit by and do nothing’, insureds were ‘not bound to launch into proceedings’ let alone appeal to the House of Lords. The test was “whether after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain”.<sup>32</sup> Accordingly, a claim for loss of possession may involve identifying what measures are reasonable for an insured to take, and when these have been exhausted.

**v. Contemporary tests for total loss**

Following *Masefield*, the contemporary law on capture claims appears twofold: (a) a test of ‘unlikelihood’ of ‘recovery within a reasonable time’ test for constructive total loss, replacing an earlier test of ‘uncertainty’,<sup>33</sup> and (b) a test of ‘irretrievable deprivation’ for actual total loss.<sup>34</sup> A ‘wait-and-see’ approach may be applied by the courts to both, to ascertain what the ultimate result of the loss might be.

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<sup>31</sup> *Moore v Evans* [1917] 1 KB 458, 471

<sup>32</sup> *Webster v General Accident Fire and Life Assurance Corporation Ltd* [1953] 1 QB 520, 531 (Parker J); cf 2.4.i below

<sup>33</sup> *Pollurian v Young* [1915] 1 KB 922 (CA), *Irvine v Hine* [1950] 1 KB 555, [1949] 2 All ER 1089, *The Bamburi* [1982] 1 Lloyd’s Law Reports 312; Colivaux’s law of insurance (9<sup>th</sup> edn, 2010, Sweet & Maxwell), 1158-9

<sup>34</sup> Total losses in marine insurance have since about the 1850s been characterised as either actual or constructive (in earlier cases ‘real’ or ‘technical’ losses). These tests were codified separately by the 1906 Act.



*Panamanian Oriental Steamship Corporation v Wright*<sup>35</sup> indicated that the test for actual total loss of ‘irretrievable’ deprivation is difficult to satisfy on a loss of possession claim. There, a vessel detained by Vietnamese customs officials was confiscated and condemned by a military tribunal. Mocatta J held in relation to actual total loss:

“[The] claim ... on the basis that the plaintiffs were irretrievably deprived of the Anita is somewhat academic. ... It may be true that the order of confiscation divested the plaintiffs of the legal ownership as is the case of a ship by a Prize Court. But the test of irretrievable deprivation is clearly far more severe than the test of unlikelihood of recovery of possession, and despite the gloomy prospects for the future as of Aug 29, 1967, I feel unable to find that the plaintiffs were at the date irretrievably deprived of their vessel”.<sup>36</sup>

Subsequently, *Masefield v Amlin Corporate Member*<sup>37</sup> confirmed that an insured could not recover for a total loss, actual or constructive, immediately after a piratical capture. The academic consensus following *Masefield* is that an insured, under English law, must ‘wait-and-see’ if he is ‘irretrievably deprived’ of the subject matter before recovering for an actual total loss, and that, ‘mere seizure of a vessel or cargo by pirates is insufficient to ground a claim in either actual or constructive total loss’.<sup>38</sup> Recently, an insured vessel covered by, inter alia, a War Risks policy was boarded by pirates who ordered the vessel sail to Somalia. After a fault developed with the main engine, the pirates disabled the vessel, and abandoned her. Salvage tugs were engaged, and recovered her. It was not apparently argued that the vessel became a total loss by capture, following the explanation of the law propounded in *Masefield*.<sup>39</sup> Arguably, *Masefield* established a new consensus on the law of total loss.

The test on detention for constructive total loss on restraint or detention was once similar to that on capture. However, it is now unclear whether there is a deemed loss of property on these perils, or merely a deemed loss of the voyage. On either basis, these situations have been tested by a 12 month period before abandonment.<sup>40</sup> Further, it appears that actual total loss by restraint of princes is difficult or impossible a test to satisfy.<sup>41</sup> Of course, the situation following capture or detention may not be static, and the property may be sold by those authorities in control of property taken or restrained, or even destroyed. Eventual sale may<sup>42</sup>

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<sup>35</sup> (1970) 2 Lloyd’s Rep 365, [1971] 2 All ER 1028

<sup>36</sup> *ibid*, 383

<sup>37</sup> [2011] EWCA Civ 24, [2011] 3 All ER 554, [2010] EWHC 280 (Comm)

<sup>38</sup> eg Michael Underdown ‘Case Notes; *Masefield AG v Amlin Corporate Member Ltd*’ (2010) 21 ILJ 62

<sup>39</sup> *Suez Fortune Investments Ltd v Talbot Underwriting Ltd and others (The Brillante Virtuoso)* [2015] EWHC 42 (Comm)(Flaux J)

<sup>40</sup> *The Bamburi* [1982] 1 Lloyd’s Rep 312

<sup>41</sup> *Panamanian Oriental Steamship Corporation v Wright (The Anita)* [1970] 2 Lloyd’s Rep 365; [1971] 1 Lloyd’s Rep 487

<sup>42</sup> *Le Cann* [1886-90] All ER Rep 957

or may not<sup>43</sup> result in a total loss to the insured. If an insured must wait-and-see, the consequence of failing to abandon early has been untested in recent authority.

This brief survey illustrates that on claims for loss of possession, what was in 1756 a simple rule has evolved into a significantly stricter test for insureds. This study aims to answer: (i) how was it that a presumption that allowed an insured to abandon and recover instantly evolved into a rule where he could not; and (ii) what is the contemporary law?

## 1.4 Research Methodology

This study aims to state the contemporary law – or construction of marine policies – in England and Wales. In doing so, it identifies once settled principles, and questions the accuracy of decisions deviating from these. The law of marine insurance is largely that of construction of the clauses in the policy.<sup>44</sup> These terms entered English policies by the Lloyd's SG Form, and find contemporary expression in the range of marine policies currently available in the Lloyd's market, primarily the Institute clauses, or other policies subject to English law. A thorough analysis of English marine insurance law requires a historical approach, tracing the development of authority on the clauses. A comparative study with American authorities, in particular those of the Federal courts and the state of New York, adds useful context to this interpretation.

### *i. Justification for a Historical Approach*

As there is comparatively little express academic consideration of these issues, any exposition of insurance law depends directly on primary authority – often older cases and early treatises. Continuity in insurance practice and law justifies consideration of older reported decisions, treatises and textbooks than might remain practically relevant to other areas of contemporary commercial law. The factual matrix of total loss claims '*reflect the political and commercial history of the Western world for the last two hundred years*';<sup>45</sup> the editors of Arnould note most principles were established during the eighteenth and early nineteenth centuries.<sup>46</sup> The form of marine insurance policy changed little between about 1613 and 1982. The SG Policy preserved an earlier of wording, found in the earliest surviving policy known to have been

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<sup>43</sup> *Fooks v Smith* [1924] 2 KB 508

<sup>44</sup> *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1, 34 (Scott LJ)

<sup>45</sup> *The Bamburi* [1982] 1 Lloyd's Law Reports 312, 312 (Staunton J)

<sup>46</sup> Arnould (17<sup>th</sup> edn, 2008), v

issued in England (1613),<sup>47</sup> recorded in early textbooks,<sup>48</sup> and possibly used in England from 1450.<sup>49</sup> Lloyd's formally adopted the form in 1779. It is a statutory form of policy scheduled to the Stamp Duties Act 1795<sup>50</sup> in near identical terms to the Marine Insurance Act 1906.<sup>51</sup> The SG policy was used for '*centuries without [significant] change*', and the English formulation, due to the commercial influence of Lloyd's, acquired a global influence not far short of a '*lingua franca*' or '*common currency*' of international insurance.<sup>52</sup> The SG policy was used in the English market to insure both ship and cargo<sup>53</sup> and against marine and war risks, until superseded by the 1982 reforms.

### English Authorities

Although vessels were undoubtedly captured or detained throughout English history,<sup>54</sup> few authorities consider captures on wagering assurances before the Glorious Revolution.<sup>55</sup> The development of a body of English insurance authorities on valued policies begins with Lord Mansfield. Earlier cases on wagering policies remain relevant to the doctrine of 'loss of the voyage', although these are few. These authorities remain relevant for understanding contemporary law. Early authority may identify longstanding customary or trade usage. Mansfield CJ's 1780 guidance that '*the material rules to be adhered to in the construction of policies are the intention of the parties entering into the contract and the usage of trade*'<sup>56</sup> remains applicable and persuasive. In 1791 it was recognised that the SG policy '*has at all times been considered in Courts of Law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage*'.<sup>57</sup> Lord Mansfield noted difficulties in interpretation, and viewed the court's role as applying a '*system of construction*

<sup>47</sup> Martin, Frederick; *The History of Lloyd's and of Marine Insurance in Great Britain* (MacMillan & Co, London 1876), 46-8; Gow, *Marine Insurance; A Handbook* (MacMillan 1917), App B

<sup>48</sup> Policy issued 1753, Magens (1755) Vol I, 50, Vol II, 384

<sup>49</sup> MacLachlan suggested use in England from c.1450, cf Arnould (6<sup>th</sup> edn, 1877), 814; the earliest surviving marine policy is that contained in a Florentine ordinance of 1525 – English policies, written in Italian, survive from 1547 onwards, C Wright, CE Fayle, '*A History of Lloyd's* (1928, MacMillan), Ch 6; DEW Gibb, '*Lloyd's of London*' (1957, MacMillan)

<sup>50</sup> 35 Geo 3 c63; Arnould (17<sup>th</sup> edn, 2008), [2-21] fn 113

<sup>51</sup> eg in 1850, "*Be it known that*" replaced the solemn preamble "*In the name of God, Amen*"

<sup>52</sup> *Amin Rasheed Shipping Corp v Kuwait Insurance Co The Al Wahab* [1984] AC 50, 65; [1983] 2 All ER 884, 891, 895

<sup>53</sup> "SG" probably meaning "ship and goods", Fayle Wright, *History of Lloyds*, 132-133

<sup>54</sup> The oldest insurance dispute recorded in England, decided 1426 at the Guildhall, concerned a vessel seized by Spanish privateer; Florentine law and custom, or the 'law merchant' was applied, presumably on an Italian policy, *Ferrantyn's case (The Seint Anne of London)* (Plea Rolls, City of London) Thomas, AH (ed): *Calendar of plea & memoranda rolls of the City of London preserved among the archives of the Corporation of London at the Guildhall, AD 1413-1437*, Cambridge: Cambridge University Press, 1943, 208-210

<sup>55</sup> few reported decisions until Mansfield LCJ, De Koning (1997)

<sup>56</sup> *Syers and others v Bridge (the Mary)* (1780) 99 ER 335 (KB), (1780) 2 Doug KB 526 (Mansfield LCJ); Steel, David, *The Ship-Master's Assistant and Owner's Manual* (9<sup>th</sup> edn, 1801, Steel and Galabin) 211, (20<sup>th</sup> edn, 1832, Longman and others), 841

<sup>57</sup> *Brough v Whitmore* (1791) 4 Term Rep 206, 210, (1791) 100 ER 976, 978 (KB) (Buller J)

*established, upon the ancient and inaccurate form of words in which the instrument is conceived*'.<sup>58</sup> Consequently, early authorities remain useful in construing a document of such longevity, as the wording acquired a settled judicially approved usage,<sup>59</sup> so that when "asked to construe an expression in a mercantile document of ancient origin, interpreted by decisions that have stood for more than a century... the only safe rule for a Court is stare decisis".<sup>60</sup>

It was recognised from an early date that the ordinary meaning of words may be overruled by a customary interpretation.<sup>61</sup> Further, settled judicial interpretation may reinforce customary usage, in a process by which the 'law merchant' – the custom of merchants and traders – became ratified by courts of law.<sup>62</sup> Where words were for many years given a settled judicial construction, it was reasonable to suppose that parties believed this accepted construction would be applied.<sup>63</sup> The policy of insurance was recognised from an early date to have a settled meaning ascribed to terms, in consequence of being a written document from a time when much commerce was not reduced precisely to writing. The standard nature of the policy, through extended use and practice, gave its terms a comparatively known and definite meaning.<sup>64</sup>

This applicability of *stare decisis* is even stronger where it is recognised that a document has an international usage. Precedent would be respected not only where words were identical, but also where substantially the same. Courts would be reluctant to interfere with long-established constructions. The international aspect was particularly important, in that insurance "*is commonly offered in standard form policies which have a national or international provenance. Courts recognise this fact and the consequence that risks may be assessed, and reinsurance procured, on the footing that settled interpretations of commonly used language will not be disturbed without good reason...*"<sup>65</sup> While non-standard terms or riders added in writing would be given greater weight, as being specifically negotiated by the parties,<sup>66</sup> total loss claims have usually turned on standard terms. Few if any commercial documents have been settled in such longstanding, widespread use as the SG policy. *Janson*

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<sup>58</sup> *Pelly v Royal Exchange Assurance Co* [1558-1774] All ER Rep 405, 409

<sup>59</sup> *Becker, Gray & Co v London Ass Corp* [1918] AC 101, 114 (Sumner LJ); *The Mihalis Angelos* [1971] 1 QB 164, 194 (Denning MR)

<sup>60</sup> *Becker, Gray and Co v London Assurance Corporation* [1918] AC 101, 109 (Dunedin LJ)

<sup>61</sup> *Olivera v Union Insurance Company* (1818) 16 US 183, 191 (US Supreme Court)

<sup>62</sup> *Goodwin v Robarts* (1874-75) LR 10 Ex 337, 346

<sup>63</sup> *Thames and Mersey Marine Insurance Company, Ltd v Hamilton, Fraser & Co (the Inchmaree)* (1887) LE 12 App Cas 484, 490 (Lord Halsbury LC)

<sup>64</sup> *Robertson and another v French* [1803-13] All ER Rep 350, 353 (Ellenborough LCJ)

<sup>65</sup> Malcolm Clarke *The Law of Insurance Contracts* (Informa, 2006), [15-2A]; approved *Sunspport Shipping Ltd and others v Tryg-Baltica International (UK) Ltd and others* [2003] EWCA Civ 12, [26]

<sup>66</sup> *ibid* [1803-13] All ER Rep 350, 353

*v Driefontein Consolidated Mines Ltd*<sup>67</sup> confirmed settled usages should not be lightly disturbed by policy considerations. Serjeant Marshall’s *Marine Insurances* was approved; certainty required established judicial rules not to be set aside for policy reasons, absent legislative intervention a rule of law ought to remain settled, and the legislature alone “...has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force”.<sup>68</sup> The presumption is that settled rules ought not to be overturned lightly. On overturning an established rule, even on good authority, the approach must be cautious: “The decision... has been unchallenged and presumably acted on for fifty years, and even if I did not agree with the view there expressed I should hesitate before overruling it”.<sup>69</sup> Consequently, an approach considering the history of clauses is uncontroversial,<sup>70</sup> and this study aims to consider the full history of the interpretation of these clauses.

Nevertheless, rules no longer reflecting commercial reality may be overturned.<sup>71</sup> Clearly, the law must adapt to changing factual situations or expectations.<sup>72</sup> Older sources of law may state rules contrary to contemporary judicial or market understanding. Where older laws have been replaced by contrary custom *stare decisis* is not inflexible; “... although precedent is respected, the court is not bound by the doctrine of stare decisis to respect it”.<sup>73</sup> This is particularly so where the law merchant was once simply custom – if that custom is changing, then it may be a question of balance as to when the law adapts to follow. Presumptions of loss on loss of possession claims engage this balance; terms may have a customary interpretation, but if the custom has been changed, eg by decisions such as *Masefield*, the extent to which previous inconsistent authority has relevance may be lessened.

### Continental Treatise Writers and Development of English literature

The wording of the SG policy conformed to the French policy in ‘*Guidon de La Mer*’ published about 1600.<sup>74</sup> The underlying principles are much older still, the courts perceiving the right to abandon – ie recover for total loss – originating ‘in the Rhodian law and the laws of Oleron’.<sup>75</sup> In determining the relevance of a source of law, it is instructive to note the materials available to maritime practitioners in the Doctor’s Commons, the practitioners in

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<sup>67</sup> [1902] AC 484

<sup>68</sup> [1902] AC 484; [1900-03] All ER Rep 426, 430

<sup>69</sup> *R v Hooley Hill Rubber and Royal Insurance Co* [1920] 1 KB 257, 269 (Bankes LJ)

<sup>70</sup> *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm), [28]

<sup>71</sup> *C Czarnikow v Koufos* [1966] 2 QB 695

<sup>72</sup> *Jones v Kaney* [2011] UKSC 13

<sup>73</sup> Malcolm Clarke, *The Law of Insurance Contracts* (Informa 2006), [15-2A]

<sup>74</sup> Observed in Martin (1876), 41; *Guidon de la Mer*, Le in Pardessus, Marie J, *Collections de lois maritimes antérieures au XVIII<sup>me</sup> siècle* (Paris 1828-1845), Vol 2, ch 13, 69ff

<sup>75</sup> 2 Burr 693 (Mansfield LCJ)

the Admiralty courts.<sup>76</sup> English insurance law from its Tudor origins borrowed heavily from treatise writers and Continental codes, both of which amplified Roman law principles, and from the *lex mercatoria*, which was recognised as an international customary law. Renaissance and early modern treatises on insurance are frequently cited in earlier English authorities. Amongst these, *le Guidon de la Mer* (1556), the *Us et Coutumes de la Mer* by Cleirac (1656) and the *Ordonnance de la Marine* (1681) were particularly significant for the development of total loss tests, and remain directly relevant. Later Continental treatises were significant, principally Valin,<sup>77</sup> published in 1766, Pothier from 1775,<sup>78</sup> and Emerigon,<sup>79</sup> published in 1783. Arnould considered Emerigon the most important of the treatise writers, remaining authoritative in then contemporary English law.<sup>80</sup> Other laws of insurance, such as fire or lives, were unknown before the eighteenth century, and ultimately derived their principles from marine insurance. The influence of those early Continental writers persists in the common-law to the present. These, especially Emerigon and *The Guidon*, were cited with approval as late as 1908 as the direct source for English rules.<sup>81</sup> Their importance is all the greater for the fragmentary records kept of Court of Admiralty decisions, which did not go back beyond 1641, and were of a very poor quality before 1690.<sup>82</sup>

Only in 1786 was the body of English cases sufficient for the first English text, Park,<sup>83</sup> soon followed by Marshall,<sup>84</sup> both of which, along with the Continental writers, were treated as principal authorities in the United States.<sup>85</sup> Arnould, now a leading English practitioner work, was first published in 1848. Until a sufficient body of English works or cases had accumulated, in the absence of prior authority, English courts looked to French principles as expounded in these treatises.<sup>86</sup> Consequently, this study looks to Emerigon and other writers

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<sup>76</sup> Alex Parks, *The Law and Practice of Marine Insurance and Average* (Cornell Maritime Press, 1987) Vol 1, 4-8; William Tetley, *Maritime Law as a Mixed Legal System, (with particular reference to the distinctive nature of American maritime law, which benefits from both its civil and common law heritages)* (1999) 23 Tul Mar LJ 317

<sup>77</sup> Valin, *Nouveau Commentaire Sur L'Ordonnance de 1681* (La Rochelle, 1766)

<sup>78</sup> Pothier RJ, *Supplement A Treatise on Maritime Contracts of letting to hire* (trans Cushing C, 1821, Cummings and Hilliard); *Traité du contrat d'assurance* (editor Estrangin, 1810, Marseille)

<sup>79</sup> BM Emerigon, *Traite des Assurances et des Contrats a la Grosse* (Marselles, 1783)

<sup>80</sup> Arnould (1848) Vol I, viii-ix

<sup>81</sup> eg *The Teutonia* (1871) LR 3 A&E 394, 424; *Polurrian v Young* [1915] 1 KB 922 (CA), (1913) 84 LJKB 1025, [1914-15] All ER Rep 116

<sup>82</sup> *Lindo v Rodney* (1782) 2 Doug 613, 99 ER 38 (Mansfield LJ); A Browne, *A Compendious View of the Civil Law and the Law of Admiralty, being the substance of course of lectures read in the University of Dublin by Arthur Browne* (Butterworth 1802) 209

<sup>83</sup> J Park, *A System of the Law of Marine Insurance* (London, 1786)

<sup>84</sup> S Marshall, *Treatise on the Law of Insurance* (1<sup>st</sup> edn, 1802)

<sup>85</sup> Graydon Staring, 'Admiralty and Maritime Law; Selected Topics', Tort & Insurance Law Journal, Vol 26, No 3 (Spring 1991) 538, 539

<sup>86</sup> eg *Butler v Wildman* (1814-23) All ER Rep 748 (Best J)

as the source of law applied in later English decisions. Where later decisions appear to conflict with the rules in these authoritative works, these must be analysed closely.

*ii. Utility of comparison to US law*

To a significant extent, American authorities, in particular those of the earlier nineteenth century, usefully explain English insurance law. The commercial background, including a shared legal history until 1776, meant that American brokers routinely offered British policies to their customers into the 1950s, and themselves used policy forms in similar terms to the SG form. Reinsurance across the American and British market was routine. Given the international unity of the industry, difficulties to insureds resulted from divergence between the laws applying in the two markets.<sup>87</sup>

*American Authorities explaining English law*

Until 1955 it was settled that marine insurance as part of admiralty law was subject to federal law. Justice Storey established Federal admiralty jurisdiction in 1815,<sup>88</sup> and later reaffirmed his decision adding ‘*that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction*’, which decision was confirmed in 1871.<sup>89</sup> In the numerous nineteenth century marine insurance decisions of the American Supreme Court and lower federal and state courts, there is frequent citation of English cases, and Valin, Emerigon and early Continental treatises.<sup>90</sup> While the draft Field Code was never adopted by New York, it reflected an existing incorporation of the English authorities, including Park and Marshall into state law.<sup>91</sup> The earliest American authorities demonstrate an understanding of marine insurance as an international *lex mercatoria*. Ideally, decisions would be consistent across state and federal jurisdictions and in harmony with the English decisions, especially those of Lord Mansfield.<sup>92</sup> The US Supreme Court cited English and early State decisions frequently, many of them founded on the Continental writers, and occasionally cited those writers directly.<sup>93</sup> As recently as 1938 and 1953, the Supreme Court

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<sup>87</sup> ‘International Divergencies in Marine Insurance Law: The Quest for Certainty’, Harvard Law Review, Vol 64, No 3 (Jan, 1951) 446

<sup>88</sup> *De Lovio v Boit* 7 Fed Cas 418 no 3, 776 CCDMass 1815

<sup>89</sup> *Insurance Company v Dunham* (1871) 78 US 1, 20 L Ed 90, 1870 US Lexis 1455; 1997 AMC 2394; 11 Wall 1 (USSC)

<sup>90</sup> Graydon Staring, ‘Admiralty and Maritime Law; Selected Topics’, Tort & Insurance Law Journal, Vol 26, No 3 (Spring 1991), 539

<sup>91</sup> Cal Civ Code, tit XI annotations (H S Crocker & Co, Sacramento, 1872)

<sup>92</sup> William A. Fletcher, ‘The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance’, Harvard Law Review, Vol. 97, No 7 (May, 1984), 1513, 1519, 1564-1569

<sup>93</sup> Graydon Staring (1991), 538-559, 540

freely mixed English and early state decisions in deciding marine insurance cases,<sup>94</sup> and lower courts more recently.<sup>95</sup> The English Marine Insurance Act 1906 has a persuasive status in US courts, as it is thought to codify laws adopted into federal law since independence.<sup>96</sup>

Impliedly, insurance laws across the American states should remain in harmony; state courts recognised that their marine laws were part of a global law of nations. For example, in *The Jerusalem Storey J* stated, "[When admiralty jurisdiction] rightfully attaches on the subject matter, [the federal court] will exercise it conformably with the law of nations, or the *lex loci contractus*, as the case may require".<sup>97</sup> *Hammond v Essex Fire & Marine Insurance Co*<sup>98</sup> confirmed American admiralty jurisdiction, exercised in conformity with the law of nations and reinforced links to English law.<sup>99</sup> In recognition of the principle underlying the *lex mercatoria*, the Supreme Court declared in 'The Supreme Courts Harmony Rubric' of 1923, that "[t]here are special reasons for keeping in harmony with them marine insurance laws of England, the great field of this business".<sup>100</sup> That view has been accepted as a guideline by lower courts<sup>101</sup> and the Supreme Court endorsed it in 1953.<sup>102</sup> Such harmony could not be encouraged practically without national uniformity in America, guided by federal decisions. The principle of harmony was therefore incompatible with the Supreme Court's subsequent decision in *Wilburn Boat Co v Fireman's Fund Insurance Co*,<sup>103</sup> which held Admiralty Jurisdiction – in America including marine insurance – was, absent prior authority, a matter of state law only.<sup>104</sup>

In particular, the common-law of marine insurance in New York antedates the US general maritime law, and is largely based on English law as understood by American practitioners in the 18th and 19th centuries, including Alexander Hamilton.<sup>105</sup> Because the US general

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<sup>94</sup> *Lanasa Fruit Steamship & Importing Co.*, 302 US 556, 1938 AMC 1 (1938); *Calmar SS Corp v Scott* 345 US 427, 1953 AMC 952 (1953); Graydon Staring (1991), 538, 539

<sup>95</sup> *Nautilus Virgin Charters v Edinburgh Ins Co* 510 F Supp 1092 (D Md 1981)

<sup>96</sup> Richard E Burke, 'An Introduction to Marine Insurance', The Forum (Section of Insurance, Negligence and Compensation Law, American Bar Association), Vol 15, No 4 (Spring 1980), 729, 730; Parks AL, Marine Insurance Principles: Contract Formation and Interpretations, (1978) 3 Mar L 129, 130

<sup>97</sup> 13 FedCas 559 (CCD Mass, 1814)(No 7293) 563

<sup>98</sup> 11 FedCas 387 (CCD Mass, 1826)(No 6001)

<sup>99</sup> US 310, 1955 AMC 467 (1955)

<sup>100</sup> *Queen Insurance Co v Globe & Rutgers Fire Ins Co*, 263 US 487,493, 1924 AMC 107, 109 (1924); *General Ins Co v Link*, 173 F2d 955 (9th Cir 1949)

<sup>101</sup> *Queen Insurance Co v Globe & Rutgers Fire Ins Co* (1923) 263 US 487; see further B Yancey, 'State Regulation of Marine Insurance' 23 Ins Counsel J 143 (1956)

<sup>102</sup> *Calmar SS Corp v Scott*, (1953) 345 US 427, 443, (1953) AMC 952, 965

<sup>103</sup> US 310, 1955 AMC 467 (1955)

<sup>104</sup> Graydon Staring 'Wilburn Boat is a Dead Letter: R.I.P.' 42 J Mar L & Com 465 (Oct 2011)

<sup>105</sup> *Atlantic Ins Co v Storrow*, 5 Paige 285 (NY Ch 1835); *Vandenheuvel v United Ins Co* 1 Johns 406 (Sup NY 1806); *Wallace v Sloop Ann* (NY 1771) Charles Hough, *Reports of Cases in the Vice-Admiralty of the Province of New York* (1925, Yale University Press)



maritime law largely followed English law,<sup>106</sup> conflicts between federal and state law with respect to marine insurance rarely arise in New York, although more frequently in other state jurisdictions.<sup>107</sup> That courts aim for commercial uniformity of outcome rather than mere legal parallelism is illustrated by a case on the construction of a FC&S clause, where the result achieved differed in the construction of a term, but reached the same result.<sup>108</sup> Nevertheless, significant differences emerged, which directly influence total loss claims, in particular the time when parties' rights are to be determined, and in respect of causation in respect of delay.

### Development of American Literature

The first American treatise on insurance was Phillips in 1823, published up to 1867. Chancellor Kent devoted 93 pages of his Commentaries to marine insurance. The authorities he cited to explain American law included the English cases, Park, Marshall, Valin, Emerigon and Boulay-Paty. Duer<sup>109</sup> followed in 1845 and Parsons<sup>110</sup> in 1868. These texts rested explicitly on the authority of their English and Continental predecessors and aspired to an ideal of uniformity in the Western commercial world, treating the law of insurance contracts as a part of the *lex mercatoria*, a body of commercial law conceived to be common to the United States and other commercial nations. Phillips, Duer and Parsons were considered by English judges as late as 1984 to determine their views on a question of disclosure. Probably in no other commercial field have the common-law courts referred so much to the authority of treatises or been so "richly endowed" with them.<sup>111</sup> Reciprocally, Arnould considered American authorities alongside the English. The plurality of jurisdictions in the US prevent this study from offering a complete summary of the law in each State. Instead it draws assistance from US laws in understanding English law.

Despite these general requirements, marine insurance laws diverged from the English authorities, the best-known illustration of divergence being the difference in the value of damage that permits total loss in England and America, probably explained by changing trade

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<sup>106</sup> *New England Marine Ins Co v Dunham* 78 US 1 (1871)

<sup>107</sup> eg *Wilburn Boat* US 310, 1955 AMC 467 (1955) and *Albany Ins Co v An Thi Khieu* 927 F 2d 882 (5 Cir, 1991)

<sup>108</sup> *United States v Standard Oil Co* 178 F2d 488 (2d Cir 1949); 'International Divergencies in Marine Insurance Law: The Quest for Certainty', *Harvard Law Review*, Vol 64, No 3 (Jan, 1951) 446, 450

<sup>109</sup> J Duer, *The Law and Practice of Marine Insurance* (1845, New York)

<sup>110</sup> T Parsons, *Treatise on the Law of Insurance* (1868, Boston)

<sup>111</sup> M Mustill, 'Fault and Marine Losses' (1988) LMCLQ 256

Quarterly 310, 313 n 8: "It is remarkable that marine insurance has attracted such a wealth of scholars who combined intellectual superiority, breadth of learning and practical acumen. In addition to other writers mentioned in the text [Valin, Emerigon, Park and Marshall], one has to name only Phillips, Parsons, Abbott, Arnould, Chalmers, Maclachlan and Cohen, among many others."

custom immediately after independence.<sup>112</sup> For issues of loss of possession, there are two material differences: first, the time when the parties' rights became settled; secondly, on the law of causation.<sup>113</sup> As a result of these differences, total loss claims have potentially different outcomes between the two legal systems.

Naturally, similar considerations would arise in relation to Australian and Canadian cases. However, despite a search through the literature, there appear to be few decided cases on material points in those jurisdictions. This may be because the insurance markets in these countries are less well established than those of American, in particular New York, jurisdictions.

### *iii. Policy Considerations*

In addition to settled principles of construction imported from general contract law that justify a historical approach, and a presumption of common sense,<sup>114</sup> there are particular considerations that influence the court's construction of a marine policy. Underlying the construction of the policy for the purposes of total loss claims, are two competing policy issues:

#### *Minimising commercial harm caused by delay*

On learning of an incident involving his vessel or cargo an insured will ask when and to what extent he may recover in respect of his loss from his insurers. Uncertainty or a long delay in finding out his position must be undesirable. It has long been recognised that: “[c]ommercial men must be entitled to act on reasonable commercial probabilities at the time they are called upon to make up their minds”,<sup>115</sup> and that “[c]ommercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not”.<sup>116</sup> After a vessel's capture, the House of Lords recognised, “the assured

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<sup>112</sup> Herbert Barry, ‘Casual Comments on Particular Average and Constructive Total Loss’, *Virginia Law Review*, Vol 9, No 5 (Mar 1923), 344, 353

<sup>113</sup> On causation, US Supreme Court declined to follow *Pink v Fleming* and *Taylor v Dunbar* as being inconsistent with *Leyland Shipping, Lanasa Fruit Steamship & Importing Co Inc v Universal Ins Co* 302 US 556 (1938); *Brandyce v US Lloyd's* 207 AppDiv 665 (1924)

<sup>114</sup> “The construction of a commercial contract leading to such a result seems unlikely to be correct, except in a community consisting of fools and knaves.” *Forestal Land, Timber and Rlys Co Ltd v Rickards* [1940] 4 All ER 395, 408 (MacKinnon LJ)

<sup>115</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 706, [1981] 1 All ER 161, 180, HL (Simon LJ)

<sup>116</sup> *Embiricos v Sydney Reid & Co* [1914] 3 KB 45

*should not be obliged to wait till he had definitely ascertained whether his ship had been recaptured or not*".<sup>117</sup>

Cargo owners are especially vulnerable to the consequences of delay: *'to all who are engaged in commercial speculations, it is of the last importance to have a ready and quick command of their capital, so as to be enabled at once to draw it from any venture which appears likely to be losing, and invest it in another that promises to be lucrative'*. Further, that for a merchant to have his funds locked up during the whole time he waited for the final consequences of the accident to materialise would more disastrous than the actual instant physical destruction of his property.<sup>118</sup> Delay in a decision as to whether to pay for a loss following a casualty harms commerce. Policy considerations require the law assist in determining parties' rights without undue delay. This was recognised by Emerigon; *"Commercial adventures require celerity, and there is nothing so fatal as the experience of delays"*.<sup>119</sup>

In terms of the utility and purpose of insurance, a fundamental function is to encourage trade. Insurance allows merchants to trade where the risks would otherwise be prohibitive, by mitigating losses that would potentially ruin individual traders.<sup>120</sup> It has long been recognised, from the 1770s to the Great War, that marine insurance has a vital role in sustaining trade in times of conflict.<sup>121</sup> Quick resolution of issues of delay, one of the main consequences of conflict and terrorism, should arguably be a key policy aim of insurance.

### Reducing uncertainty

Simple rules discourage disputes. Arnould approved Mansfield's maxim, applicable to the determination of any mercantile dispute, *"That the property and daily negotiations of merchants ought not to depend on subtleties and nicities, but on rules easily learned and easily retained, because they are the dictates of common sense"*, and applied this to the insurance context.<sup>122</sup> Rules should be clear, and allow all parties, not least the master, to act promptly. For example, on damage, the master should know how to act, and what effect in law his acts have. Accordingly, he should have clear rules to guide his actions. Where it was suggested that the simple rule that masters should, where possible, repair the vessel and proceed with

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<sup>117</sup> *Moore v Evans* [1918] 1 AC 185 (HL) (Atkinson LJ)

<sup>118</sup> Arnould (2<sup>nd</sup> edn, 1857), 1014 (Lord Ellenborough CJ)

<sup>119</sup> Emerigon XVII

<sup>120</sup> eg *"By means of a policy of insurers it cometh to pass that upon the loss or perishing of any ship there followeth not the undoing of any man but the loss lighteth rather easily upon many than heavily upon few."* An Acte concerninge matters of *Assurances*, amongste Merchantes 1601 43 Eliz ch 12

<sup>121</sup> Luis Lobo-Guerrero, *Insuring War: Sovereignty, Security and Risk* (2012, Routledge), 42ff

<sup>122</sup> Arnould (3<sup>rd</sup> edn, 1866), Vol II 907

the charter, the reasons the court gave in declining to complicate the law, regardless of the justice in the individual case, was to avoid complicating the simple rule, stating “...*the rule now sought to be laid down would place shipowners and freighters in a position of the greatest uncertainty and difficulty*”.<sup>123</sup> Similar concerns have been applied in the construction of a charterparty, in that a construction that provides clear rules to guide conduct is to be preferred to a construction that results in uncertainty, even where that would be just in the instant case: “[the law prefers] a construction which gives a certain, clear, and honest rule of conduct to act by in all cases, upholding a contract, over one which introduces uncertainty and difficulty as to conduct, and admits of reasons for defeating a contract which are to be derived from considerations of interest at the time”.<sup>124</sup>

A literal construction may well be preferable: ‘*The question seems a simple one; but, if we depart from the literal construction, we may be led into complications and metaphysical refinements from which mercantile contracts ought, as far as possible, to be free*’.<sup>125</sup> Any test requiring the exercise of discretion of judgment, arguably extending to judicial discretion, is undesirable in a commercial situation. In reference to a test of uncertainty, in the context of total loss by putrefaction by sea-damage to goods landed in specie at the destination port, Arnould recognised in 1848:

“... as Emerigon says, with reference to this very point, to introduce such a test would be to make the question of the underwriter’s liability “depend on the fluctuating views which different men might form on the same subject, and could be of no service except to give rise to litigation ruinous to commerce”.<sup>126</sup>

Further, as with the interpretation of any contract, the aim is to understand what the parties meant, which means that a business sense is given to the terms, where appropriate.<sup>127</sup> It is well recognised both in the UK and in America that the parties’ relative bargaining power, in this commercial context, are unequal. Few merchants or brokers thoroughly understand insurance law, and further insurers frequently issue policies on standard terms over which brokers exercise little influence. Negotiations concern the few most salient terms, and the rest is left on standard forms, usually drafted to favour the insurer.<sup>128</sup> Consequently the policy is often construed against the insurer.<sup>129</sup>

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<sup>123</sup> *Jackson v The Union Marine Insurance Company Ltd* (1874) LR 10 CP 125, 131

<sup>124</sup> *ibid* (1874) LR 10 CP 125, 133

<sup>125</sup> *Cory v Burr* [1881-85] All ER Rep 414, 422 (Fitzgerald LJ)

<sup>126</sup> Arnould (1<sup>st</sup> edn, 1848), 1036

<sup>127</sup> “...insurer and insured must be taken to have understood the words “total loss” in the business sense of those words.” *Blairmore v Macredie* [1898] AC 593, 599

<sup>128</sup> Samuel Williston, *7 Williston on Contracts* (3d edn, 1963), [900]

<sup>129</sup> eg where lines 42-44 of the American Institute Hull War Clauses were ambiguous, construed against the insurer, *the Bamburi* [1982] 1 Lloyd’s Rep 312

Marine insurance must not encourage litigation. The law should, by applying certain rules, prevent litigation, and the wasting of resources. The presumptions of total loss expounded in earlier authority, and eroded or ignored in recent, discouraged uncertainty and consequent litigation. Throughout all considerations of marine insurance, Mansfield's desire for certainty has been confirmed as the paramount consideration.<sup>130</sup>

### Protecting Insureds and Insurers

Courts must strike a balance between the rights of the insurer and insured. Insurance law aims to prevent overcompensation, often expressed by describing the policy as a contract of 'indemnity', where the insurer promises to pay only on the occurrence of certain events causing loss in a certain way.<sup>131</sup> The guiding principle is that a contract for indemnity will not over-compensate the insured. The expression 'indemnity only' meant an insured '*shall be fully indemnified, but shall never be more than fully indemnified*', so that any argument that either prevented an insured from being fully compensated, or conversely overcompensated him, would be rejected.<sup>132</sup> The principle should be even-handed, and not be used to exclude properly covered compensation for losses suffered.

Insurance law balances providing compensation for losses within the policy with protecting the insurer from excessive or disproportionate payments, or from making insurers act as merchant, shipowner, or broker of property abandoned to them unjustifiably.<sup>133</sup> Insurance does not compensate for normal fluctuations in the market. Consequently, an insurer is not seen to be liable for losses proximately caused by delay where the goods arrive undamaged. If permitted improperly to abandon, an insured might be tempted to take advantage by overvaluing his interest in relation to the value at the time of a cargo's arrival. Mansfield LCJ stated... "*that ought not to be encouraged as it is productive of fraud, [and] contrary to the spirit of maritime law. Or that the market has fallen since he insured, but as the insurer can have no advantage by the rise he ought not to lose by the accidental fall. On a valued policy, a plaintiff cannot recover more than the actual loss which has happened, at the time when he chooses to abandon...*"<sup>134</sup> Ellenborough CJ noted '*In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the Court to watch every such case, and in no instance to enlarge that which in the nature of the thing is a partial, into*

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<sup>130</sup> eg 'When is a Ship a Total Loss?' Harvard Law Review, Vol.12, No 3 (Oct 25, 1898), 212-213; *Blairmore v Macredie* [1898] AC 593

<sup>131</sup> *Becker, Gray & Company v London Assurance Corporation* [1918] AC 101, 113 (Sumner LJ)

<sup>132</sup> *Castellain v Preston* (1883) 11 QBD 380, 386; *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266

<sup>133</sup> *Deblois v Ocean Ins Co* (1835) 16 Pick 303

<sup>134</sup> *Hamilton v Mendez (the Selby)* (1761) 97 ER 787; (1761) 1 Black W 277; 2 Burr 1198

*a total, loss*'.<sup>135</sup> Both the need to protect insurers from market forces,<sup>136</sup> and insurers' vulnerability to fraud, have been restated frequently. These policy considerations underpin contemporary law. Equally, insureds must also be properly protected from losses within the policy, or insurance serves no purpose.

Consequently, a properly informed construction of a contemporary policy requires a consideration of cases from Tudor England onwards, when the applicable principles and constructions, borrowed from Continental laws, were introduced into English law. This history is of practical significance, not least in the continuity of documents and usage, and the continuing relevance of older treatises and cases domestically, but also between this jurisdiction and American decisions.<sup>137</sup> The correct approach is to identify the state of the law as settled in the earliest authorities. This enables a narrow approach identifying the ratio in subsequent cases, and allows a comparison between settled rules and later commentary or speculation. This is necessary to identify *dicta* in cases and commentary which were not grounded in settled rules or justified by judicial authority. As will be seen, this conservative approach is necessary to loss of possession cases, as the intervals between major authorities encouraged an approach which did not fully consider older authorities.

## 1.5 Time when rights to be finalised

Loss of possession claims demonstrate tension between those two competing policy considerations. For claims where the *specie* survived, so that a chance of restoration invariably persisted, disputes frequently concerned situations where the peril had ended by the time proceedings reached court. Policy considerations, primarily certainty, dictated that the parties' rights had to be finalised at some fixed date. As restated in 1954:

*"Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided".*<sup>138</sup>

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<sup>135</sup> *Bainbridge v Neilson (the Mary)* 10 East 329, 343, (1808) 103 ER 800 (KB)

<sup>136</sup> Richard Morrison, 'On the Principles of Marine Insurance', *The Assurance Magazine, and Journal of the Institute of Actuaries*, Vol 11, No 5 (April, 1864) 285, 299

<sup>137</sup> Graydon Staring, 'Admiralty and Maritime Law; Selected Topics', *Tort & Insurance Law Journal*, Vol 26, No 3 (Spring 1991) 538, 559

<sup>138</sup> *Atlantic Maritime Co Inc v Gibbon* [1953] 2 All ER 1086, 1107 (Jenkins LJ); *Bank Line Ltd v Arthur Capel & Co* [1919] AC 454

The resolution of these tensions in loss of possession cases evolved over time. The English courts' approach has increasingly protected insurers.<sup>139</sup> As observed in *Ruys v Royal Exchange Assurance Corporation*:<sup>140</sup>

*"...much might be said for the review suggested by Lord Eldon and adopted in the American and other systems, that the rights of the parties should be finally ascertained upon a proper abandonment. But, the object of litigation being to settle disputes, it is obvious that some date must be fixed upon when the respective rights of the parties may be finally ascertained, and the line of the writ may be regarded as a line of convenience which has been settled by uniform practice for at least seventy years ..."*<sup>141</sup>

As noted, American rules increase certainty by looking to the situation as at the time of abandonment (Chapter 4.1.iii, below). Accordingly, an approach aiming to consider the full history of the decided cases and academic commentary in England and America is taken when addressing the two issues central to this study: when do insureds have a right to abandon on loss of possession, and, if denied, when proceedings are issued, how should claims for loss of possession be decided?

## 1.6 Issues addressed

In answering when an insured may be compensated on loss of possession:

Chapter 2 questions how the specified perils in the policy covering loss of possession situations construed, and what material facts are needed for an insured to claim a loss within the policy. It argues that while the perils overlapped, it was clear that simple loss of possession was a peril covered by the policy and/or the "FCS clause". It identifies that the 'wait and see' approach derives from non-marine perils, and contradicts the former marine definitions.

Chapter 3 considers the effect of loss of possession on the insured's property rights and contractual obligations. It clarifies that the moment of loss of title, or charterparty frustration, should not govern the time at which an insured should be able to recover on his policy for total loss. It identifies that rules governing loss of title are expressly distinguished from the insurance test, and argues that a similar distinction should apply to contractual frustration.

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<sup>139</sup> Divergence between laws of England and in America in respect of the time of abandonment be because when Park's work was published, the rule might not have been fixed, and Park may not have been then fully integrated into American laws; Herbert Barry, 'Casual Comments on Particular Average and Constructive Total Loss', *Virginia Law Review*, Vol 9, No 5 (Mar 1923), 344, 350ff

<sup>140</sup> [1897] 2 QB 135, 142 (Collins J)

<sup>141</sup> Considered, *Kuwait Airways Corporation and another v Kuwait Insurance Company SAK and others* [1996] 1 Lloyd's Rep 664(QB), (Rix J)

Chapters 4 and 5 consider the authorities pre 1906 on claims for loss of possession both in England and Wales and American jurisdictions. Chapter 4 argues for a presumption of total loss arising on capture and seizure. Chapter 5 argues that a similar presumption arises on perils of embargo, arrest, restraint and detention, albeit situations where the peril was never engaged are distinguished.

Chapter 6 considers the meaning of the cover for the 'voyage' or 'time', and identifies situations where this the voyage is deemed totally lost by the loss of possession. It argues that these situations support the presumption of total loss identified in Chapters 4 and 5.

Chapter 7 considers causation. It explores the exclusion for delay, and argues that the general rule now codified by the 1906 Act evolved after the presumption of total loss documented in chapters 4 and 5, and therefore did not displace it. The doctrine of causation confined this exception to the protraction of voyage caused by weather, and was not extended to cover the specific perils of loss of possession. There is no applicable doctrine of relation back that acts as a suspensory doctrine. On loss of possession claims, the ultimate loss is usually by the peril causing loss of possession, and unlike on stranding, will rarely be by a failure to sue and labour.

Chapter 8 considers how the established presumptions were lost after the 1906 Act. It argues that the presumptions of total loss remain arguable within s 60 of the Act.

Finally, Chapter 9 concludes that the presumption of total loss, long recognised in English law, may remain arguable under s 60. It considers the merits of this presumption against policy considerations in England, and the desirability of uniformity of outcome with American usage.



”*Deprivation of possession*” as such was not an insured peril... ”<sup>142</sup>

If loss of possession *simpliciter* was not covered, what else must insureds establish? A marine policy names and/or excludes ‘perils’ against which an insured purchases cover. What defined facts must occur to allow a claim on a policy for loss of possession, and when may an insured make this claim? Was a deprivation of possession never an insured peril? While precedents before *Kuwait Airways Corporation* anticipated this restricted understanding, it was apparently surprising that deprivation of possession was not covered, given the leading underwriters’ willingness to pay on the initial event of deprivation of possession.<sup>143</sup> *Masefield* largely turned on the understanding that hostage-and-ransom was an exceptional situation requiring a *sui generis* approach distinguished from ‘capture’, and that ‘loss of possession’ was insufficient. Generally, what defined perils might a loss of possession or control situation engage? What facts must an insured establish to claim successfully within these? Understanding when defined perils have occurred is an essential to identify when an insured may give notice of abandonment and consequently claim on the policy for a total loss. Chapters 4 and 5 consider whether, once established, the bare fact of these perils indicate that a total loss has occurred.

These definitions remain significant for a total loss claim, despite the test of ‘total loss’ being separately codified. First, perils may be expressly excluded, so these definitions clarify the extent of cover. Less obviously, a ‘fact sensitive’ approach historically applied to each peril. *Sanday & Co* confirmed this different test of causation between the different perils: “*In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss*”.<sup>144</sup> The different approach between perils remained significant in *Sanday*. Had the insured acted to avoid a capture, there would have been no loss, but the same action in consequence of a ‘restraint of princes’ allowed a claim:

“... *If on the other hand he acted in precisely the same way in order to avoid capture, ... then Hadkinson v Robinson<sup>145</sup> and cases of that class decide that as his vessel has not in fact been captured he cannot rely upon capture as the cause of loss. In my opinion*

<sup>142</sup> Dawson’s Field (Michael Kerr QC); *Kuwait Airways Corporation and Kuwait Insurance Company* [1996] 1 Lloyd’s Rep 664 (QB) (Rix J)

<sup>143</sup> [2002] EWHC 1348 (Comm), [44]

<sup>144</sup> [1915] 2 KB 781, 789

<sup>145</sup> 3 Bos&P 388

*this case falls within the principle of Miller's Case<sup>146</sup> and restraint of princes was the proximate cause of the loss".<sup>147</sup>*

Although predating the subsequent shift in approach to causation in *Leyland*,<sup>148</sup> the importance of this categorisation was stated in 1915, so following the 1906 Act. Likewise, American courts distinguished different types of peril when testing causation.<sup>149</sup> Arguably, a 'fact-sensitive' approach to causation applies to different categories of perils, and a universal approach covering all perils should not apply. Conceivably, in *Masefield*, had the loss been considered 'capture', the actual total loss claim might – arguably unjustifiably – have succeeded. Accordingly, the definitions remain significant in determining the success of a claim.

To what extent are these perils separately and clearly defined? Difficulties of interpretation are well recognised. It has been doubted whether it was possible to distinguish between and define the perils defined in the policy, in particular that it was impossible "*to distinguish between "arrest," "restraint," and "detention"*".<sup>150</sup> Nevertheless, where perils' definitions influence the merits of a claim, this task must be attempted. The following discussion questions whether there is a settled definition to these perils, whether there is a degree of overlap, aiming to identify the material facts an insured must establish to claim for a total loss within each peril. The perils are considered in three classes:

- i. capture and seizure;
- ii. arrest, restraint, detention, embargo;
- iii. loss of possession *simpliciter* after 1906.

## 2.1 General approach to interpretation

### i. *The Lloyds SG Policy*

The Lloyds SG policy was understood to have evolved from a simple wording, in which 'perils of the sea' covered a wide range of perils. Arnould recorded loss by 'pirates and rovers' "*...was formerly included in our maritime law amongst the general perils of the seas....*"<sup>151</sup>

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<sup>146</sup> [1903] 1 KB 712

<sup>147</sup> [1915] 2 KB 781, 789-780

<sup>148</sup> (1918) AC 350 (HL); cf *Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)* [2011] UKSC 5, [2011] 1 Lloyd's Rep 560

<sup>149</sup> Delays consequent on wind and wave distinguished from delays following stranding or damage; *Lanasa Fruit Steamship & Importing Co Inc v Universal Ins Co* 302 US 556 (1938); *Brandyce v US Lloyd's* 207 App Div 665 (1924); see 7.1 below

<sup>150</sup> *Johnson & Co v Hogg and others* (1883) 10 QBD 432, 436 (Cave J)

<sup>151</sup> Noting the foreign law was to the same effect; 2 Roll Abr 248, 10 Cumberbatch 56; *Park on Ins* (8th edn), 137; The foreign law is to the same effect; Chancellor Kent, Comm., vol. III, 302, note (d), (1844)

and probably would still be held to be so; though, as piracy is one of the enumerated perils, the point is of less importance...’’<sup>152</sup> The SG policy, the starting point for understanding contemporary definitions, provided more specific terms.<sup>153</sup> Conceivably, the SG policy was drafted to cover the insured extensively, the wording covering every incident that could be anticipated,<sup>154</sup> with the saving words ‘*and all other losses*’ clarifying that intention, and the clause construed against the insurer.<sup>155</sup> The approach in *Naylor v Palmer* followed such a construction in that seizure of the ship, where it was taken out of the possession of the master and crew by the passengers, was either piracy or theft within the express words of the policy, or alternatively “*if not of that quality, because it was not done animo furandi, it was a seizure ejusdem generis analogous to it, or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy*”.<sup>156</sup> The general words ensured the peril was covered, whatever the cause was. Perils falling outside the specified perils fell within those saving words.<sup>157</sup>

The SG policy was frequently supplemented by additional clauses. Most significant was the ‘free of capture and seizure clause’ (FCS), the form of which was familiar by the early eighteenth century,<sup>158</sup> and reached a settled wording about 1883.<sup>159</sup> This separated ‘marine’ and ‘war’ risks, providing:

*‘Warranted free of capture, seizure, or detention, and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities, warlike operations, and all risks of riots and civil commotions, whether before or after declaration of war’.*

This excluded war risks, but left piracy covered on the marine policy. The separation of marine and war risks continued into modern policies. The FCS clause was held to mirror the wording of the SG policy, so that the missing word ‘restraint’ was implied, as the purpose of the clause was to “*free the underwriters from liability under the words "arrests, restraints, and detentions" in the body of the policy*”.<sup>160</sup> A significant volume of authority defining perils derives from arguments concerning whether casualties were excluded by this clause. Lack of

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<sup>152</sup> Arnould (1<sup>st</sup> edn, 1848), 817

<sup>153</sup> Appendix I to the 1906 Act, “Form of Policy”

<sup>154</sup> Perils of the seas acquiring a restricted meaning, contra its natural meaning, *Cullen v Butler* (1816) 105 ER 1119, 5 M&S 461

<sup>155</sup> eg American position that policyholders favoured by general law of contract, specifically *contra proferentem*, Jeffrey Stempel, *Stempel on Insurance Contracts*, (2006, Aspen) 2011 Supplement, xvii

<sup>156</sup> (1854) 8 Ex Rep 750 (Pollock CB), 10 Ex Rep 381 (Colridge J)

<sup>157</sup> eg *Cullen v Butler*; *Butler v Wildman* (1814-23) All ER Rep 748

<sup>158</sup> eg policy dated 1739, *Green v Browne* 2 Strange 1199

<sup>159</sup> *Britain SS Co v the King (The Petersham)* [1919] 2 KB 692

<sup>160</sup> [1902] 2 KB 694 (Bingham J)

clarity in contemporary definitions largely derives from judgments deciding whether the FCS clause as a whole excluded the perils, rather than specifying which precise peril was engaged.

*ii. Rewording into Contemporary Policies*

After the 1982 reforms, contemporary policies omitted the perils ‘men of war’, ‘enemies’, ‘rovers’, ‘surprisals’, ‘letters of mart and counter-mart’, and ‘takings at sea’; consequently these perils are not further considered. Nevertheless, the influence of the FCS clause continues in the Institute Cargo Clauses, which are the current standard terms in the UK market for cargo cover. There are three cargo clauses, (A), (B), and (C), and the Risks Clauses in the 2009 Clauses follows the 1982 Clauses. The effect of the B and C clauses is that no claims can be made for perils of loss of possession, and the law as expressed in this work applies only to the element of piracy on the (A) clauses. Most cargo cover is on the (A) clauses.<sup>161</sup> The (A) clauses exclude the following perils taken from the SG policy:

*‘6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat’.*

‘Capture’, ‘seizure’ ‘arrest’ ‘restraint’ and ‘detention’ are still listed; despite the extensive rewording, there has been no radical shift in the way these words are construed, so that authorities from the older policy still inform their interpretation.<sup>162</sup> In 1999 the House of Lords approved that *‘the normal and usual meaning of seizure includes forcible capture’*. An alternative – attractively logical – approach to the construction of a modern policy without reference to the history of the clauses, namely that each section of a war risks policy “*was designed to deal with one particular type of peril, exclusively of perils dealt with by other paragraphs*”, so that ‘seizure’ and ‘capture’ had separate meanings, was not adopted.<sup>163</sup> Instead, the House followed *stare decicis*, retaining the meanings inherited from early authority.

For hull insurance, like terms to the ICC clauses are found in the International Hull Clauses 1/11/03, so that losses arising from capture, seizure or war, arrest and detainment are not covered, save by piracy or barratry. Clauses similar in effect in United Nations Marine Cargo Insurance, All Risks Cover (Model Clauses on Marine Cargo Insurance (Geneva, 1987). Cover for perils of loss of possession may be additionally purchased on the ‘Institute Marine Cargo Clauses, War’, or the ‘Institute Cargo Clauses, War’ which deal specifically with loss

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<sup>161</sup> Arnould (18<sup>th</sup> edn), 1169

<sup>162</sup> *Kuwait Airways Corp and another v Kuwait Insurance Co SAK and others* [1999] 1 All ER (Comm) 481, 485 (Browne-Wilkinson LJ, dissenting)

<sup>163</sup> *ibid* [1999] 1 All ER (Comm) 481, 485 (Browne-Wilkinson LJ, dissenting)

of possession situations, and specifically covers in the perils clause, '*capture seizure arrest restraint or detainment*' in the same words as the SG policy. These clauses may be restricted by the terrorism clause, which excludes from cover acts done for a political, ideological or religious motive. The motives of a captor may therefore be relevant to this aspect of cover, which is not further considered. The ICC war and strikes clauses may contain time limits before which claims for constructive total loss for loss of possession may be made. There are frequently terms in war risk insurance offering cover for lost hire after a 'detention' has lasted more than 180 days.

The standard FC&S clause in American policies, the American Institute FC&S Clause (Hulls) (1959) excludes all claims arising from capture or seizure, including by piracy or barratry. Such a comprehensive clause would prevent claims for loss of possession, where incorporated.<sup>164</sup> The FC&S Clause (1989) for cargo policies is equally broad, and excludes capture, seizure, restraint, arrest, detainment, confiscation, pre-emption, requisition or nationalisation, or the consequences of any attempt in both peace or war, lawful or unlawful.<sup>165</sup> The law of loss of possession was by these terms transferred fully to the war risks insurance, and this may account for why there is less recent authority on total losses for loss of possession arising from disputes on American policies.

Finally, some clauses contain express time limits before claims for constructive total loss by capture seizure and detention may be made. An example is in the *Atlasnavios*, where the terms of the Institute War and Strikes Clauses, which required at line 20 12 months to elapse before a detainment is treated as giving rise to a constructive loss, were amended to six months. Where such terms have not been agreed, or where the time limit is not incorporated, the common-law rules apply. For this reason, it is primarily where cover is on the ICC(A) or International Hulls clauses, or where the time limit for detention clause has been removed from the policy, that the common-law rules as expressed in this study remain applicable.

### ***iii. Perils necessarily causing total loss?***

Perils in the SG Policy fell into two categories. First were perils of "...*men-of-war,*" "*enemies,*" "*pirates,*" "*rovers,*" and... "*barratry of the master or mariners,*" which might not themselves cause any loss. However, "*when by one of these the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get or but for their own fault might get, their property*

<sup>164</sup> <http://www.aimu.org/forms/87B-59.pdf>, accessed 3 October 2016

<sup>165</sup> <http://www.aimu.org/forms/87B-109A.pdf>, accessed 3 October 2016

back".<sup>166</sup> This first category identifies the party constituting the peril, and this issue of identity remains relevant for whether the loss is a marine or war risk, eg 'piracy' remains a marine risk on the ICC(A) Clauses, whereas hostile capture would not. Secondly, perils "*such as 'takings at sea,' 'arrests, restraints, and detainments of princes,'*" were assumed inherently to include such a taking of the specie out of the owners' control.<sup>167</sup> Significantly, Blackburn LJ suggested in *The Rosslyn* these second type of perils of themselves might be enough to found a total loss (see Chapters 4, 5).

## 2.2 Capture and seizure

What material facts establish 'capture'; when might these allow an insured to establish total loss? Notwithstanding that in practice, 'capture' and 'seizure' frequently have been held to be synonymous,<sup>168</sup> to what extent have they been given separate definitions, and to what extent might these lead to different results in insurance claims?

### i. *Early English authorities on capture*

Marshall believed that early policies did not define 'capture'; an insurer was liable under 'perils of the sea' for captures generally, except where the insured concealed a particularly high risk of capture from the insurer in two ways: (i) by prosecuting a voyage near an enemy port; or (ii) where the vessel carried contraband, so was liable to lawful confiscation by neutral port authorities. This protected the insurer from increased risks of which it was unaware when the policy was formed.<sup>169</sup> Where the policy was '*warranted free of captures,*' the insurer escaped liability for captures where the insured was blameless of misconduct, as when crew without the insured's knowledge concealed contraband risking the vessel's confiscation.<sup>170</sup> Accordingly, 'capture' once included confiscation for infringement of customs laws as much as 'enemy' activity, combining marine and war cover.

### ii. *Physical loss of possession*

Capture requires actual loss of possession or control.<sup>171</sup> The peril covered is actual capture. Establishing factual loss of possession seldom creates evidential difficulties. Losses caused

<sup>166</sup> *Cory & Sons v Burr* (1883) 8 App Cas 393, 399 (Blackburn LJ), citing *Dean v Hornby* (1854) 3 El&Bl 180; 118 ER 1108

<sup>167</sup> *Cory & Sons v Burr (The Rosslyn)* (1883) 8 App Cas 393, 399; [1881-85] All ER Rep 414 (Blackburn LJ)

<sup>168</sup> eg *The Mim* [1947] 2 All ER 476

<sup>169</sup> Marshall (1802), 418; early clauses appear similar in wording to the SG policy, consequently it is unclear how accurate Marshall's understanding of the law was.

<sup>170</sup> Magens (1755) Vol I, 75; cf *Cory v Burr* (1883) 8 App Cas 393

<sup>171</sup> Emerigon, *Traite des Assurances et des Contrats a la Grosse* (Mossy 1783) Chap XII, s XXI

by the apprehension of capture do not flow from this peril,<sup>172</sup> even where the voyage is lost. Accordingly, if the master, fearing a high probability of capture, abandons a voyage this does not allow an insured to allege a loss by capture.<sup>173</sup> Different considerations potentially arise where a voyage becomes illegal on the outbreak of war,<sup>174</sup> but this cause of loss of the voyage – ‘supervening illegality’ – is distinguished from apprehension of an increased risk of capture on outbreak of war. American law likewise provided that fear of the peril did not justify abandonment.<sup>175</sup>

### **iii. Investigating the Captor’s Intention**

#### English Law

Must an insured additionally establish either: (i) a captor’s intention to permanently deprive the owner; or (ii) what subsequently happened after loss of possession? Reports before 1787 do not assist. Lack of intention neither appears as a defence, nor was found lacking. Either such intention was irrelevant or routinely presumed. Insureds simply pleaded physical possession of the *specie* by the captor. The issue first arose in *Mitchell v Others v Edie (the Lady Mansfield)*,<sup>176</sup> where the insured vessel was captured by an American privateer. Her captors never intended to keep her, and abandoned her at sea. Part of her crew was removed. The voyage was abandoned due to the short crew. The court held, indeed the insurer conceded, that the insured would have been able to claim for a total loss had they promptly served a notice of abandonment. The absence of an intention to keep the vessel permanently would not defeat the total loss claim. The loss was expressed throughout to be by ‘capture’. Accordingly, the first direct authority indicated plaintiffs need not prove the captor’s intention once possession was lost, but merely simple loss of possession.

In *Powell and Others v Hyde*,<sup>177</sup> the *Bedlington* was sunk by shot from a Russian fort while navigating the Danube during the Crimean war, before Britain declared war on Russia. Perhaps the Russians intended to capture or seize the vessel unlawfully, and she was sunk in their attempt. The Russians had apparently previously detained then released a British vessel. The goods policy contained the FCS clause, which the insurers argued excluded an attempted ‘unlawful’ capture. Campbell CJ stated: “*capture, in the warranty, is not confined to lawful capture, but includes any capture in consequence whereof the ship is lost to the insured. The*

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<sup>172</sup> *Becker, Gray and Co v London Assurance Corporation* [1916] 2 KB 156, [1918] AC 101

<sup>173</sup> *Kacianoff v China Traders Insurance Company Ltd* [1914] 3 KB 1121

<sup>174</sup> *Sanday’s Case* [1916] 2 KB 156, 164

<sup>175</sup> *Massonier v The Union Ins Co of Charleston* (1818) 1 Nott & M’Cord’s S Cs Rep 155

<sup>176</sup> (1787) 1 TK 609

<sup>177</sup> (1855) 5 El&Bl 607

*underwriters here, seeing what perils were likely to accrue in the Danube, took care to protect themselves*'.<sup>178</sup> Campbell's judgment stated further that the attempted 'detention' amounted to a 'seizure', using the three perils interchangeably, and accordingly *Powell* did not clearly separate the definitions. Nevertheless *Powell* did not clearly restrict the meaning of capture by requiring an intention to permanently deprive the owner of possession.

Contrastingly, academic discussion suggested such intention was required. Consideration of the issue for insurance began in *The Guidon*.<sup>179</sup> Emerigon, collating this and contemporary authorities including Roccus, Scaccia, Valin and Pothier, concluded "*The insurer is responsible for captures made by friends or by enemies not declared, just as they are for those made by open and declared enemies; for whoever commits depredation upon another is a pirate and becomes an enemy*".<sup>180</sup> Emerigon distinguished capture with 'a design to deprive the true owner of her',<sup>181</sup> from capture to take enemy effects or contraband, ie 'arrest'. English textbooks from an early date followed this distinction, differentiating 'capture' with such intention to permanently deprive, from 'arrest' or 'detention' by a state with the purpose of searching a friendly or neutral vessel for illegal contraband or enemy cargo. These refinements conflict with *Mitchell*; no decision before the 1906 Act tested the captor's intention. Notwithstanding *Mitchell*, Emerigon's narrow definition of capture was adopted by Marshall in 1802, and appears in substantially like terms in subsequent works.<sup>182</sup>

However, Emerigon elsewhere gave a wide definition, ignoring the captor's intention: "*it is capture, whenever by force a ship is seized in open sea, and being prevented from navigating to her final destination, in place of that destination is taken to another place*".<sup>183</sup> He further recorded the application of this definition to a case of 'arrest of princes'. An insured Genoese vessel was captured by the English, and taken to New York. The French cargo was condemned. The insurer claimed this constituted arrest only, not a capture, as the vessel was released. Nevertheless, the French court held this situation was a total loss by 'capture'.<sup>184</sup> Emerigon was authority for both the wide and narrow definition.

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<sup>178</sup> *ibid*, [611]

<sup>179</sup> Capture and insurance was little treated in the early codes preserved in the Black Book of the Admiralty. The Rhodian-Byzantine law provides simply that capture and ransom will be essentially a general average situation '*Nomos Rhodon nautikos. The Rhodian sea-law*' (Walter Ashburner tr, Clarendon Press, 1909), clxvi. *The Guidon* is the earliest material authority.

<sup>180</sup> Emerigon, *A Treatise on Insurances*, Chap XII, s XVIII (trans Meredith S, 1850, Butterworth)

<sup>181</sup> *ibid*, Chap XII, s XVIII, restating the doctrine from *The Guidon* that insurers must compensate for capture by '*friends or enemies*'

<sup>182</sup> eg Marshall (1802), 418; Arnould (18<sup>th</sup> edn, 2013), [24-16]–[24-18]

<sup>183</sup> Ch XII, s XXI

<sup>184</sup> Ch XII, s XXI



The significance of a narrow definition of capture – requiring intent to deprive the owner of the property – was limited. Both Emerigon then later Marshall provided that for every loss occasioned by capture, whether lawful or unlawful, or by friends or enemies, the insurer would be liable.<sup>185</sup> The words of the policy were sufficiently comprehensive to include every species of capture to which ships at sea could ever be exposed.<sup>186</sup>

Cover for ‘unlawful’ capture is significant. English courts presume courts of other countries will not breach their own laws.<sup>187</sup> This must extend to matters of prize and capture. Therefore an unlawful capture suggests, *prima facie*, that there *may* be a return of the property once prize/confiscation is adjudicated or appealed, and/or the possibility of legal process to recover property. Nevertheless, no suggestion appears in early authorities that these avenues for restoration of property delayed or defeated claims for total loss.<sup>188</sup> Nor was there any suggestion there would have to be a ‘wait-for-condemnation’ approach, to ‘wait-and-see’ if a foreign court upheld an unlawful condemnation. Additionally, Marshall provided ‘capture’ covered ‘arrest and detention’ as he elsewhere defined those. For Marshall, ‘capture’ included a taking of a ship or cargo *without* an intention to permanently deprive:

*“Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband... The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to dispossess the owner...”*<sup>189</sup>

Clearly, a wide definition of capture remained in Marshall. By partial quotation, citing Emerigon and Marshall for their definition of lawful capture only, without the above extract, Arnould expressed the rule<sup>190</sup> that ‘capture’ required an intention to permanently deprive. Arguably, this partial quotation erroneously narrowed the definition. A complete reading of both Emerigon and Marshall supported the wide meaning of ‘capture’.

Judicial distinction between ‘capture’ and ‘seizure’ first appeared – at a late date – in *Rodocanachi v Elliot*.<sup>191</sup> Silks in transit insured under a marine policy were trapped in Paris

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<sup>185</sup> cf *Guidon de la Mer*, Ch 7; Casaregius, *Disc* (1740), 118, Roccus *Notabilia de navibus et nauto*; Valin, *Nouveau commentaire sur l’ordonnance de la marine*, art 26; Pothier, *A Treatise on Maritime Contracts*, 54

<sup>186</sup> Marshall (1802), 418

<sup>187</sup> eg *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628, 671, [2010] 2 All ER 877 (Lord Collins)

<sup>188</sup> In *Berens v Rucker* (1761) 96 ER 175 the vessel was unlawfully condemned by a foreign tribunal. Subsequently, she was repurchased (‘ransom’) by the owner. The insured recovered the cost of the ransom – to avoid a total loss – although it was recognised that an appeal against condemnation might be successful. Arguably, this would not have been recovered, if the sentence of ‘unlawful’ condemnation suspended any potential claim for total loss.

<sup>189</sup> Marshall (1802), 418

<sup>190</sup> (2<sup>nd</sup> edn, 1850), 832; cited in argument in *Kleinwort* (1859) 1 EL&EL 447

<sup>191</sup> (1874) LR 9 CP 518, [1874-80] All ER Rep 618

by a siege. Brett J expressed *obiter* that '[c]apture means the hostile seizure of goods with intent to deprive the owner of them'.<sup>192</sup> Subsequently, in *Johnston & Co v Hogg and Others (the Cypriot)*,<sup>193</sup> this distinction was not applied. The insured ship was taken by "natives" in the Brass River, and her cargo plundered. The "natives" had no intention of keeping the ship, and abandoned her. Cave J repeated Brett J's observation on the meaning of 'capture', supported by academic discussion.<sup>194</sup> However, he noted that, '*Marshall seems to recognise two meanings of the word "capture," but certainly does not assert that the more restricted meaning is that in which alone the word is understood in insurance law*'.<sup>195</sup> He observed capture and seizure had substantially the same meaning, and noted the futility of attempting to define each separately.<sup>196</sup>

Accordingly, considering Marshall's commentary against the proper context of judicial authority, before 1906, 'capture and seizure' in the SG policy and FCS clause arguably included simple loss of possession, without either party being required to establish the captors' intention. The rule in *the Lady Mansfield*,<sup>197</sup> approved in *the Cypriot*,<sup>198</sup> that such an intention need not be established to claim for capture, was not clearly overruled by *Rodocanachi*. Arguably, the settled law by 1906 was that an insured did not have to establish an intention to permanently deprive in the minds of captors to allege a loss by 'capture'.

### American law

States' laws mirrored the English academic understanding of capture, copying both the wide and narrow definitions, deriving ultimately from Marshall.<sup>199</sup> Academic definitions similarly distinguished lawful and unlawful capture, in identical terms to the English texts.<sup>200</sup> These definitions, as in English law, potentially allowed a distinction in approach to total loss. However, it was confirmed that the presumption of total loss on capture was broadly interpreted. In *Mauran v Insurance Company*<sup>201</sup> where the issue was whether capture by the Confederates was a 'capture' or piracy outside the meaning of the policy, it was argued that any capture or seizure, rightful or wrongful, by state government or mere pirates, fell within the FCS clause, following academic authority, and the English cases of *Powell v Hyde and*

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<sup>192</sup> (1873) LR 8 CP 649, 671

<sup>193</sup> (1883) 10 QBD 432

<sup>194</sup> see Parsons (1868), Vol I, 584; Marshall (1802), 394; Phillips (1867), [1108]

<sup>195</sup> (1883) 10 QBD 432, 436

<sup>196</sup> *ibid*, 436

<sup>197</sup> (1787) 1 TK 609

<sup>198</sup> (1883) 10 QBD 432

<sup>199</sup> Sherman, *Marine Insurance* (1841), 59

<sup>200</sup> *ibid*, 59

<sup>201</sup> (1867) 73 US 1; 18 L Ed 836, 6 Wall 1

*Kleinworth v Shephard*. Nelson J held that the wide definition of capture was meant in the policy and FCS clause. He considered that originally ‘capture’ meant loss of possession together with intent to deprive. However, he held that usage and established decisions had widened its meaning, and it was settled as embracing the taking of a neutral ship and cargo by both belligerent and friendly governments, and even the home government.<sup>202</sup> Following Marshall, lawful and unlawful capture were covered, “*the words of the policy being broad enough, and intended to be broad enough, to include every species of capture to which ships or cargo, at sea, may be exposed*”.<sup>203</sup> Capture by a friendly power or requisition by the home government were insured, because:

*“Any other rule would furnish but a very imperfect indemnity to the assured if we regard either the character of these seizures and the irregularities attending them, or the trouble, expense, and delay consequent upon the duty or burden of proving in a court of justice the unlawfulness of the act. It is never, therefore, a question between the insurer and the insured whether the capture be lawful or not. The recent case of Powell v Hyde<sup>204</sup> is very decisive on this point”.*<sup>205</sup>

Accordingly, English and American laws pre-1906 alike provided that claims for capture could be made on loss of possession. Perhaps *Mauran* stated the policy with greater clarity than any English authority; nevertheless *the Cypriot* arguably established that there was no investigation into the captor’s intention. Arguably, this lack of investigation into the captor’s intention is more consistent with the idea that captures were presumed fatal, than with speculation that in the early cases the issue of intention was relevant, but was uncontested.

#### ***iv. Seizure; an intention to permanently deprive?***

Seizure is the physical act of taking possession of property. Forcible dispossession is required for seizure.<sup>206</sup> It may accompany an intention to permanently deprive,<sup>207</sup> and accordingly overlap with the narrow definition of capture. Nevertheless seizure has been found where this intention was absent. In *Kleinwort v Shepard*, emigrants on board seized the insured vessel and partly took insured provisions before escaping. It was held that their actions came within the meaning of the word ‘seizure’ in the FCS clause, and “[t]hat the loss, as alleged in the declaration, is a loss by seizure, according to the common meaning of that word in the English language, can admit of no doubt. Dr Johnson defines “seizure” to be “the act of taking forcible

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<sup>202</sup> *ibid*, 18

<sup>203</sup> Marshall (1802), 418

<sup>204</sup> (1855) 5 El&Bl 607

<sup>205</sup> (1867) 73 US 1, [19]

<sup>206</sup> Robert Merkin, *Marine Insurance Legislation* (4<sup>th</sup> edn, 2010); (*Shell International Petroleum Co Ltd v Gibbs “The Salem”* [1983] 2 AC 375. It is not enough that goods are put into a compound by customs authorities and then stolen *Mitsui Marine & Fire Insurance Co v Bayview Motors Ltd* [2003] Lloyd’s rep IR 117.

<sup>207</sup> Emerigon, *Treatise on Insurances*, Chap XII, s XVIII

*possession*”<sup>208</sup> The court refused to investigate the mutineers’ motives, ‘*The conjectural motives which may have influenced the parties to the policy cannot influence us*’.<sup>209</sup> The emigrants taking the vessel was held a loss by seizure, despite there being no intention to permanently deprive. While the court did not consider whether the facts could amount to total loss (or total loss of part), only whether the claim fell within the FCS clause, it illustrated clearly that simple loss of possession fell within ‘seizure’.

In *Powell v Hyde* where the issue was whether the FCS clause protected the insurers from the Russian destruction of the vessel. The court resolved that on the evidence, the Russians’ object was to ‘detain the ship. For the purposes of insurance, once they had fired on the vessel, and her crew had left her, so that she was at the mercy of the Russians, and found that she was “seized by them: that there was, not only an attempt at seizure, but an actual seizure”’.<sup>210</sup> Accordingly, the court found ‘seizure’ where there was no attempt to board the vessel. Further, this attempted ‘seizure’ was an initial step in an intended ‘detention’, suggesting that seizure did not require an intention to permanently deprive. In *Cory v Burr*, where the vessel was seized under foreign customs laws because of the master’s barratry in attempting to smuggle, Selborne LC stated that seizure had a broad meaning. The vessel was taken in every sense of the word ‘seized’:

*“It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy and the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship; and the case states that that would have been the result of the seizure which took place in the present instance if money had not been paid to redeem the ship from that confiscation and total loss... those facts are properly described by the word “seizure...””*<sup>211</sup>

The phrase ‘for a temporary purpose’ appeared judicially here for the first time. ‘Remained’ was undefined. Seizure overlapped with capture. The imprecision between ‘capture’ and ‘seizure’ was illustrated in *Cory v Burr* where Selborne LC construed ‘capture’ to have a very broad meaning. He considered that *Kleinwort v Shepard*<sup>212</sup> amounted to a case of capture, as did *Powell v Hyde*,<sup>213</sup> and accordingly held that the FCS clause covered the seizure.<sup>214</sup> Construction of the policy *nosciatur a sociis* suggests the precise definitions were of little importance given the breadth of the FCS clause. The requirement that the taking be more than

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<sup>208</sup> (1859) 1 El&Bl 447

<sup>209</sup> *ibid*

<sup>210</sup> (1855) 5 El&Bl 607, 611

<sup>211</sup> [1881-85] All ER Rep 414

<sup>212</sup> (1859) 1 El&EL 447

<sup>213</sup> (1855) 5 El&Bl 607

<sup>214</sup> [1881-85] All ER Rep 414, 417-8

‘temporary’ implies that courts might investigate the captors’ purpose, even on seizure. However, this conflicted with Blackburn LJ’s simpler test in the case, that “*taking out of control [is sufficient] to claim a total loss*”,<sup>215</sup> excluding an assessment of whether the test would be ‘temporary’. The word ‘temporary’ apparently derived only from Marshall, who referred to a ‘*small temporary inconvenience*’:

*‘But a capture or arrest does not necessarily, and at all events, terminate in a total loss, so as to entitle the insured to abandon; for a he cannot abandon till he has received advice of the loss; if, at the time he receives such advice, or before he has elected to abandon, he receive advice that the ship or goods insured are recovered, or are in safety, he cannot then abandon’ because he can only abandon while it is a total loss, and he knows it to be so; not after he knows of the recovery. Therefore, if a captured ship be retaken and permitted to proceed on her voyage, so that she suffers but a small temporary inconvenience; this would only be a partial, and not a total loss’.*<sup>216</sup>

While correctly stating that the peril had to subsist at the time of capture, introducing a requirement that there must be an investigation either into the captors’ intention or whether the capture or seizure was intended to be, or would be, temporary was innovative. Any investigation would contextually have been understood as merely into whether the peril was in fact over at the relevant date, and never whether it was likely to continue if it still did. Selborne LC in *Cory v Burr*, therefore, went beyond the contemporary authorities in expressing his definition of seizure, by including the requirement that it not be temporary. It is not clear that he intended to change the law. Arguably, as the concurring judgments did not contain this addition, this innovation was *obiter*. It was more consistent to understand the sense as questioning: (i) whether the property was recovered; and if so (ii) whether the voyage was nevertheless lost.

In *Cory v Burr*, Fitzgerald LJ introduced a further distinction between ‘capture’ and seizure’, namely whether it was only a declared enemy, rather than a pirate or thief, who could ‘capture’. Capture meant the act of an enemy or declared belligerent. Seizure was a larger term including ‘*every act of taking forcible possession, either by a lawful authority, or by overpowering force*’.<sup>217</sup> Sherman stated that a pirate could ‘capture’;<sup>218</sup> *Cory v Burr* draws this distinction for the first time. It was, of course, perfectly possible for a pirate to commit an act of seizure, as the barratry in *Kleinwort* demonstrated, if not lawful ‘capture’. In the comparable context of the construction of a charterparty off-hire clause, it was recently held

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<sup>215</sup> ‘...but when by one of these the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get or but for their own fault might get, their property back’ [1881-85] All ER Rep 414, 419; *Dean v Hornby* 3 El&Bl 179

<sup>216</sup> Marshall, (1802), 484

<sup>217</sup> [1881-85] All ER Rep 414, 422

<sup>218</sup> Sherman, 59

that ‘seizure’ did not, unlike ‘capture,’ require to be made by a declared enemy, so that ‘seizure’ could be committed by pirates – implying that ‘capture’ could not be made by pirates,<sup>219</sup> and that, “... *"seizure," like many other words, is sometimes used with more general and sometimes with more restricted meaning, and whether it is used in a particular case with the one meaning or the other depends not on any general rule but on the context and the circumstances of the case*”.<sup>220</sup> Later authorities on seizure arguably undermine the certainty, on which commercial law depends, by not giving effect to this pragmatically wide definition of the peril.

*Horlock v Beal* introduced some confusion of the relationship between capture and seizure, albeit construing employment contracts. *Horlock* confirmed contracts of employment were not terminated on ‘detention’ by an enemy. After consideration of Ellenborough LJ’s judgment in *Beale v Thompson*,<sup>221</sup> it was observed that seizure *per se* was an equivocal act, and whether it would additionally be capture depended on the intention of the captor in making it. That could be demonstrated by subsequent acts, such as condemnation or a government order for confiscation. It was suggested such clarification of intention “*operates by relation back to the original seizure, turning it either into a capture ab initio, or into a temporary detention ab initio not amounting to capture*”.<sup>222</sup> This dictum supports the idea of ‘wait-and-see’, and the doctrine of ‘relation back’, although it is not clear whether this was intended to undermine situations which appeared to be capture. Suggestion that a doctrine of ‘relation back’ to an earlier time was inconsistent with the then recent House of Lords decision in *Anderson v Marten*<sup>223</sup> confirming that there was a total loss at once by capture (not excluding a concurrent total loss by seizure or other perils), although the lawfulness was not determined by afterwards. The rights of the parties were not suspended while the issue of the lawfulness was determined, though (eg per the Earl of Halsbury) an eventual condemnation would determine that the seizure had been ‘lawful’ from the outset. The doctrine of ‘relation back’ as a suspensory doctrine was not accepted in 1908. Arguably, the peril of capture was seen as complete from the moment of loss of possession.

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<sup>219</sup> *Osmium Shipping Corporation v Cargill International SA (The Captain Stefanos)* [2012] 2 All ER (Comm) 197 (QB) (Cooke J)

<sup>220</sup> *Johnson & Co v Hogg and others* (1883) 10 QBD 432, 436 (Cave J)

<sup>221</sup> 4 East 546, 561

<sup>222</sup> [1916] 1 AC 486, 505

<sup>223</sup> [1908] AC 334 (Loreburn LC)

## 2.3 Arrest, Restraint, Detention, Embargo

### *i. Generally*

Arrest, restraint, detention and embargo may each involve a loss of free use and disposal, and conceptually these overlap. By Rule 10 of the ‘Rules for Construction of Policy’ in Sch 1 to the 1906 Act, cover under these perils was for ‘political or executive acts’, and not losses by riots or by ordinary judicial process. While the wording has changed slightly from the SG policy to the Institute Clauses<sup>224</sup> there was no intention to change the meaning<sup>225</sup> and arguably guidance from early authorities remains useful. The perils are usually treated together in textbooks, although ‘arrest’ has occasionally been closely linked to ‘capture’.

Emerigon’s distinction between these and capture was that while capture was made to secure ownership, ‘arrest’ was made with a design ultimately either to release the vessel, or to compensate the insured for taking it. An arrest was temporary detention only,<sup>226</sup> and the peril applied where the captors did not intend to keep the property. Marshall considered in relation to detention of princes that by the policy terms the insurer was answerable for all loss occasioned by “arrests or detainments of all “kings, princes, and people, of what nation, condition, or quality forever.” Those words, in uniform usage across European maritime jurisdictions, provided insurers were liable “*for all losses occasioned by arrests or detention by the authority of any prince, or public body claiming to exercise sovereign power, under what pretence soever*”.<sup>227</sup>

Contrastingly, Emerigon treated a vessel’s detention after a declaration of war in port as ‘capture’, even absent condemnation. Where a vessel was taken at sea, and into a port, with the object of condemning a cargo, this was a capture even of the vessel.<sup>228</sup> French law, following Pothier, granted the insured an instant right of abandonment.<sup>229</sup> Marshall adopted these same definitions: “*When a ship is detained in a port after a declaration of war, or the issuing of letters of reprisal; this more resembles a capture than a detention, and gives the insured an immediate right to abandon, as for a loss by capture, even though no condemnation be pronounced, and though the ship be afterwards restored*”.<sup>230</sup> Arnould provided likewise:

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<sup>224</sup> eg ‘Kings, princes and people, no longer appears in Institute Clauses or the FCS exclusion

<sup>225</sup> O’May, *Marine Insurance* (Sweet & Maxwell, 1993), 267; Arnould (17<sup>th</sup> edn, 2008) 1111, fn 184

<sup>226</sup> Emerigon Ch XII, [XXX]; Marshall (4<sup>th</sup> Edn) 394; Halsbury’s Laws Vol 25 (4<sup>th</sup> edn, 1994), [158]

<sup>227</sup> Marshall 434; *La Guidon*, Ch 7, art 6, Ch 9 arts 6, 13; Valin, *Nouveau Commentaire sur l’Ordonnance de la Marine*, (Legier 1766) Vol 2, 416

<sup>228</sup> Emerigon XII, [30]

<sup>229</sup> *ibid*

<sup>230</sup> Marshall (1<sup>st</sup> edn, 1802), 434; Pothier (trans Caleb Cushing, 1821, Cummings and Hilliard), 56

*“In this lies the grand distinction between arrest and capture. A capture is, as we have seen, the forcible taking of a ship, &c., in time of war, with a view to appropriating it as prize. Arrest is a temporary detention of a ship, &c., with a view to ultimately releasing it, or repaying its value”*<sup>231</sup> and likewise documented an instant right of abandonment. He described that detention ‘resembles capture’<sup>232</sup> where an insured vessel was detained in an enemy port, or where a neutral vessel was detained with the suspicion of containing enemy contraband. Both were *“to be esteemed a capture than a simple arrest, and accordingly is, prima facie, a ground of abandonment”*.<sup>233</sup> Accordingly, detention by a hostile power appears properly to be akin to capture, although there might not be an overt exercise of force on the property, and where condemnation never takes place.

## **ii. Embargo**

From an early date embargo was defined as *“...an order of government (generally, but not always, issued in contemplation of hostilities) prohibiting the departure of ship or goods from some or all the ports within its dominions”*.<sup>234</sup> Embargo was thought the most common example of ‘arrest, restraint, and detention’,<sup>235</sup> although it was not clear which one or combination of these perils would be engaged. Emerigon recorded the French Ordonnance distinguished ‘arrest of princes’ and ‘embargo’. By embargo, a port was closed and all vessels therein were arrested, but an arrest could be made of a specific vessel.<sup>236</sup> An arrest of princes could be made by a sovereign within his territory, but not on the high seas. In practice, embargo has not always been treated as separate to capture, as in *Livie v Janson*,<sup>237</sup> where a vessel condemned following breach of embargo was held lost by ‘capture’.

## **iii. Restraints of people:**

Marshall defined ‘restraints’ as encompassing when: *“the sovereign of the country to which a ship belongs, or any other sovereign, not at war with him, from motives of necessity, not of hostility, arrest the ship either singly, or together with others in the same port or harbour; this is a detention of princes”*.<sup>238</sup> ‘Restraints of people’ covered an act of official authority for “state purposes”. An arrest of a vessel for private legal proceedings fell outside the peril.<sup>239</sup> In

<sup>231</sup> Arnould (1866) Vol II, 707; 1 Emerigon, Ch XII, [30], vol I, 527 (edn 1827)

<sup>232</sup> 1 Emerigon, XII, [30], 527; *Fowler v The English and Scotch Marine Ins Co* 34 LJ(CP) 207

<sup>233</sup> (1866) Vol II, 707

<sup>234</sup> Emerigon, Ch XII, 30 vol I, 526; Arnould (1848), 813; Arnould (1866), Vol II, 707

<sup>235</sup> *ibid*

<sup>236</sup> Chap XII, Sn XXX

<sup>237</sup> (1810) 12 East 647

<sup>238</sup> Marshall (1802), 434; *La Guidon de la Mer*, Ch 7, art 6, Ch 9 arts 6, 13; *Valin* Vol 2, 416

<sup>239</sup> *Crew, Widgery & Co v Great Western Steamship Company* (1887) 4 TLR 148



*Rodonacci v Elliot*, where insured cargo had not been seized, it was prevented from being forwarded to its destination by the German army's blockade of the cargo in Paris. The court held that the loss was not a loss by 'capture', and ruled that the loss – effectively a blockade albeit on land – constituted 'restraint of princes'.

The issue arose in *Fooks v Smith* where property covered by an English policy was loaded on an Austrian ship at the outbreak of the Great War. The Austrian shipowners obeyed orders of their government, and put into a port friendly to the Austrian government. Eventually, the cargo was unloaded and sold. In *Fooks v Smith* these facts constituted a restraint of princes from the moment the master obeyed general instructions of the Austrian government to get their vessels into a place of safety in anticipation of war. While no force was used "*behind the instructions of a Government there is always the ultimate resort to force if force be necessary.*", and consequently, as in *Sanday's Case*, this amounted to restraint.<sup>240</sup> On identical facts in the *Minden; Wangoni; Halle* at the start of the Second World War, where vessels were ordered by the German government to put into German ports. Rather than follow *Fooks v Smith*, it was held that: "*...the master, being in possession of the goods as a carrier for the assured, seized them in the same that he ceased to hold them as carrier and changed the character of his possession by taking and controlling them as agent for the German government... In doing so he deprived the assured of them*".<sup>241</sup> Concerning similar orders from the Italian government<sup>242</sup> it was held that there had been a constructive total loss of both cargoes by 'restraint', despite assurances given that, as at the date of the action, the state authorities would respect the neutrality of the owners, and despite the presumption that foreign courts will not breach their own laws, which appropriation of the property would have constituted.

Wars are not the only situations leading to loss of possession. While detention for a private cause falls outside the peril, *Miller v Law Accident Insurance Company (the Bellevue)*<sup>243</sup> established that the operation of the ordinary municipal law of a country affecting or preventing the delivery of insured goods at their port of destination is a 'restraint of princes or people' covered by the SG policy. The executive authority at Buenos Aires stopped the *Bellevue* before she reached her berth. Discharge of cattle was prohibited, and they were detained on board the vessel. The master was directed to leave Buenos Aires and land the cattle elsewhere. He obeyed; the cattle were transhipped elsewhere and sold for a loss. The

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<sup>240</sup> [1924] 2 KB 508, 513

<sup>241</sup> [1942] AC 50 (HL) [80]-[81] (Wright LJ)

<sup>242</sup> *C Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd; Leslie & Anderson Ltd v Java Sea and Fire Insurance Co Ltd (The Oder; the Lichtenfels)* [1941] 3 All ER 256

<sup>243</sup> [1902] 2 KB 694, [1903] 1 KB 712

policy contained the FCS Clause. It was held the natural inference was that if the captain had not left Buenos Aires, possession would have been taken of the ship by persons acting on the authority of the Government. Acts done under Argentine laws could be acts the Argentine Government.

*“An intervention to enforce laws relating to revenue has been decided to be a peril within the terms of a policy of insurance similar to those of the policy before us, and I can see no distinction in principle between enforcing laws relating to revenue and enforcing sanitary laws. The principle, so far as it relates to enforcing revenue laws, is recognised in Cory v Burr, where the vessel implicated was engaged in smuggling, and in Robinson Gold Mining Co v Alliance Insurance Co”.*<sup>244</sup>

The distinction must be that revenue and customs laws are within the public sphere – therefore covered – whereas individuals seeking a private remedy fall outside the peril. Consequently, the decree of the Argentine Government was a state act within the term ‘restraints of people’, and there was no analogy between arrest and detention to enforce the rights of a private individual.<sup>245</sup>

Further in *Miller*, it was noted that ‘detention’ had a wide meaning: Parsons<sup>246</sup> did not give an opinion with great certainty on the matter, but suggested that “detention” was “a taking with intent to return the thing taken; as where a ship is arrested by an embargo, or stopped for search, or detained in port by an actual blockade thereof, or, perhaps, by being lawfully restrained from entering her port of destination by a blockading force.” Additionally, ‘restraint’ extended to cover restrictions arising from the operation of a sanitary law. There is some overlap with the word ‘detention’, so that a clause excluding liability for ‘arrests, restraints, and detainments’ was extended to cover a sanitary law, on that basis that there was ‘[not] much difference between a restraint by a blockading force and a restraint arising under the operation of a sanitary law’.<sup>247</sup> Accordingly, a loss of free use and possession arising from customs or sanitary laws may constitute both ‘restraint’ and ‘detention’.<sup>248</sup>

Where policies cover “arrest restraint detainment confiscation or expropriation... by reason of infringement of any customs or trading regulation”, cover has not been extended to every detention by government. While ‘customs regulations’ is a wide phrase, so that seizure of a

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<sup>244</sup> [1903] 1 KB 712, 721-2

<sup>245</sup> *ibid* 719 (Vaughn Williams LJ)

<sup>246</sup> cf Arnould, (2<sup>nd</sup> edn, 1857) Vol I, 584

<sup>247</sup> [1902] 2 KB 694, 700

<sup>248</sup> [1903] 1 KB 712, 720

vessel by reason of its carrying prohibited imported goods is covered,<sup>249</sup> trading regulations are concerned with carriage of goods and the fulfilment of international trading transactions, so that a seizure for infringement of environment and ecological protection measures by reason of illegal fishing is not covered.<sup>250</sup> The restriction is added by the phrase ‘customs or trading regulation’, so where this is not excluded, cover may otherwise extend to cover that class of seizure. Accordingly, there does not have to be a direct application of force to claim under arrest, restraint or detention, and on this basis, cover is wider than that of capture and seizure. Importantly, wide definition permitted a greater variety of claims for loss of the voyage.

Arnould suggested that ‘capture’ and ‘seizure’ are ‘stronger expressions’, but following *Miller v Law Accident Ins Co*<sup>251</sup> they were not mutually exclusive, and overlapped with ‘arrest’. Contemporary Arnould now suggests that it is impossible to distinguish arrest from capture, following *Panamanian Oriental SS Corp v Wright (The Anita)*, where Mocatta J held there was a loss by ‘restraint of people’ where state officials seized and condemned the vessel for smuggling offences. Accordingly, ‘arrest’ has been held to cover a situation where there was an intention permanently to deprive the insured of his property.<sup>252</sup> Indeed, consideration of the precise definitions has been omitted from the latest editions of Arnould. Arguably, however, these definitions remain important for understanding the historical results, and consequently their application to more recent cases. Further, the classification of *The Anita* as ‘arrest’ only is doubtful, given the condemnation and consequent transfer of title. If the definitions of these perils have in law been changed by *Panamanian*, it is difficult to find the authority for such change, or find express reasoning justifying this change. Further, the definitions are increased in importance if different rules on causation apply to certain perils.

## 2.4 Loss of Possession after 1906

Accordingly, to claim capture or seizure, it was arguably possible to simply allege a loss of possession, although capture might sometimes have a narrower definition in commentary, although rarely in judicial authority. Further, arrest, restraint and detention did not have to be accompanied by an intention to permanently deprive to amount to the insured peril. How did

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<sup>249</sup> *Panamanian Oriental Steamship Corporation v Wright, (The Anita)* [1971] 1 Lloyd’s Rep 487, concerning smuggled radios; *Sunport Shipping Ltd v Atkin, (The Kleovoulos of Rhodes)* [2003] Lloyd’s Rep IR 27, affirmed [2003] Lloyd’s Rep IR 349, concerning smuggled drugs.

<sup>250</sup> *Svenska Handelsbanken AB v Dandridge (The Alicia Glazial)* [2003] Lloyd’s Rep IR 10

<sup>251</sup> 1903 1 KB 712

<sup>252</sup> Arnould (17<sup>th</sup> edn, 2008), 1113

the law evolve to suggest loss of possession *simpliciter* was not insured? Hostage and Ransom – which now appears to require the ultimate event to be demonstrated – is not defined separately in any policy, but recent cases treat hostage and ransom as a separate class of peril, to which the courts apply a ‘wait-and-see’ approach. How has ‘wait-and-see’ evolved, and is its application clearly distinguished from the established perils? The answer is that wait-and-see first appeared in marine stranding, was later applied in non-marine cases where there was a simple loss of possession, and the intention of the captors was unknown or difficult to predict. From these limited situations, the approach has been extended to become the primary way to construe any marine loss of possession situation.

*i. Wait-and-See; Evolution*

‘Wait-and-see’ – first applied to marine stranding cases<sup>253</sup> – was applied in two non-marine cases on policies where movement of property was hindered by occupying forces. First, in *Moore v Evans*<sup>254</sup> jewellers consigned pearls on sale and return to customers in Frankfurt and Brussels before the outbreak of war; these cargoes were trapped by the German advance. There was no evidence that the pearls had been interfered with by the German authorities, but the jewellers were unable to recover them for the duration. It was held that there was no loss. The House of Lords stated that the jewelers had not even been dispossessed. The House of Lords questioned whether possession of jewels in a cellar would be lost, if the building above were reduced to ruins by bombardment, or occupied by government forces. They held not. Materially, “...at the time of action brought there was no evidence that the subject-matter of the insurance was not in the custody of the persons to whom it had been entrusted by the plaintiffs, or in the custody of the bank to which with the plaintiffs' subsequent approval a portion of the goods had been sent”. Accordingly, an inability to deal with non-marine property was no actual total loss. Secondly, *Mitsui v Mumford* concerned a cargo of timber warehoused in Antwerp, which city the Germans occupied. Continued business became illegal, as the goods were in enemy territory. The timber remained warehoused in the custody of the insured’s agents. The court held that, while the timber might be requisitioned by the Germans (and the insured compensated, as the goods were on land not at sea), there had been no ‘loss of possession’.<sup>255</sup> Additionally, a test of ‘uncertainty’ was applied to a non-marine policy in *Webster v General Accident*. Parker J considered whether there was a loss on a policy covering a motor vehicle, which had been sold to a purchaser by an agent, who dishonestly kept the proceeds of the sale. Parker J held there was not. Every case turned on its own facts

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<sup>253</sup> Derived from *Peele v Merchants Insurance Company* 3 Mass CC 27 – ‘possession’ was not lost on stranding; whether vessel would be lost was unknown but would be established quickly.

<sup>254</sup> [1918] AC 185

<sup>255</sup> [1915] 2 KB 27

An insured was not entitled to do nothing, yet “...he is not bound to launch into legal proceedings or if necessary carry them to the House of Lords. The test... is whether, after all reasonable steps to recover a chattel have been taken by the assured, recovery is uncertain”.<sup>256</sup> These decisions were made despite judicial opinion at the highest level in America on marine policies, principally, *Olivera v Union Insurance Company*,<sup>257</sup> confirming English authority that such situations amounted to be ‘restraint’ justifying a total loss at once (Chapter 5.2 below).

These authorities were developed in the *Dawson’s Field* arbitration concerning aircraft hijacked in 1970 by the Popular Front for the Liberation of Palestine and later destroyed in sequence. At issue was whether the loss of all four aircraft arose from ‘one event’. The court held that the aircraft were lost when destroyed, not hijacked, since ‘wait-and-see’ was an essential ingredient in a ransom situation:<sup>258</sup>

*“Parker J ... [held] in Webster v General Accident (1953) 1 QB 520 at pp 531/2 every case in which there has been a dispossession must depend on its own facts as to whether and at what stage a total loss has occurred. One must consider the facts concerning the dispossession, the apparent intention of the person or persons concerned, whether or not or to what extent the whereabouts of the subject-matter are known, and allow for the lapse of a period of time to form a view about the prospects of recovery; i.e. whether the loss is total or partial”.*<sup>259</sup>

This arbitral award distorted the meaning of Parker J’s judgment, by introducing the latter sentence, thereby allowing for the lapse of a period of time to form a view. *Dawson’s Field* distinguished *Dean v Hornby* and other capture cases because:

*“... the persons who deprived the owners of possession clearly intended there and then to deprive him of possession and ownership forever, if they could. ”Deprivation of possession” as such was not an insured peril... It is therefore dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery...”*

*Dawson’s Field* imported a test of the captor’s intention into the law, to which a ‘wait-and-see’ approach was appropriate:

*“Wait and see is therefore to some extent always an essential ingredient of a claim for a total loss in circumstances involving deprivation of possession, unless (perhaps) there is a deprivation within the terms of specifically enumerated perils such as capture or one can infer from the circumstances that there was a clear intention at the time of*

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<sup>256</sup> [1953] 1 QB 520, 532

<sup>257</sup> (1818) 16 US 183

<sup>258</sup> *Steel J* at [49]; *KAC v KIC* [1996] 1 Lloyd’s Rep 664 (QB), 685

<sup>259</sup> *Dawson’s Field Award* (29 March 1972, unreported); *Masefield* [2011] 3 All ER 554, [51]

*the dispossession permanently to deprive the owner of possession and ownership. This is quite different from a ransom situation such as in the present case”.*<sup>260</sup>

The award implied either that ‘capture’ included the intention to permanently deprive, or that only loss of possession accompanied by such intention permitted a total loss. The crystallisation of the ‘wait-and-see’ doctrine occurred largely through Rix LJ’s judgments in the *Kuwait Airways Corporation and another v Kuwait Insurance Company SAK and others*<sup>261</sup> litigation. Early on 2 August 1990 the invading Iraqis took control of the Kuwait International Airport, and within the day, if not earlier, Kuwait itself. On the hardstanding were 15 aeroplanes belonging to the Kuwait national airline. From 2 August, those aircraft were flown out of Kuwait by the Iraqis. By 8 August, 14 of the 15 aircraft had left Kuwait, along with aircraft spares. By a government decree of 8 August, the public character of the Iraqi invasion changed from turning Kuwait into an Iraqi satellite state, to a war of conquest and annexation of property. To avoid a cap on liability on their war risks policy,<sup>262</sup> the claimants argued that the taking of their aircraft on different occasions constituted a series of separate incidents. Rix J found that the Iraqis intended to take aircraft from 2 August. Consequently, he held that the loss of the aircraft arose from one incident, unified in time, location, and intent.<sup>263</sup> He distinguished *Dawson’s Field* on the basis that it was a ransom case where ‘wait-and-see’ was appropriate. However, “*Mr Kerr, QC specifically distinguished cases within specifically enumerated perils such as ‘capture’ or where it can be inferred that there was a clear intention at the time of dispossession permanently to deprive the owner of possession and ownership*”.<sup>264</sup>

Contrastingly *Scott v Copenhagen* concerned one British Airways aircraft trapped alongside the aircraft in the *Kuwait Airways Corp v Kuwait Insurance Co* (KAC v KIC) proceedings, the issue being whether it was lost on the 2 August 1990 invasion, or on the outbreak of war between coalition forces and Iraq in January 1991. It was recorded that from 2 August: “*the leading Hull War Risks Underwriter made it clear from the beginning that underwriters would have been prepared to pay a claim for the aircraft but BA had nonetheless decided to defer making a claim because the aircraft remained intact*”.<sup>265</sup> The claim was made on the policy after a period of about 6 months’ loss of possession, and the aircraft was destroyed by ground

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<sup>260</sup> *ibid*, [7]

<sup>261</sup> History of successive proceedings at [2004] EWHC 2603 (Comm); *KAC v IAC* (No 5) [2007] EWHC 1474 (Comm)

<sup>262</sup> Aviation insurance; actual total losses recoverable but not constructive total losses, *Moore v Evans* [1918] AC 185; *Kuwait Airways Corporation and Kuwait Insurance Company* [1999] 1 Lloyd’s Rep 803, 809 (Lord Hobhouse); *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2002] EWHC 1348 (Comm), [67]

<sup>263</sup> [1996] 1 Lloyd’s Rep 664

<sup>264</sup> [1996] 1 Lloyd’s Rep 664, 689

<sup>265</sup> [2002] EWHC 1348 (Comm), [44]

forces while the claim was being agreed. Expert evidence differed on whether there had been any Iraqi policy towards the capture of BA assets, and Langley J could not be sure of the motivation. He found that the captor's intention was unknown: *"The BA aircraft was in no sense a target of the invasion nor did it become one later in any relevant acquisitive or retributive sense. It was in common parlance "stranded" when the invasion occurred. I think that had the question been asked on 2 August "is the aircraft lost?" the answer would have been "I don't know. Wait and see".*<sup>266</sup> As in *KAC v KIC*, he considered whether the losses arose from one event, but avoided being bound by the same finding, by minimising the issue:

*"In a real sense I think the question is one of impression which does not bear too much analysis. It has to be considered in the context of underlying insurance which covered loss from war risks and "seizure, restraint, detention, appropriation." It also has to be considered as a provision intended to address a situation in which a single cause may lead to a plurality of losses".*<sup>267</sup>

He decided when the aircraft was lost. This was not as a result of the invasion and capture of the airport. He considered an informed observer would recognise "real difficulties" for BA in recovering its aircraft, but not an actual loss. He concluded, *"The position was analogous to ransom and "wait and see" albeit it lacked the features of an offer of return if a demand was met and also of any expressed intention to exercise permanent dominion over the aircraft. But I think those factors are balanced"*.<sup>268</sup> By *Scott*, the 'wait-and-see' doctrine was extended beyond a ransom situation, to cover one where there was a clear loss of possession and no ransom demand. In *Masefield* this doctrine, originally from non-marine hostage-and-ransom situations only, was applied to the marine peril. Wait-and-see is an entrenched approach to a ransom situation. The precedent in *Scott v Copenhagen* potentially undermines certainty. Why should a situation that was not one of hostage-and-ransom be so treated? Was Kerr QC right in any event to apply wait-and-see to a marine ransom situation; if so, should this apply to a maritime claim?

## **ii. Wait-and-see; Marine Ransom**

Issues of ransom arose again in *Masefield*, where piratical hostage and ransom was distinguished from 'capture'. Underlying this was an emerging consensus in contemporary commentary that both 21<sup>st</sup> century Somali piracy and 1970s terrorism were somehow innovative. Piracy itself was unusual: privateering ended following the Crimean War. Piracy

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<sup>266</sup> *ibid*, [58]

<sup>267</sup> *ibid*, [60]

<sup>268</sup> *ibid*, [73]

dramatically diminished during the nineteenth century,<sup>269</sup> and wholly ceased by the twentieth.<sup>270</sup> This invited the conclusion that Somali piracy was a wholly new type of maritime peril distinct from historical piracy; historically, pirates sought plunder; contrastingly Somalis' sole aim was ransom extortion.<sup>271</sup> The European Union Naval Force Operation Commander, Major General Howes, stated: '*This is not piracy in the classic sense that Emperor Augustus, Pliny and raiders off the Barbary Coast in 1753 would recognise. It is hostage and ransom*'.<sup>272</sup> This view underpinned the judgments in *Masefield*.<sup>273</sup>

Problematically, the notion that 'hostage and ransom' differs from 'traditional' piracy is unhistorical. Piracy is recorded from an early date in, eg *The Odyssey*,<sup>274</sup> the Homeric Hymns, Thucydides,<sup>275</sup> and Roman historians from 509BC<sup>276</sup> describing 'letters of marque' and routine ransom of captives.<sup>277</sup> Ransom was never described as exceptional. Significantly, the earliest known individual pirate captive, Julius Caesar, was ransomed.<sup>278</sup> It was nowhere suggested his captors acted outside established historical norms. Cicero considered whether promises to pay ransom to pirates need be kept because of the implied coercion;<sup>279</sup> such transactions were therefore familiar in Roman law. It is consequently implausible to conclude that classical piracy established norms excluding ransom payments, since 'hostage and ransom' was well recorded. Although pirates known to Augustus, Pompey, and Pliny would

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<sup>269</sup> C Douse 'Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry'; 35 Tul Mar LJ 267 (2010-2011), 285; PW Birnie, 'Piracy Past, Present and Future' 11 Marine Policy (1987) 163; Whateley (1874), 640

<sup>270</sup> Bento 404-5; Barry Dubner, 'On the Definition of the Crime of Sea Piracy Revisited: Customary vs Treaty Law and the Jurisdictional Implications Thereof, 42 JMLC 71 (2011)'; cf *Masefield*

<sup>271</sup> House of Commons Foreign Affairs Committee, 'Piracy off the coast of Somalia; Tenth Report of Session 2010-12', 14; *Masefield* [2011] EWCA Civ 24, [2011] 3 All ER 554; [2010] EWHC 280 (Comm). *passim*.

<sup>272</sup> *Ibid*, 14

<sup>273</sup> [2011] EWCA Civ 24 [67]

<sup>274</sup> Homer, *The Odyssey* trans. Murray AT (Harvard University Press, William Heinemann Ltd, 1919), Book 9, 253-255. *Ληστήρ* 'a thief/buccaneer'; contextually, the word describes raids onshore by ships as much as against other ships. *πειρατής* later used, latinised as *pirata*, alongside *praedo*; Odysseus taken for a pirate by Polyphemus, later poses as one in Ithica; Robol (2000), 522-3

<sup>275</sup> Goodwin 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' 39 Vand J Transnat'l L (2006), 973, 978. Other notable incidents listed by AT Whatley (1874), 537

<sup>276</sup> *ibid*, 537, mentioned in a treaty between the Romans and the Carthaginians in around 509 BC; Merkin (2011), 718

<sup>277</sup> Queen Teuta in 219BC: '*Her first measure was to grant letters of marque to privateers, authorising them to plunder all whom they fell in with... and despatched them with general instructions to the leaders to regard every land as belonging to an enemy.*' The 'pirates' accepted ransom payments for captives. Polybius, *Histories* II, 4-6 (trans Shuckburgh E, 1889, New York)

<sup>278</sup> Plutarch, *The Life of Julius Caesar* in *The Parallel Lives*, Loeb Classical Library edition, 1919, Vol VII, 445. The pirates originally demanded 20 talents, but Caesar felt undervalued and demanded they ask more. He was released on payment, returned, captured and crucified them.

<sup>279</sup> '*For example, suppose that one does not deliver the amount agreed upon with pirates as the price of one's life, that would be accounted no deception—not even if one should fail to deliver the ransom after having sworn to do so; for a pirate is not included in the number of lawful enemies, but is the common foe of all the world; and with him there ought not to be any pledged word nor any oath mutually binding*'. M Tullius Cicero *De Officiis* (Trans Walter Miller, 1913, Harvard University Press; Cambridge, Mass), Book 3, 107



frequently have kept or on-sold captured property, ‘hostage and ransom’ was unexceptional, and demonstrably ransom was known to them. The assumption in the EU report is unjustified.

Barbary piracy was contemporary to the development of insurance laws in England and America, and Berber ransom was commonplace. The earliest known captive of the Berber pirates was ransomed.<sup>280</sup> In 1625 a Berber vessel committed the first recorded piratical attack on an American colonial vessel,<sup>281</sup> an increasingly frequent event following Independence,<sup>282</sup> and ransom was routinely demanded. In 1784 Thomas Jefferson, John Adams, and Benjamin Franklin negotiated the release of the *Betsy* for a US\$20,000 ‘gift’.<sup>283</sup> A significant portion of American revenue,<sup>284</sup> perhaps 20%, went on ‘tribute’ payments in the following years, increasing the sums demanded.<sup>285</sup> The regular humiliation of paying ransom encouraged the establishment of an American navy, and Berber Wars from 1801. Ransom was demonstrably a *mainstream* element of early modern piracy.

Further, Valin and Emerigon both noted ransom, either money or a portion of the cargo, was frequently of more use to pirates than the vessel.<sup>286</sup> French law, by 1781, prohibited payment of ransoms to the Berber pirates.<sup>287</sup> Accordingly, the contemporary view underpinning insurance decisions such as *Masefield* that ‘hostage and ransom’ is somehow innovative is at best inaccurate guesswork. It provides an unsafe gloss to construe early insurance authorities. Demonstrably, hostage-and-ransom was known to Roman law, recognised in insurance laws recorded by Valin and Emerigon, and the possibility of ransom payments was recognised at a time when insurance law was introduced to the laws of both England and later America. If early authorities neither: (i) investigated the possibility of ransom; and (ii) allowed such possibility to undermine a total loss if not negotiated, then the definition of ‘capture’ or ‘seizure’ gains an extra dimension. Since claimants successfully established total losses simply on the basis of loss of possession, the grounds for distinguishing ‘hostage-and-ransom’ from historical piracy are doubtful. This raises the important issue that if wait and see had no application to capture historically, should it be applied at all?

## 2.5 Loss of Possession as an insured peril

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<sup>280</sup> *The Travels of Reverend Ólafur Egilsson*, Editors Karl Smári Hreinsson, Adam Nichols (Fjölvi, 2008)

<sup>281</sup> Abbott CJ, ‘Hijacked: Somalia Sanctions Hold U.S. Ship Owners Hostage’ Vol 35 Suffolk Transnat’l LR (2012) 102, 102ff

<sup>282</sup> *ibid*, 103

<sup>283</sup> *ibid*, 103

<sup>284</sup> Todd Emerson Hutchens, ‘Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates’ California Law Review, Vol 99, No 3 (June 2011), 819, 852

<sup>285</sup> *ibid*, 104

<sup>286</sup> Emerigon, XII, [XXI]

<sup>287</sup> Emerigon, XII, [XXVII]

Was ‘loss of possession’ *simpliciter* ever an insured peril? In *Dawson’s Field* Michael Kerr QC noted that in *Dean v Hornby* the rule was that capture was construed to be permanent. However, he considered this rule could not apply to the facts before him, but should be distinguished:

*“First, they all occur in the context of a loss resulting from a specifically defined peril such as “capture” or “pirates”, and in situations in which the persons who deprived the owners of possession clearly intended there and then to deprive him of possession and ownership forever, if they could. “Deprivation of possession” as such was not an insured peril, let alone a term of art to describe a case of total loss”.*<sup>288</sup>

Clearly, while ‘deprivation’ falls outside the narrow definition of capture, it nevertheless amounts to seizure. The question was never whether loss of possession was an insured peril, but what facts amounted to the specific peril. Emerigon considered both capture and seizure established a presumption of total loss; in that way, deprivation of possession *simpliciter* was once covered. The governing factual issue for capture and seizure cases had always been actual ouster of possession. In *Mitsui*, and in the warehouse cases, there was never any change in possession. The facts of *Mitsui v Mumford* described as ‘loss of possession’, were properly classified as potential ‘restraints of princes or peoples’ within the peril. In the events at the Kuwait International airport, there was clearly loss of possession, an actual change in physical control of the property, and arguably this fell within the seizure cases. Likewise in *Masefield*, there was a clear change of possession and control. Yet because there was still some eventual uncertainty, the peril of loss of possession was treated as something novel, falling within those cases where actual possession had not been lost. This was clearly a new way of interpreting the definitions of the established perils.

Finally, should the courts additionally test the motives of the captors, before their ultimate intention has been demonstrated finally? Testing the captor’s intention creates practical difficulties. In *Johnston & co v Hogg and others (the Cypriot)*,<sup>289</sup> the ship was captured by “natives” in the Brass River. They intended to plunder the ship’s cargo. While they intended to abandon the ship, they certainly did not intend to return it to its owner. Was there a loss of possession? Certainly, the case would not have justified a total loss had ‘wait-and-see’ been applied as set out by Rix J – yet a total loss was found. Once, the courts were reluctant to even consider the motives of people who had deprived the owners of possession. In *Naylor v Palmer* the court considered whether there was a total loss by a mutiny of “Coolies”, effectively carried as cargo, who had no desire to keep the vessel. In *Naylor v Palmer*, the

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<sup>288</sup> (29 March 1972) *Dawson’s Field Award*, [7]

<sup>289</sup> (1883) 10 QBD 432

time the loss occurred was the moment the passengers had taken control of the vessel. Further, it was held the motives and intention of the passengers was not considered as a question of insurance, an approach also adopted in *Kleinwort v Shephard*. Further, *Naylor* established the doctrine of relation back did not apply – the loss was complete by simple loss of possession as soon as it occurred. There were two possibilities; first, no loss occurred until after the Coolies had restored the vessel to the possession and control of her crew, so their not being carried to the destination was referable solely and proximately to their unwillingness to be carried. Alternatively, the loss was complete “*as soon as they had murdered the captain and forcibly taken possession of the vessel, and for a time put an end to the voyage*”, in which case the loss was referable to their unlawful act. Critically, “*the motive which induced them to commit it; their unwillingness, namely, to be carried to their original destination is immaterial to be considered, because remotely only the cause of what occurred*”.<sup>290</sup> In providing that latter view was correct, in addition to the recognition of the loss of the voyage for a time, *Naylor* neatly encapsulates the presumption of loss working in practice, because there no material fact was left for the insured to establish to complete the claim:

*“We think the latter is clearly the true view of the case, and that nothing can make it more clear than the simple statement. Nothing was then wanting to make the loss complete. A change of circumstances might have reduced it; this, however, never occurred, and therefore may be dismissed from consideration”.*<sup>291</sup>

Marshall had earlier rejected the doctrines of wait-and-see or relation back, because the ‘*character of any action depends on the original design with which it was done*’,<sup>292</sup> and therefore once the perils as defined above were met, nothing else was missing to make the peril complete. Where the intention was not an essential part of the definition, as in early definitions of capture or seizure, a ‘wait-and-see’ approach appears redundant.

English authorities gradually restricted the definition of capture. How they did so, contra *Mitchell*, raises challenging issues concerning the authority of academic discussion as against judicial authority, against a background of potentially evolving commercial understanding. Prima facie, judicial statements retain overriding authority once a rule becomes settled. Arguably, the wide definitions of capture, that looked only to simple loss of possession, applied in *the Lady Mansfield*),<sup>293</sup> *the Bedlington*, *Kleinwort v Shepard*, and *the Cypriot*, should be considered greater authority than then contemporary and later contrary academic speculation. Before the 1906 Act ‘loss of possession’ was demonstrably an insured peril. Non-marine authorities should have been unpersuasive authority for introducing a wait-and-see

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<sup>290</sup> (1854) 10 Ex Rep 381, 390

<sup>291</sup> *ibid*, 390

<sup>292</sup> Marshall (1802), 434

<sup>293</sup> (1787) 1 TK 609

approach on the basis that circumstances of ransom were distinct from previous authorities. *Scott v Copenhagen*, concerning capture of neutral property in war, fell under the wide definition of ‘unlawful capture’ in prior marine cases. Arguably, the insurers should there have been liable for simple loss of possession. Arguably, the better view is that these losses were covered in principle as loss of possession *simpliciter* was a covered peril. Accordingly, the only issues were whether simple loss of possession caused recoverable losses, and, if so, when the insured became entitled to claim compensation.

### 3 THE INSURED SUBJECT MATTER; TITLE & CONTRACTS

When does removal of property from the possession and control of the insured terminate ownership? How does loss of possession disturb commercial relationships with other parties? If property law provided adequate tests identifying when property is lost, and contract law governing when the charterparty or sale contract was ended by a loss of possession, then insurance laws might follow these, absent policy reasons or established practice to do otherwise. If the underlying rules are uncertain or various, or inappropriate for insurance, then insurance laws might apply different tests.

#### 3.1 Loss of Possession and Loss of Title:

##### *i. The Hope of Recovery as a Property Law test*

Between 1756 and 1908, the *spes recuperandi* was excluded from consideration on capture and seizure, being a property law test, unsuitable for the insurance context. When in 1756 the issue of capture and recapture first arose on a valued policy, counsel argued property or prize law applied; total loss occurred on loss of title. In *Goss* the plaintiff held two policies, one covering the vessel, the other her cargo of fish, from Newfoundland to a European port. She was captured by a French privateer but recaptured, damaged, eight days later. The plaintiff heard of her capture and recapture simultaneously, and abandoned alleging total loss. Had the plaintiff lost his vessel on the capture?

The insurer argued that title passed on enemy capture – capture became ‘complete’ – only on condemnation by a prize court. There was no condemnation in *Goss*; was there never loss? In England and common-law jurisdictions, and eventually most European countries, prize law prevented transfer of title on capture and seizure without a regular sentence of condemnation.<sup>294</sup> Owners retained title, even where their property was taken then sold. For example, in *Wilson v Forster*,<sup>295</sup> where the vessel was seized and sold by a neutral state, no sentence of condemnation by any competent court was shown. The court held that title remained vested in the owner. Absent condemnation, even enemy capture could not transfer

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<sup>294</sup> In *Assievedo v Cambridge (the Ruth)* (1711) 10 Mod 77, (1711) 88 ER 634 (KB), the captured vessel was in enemy possession for nine days before its restoration. It was held that the property had not changed. The decision in relation to the wager was not recorded, [80]. *The Ruth* suggested insurance should follow property law, contra the law later developed in *Goss*. *The Ruth* records *East-India Company v Sands* (unreported), where a ship captured and recaptured was restored to its owner ‘after a long possession, two sales and several voyages’, between 1691 and 1695, because there had been no judicial condemnation. *Sands* must be the unnamed report Mansfield LCJ considered in *Goss*. In *Berkley v Cullen* (unreported) Lee LCJ held the voyage was lost, where the vessel was requisitioned by the government and turned into a hulk, and she was restored after the voyage would have ended.

<sup>295</sup> (1815) 6 Taunt 25, 1 Marsh 425

title.<sup>296</sup> On recapture, even after several years and/or re-sales, the owner retained title throughout (“postliminy”)<sup>297</sup> and could take possession, subject to paying salvage – a requirement of Prize Acts, not the *lex mercatoria*. Absent condemnation, ‘the *ius postliminii* is perpetual’.<sup>298</sup> As the due process of condemnation might not be observed, a ‘wait-for-condemnation’ approach potentially caused delay,<sup>299</sup> by suspending parties’ claims indefinitely.

Facing that clearly unsatisfactory position, counsel and Mansfield CJ cited alternative doctrines from Roman law and the *lex mercatoria*, permitting transfer of title absent condemnation. Roman law provided title passed on enemy capture in war, but not where property was stolen. Gaius’s Institutes stated, ‘Capture from an enemy is another title of property by natural law’,<sup>300</sup> and ‘...what a man had captured from the enemy was held to be most distinctly his own’.<sup>301</sup> Justinian’s Institutes confirmed that belligerent capture transferred title; ‘Things again which we capture from the enemy at once become ours by the law of nations’.<sup>302</sup> This added an element of time; property passed *immediately* on capture, though the reciprocal point as to time on recapture was not expressed. The analogy was ownership of captive wild animals, which ended when animals appeared to make good their escape. Roman law provided, contrastingly to enemy capture, that pirates gained neither legal ‘ownership’ nor legal ‘possession’ of goods or persons whom they captured;<sup>303</sup> “*Ea quae piratae nobis eripuerunt, non opus habent postliminio, quia jus gentium illis non concedit ut jus dominii mutari possint*”.<sup>304</sup> The same principle was applied to the case of people taken by pirates “a

<sup>296</sup> In *Spencer v Franco (the Prince Frederick)* Hardwicke LJ held property was not changed by the capture, where the ship was restored in London after capture in Vera Cruz (see *Goss* 2 Burr 695); the loss was not total, after the return of the vessel in safety, after she had been seized and long kept to the King of Spain in time of actual war *The Selby* (1761) 2 Burr 1198, 1211 (Lord Mansfield CJ)

<sup>297</sup> Mansfield LCJ cited a prize law case under King Charles II restoring a ship lost for 14 weeks, and *The East-India Company v Sands*, reported with *the Ruth (Assievedo v Cambridge)* (1711) 10 Mod 77, (1711) 88 ER 634 (KB) where an owner had good title against a vendee ‘after a long possession, two sales and several voyages’. Postliminy was confirmed, *inter alia*, in *Our Sovereign Lady The Queen v Augustus McCleverty* (1871) 17 ER 229 (PC)

<sup>298</sup> *Hamilton v Mendez (The Selby)* (1761) 1 Black W 277, 279 (Mansfield LCJ); cf Naval Prize Act 1743, 29 Geo 2, c 34, s 24

<sup>299</sup> *Goss* 3 Keny 325, 333; J Sweeney, ‘The Silver Oar and Other Maces of the Admiralty: Admiralty Jurisdiction in America and the British Empire’ (2007) 38 JMLC 159

<sup>300</sup> *Gai Institutiones* (trans Poste E, 4th edn, 1904, Oxford), Book 2, [69]

<sup>301</sup> *ibid*, Book 4, [16]

<sup>302</sup> The Institutes of Justinian (trans J B Moyle; The Institutes of Justinian, 5th edn, Oxford, 1913) Bk II, [17]

<sup>303</sup> Whatley, AT ‘Historical Sketch of the Law of Piracy’ 3 Law Mag & Rev Montly J Juris & Int’l L Both Leg Prof Home & Abroad 4th ser 618 (1874), 622

<sup>304</sup> Jacques Cujas, *Paratitla, praestantissimi opera omnia in decem tomos distribute*, (edn CA Fabrot 1658) *Digest Salvii Iuliani, Do capt et Postl Revers*, 870

(<https://books.google.co.uk/books?id=e0biAAAAMAAJ&pg=RA1-PT137&lpg=RA1-PT137&dq=Digest.+do+capt+et+Postl.+revers&source=bl&ots=jqpDkSSoth&sig=5HQ9yMquy9BAFO-KGSunutlOdFM&hl=en&sa=X&ved=0ahUKEwiStLnOj3LahVDORQKHdaiCPMQ6AEIIjAB#v=onepage&q=Digest.%20do%20capt%20et%20Postl.%20revers&f=false> accessed 29 February 2016)

*piratis capti liberi permanent*'.<sup>305</sup> It followed that re-captured goods should be restored to their rightful owners – the re-captor took nothing.<sup>306</sup>

Medieval municipal laws modified Roman laws, particularly those governing recapture. Venetian law granted the property to the recaptor if the pirate had kept it for more than 24 hours. Some specified a set proportion of the value of the property recovered as owed to the recaptors as salvage, as in England by the Prize Acts. Nevertheless, the classical Roman doctrine of 'postliminity', suggesting that property should be restored to the original owner, excluding the recaptor endured where title had not passed.<sup>307</sup> Grotius wrote, distinguishing rules on land where property passed immediately on capture, that ships were only considered captured when they reached harbours or ports of the enemy, because that moment was when recovery looked hopeless. He noted contemporary European codes providing 24 hours' capture transferred property.

In *Goss*, alternative tests amplifying the Roman law test of transfer of title on capture were identified by counsel. These generally tested the *spes recuperandi*, but differed on the timing. Various, title transferred: after 24 hours;<sup>308</sup> when no *spes recuperandi* remained;<sup>309</sup> when prize came *infra praesidia*, or *infra classis*;<sup>310</sup> 'when the battle, and pursuit were over'; on sale by the captor; and that the Prize Acts determined transfer of title. The complication that re-captors might gain valid title over the property<sup>311</sup> was overlooked.

Did these rules govern insurance? It might be thought that the rules governing loss of property governed total losses too. The law developed differently. First, European treatise writers suggested situations where a presumption of total loss arose, including capture, detention and

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<sup>305</sup> Grotius, *Digest* XLIX, [xv], 19

<sup>306</sup> Grotius, *Digest* XI, [xvii] 9, III, [ix], 16

<sup>307</sup> Cornelius Bykershoek, *Quaestiones Juris Publici*, Bk I, trans Du Ponceau, Peter Stephen; 'A Treatise On The Law of War' (1810) 3 Am LJ 1, 36; Whateley, 622ff

<sup>308</sup> Cf Grotius, *De jure belli et pacis libri tres: in quibus jus naturae & gentium, item juris publici praecipua explicantur* (Paris 1625) Trans Campbell AC (London and New York 1901)

<sup>309</sup> Citing Bynkershoek.

<sup>310</sup> Bynkershoek stated '*intra praesidia*' had a flexible meaning, either into a fleet or port where the *spes recuperandi* ended. He attributed the '24 hour rule' to Grotius' innovation. He regarded it as workable, and only applied once in 1624, where the judges had been 'seduced by... Grotius'; Bynkershoek, Cornelius, *Quaestiones Juris Publici*, Bk I, trans Du Ponceau, Peter Stephen; 'A Treatise On The Law of War' 3 Am LJ 2 (1810), 1-198

<sup>311</sup> '...movable goods carried *intra praesidia* of the enemy, become clearly and fully his property, and consequently, if retaken, vest entirely in the recaptors. The same is to be said of ships, carried into the enemy's ports, and afterwards recaptured, so that no property or right to them remains in the former owner...' Bynkershoek, 27. It followed that, where capture had not been 'completed', following property law, owners were entitled to restoration without salvage, Bynkershoek 51; the obligation in English law to pay salvage arose from Prize Acts, not the *lex mercatoria*: *The carrying a ship infra presidium hostium, or si pernoctaverit with, the enemy, makes it the prize of the person retaking it, as if it had been originally the ship of the enemy; but by the act, the re-capture is the re-vesting of the property of the owner*" *Pringle v Hartley* (1744) 3 ATK 195, 196

embargo; this suggestion was adopted by English courts by Mansfield LCJ on capture, and later on embargo, arrest or detention. Accordingly, at one time, because the time property transferred was uncertain, insurance substituted a more certain rule. This underlying property law remains relevant to recognise the once inapplicable property tests when these reappear in the contexts from which they were expressly excluded. This matters; if the property law test, deciding when the hope of recovery was over, was excluded as providing no sufficiently certain answer to when an insured might recover, introducing a test of impossibility or unlikelihood as to recovery amounts to reintroducing similar tests in error.

## ii. *Exclusion of property law test:*

Mansfield LCJ established that total loss on a policy differed to loss of title in *Goss*. Property law did not apply because it was ‘quite uncertain’ as to when title passed, consequently insufficiently certain for commercial insurance purposes.<sup>312</sup> Title only mattered between owners and recaptors. Rather, ‘*controversies between the insured materially differ from those between owners and re-captors*’.<sup>313</sup> That separation has never been overruled. In *Hamilton v Mendez (The Selby)*, Mansfield LCJ repeated: ‘*...arbitrary notions concerning the change of property by a capture, as between the former owner and a re-captor or vendee, ought never to be the rule of decision, as between the insurer and insured upon a contract of indemnity...*’<sup>314</sup> Advocates never successfully opposed this.<sup>315</sup> The House of Lords confirmed in *Anderson v Marten* that, ‘*...as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed...*’<sup>316</sup> No court until *Masefield* suspended a claim on the basis of continuing legal title after marine ‘capture’. *Obiter* considerations of property law arose later in the High Court in *The Romulus* (these doubted on appeal),<sup>317</sup> and *Panamanian Oriental Steamship Corporation v Wright*.<sup>318</sup> Arguably, Steel J in *Masefield* erred in treating title as a determinative consideration for constructive total loss. While

<sup>312</sup> *The Bamburi* [1982] 1 Lloyd’s Rep 312, 316

<sup>313</sup> The typical dispute was whether the owner had to pay salvage, *Bynkershoek* (1810), 133

<sup>314</sup> (1761) 1 Black W 277, (1761) 97 ER 787, 2 Burr 1198, 1201, 1209

<sup>315</sup> eg *The Selby*, 1209; cf *Roccus’s Notabilia*, 50, [204]; Magens, *Essay on Insurances*, Vol 2, 174ff; *Parsons v Scott (the Little Mary)* (1810) 2 Taunt 363, (1810) 127 ER 1118; where counsel submitted, ‘[the loss] might have been total, had *The "Newport"* been captured as a prize, in which case the property in the goods would have been changed by the capture: but she was not taken as a prize...’ Crompton J replied; ‘If the owner is ultimately deprived of the goods, it is quite immaterial whether or not the property in them was changed by the seizure.’ *Lozano v Janson* (1859) 2 E&E 160, 172

<sup>316</sup> The judgment at first instance, and submissions before the Court of Appeal, did refer to property law, by the suggestion that a condemnation ‘related back’ to the time of capture, so that property passed, for insurance purposes, from the moment of capture. The Court of Appeal and House of Lords distanced themselves from this property law speculation.

<sup>317</sup> [1908] 1 KB 601, 609

<sup>318</sup> (1970) 2 Lloyd’s Rep 365, [1971] 2 All ER 1028



property law remained excluded – as arguably it still should be<sup>319</sup> – the courts applied a presumption of total loss on capture.

Incidents of arrest, detention or embargo do not imply an intention to take ownership of the property. Property is not necessarily divested by such perils. It is not possible, in relation to these, to identify anything more definite for insurance purposes than the fact of the continuation of the peril, unless followed by condemnation, sale or destruction, which later events may not be held a natural consequence of the original peril.

### 3.2 Loss of Possession and Contractual Obligations

#### *i. Importance of Frustration*

From an early date insurance was understood to cover the voyage.<sup>320</sup> Ordinarily, a voyage reflects numerous contractual relationships, in three main classes: sale contracts; charterparties; and ancillary matters such as employment. When does the law consider the underlying ‘voyage or venture’ of which each contract forms part frustrated by loss of possession? Understanding this is essential to assess the effectiveness or fairness of insurance law following loss of possession or free use and disposal. The defined perils engaged on dispossession, or loss of free use and disposal, are capture, seizure, restraint, detention and embargo. These may frustrate (in American idiom ‘render performance impossible’) the charterparty, contracts of sale, or employment contracts. The issue has been frequently considered on the outbreak of hostilities,<sup>321</sup> but events of capture or seizure absent formally declared hostilities also engage these general principles. Unlike the English insurance position after abandonment, once frustration has occurred, the agreement remains frustrated regardless of whether it unexpectedly becomes possible again.<sup>322</sup>

Examples appear in the mid-nineteenth century reports of strict rules insisting on charterparty performance. The doctrine of frustration appeared more lenient in early twentieth century authorities and contemporary guidance suggests courts may consider such contracts frustrated by loss of possession. Nevertheless, the underlying rule remains that delay caused by loss of

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<sup>319</sup> Contra Arnould (18<sup>th</sup> edn, 2013)

<sup>320</sup> *Dapaba v Ludlow* (1721) 1 Comtms 361, (1721) 92 ER 1112 (CB); *Manning v Newnham*, Trin 1782, report recorded in *Wilson v Royal Exchange* (1811) 2 Camp 682; *Sanday v British and Foreign Marine Insurance Company* [1916] 1 AC 650, 664

<sup>321</sup> Keith Michael, *War, Terror and Carriage by Sea* (Informa 2004), 420

<sup>322</sup> Treitel, *Frustration and Force Majeure* (3<sup>rd</sup> edn, 2014, Sweet and Maxwell), [9-002]-[9-003]

possession does not usually frustrate these contracts, and frustration applies exceptionally. Further, frustration, in these contexts, may be a difficult test to predict.

Where parties objectively contemplated a peril being possible at the time of fixing their contract, nothing short of express terms would prevent frustration operating on seizure. For example, where charterparties were made after the start of the Great War, the courts inferred that the possibility of requisition was contemplated by the parties as being as much of a risk as hostile capture or seizure. Consequently, ‘...*nothing short of an express agreement providing against discharge will prevent the operation of the doctrine of frustration*’.<sup>323</sup> Frustration would be a difficult doctrine to exclude.

## **ii. General Principles of Frustration**

### English Authorities

The modern formulation developed following interruption to charterparties during the First World War, became largely settled before the Second World War,<sup>324</sup> and was generally thought by the 1940s to operate as an implied term, although an alternative conception defined frustration as ‘disappearance of the subject matter of the contract’, whether or not the parties had provided for this risk.<sup>325</sup> Often this was because the contemplated voyage, to a port coming under enemy control, became impossible. Other relevant decisions<sup>326</sup> concerned situations where charterparties were discharged when the vessels chartered were requisitioned by the Admiralty, or enemy blockade.<sup>327</sup> The general rules governing frustration developed from charterparty cases on requisition during the Great War, issues directly related to circumstances potentially permitting insurance claims for loss of free use and disposal.

Deriving from these, the leading contemporary test of frustration expresses frustration in terms of a radical change of circumstances, as occurring whenever the performance called for would be ‘*radically different*’ from that undertaken in the contract. A party could say “*Non haec in foedera veni. It was not this that I promised to do*”.<sup>328</sup> Reid LJ explained that frustration, *inter alia*: (i) mitigated the rigour of the common-law’s insistence on literal performance of absolute

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<sup>323</sup> J Unger, ‘Frustration’, *The Modern Law Review*, Vol 2, No 3 (December 1938), 234

<sup>324</sup> ‘Contract. Frustration. Long Interruption of Performance of Contract, Which in Effect Makes It a Different Contract. Event Causing Destruction in Contemplation of Parties. Contract Void for Frustration. *W J Tatem, Ltd v Gamboa* [1939] 1 KB 132’ CLJ 1939, 138

<sup>325</sup> Unger (1938), 233

<sup>326</sup> *Anglo-Northern Trading Co v Emlyn Jones & Williams* [1917] 2 KB 78

<sup>327</sup> Unger (1838), 234

<sup>328</sup> *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 8 (Bingham LJ); *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 729 (Lord Radcliffe)

promises,<sup>329</sup> by doing what was reasonable and fair to escape from any injustice caused by such insistence after a ‘significant change in circumstances’;<sup>330</sup> (ii) was not to be lightly invoked, or expanded outside narrow limits;<sup>331</sup> (iii) must follow some ‘outside event or extraneous change of situation’;<sup>332</sup> and (iv) must not follow an act or omission by the party relying on it.<sup>333</sup> In *Edwinton Commercial Corporation & Anor v Tsaviris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*<sup>334</sup> Rix LJ described frustration as a multi-factoral test requiring consideration of, inter alia: (i) contractual terms; (ii) the factual matrix and context; (iii) the parties' knowledge (so far as knowable) as to expectations, assumptions and contemplations, in particular as to risk, at the time of contract; and (iv) the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.<sup>335</sup> Its application would be inexact, requiring an exercise of judgment to do justice to the parties.<sup>336</sup> The application would often be difficult, the ‘radically different’ test indicating the doctrine was not to be lightly invoked, and that the ‘*mere incidence of expense or delay or onerousness is not sufficient; and that there has to be ... a break in identity between the contract as provided for and contemplated and its performance in the new circumstances*’.<sup>337</sup> Accordingly, frustration will seldom provide protection for financial losses caused by delay to the voyage, without something more. In the charterparty context, frustration potentially reverses the burden of risk of delay, making frustration harder to apply. The time charter was a good example, where delay, absent express provision under an off-hire clause, would fall absolutely on the charterer, however on frustration, the risk fell on the owner. This reversal was assessed as part of an additional test that frustration must occur only where it was “*in the interests of justice and not against those interests*”.<sup>338</sup>

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<sup>329</sup> *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 510; *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, 275; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 171

<sup>330</sup> *Hirji Mulji*, 510; *Joseph Constantine Steamship Line Ltd*, 183, 193; *National Carriers Ltd. v Panalpina (Northern) Ltd* [1981] AC 675, 701

<sup>331</sup> *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 459; *Davis Contractors Ltd* (supra), 715, 727; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752

<sup>332</sup> *Paal Wilson & Co A/S v Partenreederer Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, 909

<sup>333</sup> *Hirji Mulji*, 510; *Maritime National Fish Ltd* [1935] UKPC 1, [1935] AC 524, 530; *Joseph Constantine Steamship Ltd*, 170, 171; *Denny Mott & Dickson Ltd*, 274; *Davis Contractors Ltd*, 728, 729; *The Hannah Blumenthal*, 882, 909

<sup>334</sup> [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517

<sup>335</sup> *Ibid*, [111]

<sup>336</sup> *ibid*, [112]

<sup>337</sup> *ibid*, [111]

<sup>338</sup> *ibid*, [112]

A doctrine of ‘wait-and-see’ may now apply to frustration by supervening illegality. In *Andrew Millar & Co Ltd v Taylor & Co Ltd*<sup>339</sup> it was held that where a prohibition of export had been imposed, the plaintiff should have waited a reasonable time before repudiating the contract in order to see whether this prohibition was of such a nature as was likely to continue and to prevent the agreement being carried out within a reasonable time. Accordingly, the contemporary law is not only uncertain as to the amount of time which must pass to justify a frustration of an underlying contract, but it might not permit a party to treat an event of loss of possession or ultimate frustration as terminating the event at once; “*it is often necessary to wait on events*”.<sup>340</sup> These general statements recognise that the application of frustration is difficult to predict. This lack of predictability is reinforced by confirmation that the question of whether a charter is frustrated is primarily a matter for a first-instance decision maker.<sup>341</sup> Importantly, it is not the nature of the ‘cause’ which governs frustration, but the effect of that cause on the agreement the parties have made.<sup>342</sup> In what situations have charterparties been treated as frustrated by the types of perils that might lead to a total loss claim by loss of possession?

#### American Authorities

The discussion of general principles is weighted towards the English authorities, as American courts appear to take a strict approach to the application of frustration outside the marine context. The American profession separates conceptually ‘physical impossibility’ situations from ‘frustration of purpose’ situations.<sup>343</sup> Situations of supervening illegality generally fell within the ‘impossibility’ doctrine. While frustration of purpose was apparently adopted in American states laws following the English rules, it had not by 1953 been applied in an appellate court. While approved by numerous *obiter dicta*,<sup>344</sup> by 1960 it had only been invoked in 29 cases,<sup>345</sup> despite frustration of purpose being included in the persuasive 1932 *Restatement (First) of Contracts*.<sup>346</sup> The *Restatement (Second) of Contracts*, defines frustration in terms closer to the English doctrine, being where: ‘*without his fault by the*

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<sup>339</sup> [1916] 1 KB 402, CA

<sup>340</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752 (Roskill LJ); Chitty on Contracts, Vol 1 [23-035], fn 150, 151

<sup>341</sup> *Finelvet AG v Vinava Shipping Co Ltd (the Chrysalis)* [1983] 1 Lloyd’s Rep 503, 507

<sup>342</sup> *The Nema* [1982] AC 724, 752 (Roskill LJ)

<sup>343</sup> eg Arthur Linton Corbin, *A Comprehensive Treatise on the Rules of Contract Law* (West Publishing Company, 1962), [1325]

<sup>344</sup> Arthur Anderson, ‘Frustration of Contract – A Rejected Doctrine’, 3 DePaul LR 1 (1953)

<sup>345</sup> T Ward Chapman, ‘Comment, Contracts-Frustration of Purpose’, 59 Mich L Rev 98 (1960), 106

<sup>346</sup> ‘Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears’, Restatement (First) of Contracts, § 288 (1932)

occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made'.<sup>347</sup> The *Second Restatement* goes further than the English authorities, in that s 272, comment c, allows courts to imply a reasonable term to deal with an event not in the parties' consideration when the contract was formed, and thus allows a significant discretion to the courts to vary contracts. Perhaps as a result of this judicial flexibility to modify contractual terms, there appear comparatively few charterparty decisions on frustration of purpose, absent impossibility for supervening illegality in American jurisdictions.

### *iii. Charterparty Frustration*

#### General principles expressed in charterparty context

Will a charterparty be frustrated in circumstances that would amount to capture under a marine policy, or will a charterer remain liable to pay hire for a vessel which remains for the present of no use to him? General expressions of the law indicate that charterparties are seldom frustrated by delay, whether caused by perils of the sea, time taken during repairs, or detention:

*"The principle of all these cases is thus shortly and clearly expressed by Mr Benecke:-  
"the owner owes the services of the crew to the freighter and to the ship herself during  
the whole voyage, and consequently also during the time of repairs or detention, which  
forms part of the voyage, and he cannot call upon the underwriter for expenses which  
are foreign to his (the underwriter's) contract""*<sup>348</sup>

In *Blane Steamships v Ministry of Transport*,<sup>349</sup> the court tested frustration where a vessel on demise charter stranded. The owners gave notice of abandonment on the freight policy, which was refused. The operative issue was whether the charterparty had been frustrated, so freight was no longer payable. The court held physical impossibility frustrated the charter. It was clear from *Bank Line Ltd v Arthur Capel & Co* that the principle of frustration of the adventure applies to a time charter, so that:

*"...one must imply into the contract between the parties that the ship must remain capable of carrying out the purposes for which she was hired; in other words, if her use for the purposes of the hire became impossible during the continuance of the term for which she was hired, the charterparty automatically came to an end".*

Evidently, on physical impossibility, the law diluted the strict situation of an insistence of performance of the contract, to a more permissive situation potentially allowing the charter to be frustrated. What about commercial impossibility? The doctrine of constructive total loss does not apply in a charterparty context. In *Assicurazioni Generali v SS Bessie Morris*

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<sup>347</sup> Section 265

<sup>348</sup> Arnould (3<sup>rd</sup> edn, 1866), Vol II, 731

<sup>349</sup> [1951] 2 KB 565

*Company Limited (The Bessie Morris)* where the voyage was abandoned following collision damage that was uncommercially expensive to repair, the court declined to hold that a charterparty had been frustrated, stating: *the doctrine of constructive loss has no application to it. The shipowners' contract has been broken by them*'.<sup>350</sup> The court applied a strict test, and the fact that the charterer was prevented in a business sense from performing the contract provided no ground for frustration.

Subsequently, in relation to freight policies, it has been stated that a superficially similar test to constructive loss applies that resembles tests of frustration, in that the business sense of the contract might be considered. For example, *"The test is the same, under the freight policy and under the charterparty - namely, whether the shipowner has been prevented either in a physical sense or in a business sense from performing the freight contract, so that the freight is lost"*.<sup>351</sup> However, it is doubtful that *dicta* in freight policies introduced a 'business sense' test into charterparty frustration, as *"the three contracts, the charterparty, the freight insurance and the hull insurance are completely different"*.<sup>352</sup> Notwithstanding such *dicta*, it is doubtful whether a 'business sense' doctrine permitting frustration ever applied in charterparty cases. Indeed, a significant potential injustice in the context of a charterparty is that while a doctrine of 'commercial impossibility' may be considered in testing constructive total loss, the unprofitability of a contract for one party is no reason to set it aside. *"Commercial prevention" was the need to give effect to the principle of the law of contract that the fact that a contract proves unprofitable is not of itself prevention and is no ground for release from the obligations under the contract*".<sup>353</sup> In *Kulukundis v Norwich Union*,<sup>354</sup> this was recognised in the context of commercial contracts: *'commercial prevention is equivalent to physical prevention has therefore to be harmonized with this rule of holding a man to his contract though it be financially to his own let or hindrance. Both rules are fundamental and the solution must transgress neither'*.<sup>355</sup> The doctrine of frustration in the charterparty context was stated in a way which avoids this conflict by the implication that the contract depended on the continued existence of some basic condition, so that if the condition failed the contract would be discharged.<sup>356</sup> For example:

*"The basic condition under the charterparty ...[transhipment excluded by the parties]... was the continued existence and availability of the Mount Taygetus throughout the voyage. If the Mount Taygetus should be at any time during the contract*

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<sup>350</sup> [1892] 2 QB 652

<sup>351</sup> *Carras v London and Scottish Assurance* [1936] 1 KB 291

<sup>352</sup> *ibid*

<sup>353</sup> *Bunge SA v Kyla Shipping Company Ltd* [2012] All ER (D) 71 (Dec) 59

<sup>354</sup> [1937] 1 KB 1

<sup>355</sup> *Kulukundis v Norwich Union* [1937] 1 KB 1

<sup>356</sup> *Taylor v Caldwell* (1863) 3 B&S 826; *Jackson v Union Marine Insurance Co*; *Bank Line v Capel*; *Comptoir Commercial Anversois v Power* [1920] 1 KB 868; *Scrutton on Charterparties* (13th edn, 1931), 110ff

*voyage rendered by sea perils incapable of completing the voyage within a reasonable time so as to earn the freight...*<sup>357</sup>

It was only once perils of the sea had prevented the voyage, was any latitude given to consider the business aspect, such as whether it was worth the owner paying for repairs:

*“...whether the incapability was physical or commercial the basic condition of the contract would be broken, and the charterparty contract ipso facto discharged... if the ship as a merchant ship employed in a shipowner's business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the cost of repair, the ship would be commercially lost and the basic condition would be broken; the charterer's right to insist on carriage of the cargo to destination, and the owner's to insist on payment of freight, would both lapse”.*<sup>358</sup>

Here, the business or commercial test is applicable only after some physical damage to the vessel. There is no general statement that simple delay could establish charterparty frustration. How were these general principles applied to cases of capture and seizure, or arrest, detention and requisition?

#### Application to the marine perils

Against that background, it is significant that early academic commentary indicated that ‘...capture or hostile seizure, prima facie, dissolves the contract of affreightment, or, at all events, suspends it for a time’.<sup>359</sup> Conversely, arrest or detention did not dissolve the charterparty:

*“But an embargo, detention, or arrest of princes, does not thus work a dissolution of the contract of affreightment, nor even suspend it, however long it may last; such a casualty, in fact, leaves the relative rights of all the parties wholly untouched.”*<sup>360</sup>  
*...wages and provisions during the detention are a charge upon the freight, an ordinary expense of the voyage, which the shipowner, if insured, cannot recover against his underwriters”.*<sup>361</sup>

Why were these perils different in effect from capture? In *Hadley v Clarke (the Pomona)*,<sup>362</sup> the earliest authority considering frustration by delay arising from embargo, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. An embargo kept the vessel in Falmouth, until further Order of Council. As in the search to identify the moment when title transferred in *Goss*, the court considered whether after a certain passage of time an embargo would frustrate the contracts: “I expected that the defendant's counsel would have

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<sup>357</sup> *Bunge SA v Kyla Shipping Company Ltd* [2012] All ER (D) 71 (Dec) 59

<sup>358</sup> *ibid*

<sup>359</sup> Arnould (1866), 731; *The Hiram* 3 C Rob Ad R180; *Liddard v Lopes* 10 East 526

<sup>360</sup> *Hadley v Clarke* 8 T Rep 259

<sup>361</sup> *Vessel - Eden v Poole* 1 Park Ins 117; *Robertson v Ewer* (1786) 1 TR 127: freight – *Sharp v Gladstone* 7 East 33; *Everath v Smith* 2 M&Sel 278; Arnould (3<sup>rd</sup> edn, 1866), 731

<sup>362</sup> (1799) 101 ER 1377

*drawn the line, and would have shewn, that though an embargo of a certain duration would not put an end to such a contract... an embargo of some longer duration would. But no such line... can be drawn*".<sup>363</sup> The comparison was drawn to delay caused by weather or deviation, which would not have such effect. Accordingly, it was decided that embargo does not frustrate the voyage, but merely suspended not dissolved the parties' rights under the charter, even though the embargo lasted for two years. The defendants were liable for damages for non-performance of the contract. The rule was adopted in both English<sup>364</sup> and American<sup>365</sup> texts. This significantly restricted the ability of an insured to claim for interruption to the voyage.

Embargos, being of uncertain duration, might result in the voyage becoming impossible until a new season, or commercially unviable at any time. However, the rules on embargo did not allow for commercial considerations, as might be considered in certain contexts in testing constructive total loss on a policy, eg for cost of repairs to be taken into consideration. The starting point for this rule was the action on a charterparty in *Touteng v Hubbard*,<sup>366</sup> where the vessel was detained at Ramsgate by English embargo on Swiss vessels in English ports for six months. The charterer refused to load a cargo six months late, as the fruit season was long over: "*the season for shipping fruit had long passed, and the voyage would be useless and nugatory, which may be construed as having the same meaning as that the commercial speculation was at an end*". The commercial value in the voyage had gone. Following *Hadley v Clarke*, Lord Alvanley held that the embargo had not frustrated the voyage. In findings approved in *Jackson v Union Marine Insurance Co Ltd* he held embargo did not put an end to any contract between the parties, but was construed as a temporary suspension of the contract. Consequently, the parties must submit to whatever inconvenience may arise, unless they have provided against it expressly:

*"The object of the voyage might equally have been defeated by the act of God as by the act of the State, as, if the ship had been weather bound until the fruit season was over; and yet in that case the merchant would have been bound to fulfil his contract. The principle of Hadley v. Clarke is, that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas, and, therefore, if they do not provide against it, they must abide by the consequences of their contract"*.<sup>367</sup>

That an embargo was deemed temporary detention only matched the 'temporary purpose' definition in Marshall. Nevertheless, where the English embargo prevented departure of the

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<sup>363</sup> Ibid; 8 TB, 288

<sup>364</sup> Lord Tenterden, A Treatise of the law relative to Merchant Ships and Seamen (Philadelphia 1802); *Abbott on Shipping* (5th Edn), 429

<sup>365</sup> Parsons (1868), Vol 1, 318, 330

<sup>366</sup> (1802) 3 Bos & Pul 292

<sup>367</sup> *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125, 134-5



vessel, the voyage – the charter – was held lost, and the owner did not recover on his claim for freight. The better view of this result is to understand it as a policy decision based on the nationality of the claimant – at that time hostile to the government, but *Handley v Clark* has later been discussed as applying the same rules on insurance as a charter.

The difficulty was noted in a dissenting judgment in *Jackson*, noting the commercial harm caused by such interruption: Kent confirmed the suspensory effect of embargo, and extended this to a wide variety of detentions:

*"...a temporary impediment of the voyage does not work a dissolution of the charterparty, and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time... The same construction is given to the legal operation of a hostile blockade or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up, or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, the general principle applies that nothing but occurrences which prevent absolutely the performance of the contract will dissolve it. The parties must wait until those which merely retard its execution are removed".*<sup>368</sup>

In *Jackson*, it was noted that “Such occurrences would cause unreasonable delay, and destroy the commercial speculation of the contract; still it would subsist”.<sup>369</sup> The Victorian position was that aside from capture and seizure, the marine perils would seldom excuse contractual performance. Were insurance to follow this strict position, insureds would be deprived of a substantial benefit of cover.

The 20<sup>th</sup> century charterparty cases<sup>370</sup> classified enemy capture as ‘restraint’ or ‘detention’, treating it identically to requisition by the owner’s government. It was recognised, though the conceptual basis was less satisfactory to the American profession,<sup>371</sup> during the Great War that charterparties could be frustrated by ‘effective capture by a belligerent which transfers the property in the ship from its owners to the captor and enables that captor to give an effective title to his vendee, and ... capture by pirates, which transfers the possession and custody of the ship, though not her ownership’.<sup>372</sup> Why ‘imperfect’ enemy capture was not considered likewise was not explored. First, in application it was recognised that such frustration could apply to a voyage charter; later, requisition by the owner’s government was sufficient to establish frustration in a time charter of 12 months<sup>373</sup> but applying a fact-specific

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<sup>368</sup> Kent Commentaries (10<sup>th</sup> edn, 1860) Vol 3, 312, 346

<sup>369</sup> *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 PC 125, 134-5

<sup>370</sup> cf *Tatem Ltd v Gamboa* [1938] 3 All ER 135, 143

<sup>371</sup> ‘Effect of a Requisition on Charterparty Relations’, 40 Harvard Law Review 2 (Dec 1926), 305

<sup>372</sup> *Horlock v Beal* [1916] 1 AC 486, 500

<sup>373</sup> *Bank Line Ltd v Arthur Capel & Co* [1918] UKHL 1; [1919] AC 454; [1918-19] All ER Rep 504

test, not to a charter of 60 months.<sup>374</sup> The Great War jurisprudence was expressed in fact-specific terms, it is difficult to extract general rules as to whether capture or requisition established a frustration at once. An approach similar to ‘wait-and-see’ was adopted, rendering the charterer potentially liable for hire for an extended period, despite having lost use of the vessel.

In *Hirji Mulji v Cheong Yue Steamship Co Ltd*,<sup>375</sup> a time charter for 10 months commencing in March 1917 was frustrated by the requisition of the vessel at the end of March 1917. It was stated that, ‘*The facts of the present case are a fortiori to those in the Bank Line Case and no court of law could have held upon them that the charter had not been frustrated at latest when, in the latter part of 1917, it had become plain that the first expectations of a speedy release of the ship were unfounded*’.<sup>376</sup> The rule provided that the contract was frustrated by “*Such delay in the prosecution of her voyage as entitled the charterer to determine the adventure*”.<sup>377</sup>

When assessing the consequences of an event such as requisition:

*“Sometimes the event is such as to speak for itself, like the outbreak of war on 4 August 1914, in Horlock v Beal... Sometimes the frustration is evident, when the gravity and the circumstances of the breakdown can be known, as in Bensaude’s Case; sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and a fortiori when it has continued so long as to defeat the adventure... ”.*<sup>378</sup>

In *Larrinaga & Co Ltd v Societe Franco-Americaine des Phosphates de Medulla*,<sup>379</sup> the Court of Appeal confirmed that frustration of purpose applied: where a contract for a charterparty had included a voyage 7½ years after the signing of the charterparty, the outbreak of War, and then the Armistice, did not frustrate that charterparty, due to be performed in 1919, albeit previous severable charterparties under the same contract had been frustrated by the outbreak of war and terminated by consent.

Contrastingly, short periods of requisition would not excuse future performance by the charterer, so the obligation to pay hire remained. In *Modern Transport Co v Duneris*,<sup>380</sup> the vessel was requisitioned a month after the commencement of the 12 month time charter in 1915. The fact-specific test established in *F A Tamplin Steamship Co Ltd v Anglo-Mexican*

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<sup>374</sup> *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, [1916-17] All ER Rep 104

<sup>375</sup> [1926] All ER Rep 51

<sup>376</sup> *ibid.*, [55]

<sup>377</sup> (Watson LJ); *Bensaude v Thames and Mersey Marine Insurance Co* [1897] AC 609

<sup>378</sup> [1926] All ER Rep 51, 59

<sup>379</sup> [1923] All ER Rep 1

<sup>380</sup> [1917] 1 KB 370

*Petroleum Products Co Ltd*<sup>381</sup> was applied, which was that a charter of five years was not frustrated by the requisition. It was held that there may be many months during which the ship might yet be available before the charter expired, and the charterer should not be deprived of this use.<sup>382</sup> The test remained a fact specific one, specific to the charterparty terms, so conceivably “...in the case of a charter for a single voyage, the same event might be sufficient to destroy the very basis in the case of a voyage charter when it would not have been sufficient to destroy that of a time charter”.<sup>383</sup>

In *W J Tatem Ltd v Gamboa*<sup>384</sup> the court considered the frustration of a charterparty containing a frustration clause. The vessel was seized by a nationalist cruiser in the Spanish Civil War. Nationalists were not recognised as belligerents by the UK Government, and did not hold prize courts. The policy contained a 6-month constructive total loss clause, establishing a presumption of irretrievable total loss. The claimants successfully contended that they were not liable to pay further hire after the capture, as the contract was frustrated. While a time charter, the limits were very narrow, namely to evacuate the civilian population of Northern Spain to France. It was decided that the foundation of the contract was destroyed as soon as the insurgent war vessel had seized the ship. Nothing more could be done with the vessel. The owners were unable to leave it under the control of the charterer. The charterer was unable to make use of it. Consequently, the performance of the charter was frustrated from the time of the seizure. This rule provided the frustration occurred immediately on the capture or seizure. This appears a more certain rule than previous Great War jurisprudence, dating the frustration to the time of the seizure, rather than some later date, and not by ‘relation back’.

The authorities generally concern single-ship companies, but the situation may be changed where the insured has an alternative vessel, and has contracted for its possible charter. In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*,<sup>385</sup> the defendants agreed to carry the plaintiff’s oilrig using either of their two vessels. The defendants contracted with third parties for the use of one vessel, intending the other for the plaintiff’s contract. When the intended vessel sunk, the contract was held not frustrated, as another suitable vessel still existed. By analogy, if a charterparty were structured so that an alternative vessel were available, it would not be frustrated by the capture of one vessel. Most charters, however, provide for a single ship.

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<sup>381</sup> [1916] 2 AC 397, [1916-17] All ER Rep 104

<sup>382</sup> *ibid*, 406 (Earl Loreburn)

<sup>383</sup> *ibid*, 411 (Haldane LJ, dissenting)

<sup>384</sup> [1938] 3 All ER 135; *Bunge SA v Kyla Shipping Company Ltd* [2012] All ER (D) 71 (Dec)

<sup>385</sup> [1990] 1 Lloyd’s Rep 1 (CA)

### Frustration of Purpose

Some charters were held frustrated where the voyage was abandoned where the master anticipated a high risk of capture. In *Embiricos v Sydney Reid & Co* the charter was held frustrated by the outbreak of war in 1912 between Ottoman Turkey and Greece, where the vessel would have been likely to be detained by the enemy Turkish government if she passed the Dardanelles. Scrutton held the voyage frustrated by restraint of princes, and considered the effect of the unknown duration of the war. The war was expected to last for such a time as to disturb the commerce of merchants and defeat and destroy the object of a commercial adventure like the one insured. Where there was such a probability, the unexpected removal of the restraint for a short time, did not mean the parties should have anticipated it, and be forced to continue the performance of an adventure which at one time seemed destroyed.<sup>386</sup>

Fear of capture, not any illegality in continuing, was considered the cause of frustration. Contrastingly, in *Watts, Watts & Company Ltd v Mitsui & Company Ltd*<sup>387</sup> the defendants declined on 1 September 1914 to nominate a vessel under the charterparty on the grounds that the British Government had prohibited vessels going into the Black Sea, albeit that the British government only issued the prohibition on 26 September. This was held no 'restraint of princes', as the restraint of princes that closed the Dardanelles was only imposed on 26 September, and a reasonable apprehension of a restraint of princes did not amount to such a restraint. To fall within the exception, there had to be actual restraint.<sup>388</sup> The test of whether this loss of the voyage was charterparty frustration appears more permissive than the insurance rule, but may be unpredictable in application.<sup>389</sup> That the standard of frustration may be strict, is illustrated by *Edwinton Commercial Corporation & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*<sup>390</sup> where delay of three months near the end of a 20 day charterparty caused by unlawful detention of the vessel by port authorities did not frustrate the charterparty.

Accordingly, the occurrence of an arrest or detention or embargo, not amounting to a capture, does not break up the voyage under the charter-party. Unlike on capture, freight remains payable on an arrest, detention or embargo, as these do not break up the voyage. The voyage

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<sup>386</sup> [1914] 3 KB 45, 83 LJKB 1348; cf *Cantiere Navale Triestina v Russian Soviet Naphtha Export Agency (The Dora)* [1925] 2 KB 172 (CA); cf *Geipel v Smith* LR 7 QB 404 (1872); John Schofield, *Laytime and Demurrage* (6<sup>th</sup> edn, 2011, Informa), 307

<sup>387</sup> [1917] AC 227

<sup>388</sup> [1917] AC 227, 233

<sup>389</sup> Keith Michel, *War, Terror and Carriage by Sea* (2004, LLP), 430

<sup>390</sup> [2007] EWCA Civ 547 [2007] 2 Lloyd's Rep 517

is supposed to continue, any period of detention being considered as a portion of it. Accordingly, wages are still earned during detention by embargo, as an ordinary expense of navigation for which the shipowner is liable to pay.<sup>391</sup> This *prima facie* position is still good law, although a long detention might amount to a frustration of the charterparty, as suggested in *The Bamburi*. Accordingly, the categorisation of perils, although a difficult task, has a significant impact on whether a charter is frustrated.

### Charterparty Terms

This common-law situation is frequently modified by charterparty terms. In *The Bamburi*, it was noted that the charterer paid hire for a year, while he received loss of hire insurance payments under a specific policy. After a year, he claimed that the contract was frustrated, and the insurer acquiesced. There was a clause in the charterparty, *'providing for the payment of hire... until the date of redelivery, or, if the vessel is lost, until and including the date of loss... or if the vessel be a constructive total loss and including the time and date of the casualty giving rise to such constructive total loss'*.<sup>392</sup>

In response to Somali piracy, recognising that long periods of requisition without frustration might lead to injustice, BIMCO drafted a clause to regulate how 'off-hire' as a result of a capture is calculated. Payments of hire stop after 91 days. Interestingly, the charterers are not liable for late redelivery, demonstrating the shipping industry's awareness that hostage and ransom scenarios frequently cause the significantly late arrival of a vessel:

#### *'Piracy Clause for Time Charter Parties 2009*

...

(e) *If the Vessel is attacked by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire.*

(f) *If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first ... day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.'*

These terms were repeated in the BIMCO Piracy Clause for Time Charter Parties 2013. BIMCO has drafted similar terms for voyage charters:

#### *'Piracy Clause for Consecutive Voyage Charter Parties and COAs*

...

(d) *If the Vessel is attacked or seized as a result of Piracy any time so lost shall be shared equally between the Owners and the Charterers. The Charterers shall pay the*

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<sup>391</sup> Arnould (8<sup>th</sup> edn, 1909) 1425

<sup>392</sup> [1982] 1 Lloyd's Law Reports 312, 317

*Owners an amount equivalent to half the demurrage rate for any time lost as a result of such attack or seizure. ...'*

Subsequently the CONWARTIME 2013 War Risks Clause for Time Chartering was drafted:

*'(ii) "War Risks" shall include any actual, threatened or reported: war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel.'*

This charter further stipulates that additional payments to the owner would be payable where the vessel approaches an area where these risks are present, in recognition of the extra cost of war risks cover.

Recently, it was held that 'capture' in an off-hire clause for 'capture or seizure' encompasses capture by pirates, rather than just a state entity.<sup>393</sup> Accordingly, the contractual provisions in the charterparty may depend on whether private-ends piracy is a distinct class of peril from state-sanctioned official acts, where terms such as the CONWARTIME 2013 War Risks Clause do not apply. In the *Paiwan Wisdom*<sup>394</sup> it was held that even if the charter permitted the passing of the Gulf of Aden with insurance authorization, owners were permitted under Conwartime 2004 clause to refuse instructions to proceed from to the Indian Ocean as a consequence of piracy, defeating the intended voyage. Interestingly, in recent decisions considering charterparties and piratical capture, none state the charter would be frustrated. The very existence of the off-hire clause reinforces the position that the charter will not be frustrated on the initial loss of possession.

#### American Authorities

Consideration of American authorities indicates a strict approach to frustration of charterparties, absent supervening illegality. While isolated examples show that embargo

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<sup>393</sup> *Osmium Shipping Corporation v Cargill International SA (The Captain Stefanos)* [2012] 2 All ER (Comm) 197, concerning the NYPE form supplemented by a rider clause. The opposite result was reached in *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* [2010] EWHC 1340 (Comm) on the NYPE form, capture falling without 'average accident'; Marine Insurance Legislation (4<sup>th</sup> edn, 2010), 80

<sup>394</sup> *Taokas Navigation SA v Komrowski Bulk Shipping KG (The Paiwan Wisdom)* [2012] EWHC 1888 (Comm)

discharged a contract,<sup>395</sup> it was usually suspensive only,<sup>396</sup> and following the English authorities, capture or outbreak of war seldom frustrated a charter. A wide number of cases indicate that the charter was not frustrated, and the owner entitled to full freight as per the charterparty terms, even though the voyage was lost.<sup>397</sup> For example, in *Allanwilde Transport Corp v Vacuum Oil Co*<sup>398</sup> freight was earned, although the voyage was prevented by order of the American government preventing vessels sailing to Europe because of German submarine action which was construed as permanent.<sup>399</sup> In *Pope & Talbot Inc v Blanchard Lumber Co*<sup>400</sup> freight was earned, though the voyage was lost by torpedo damage. Similarly in *De La Rama Steamship Co v Ellis*,<sup>401</sup> where the vessel was requisitioned by government after the attack on Pearl Harbour, in *The Bris*<sup>402</sup> where there was an embargo after loading, and *Mitsubishi Shoji Kaisha Ltd v Societe Purfina Maritime*<sup>403</sup> where the voyage was lost by requisition of the Belgian government, a restraint of princes.<sup>404</sup> Other admiralty cases dealing with "frustration of the voyage," did not consider the doctrine of frustration of purpose.<sup>405</sup> In these situations, the different considerations are reconciled by holding the charterparty not frustrated, but allowing the insured to recover for loss of the voyage on a freight policy.

On the issue of whether action taken to avoid a peril was a loss for the charterparty in American laws, the insurance cases first established that such action was generally not a loss within the policy – ie blockade or embargo.<sup>406</sup> The application was not uniform, as in some American state jurisdictions the opposite conclusion was reached.<sup>407</sup> The federal courts distinguished failure to attempt entry to a blockaded port from failure to attempt leaving.<sup>408</sup> These insurance cases were first in time, preceding the charterparty cases. Later cases

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<sup>395</sup> *Foster v Compagnie Francaise* 237 Fed 858 (EDNY 1916)

<sup>396</sup> *Odlin v Insurance Co* Fed Cas No 10,433 (CCPa 1808); *Washington Mfg Co v Midland Lumber Co* 113 Wash 593, 194 Pac 777 (1921); 'Supervening Impossibility of Performance as a Defense' 5 Fordham L Rev 322 (1936), 334

<sup>397</sup> T Ward Chapman, 'Comment, Contracts-Frustration of Purpose' 59 Mich L Rev 98 (1960), 106

<sup>398</sup> 248 US 377 (1919)

<sup>399</sup> Applying *The Kronprinzessin Cecilie* (1917) 244 US 12

<sup>400</sup> 159 F 2d 134 (CCA 9th, 1947)

<sup>401</sup> 149 F2d 61 (CCA 9th 1945), cert denied 326 US 718

<sup>402</sup> 248 US 293 (1919)

<sup>403</sup> 133 F2d 552(CAA 9th, 1942), cert denied 318 US 781 (1943)

<sup>404</sup> See further *Tee Ka Chay v De La Rama Steamship Co*, 55 NYS 2d 241 (1942); *E Awad & Sons, Inc v De La Rama Steamship Co* 53 NYS 2d 900 (1942), 265 App Div 913, 38 NYS 2d 897; *West Street Warehouse Inc v American President Lines Ltd* 186 NY Misc 238, 58 NYS 2d 722 (1945)

<sup>405</sup> T Ward Chapman, 'Comment, Contracts-Frustration of Purpose', 59 Mich L Rev 98 (1960), 106

<sup>406</sup> 'Restraint of Princes' 37 Harvard Law Review 7 (1919) 839, 842; first applying English law; *Hadkinson v Robinson* 3 B&P 388 (1803); *Lubbock v Rowcroft* 5 Esp 50 (1803); *Blackenhagen v London Assurance Co* 1 Campb 454 (1808); *Richardson v Maine Insurance Co* 6 Mass 102 (1809); *Brewer v Union Insurance Co* 12 Mass 170 (1815)

<sup>407</sup> *Schmidt v United Insurance Co*, 1 Johns (NY) 249 (1806); *Thompson v Read* 12 Serg&R (Pa) 440 (1820) (semble); 1 Phillips (5<sup>th</sup> edn, 1867), [1115]

<sup>408</sup> *Smith v Universal Insurance Co*, 6 Wheat (US) 176 (1821); *Olivera v Union Insurance Co*, 3 Wheat (US) 183 (1818)

involving similar circumstances uniformly excused under the restraints clause non-performance of a charter-party or bill of lading. Equally, unlike the insurance authorities, a formal blockade or embargo was not necessary, but the danger of seizure of a belligerent merchantman by enemy warships or of seizure of a neutral for carrying contraband was sufficient.<sup>409</sup>

American academic opinion approved the charterparty cases,<sup>410</sup> on the basis of the harm suffered by the insured. The way that the conflict between the authorities was explained, given the requirement for uniformity in different commercial contexts, was by a difference in causation rather than any difference in the underlying law. Thus reference was made to English authority in *Becker v Grey & Co v London Assurance Corporation*, suggesting that in insurance cases a stricter rule of causation must be applied.

#### *iv. Crew Employment Contracts*

Does the dissolution of mariners' contracts of employment indicate when a voyage is deemed frustrated? It was commonplace until the latter 20<sup>th</sup> century for shipowners to engage crew for a specific voyage. Situations where the voyage was frustrated, so that the shipowner's obligations to his crew were discharged, may indicate when the voyage was deemed lost, so may be relevant for insurance law. In earlier authorities, where freight was no longer earned, the employment contracts automatically terminated. That underlying position has been altered by statute, so that "*The ancient doctrine that freight was... the mother of wages, that the crew and the owners of the ship were co-adventurers in the enterprise of earning freight out of which the seaman was to be paid, has been abolished by s 157 of the Merchant Shipping Act, 1894...*"<sup>411</sup> Nevertheless, employment cases both pre and post the 1894 Act assist in determining whether a voyage is seen as impossible or terminated, though perhaps earlier cases more closely follow the charterparty frustration.

Modern employment law in this context begins with *The Olympic (Wages)*,<sup>412</sup> concerning employment contracts for a voyage. The *Olympic* was involved in a collision on leaving Southampton Docks, and was docked for repair. The contemplated voyage to New York was abandoned. The owners dismissed the crew, contending that she became 'wrecked' within the

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<sup>409</sup> *Geipel v Smith*, LR 7 QB 404 (1872); *The San Roman*, LR 5 PC 301 (1873); *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326; *Embircos v Sydney Reid & Co*, [1914] 3 KB 45, 83 LJKB 1348; *The Styria* 186 US 1 (1901)

<sup>410</sup> eg 'Restraint of Princes' 37 Harvard Law Review 7 (1919), 839, 842-3

<sup>411</sup> *Horlock v Beal* [1916-17] All ER Rep 81, 87

<sup>412</sup> *Fraser and Weller v Oceanic Steam Navigation Co (No 2)* [1913] P 92, [1911-13] All ER Rep 469, 474



meaning of the 1894 Act, which argument was accepted. Section 158 of the 1894 Act applied where the service of the seaman ‘terminates’. This arose from the ‘wreck or loss of the ship’, and ‘loss of the ship included ‘something which renders the ship... unfit or unable to proceed on the voyage.’ Accordingly, this included “*anything happening to the ship which renders her incapable of carrying out the maritime adventure*”. The ship was deemed ‘wrecked’ as soon as it became impossible to continue the voyage contemplated. The owner was justified in terminating the contract of employment. Kennedy LJ’s dissenting judgment is instructive, in that it considered embargo, confirming that while embargo did not dissolve the employment contract or charterparty “...yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are therefore not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them.”<sup>413</sup> ... Accordingly, he noted that “*what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile power*”.<sup>414</sup> The *Olympic* concerned whether ‘repairs’ frustrated contracts of employment, but it was further observed obiter that that “*Dr Lushington mentions in his judgment in The Florence,<sup>415</sup> by capture: “By capture certainly... if there be no re-capture, the contract (ie, the contract between shipowner and seaman) is at once put an end to, and this, I apprehend, whether by an enemy or by pirates”.*<sup>416</sup> Damage frustrated employment, as capture was thought to, although detention and embargo would not, without more, do so.

Capture was recognised to have a much more significant effect on the underlying contracts than detention or embargo. In *Horlock v Beal*, Shaw LJ treated the effect of capture on a contract of employment as similar to that on insurance as established by Mansfield in *Goss*; charterparties terminated on a declaration of war as performance then became impossible. The employment contracts were similarly terminated, as these stood or fell with the adventure with which they were concerned. No other rule would reflect the law or would be workable. That indicated when the voyage might be lost. Specifically, detention by a power declaring hostilities dissolved the contract at once, and a wait-and-see rule would not apply:

*“When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long. In the case of a vessel in an enemy port, the war descends upon master and crew alike, taking no regard of either contract right*

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<sup>413</sup> [1911-13] All ER Rep 469, 478; Lord Tenterden, *Law of Merchant Ships and Seamen* (5th edn, 1827), 450, (14th edn, 1901), 252

<sup>414</sup> [1911-13] All ER Rep 469, 478

<sup>415</sup> (1852) 16 Jur 573

<sup>416</sup> [1913] 92, 117

*or obligations, but putting all alike on the common footing of British citizens, and as such placing their liberty completely at the disposal of the enemy Power”.*<sup>417</sup>

The owners were deprived of their vessel by capture on 4 August 1914, the crew were removed on 2 November, and were imprisoned later that month. The effect of the outbreak of hostilities frustrated the adventure, thus terminating the contracts of employment: *“While the general question as to the effect of a declaration of war should, in my opinion, be resolved as stated, I should also feel entirely free to hold that the circumstances of the present case leave no doubt as to disruption of the contract relations of parties and the loss of the adventure”.*<sup>418</sup> Accordingly, a wait-and-see approach was rejected in the context of actual enemy capture.

In *The Friends*, impossibility resulted from the act of a hostile State. The plaintiffs' ship, manned by a British crew, on a voyage from London to Newcastle and back, was captured by a French privateer. The plaintiff and other crewmembers were taken as prisoners of war. Meanwhile, the vessel was recaptured, which as far as possible restored the antecedent condition of things,<sup>419</sup> but a new hand was hired to fill the plaintiff's place. The ship completed her homeward voyage to London. The plaintiff sued for the wages which would have been due to him had he served on the homeward journey. Sir William Scott held: *“Nothing can be better settled than that the act of capture defeats all rights and interests, but it is contended that the former interests revive upon recapture”*,<sup>420</sup> which contention was rejected. Further, Blackburn LJ's dictum in *Dahl v Nelson, Donkin & Co*<sup>421</sup> was considered, noting it was:

*“...held in Geipel v Smith by the whole court, and in Jackson v Union Marine Insurance Co by the majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber that a delay in carrying out a charterparty caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end”.*

Applying that general definition of frustration, it was held that *‘the further performance of ... [the charterparty] within a reasonable time was prevented by an excepted cause - the blockade, which was a restraint of princes. Lush J, in giving judgment, put the pith of the case thus. He said: “If the impediment had been in its nature temporary I should have thought the plea bad, but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like*

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<sup>417</sup> [1916-17] All ER Rep 81, 93-94

<sup>418</sup> *ibid*

<sup>419</sup> This was a ‘complete’ capture, so that the restoration was by paying the statutory salvage, rather than by an underlying doctrine of prize law.

<sup>420</sup> 4 Ch Rob, 144, 145

<sup>421</sup> 6 App Cas 53

*this*’’.<sup>422</sup> It should not be necessary, therefore, in such a case to wait till the delay has occurred, and the presumption that a seizure or requisition will be of a long duration was supported. The fact the charterparty would be lost at any moment after seizure made it ‘reasonable, just and natural’ for the owners to conclude the adventure was ended, and to determine the rights of the crew to wages. It was noted that *Hadley v Clarke* did not establish that while an embargo might be intended to be temporary, if it were prolonged it could never end the contract of affreightment: “*All that was, in fact, decided was the abstract point that a temporary interruption of a voyage by an embargo does not put an end to such a contract. Moreover, the judgments of Grove J, and Laurence J, especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time - the dangers of the seas only excepted*”.<sup>423</sup>

Accordingly, it appears more likely that a fact specific approach will be applied to contracts of employment, to test if they have been terminated by an event of capture. This approach appears to be a more lenient test to the shipowner than the test of whether a charterparty has been frustrated by the occurrence of a similar event. While the earliest laws in New York in 1748 suggested otherwise,<sup>424</sup> the general rule in early authorities in New York<sup>425</sup> and Massachusetts<sup>426</sup> was that a capture dissolved the contracts of employment, and accordingly conformed to English law.

#### **v. Contracts of sale**

Little authority exists on the sale contract in the context of capture. In *Nickoll & Knight v Ashton, Edridge & Co*,<sup>427</sup> the contract of sale was frustrated as a result of the vessel stranding and being damaged, so that she missed the specified month of arrival. The terms of this contract were unusually specific – the cargo should be shipped in one named ship, and that if the ship were unable to complete the voyage, “*In case of prohibition of export, blockade, or hostilities preventing the shipment the contract or any unfulfilled part thereof is to be cancelled*”. Lord Smith MR found that an implied term providing that if the vessel were unable to deliver the cargo in time, due to another cause, the contract would be frustrated. However, he noted that an unconditional contract to deliver goods – not naming a specific vessel – would not produce the same result. Whether a sale contract would be frustrated,

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<sup>422</sup> LR 7 QB, 414

<sup>423</sup> 4 Ch Rob, 144, 145

<sup>424</sup> Wendell Phillips, *A Treatise on the Law of Insurance* (1<sup>st</sup> edn, 1823), 374

<sup>425</sup> *Levanworth v Dalafield* 1 Caines 573

<sup>426</sup> *Penny v New York Ins Co* 3 Caines 155; *Spafford v Dodge* 14 Mass Rep 66

<sup>427</sup> [1901] 2 KB 126 (CA)

therefore, depends on the terms of the contract. It is sufficient to note the possibility that a cargo-owner may well be in breach of a contract of sale by a capture, and yet, under the law as expressed in *Masefield*, be uncompensated for the capture. Even though his cargo might be restored, his commercial relationships will be damaged, and the law will have provided no remedy. Arguably, in both jurisdictions, contracts of sale fall to be considered under general contract law principles of frustration, rather than by a close comparison to the charterparty cases.

### 3.3 Title, Contract and delay

Insurance law should and clearly did impose a different test for total loss than is provided by the property law issue of whether title has been lost. Equally, in relation to whether the venture had been frustrated, each contractual context - charterparty, sale contract, and employment contract - turns on different considerations. A loss of possession either causes delay to or permanently prevents the voyage. Frustration operates when the voyage has been defeated by a radical change in circumstances. However, the test of whether a charter is frustrated for hull and cargo policies appears higher than that of constructive total loss. Except for clear cases of capture in wartime, 'restraint' would seldom excuse non-delivery of cargo under a contract of carriage, and unless insurance applied a different test parties would be in a difficult position.<sup>428</sup> In most situations of restraint, an element of wait-and-see might be applied to determine the charterparty position, as in *Hirji Mulji*, which conflicts with the insured's duty under his policy to abandon promptly. Similarly, the test of whether an employment contract has been frustrated involves some element of wait-and-see, although to a lesser extent than the approach suggested in the context of charterparties. The overall effect is one of uncertainty, absent express contractual provision to a loss of possession event, and it is clear that contract law does not provide a uniform general test that insurance laws might follow. The exception to this difference is that a similar test of frustration effectively applies to charterparties as to constructive total loss of a freight policy.

That different considerations apply to each of these contracts is desirable, and a comparison could be made to the potential benefit of postlimity as a property right transferring to insurers on abandonment. The insurer has a right to property abandoned after a constructive total loss. Where property is abandoned to the insurer, the insurer will have an interest in saving what is left, and it may be that the insurer will be entitled to rely on the continuation of time charters, although of course underwriters should not be forced unnecessarily to take the role of broker

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<sup>428</sup> *Becker, Gray & Co v London Assurance Corpn* [1918] AC 101, 114 (HL)(Sumner LJ); Halsbury's Laws Vol 25 (4<sup>th</sup> edn, 1994), [158] fn 3

or owner. However, there is arguable potential for injustice if the law does apply the same test in this context as to insurance. The aim of commercial insurance must be to protect a merchant in his business, and it should arguably apply a lower test to constructive total loss, than is required to allege frustration of the contract. If a wait-and-see doctrine applies to oblige parties to wait for the ultimate event of any scenario, marine insurance provides little practical protection, especially for cargo interests. It would also leave little meaning for the doctrine that the insurer takes possession of whatever is lost.

Delay and loss of market, absent physical damage to goods, is probably recoverable in a buyer's claim against carrier or seller, given the knowledge reasonably inferred to be in the parties contemplation.<sup>429</sup> Cargo delay is often excused or limited by clauses in the bill of lading, which are usually upheld in England,<sup>430</sup> and accordingly a buyer will often not have a remedy against the carrier. In America, losses from delayed delivery are recoverable pursuant to the Carriage of Goods by Sea Act,<sup>431</sup> whether physical deterioration or economic loss. Terms excluding liability for delay are likewise generally enforced.<sup>432</sup> Accordingly, situations might well arise where the charterparty or sale contract are not frustrated, and the seller or exceptionally the carrier will be liable for losses consequent on delay; simultaneously, they may not be compensated by their insurer. This creates a potential gap in insurance cover, and reveals situations where insurance law does not allow – given the understanding of an exclusion for losses consequent on delay – for the insured's loss to be compensated.

Both property law governing transfer of title, and the doctrine of frustration, are equally unpredictable as to when the original rights are terminated by marine perils. As described in the following chapters, it was once thought that insurance law applied more certain principles, suitable for the needs of commerce. *The Sea Angel*<sup>433</sup> provides a reminder of the lack of certainty in applying frustration. It might have been assumed from the Great War precedents that a period of delay that was significant in relation to the duration of the charterparty would allow frustration. However, given that the delay of about 60 days at the end of a 20 day charter did not frustrate the charter, it might have been thought that insurance would provide a more certain rule. Arguably, the presumptions of total loss formerly applied to the perils of loss of possession supplied this certainty.

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<sup>429</sup> Ordinary remoteness principles in *Hadley v Baxendale* [1854] 9 Ex 341 were applied to this context in the Federal Court in Canada, *Frasier Shipyard v Expedient* (1999) 170 FTR 1, 41, 2000 AMC 586, which arguably would be followed in England.

<sup>430</sup> Gaskell, Asarotis, Baatz, *Bills of Lading: Law and Contracts* (LLP, 2000), [10.51-10.57], William Tetley, *Marine Cargo Claims* (4<sup>th</sup> edn, 2008, Thomson Carswell), 790

<sup>431</sup> Title 46 United States Code §§ 1300-1315

<sup>432</sup> Tetley (2008), 791

<sup>433</sup> [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517

*"I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery".*<sup>434</sup>

In this sentence, *Pollurian v Young* underpins the contemporary understanding of the test of constructive total loss under the 1906 Act. Was Kennedy LJ correct in stating that a test of 'uncertainty' had been applied? Early cases indicate insureds recovered even for short periods of loss of possession. In *Goss v Withers* the insured had a right to abandon on the basis that his property was lost by capture lasting 8 days, with a strong hope of recovery. Contrastingly, by *Masefield* a loss for 41 days did not justify abandonment. In *the Bamburi*, a loss continuing a year was suggested as the minimum to recover for constructive total loss. What explains these increasingly strict judgments? Arguably, a presumption of constructive total loss governed capture claims, but came to be overlooked from *Pollurian*. The following considers evidence for how this presumption was established in the context of capture and seizure, and how it was applied.

#### 4.1 Presumption of total loss on capture established

##### *i. Presumption stated by Treatise writers*

A presumption of total loss on a policy for value in English law was anticipated by Continental treatise writers, and arose on a variety of perils. Emerigon identified those perils potentially causing total loss as "*capture, shipwreck, bris, stranding, arrest of princes, or total loss of the effects insured; and all other damages shall be reputed only average*".<sup>435</sup> Emerigon recognised that capture might not cause an actual total loss, as there was usually a chance of restoration:

*"Capture is the first case, which, according to the Ordonnance, gives room to abandonment, although it often happens that the taking is not accompanied by an actual total loss; as when the ship is retaken by her own crew; when she is recaptured within the twenty-four hours; when she is released by the captor; or she is ransomed".*<sup>436</sup>

Nevertheless, he considered the practical effect of the loss of possession:

*"But as soon as the vessel is taken, the owners are deprived of the domain, or at least of the free disposal of their effects. As against the merchant, the property tied up and uncertain is considered in some manner as if it no longer existed".*<sup>437</sup>

<sup>434</sup> [1915] 1 KB 922 (CA), 936

<sup>435</sup> Emerigon (1850 edn) XVII, [II], 669

<sup>436</sup> Emerigon, 670-671

<sup>437</sup> *ibid*, 670-671

This justified a right to claim for total loss as soon as the capture occurred:

*“Hence, according to the Ordonnance, its loss is presumed to be total, and it is allowed to make abandonment to the insurers of the effects insured”.*<sup>438</sup>

Interestingly, Emerigon noted that the right to give notice of abandonment was absolute following capture, and was not undone by subsequent events. His own opinion, following Roccus, was that he would consider capture (ie loss of possession) as simple stranding, and that if the vessel were recaptured, released or ransomed, so that the vessel was restored to the possession of the owners, the right of abandonment would end.<sup>439</sup> However, he noted French law permitted instant abandonment:

*‘But our jurisprudence is to the contrary. It is established on the strict letter of Art 46 of the Ordonnance from which it is inferred that so soon as the vessel is taken the action of abandonment is open to the assured and this jurisprudence conforms with the doctrine of Valin and Pothier’.*<sup>440</sup>

Emerigon summarised the state of insurance law as understood internationally, at a time when English authorities were first considering valued policies. Emerigon provided that capture granted an instant right of abandonment. Contrastingly, arrest of princes and stranding did not grant that instant right, but a right to claim after a set passage of time.

This presumption of total loss was not universal in European laws. For example, in 1598, the Amsterdam Reglement provided at art 25: *“And happening that a vessel by accident becomes useless to navigate; that goods or vessels insured be captured, plundered, or damaged by enemies or sea pirates, without hope of recovery it belongs to the assured, if good it seems to him, to make a transfer, to abandon such vessel or goods to the profit of the insurers”*,<sup>441</sup> so indicating that a loss of *spes* was required. Yet it was from the Guidon and Emerigon that Mansfield LCJ derived authority for his judgement in *Goss*, which settled an instant right to recover in English law. Marine insurance was not unique in forming presumptions of loss in respect of temporary impediments. There was a comparable presumption at common-law permitting an action for anticipatory breach of undertaking, notwithstanding that the breach

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<sup>438</sup> *ibid*, 670-671

<sup>439</sup> Emerigon (1850 edn), Ch XII; [XVIII], 356

[http://books.google.com/books?pg=PA356&dq=tartane&id=11kDAAAAQAAJ&as\\_brr=1#v=onepage&q=tartane&f=false](http://books.google.com/books?pg=PA356&dq=tartane&id=11kDAAAAQAAJ&as_brr=1#v=onepage&q=tartane&f=false) accessed 7 February 2016

<sup>440</sup> *ibid*, Chap XII; [XVIII], 356; Valin, *Nouveau commentaire sur l’ordonnance de la marine*, Art 46; Pothier, *A Treatise on Maritime Contracts* (trans Cushing C, 1821, Cumings and Hilliard)

<sup>441</sup> Emerigon Ch XVII, I

had actually been remedied,<sup>442</sup> applying the underlying English maxim that “*He that is once disabled is ever disabled*”.<sup>443</sup>

**ii. Established in English law by Mansfield LCJ**

In *Goss* the vessel was captured in the English Channel, where ‘*English cruisers sailed daily in the hope of (re)capturing vessels*’. The insurer, relying on a strong *spes recuperandi* attempted to distinguish capture upon the open seas, where the *spes* was remote. The insured accepted the strong *spes*. Crucially, ‘wait-and-see’ was not adopted, and the ship was a total loss ‘*while in the possession*’ of the enemy:

*‘By the capture the insurers became liable, though never carried into port; and though there may happen a recapture afterwards, that will not ...make any difference ... and though the ship be never condemned, the contract is equally binding, ex. gr. A ship may be taken by a commission from a foreign State, between whom and us there is no war... and in that case there can be no condemnation; so in the case of pirates. Yet a capture, in either of these cases, is, as between the insurer and insured, the same as a taking by an enemy at open war, &c’.*<sup>444</sup>

Total loss was found, ignoring *postliminity* and *spes recuperandi*<sup>445</sup> and justifying ‘instant abandonment’:

*‘...no capture is so total a loss that it is impossible any-thing can be recovered; she may be re-taken, and, be it at ever so great a distance, a right accrues to the owner... this possibility shall not suspend the right the assured had to recover on the contract, but he might abandon his interest in such possibility to the insurer’.*<sup>446</sup>

Capture was equivalent to total submersion, as the vessel lost all commercial utility to the insured during the capture.<sup>447</sup> Further, ransom payments – then both lawful and commonplace – were dismissed as irrelevant in argument, and formed no part of his judgment. In *The Selby*,<sup>448</sup> Mansfield LCJ confirmed that ‘*while the ship was in the hands of the enemy, it was a total loss*’.<sup>449</sup> In *Milles v Fletcher (The Hope)*<sup>450</sup> Mansfield confirmed total loss arose on capture, and stated the whole law on capture and recapture could be found in *Goss* and *The Selby*.<sup>451</sup> Finally, in *Kulen Kemp v Vigne (the Emmanuel)* Mansfield CJ stated that an insured

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<sup>442</sup> *Anon* 1 Buls 117; *Main’s Case* (1596) 5 Co Rep 21a; “*He that is once disabled is ever disabled*” Coke, *Inst* 356); Mustill, 124 LQR 574

<sup>443</sup> Coke, *Inst*, 356; Mustill, 124 LQR 574

<sup>444</sup> 2 Keny 325, 342

<sup>445</sup> *ibid*, 344

<sup>446</sup> *ibid*, 344

<sup>447</sup> 2 Keny 345; 2 Burr 698; the test of total loss on shipwreck evolved with time and technology. For *dicta* for support of this justification see *Anderson v Royal Exch Assur Co* (1805) 7 East, 38, 42; *The Commerce* (1812) 15 East 559, 564, and *The Tartar* (1816) 105 ER 947; (1816) 4 M&S 576

<sup>448</sup> (1761) 1 Black W 277

<sup>449</sup> *ibid*, 279

<sup>450</sup> (1779) 1 Doug 231, [1779] ER 151

<sup>451</sup> *ibid*, 232



on a valued policy could abandon for a ‘temporary capture’, making no reference to testing the *spes*.<sup>452</sup> There was no suggestion of any test of ‘unlikelihood’. Academic authorities, English and American, repeated Mansfield’s judgments in substance:

*“therefore, as to the length of possession by an enemy, which is deemed sufficient to divest the property out of the original owner, or the effect of a re-capture in revesting it, these are now matters which can never come directly into question between insurer and insured. They never could have come in question, in any case of insurance upon real interest; because... they never could have varied the case”*.<sup>453</sup>

After Mansfield LCJ, courts looked only to the facts at the time of the claim. The *spes recuperandi* was not argued to undermine total loss in relation to capture cases for over 100 years.

### **iii.    Meaning of a ‘prima facie right to abandon’; England compared to America**

The right to give a notice of abandonment was not, in the English courts, an automatic right to recover for a total loss in an action against insurers. A distinction existed in England between the facts that entitled an insured to give notice of abandonment, and those which allowed him to recover for a total loss, in particular where intelligence of a capture turned out to be false.<sup>454</sup> Any *spes recuperandi* exposed tension between certain and quick resolution of the parties’ rights, and fairness to the insurer. Commercial considerations, primarily certainty, support an insured’s right to serve a notice of abandonment soon on hearing of a capture. On the information required to give notice, which was the same in America and France, it was held that insureds must act on probable information, and the effect of abandonment would be determined by the eventually ascertained truth or falsehood of the intelligence received. *“If I hear of my ship’s being taken in the East or West Indies, I am not obliged to wait till I certainly know the event by the testimony of those who were present. Provided the event has once existed, what I do, believing it to have taken place, must be valid and effectual”*.<sup>455</sup>

An obvious issue arose on restoration of property after payment by the insurer. Did this unfairly over-compensate insureds? Mansfield held that restoration of property following judgment did not undo the total loss,<sup>456</sup> though the insurer took the property. A grey area remained concerning restoration between notice of abandonment and judgment. By 1808,<sup>457</sup> the parties’ rights settled at the time of action: A *spes recuperandi* existed after any capture.

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<sup>452</sup> (1786) 1 TR 304, 309

<sup>453</sup> eg Marshall (1802), 423

<sup>454</sup> *Bainbridge v Neilson* 1 Camp 240 (Le Blank J); Arnould (1848), 995

<sup>455</sup> *Bainbridge v Neilson* 1 Camp 240 (Ellenborough CJ); Arnould (1848), 1054

<sup>456</sup> (1779) 1 Doug 231

<sup>457</sup> *Bainbridge v Neilson (the Mary)* (1808) 10 East 329, 343 (Ellenborough LCJ), (1808) 103 ER 800 (KB), despite *Holdsworth and another v Wise and others* (Bayley J) (1828) 7 B&C 797, 799

The notice was an offer which remained executory, and as this was a suspended stated of things, “*considering this as a contract of indemnity the assured had a right to look to intervening accidents which might chance to restore them de integro to their former situation*”.<sup>458</sup> Both insurers and insureds had a right to look for such accidents.

Before 1906, parties looked for actual restoration before the date of the action: ‘...plaintiffs must stand, ... in the position in which subsequent events have placed them at the time when they come to demand it that is when the action is brought’.<sup>459</sup> Frequently, this is by agreement taken to be the date of the notice of abandonment, as in *Masefield*.<sup>460</sup> There was no suggestion that at this time the parties would look to future restoration if it had not already occurred.

Contrastingly, American law treated the date of abandonment as the date on which the parties’ rights became finalised: ‘... *under English law the loss must continue until the date of the commencement of the action, although in the United States once an abandonment has been rightfully made, subsequent events cannot divest any rights flowing therefrom*’.<sup>461</sup> This resulted in certainty; “*If the abandonment, when made, is good, the rights of the parties are definitively fixed, and do not become changed by any subsequent events*”.<sup>462</sup> This was an expressly considered policy:

“*If this doctrine be not true, but the rights of the parties are held to be uncertain and fluctuating, after a regular abandonment, under circumstances which by the laws of insurance constitute a total loss, there seems to be no reason why the commencement of the action should be fixed upon as the time when this uncertainty is to cease... But how great the inconvenience would be to the public, and to the parties to the contract, that the degree of responsibility of the insurer should not be known until the end of a law suit is attained, must be obvious to everyone who considers the importance of having some legal owner of the property abandoned, to prevent its waste and destruction*”.<sup>463</sup>

Later, some consideration was given to subsequent events, such as where the cost of repair proved to be less than anticipated, and these were put to a jury to determine whether

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<sup>458</sup> *Brotherston and Another v Barber* (1816) 5 M&S 418, 421-424, (1816) 105 ER 1104

<sup>459</sup> *Brotherston* (1816) 5 M&S 418, 423-424; followed in *Cologan and another v The Governor and Company of the London Insurance (the Friendship)* (1816) 5 M&S 446, (1816) 105 ER 1114; *Ruys v Royal Exchange Assurance Corporation* [1897] 2 QB 135

<sup>460</sup> *Peele v Merchants Insurance Company* (1822) 19 Fed Cas 102

<sup>461</sup> Constructive Total Loss Doctrine in Marine Insurance, *Columbia Law Review*, Vol 51, No 4 (Apr, 1951) 526-529, 527

<sup>462</sup> *Bradlie v Maryland Ins Co* 37 US (12 Pet) 378, 397 (1838) (Story J); *Orient Ins Co v Adams* 123 US 67, 76 (1887); Herbert Lord, ‘*The Hull Policy: actual and constructive total loss and abandonment*’ 41 *Tul L Rev* 347 (1966-1967) 354

<sup>463</sup> *Lee v Boardman* (1807) 3 Mass Rep 238

abandonment was justified when given.<sup>464</sup> Clearly, American courts aimed to reduce the uncertainty suffered by the parties by crystallising their obligations at a particular date (see 1.5, above). This intentionally prevented enquiry into future events, from that time, or from the time of trial. In particular, the *spes recuperandi* at the time of abandonment was never introduced into this discussion. While English courts have moved away from this degree of finality in other contexts (eg *The Golden Victory*<sup>465</sup> on anticipatory breaches of contract) nothing in the pre-Act law challenged this presumption. Further, the only approval of an approach looking to post writ-agreement events comes from writers long after the 1906 Act.<sup>466</sup> There is arguably more commercial sense in the American rule on abandonment, and little published justification exists of the now entrenched English rule. In a passage echoed in *Ruys v Royal Exchange*,<sup>467</sup> a New York court held the time of abandonment was the most natural and convenient period. The assured must make his election to abandon or not in a reasonable and short time after he hears of the loss. Property was transferred by the abandonment, and could never afterwards be claimed by the assured. Want of mutuality was want of justice. Consequently, there was no reason why the assured should be bound, but the insurer left free to take advantage of events subsequent to notice.<sup>468</sup>

Authorities on total losses for delay often concerned situations where the *specie* had been released by the date of the action, and accordingly the divergence of approach on the effect of giving notice of abandonment creates real differences between the American and English cases, despite the desirability of these laws being in harmony. Notably, no recent English authority has considered the length of time an insured might wait before abandonment, hence a potential trap is set by wait-and-see.

The ‘presumption’ of total loss appears a legal presumption, not a rebuttable evidential presumption. For example, at early date, other presumptions in insurance could be rebutted by surrounding circumstances. Contra the presumption of total loss on sinking, in 1868 it was stated: “*The mere fact of submersion of the vessel does not amount to a total loss. On the high seas it affords strong prima facie evidence, but in the shallow waters of the Missouri it does not afford even a presumption*”.<sup>469</sup> Contrastingly, the fact of capture was a presumption in

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<sup>464</sup> *Orient Ins Co v Adams* 123 US 67, 76 (1887)

<sup>465</sup> *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 AC 353; doubted in favour of certainty, Mustill (2008) 124 LQR, 569

<sup>466</sup> eg Gauci, ‘*Total Losses and the Peril of Piracy in English Law of Marine Insurance*’ WMU J Marit Affairs 11:115, 122

<sup>467</sup> [1897] 2 QB 135, 142

<sup>468</sup> *Rhineland v Insurance Company of Pensylvania* 8 US 29, 4 Cranch 29 February Term 1807 (Tilghman ChJ)

<sup>469</sup> *Copeland v Phoenix Ins Co; same v Security Ins Co* Case No 3,210 Circuit Court, D Missouri 6 Fed Cas 507; 1868 US App Lexis 1203; 2 West Jur 341, citing Emerigon *Traite des Assurances et des Contrats a la Grosse*

that it allowed abandonment to be made, and claims to be successful, even where the hope of recovery was strong. Pre 1906, the presumption could only be rebutted where possession was in fact restored.

## 4.2 Application:

### i. *In England on Capture*

“Capture *simpliciter*” – where no recapture or release or restoration occurred by the date the action - was not contested until *Masefield*. Numerous *dicta* supported a presumption of total loss. In a case involving capture by a privateer, and recapture by another privateer, Mansfield LCJ clarified, “*In effect, there was only a temporary capture, and though by construction a temporary capture is such a loss [as to justify abandonment, ie a total loss], as that an assured upon interest is warranted in abandoning at the time, if he please*”.<sup>470</sup> In *Holdsworth v Wise* it was held ‘...in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss’.<sup>471</sup> The period the peril might continue was not investigated. The insurer could only defend by shewing that the capture had already ended. In *M’Iver v Henderson*<sup>472</sup> where recapture occurred after proceedings were instituted:

*“It has not been disputed, nor can it with any colour of argument be contended, that on the 4<sup>th</sup> of April 1814 there was not a sufficient ground for the abandonment of the ship... The ship had been captured... and possession of her was not restored till afterwards, i.e. on the 11th of May 1814”*.<sup>473</sup>

The presumption was articulated in *Dean v Hornby*.<sup>474</sup> The vessel was insured on a one year time policy from April 1851. In December 1851 she was captured by pirates in the Straits of Magellan but recaptured by the Royal Navy in January 1852. The owners learned of both events simultaneously, and abandoned. The Prize Master sold her. The Admiralty Court held the proceeds pending the dispute between owners and insurers.<sup>475</sup> Campbell LCJ held that the owners could recover for a total loss, stating that once a ship was taken by pirates: ‘*then, in fact, a total loss has occurred*.’... ‘...once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration’.<sup>476</sup>

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(Mossy 1783) XII, [12], [13]; *Goss v Withers* 2 Burrows 697; *Anderson v Royal Exchange Assur Co* 7 East 38; *Sewall v US Ins Co* 11 Pick 90

<sup>470</sup> *Kulen Kemp v Vigne* (1786) KB 1 TR 304, 309

<sup>471</sup> (1828) 7 B&C 792, 799

<sup>472</sup> (1816) 4M&S575, (1816) 105 ER 947 (KB)

<sup>473</sup> *ibid*, 583

<sup>474</sup> (1854) 3 El&Bl 180

<sup>475</sup> Sale, as in *Stringer*, justified a claim for total loss without abandonment.

<sup>476</sup> (1854) 3 El&Bl 180, 190

Coleridge J held simply: ‘*There was a capture by pirates; and, if that were all, there would unquestionably be a total loss*’.<sup>477</sup> These judgments followed *Goss* in ignoring any *spes*, and restated the presumption. *Dean v Hornby* was considered in *Masefield*, although the presumption repeated in the case was arguably overlooked, as *Dean* was not contextualised against earlier authorities, which excluded property tests and the *spes recuperandi*.

In *Ruys v Royal Exchange Corporation (the Doelwyk)*<sup>478</sup> a vessel insured on a war risks policy was captured by the Italian navy on 8 August 1886, during the First Italo-Abyssinian war. Notice was given on 14 August. It was refused. The action was brought on 21 August. On 8 December, the Italian Prize Court held her lawful prize, but ordered her restitution as the war had ended.<sup>479</sup> Subsequently, the insureds recovered for total loss. *Hamilton v Mendes* was applied by Collins J.<sup>480</sup> Notwithstanding the restitution, a presumption of loss applied, that war would be of an indefinite duration.<sup>481</sup>

The House of Lords applied the presumption in *Andersen v Marten (the Romulus)*.<sup>482</sup> The insured vessel was captured by the Japanese during the Russo-Japanese war, and wrecked under the captors’ control. The Japanese Prize Court subsequently condemned both vessel and cargo. The insured claimed loss by perils of the sea, an insured risk. The insurers alleged total loss by capture, a risk not insured. Loreburn LC observed that legal property had not passed and noted the *spes recuperandi*, though ‘possession’ was lost.<sup>483</sup> He held that on the day of capture there was; ‘*a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released*’.<sup>484</sup> The Earl of Halsbury confirmed that the presumption had been the settled law for 150 years (since *Goss*), and, ‘*it would be a bold thing to argue against a judgment of the full Court of King’s Bench presided over by Lord Mansfield*’.<sup>485</sup> Consequently ‘... *it would have been impossible in an English Court to deny that there was a total loss to the owner on [capture]*’.<sup>486</sup> The unfavourable *spes* reinforced the decision, but formed no part of the applicable test; there was no test of ‘uncertainty’. The House of Lords confirmed *Goss* that the *spes* did not undermine a claim for a total loss on subsisting capture.

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<sup>477</sup> *ibid*, 192

<sup>478</sup> [1897] 2 QB 135

<sup>479</sup> English law never speculated as to how long a war might last, instead presuming an indefinite duration, *Patterson v Ritchie* (1815) 5 M&S 393, *Smith v Robertson* (1814) 2 Dow 474

<sup>480</sup> Susan Hodges, *Cases and Materials in Insurance Law* (Routledge)

<sup>481</sup> *Patterson v Ritchie* (1815) 5 M&S 393; *Smith v Robertson* (1814) 2 Dow 474

<sup>482</sup> [1908] AC 344 (HL), [1907] 2 KB 248, [1908] 1 KB 601

<sup>483</sup> *ibid*, 339

<sup>484</sup> *ibid*, 339

<sup>485</sup> *ibid*, 341

<sup>486</sup> *ibid*, 340-1

Isolated extracts support the view that capture might not operate as a total loss. In *The Hope*, Mansfield recognised: *'It was not contended, that a capture necessarily amounts to a total loss as between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo'*.<sup>487</sup> In context, these dicta refer to the possibility of recapture having occurred by the time notice was given, never whether it might occur after that date.

*Stringer and Others v The English and Scottish Marine Insurance Company*,<sup>488</sup> properly understood, supported the presumption of total loss. The policy in *Stringer* covered goods shipped to America. The vessel was captured by the American navy in 1863 and carried to New Orleans where part of the cargo was expected to be condemned by the Prize Court. The insured, expecting a profitable market possession could be recovered, did not abandon, instead contesting the prize proceedings. The prize litigation took far longer than the insured expected. The insured could have had his goods returned at any time, on giving sufficient security to the New Orleans court. The Exchequer Chamber - and other uninsured cargo interests - considered that no sane man would have given security, due to fluctuations in the value of the currency. After 18 months, the goods were held an unlawful seizure and restitution ordered. The captors appealed. The prize court sold the goods holding the proceeds pending the further appeal. Subsequently, the insured claimed on his policy for total loss. Three factual situations arose sequentially: (i) capture *simpliciter*; (ii) on-going detention after no notice was given; and (iii) following judicial sale. On capture *simpliciter*, Blackburn J stated; *'It is clear at this time the cargo was, by one of the perils insured against, taken entirely out of the control of the assured, under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances, the assured has a right... abandon it to the underwriters and claim for a total loss'*. On the insured's appeal, Kelly CB agreed with that assessment of the original loss. However, the insured had not abandoned promptly, thereby estopping himself from claiming for a total loss in the second situation. In *Masefield*, it was overlooked that the plaintiff in *Stringer* could have claimed for constructive loss at once.

Commentary supported an instant right of abandonment. A textbook endorsed by Mansfield LCJ stated: *'[On policies with an interest] ...in cases of capture the underwriter is immediately responsible to the insured. But if the ship be recovered before a demand for indemnity the insurer is only liable for the amount of the loss actually sustained at the time of*

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<sup>487</sup> (1779) 1 Doug 231, 233

<sup>488</sup> (1870) LR 5 QB 599

*the demand ...*<sup>489</sup> Academic works recorded that an abandonment could be made instantly, further supporting the rule that the spes was not a requirement of a plaintiff's case.

## *ii. In America on capture*

This presumption was equally applied in courts in American states<sup>490</sup>. Early English and American authorities unanimously affirmed that capture *simpliciter* established a total loss justifying instant abandonment.<sup>491</sup> Early American authorities followed the English presumption. In *Mumford v Church*<sup>492</sup> the insured vessel sailed on 12 May 1798. On 16 May she was captured by a British vessel and carried into Mole St Nicholas. She was detained for three weeks, and restored to the captain on his paying charges. After her release, she remained there three weeks longer. Part of her cargo of flour was sold there. On 19 June a Vice-Admiralty court decree restored the brig on the payment of charges. This decree, and the captain's protest, were delivered to the plaintiff who abandoned promptly, on about 1 July. The vessel's condition after capture entitled the insured to abandon. He abandoned on the first intelligence of the capture on 12 June. However, the vessel, unknown to insured or insurer, was then decreed to be restored on 19 June. The insurer argued this reduced the loss to a partial loss, and deprived the insured of the right to abandon. As the abandonment was before the decree of restoration, the court upheld the abandonment. Contra the English rule that events between abandonment and the action can undo a total loss, it was held the insured must act according to the information he possessed. The abandonment would be determined by the correctness of the information, but it was clear that where the insured "*had a right to proceed, and make the abandonment upon the information he then possessed; and the abandonment being rightfully made, [it] must be definitive*".

The American court expressly preferred to satisfy the requirement of certainty. The court stated the contrary idea was inconsistent with a perfect right to abandon. It would render it precarious and uncertain, by being subject to the contingency of intermediate events, and liable to be defeated. To preserve consistency in the law on this subject, and to establish certainty in its rules, the court held it was necessary to maintain the conclusiveness of an abandonment when properly made, and to allow the plaintiff to recover for a total loss.

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<sup>489</sup> James Allen, *A System of the Law of Marine Insurances with three chapters, on bottomry, on insurances on lives and on insurances against fire* (1787, T Whieldon), 87

<sup>490</sup> *Rhineland v Insurance Company of Pennsylvania (the Manhattan)* (1807) 8 US 29, (1807) 4 Cranch 29; *Marshall v Delaware* (1808) 8 US 4 Cranch 202

<sup>491</sup> *Marshall* (1802), 422-423, expanding on *Mansfield LCJ* (1758) Keny 325, 342

<sup>492</sup> 1 Johns Cas 147; 1799 NY Lexis 131 (Lansing ChJ)

The American law was clear that the insured could abandon instantly, but that this abandonment had to be made quickly:

*“The rule laid down is, that where there is a capture, the insured may abandon at once and recover for a total loss, and leave the spes recuperandi to the underwriter, who will have the benefit of any accident by which the thing may be recovered. But he must make his election whether to abandon or not within a reasonable time after notice of the loss”*.<sup>493</sup>

An illustration of the speed required was illustrated where a policy covering goods from Philadelphia to St Sebastians was ‘warranted not to abandon if detained or captured, if the property is released in six months after notice to the insurers, no risk taken in port but sea-risk’. The vessel was boarded by an armed launch close to St Sebastians, and was taken by a prize master to Port Passage, where after eight days’ quarantine she was ordered to St Sebastians. A French crew took her to Bayonne. There the cargo was requisitioned by the French government. This was held a total loss by the initial capture, not the seizure in port.<sup>494</sup> Crucially, “...where the insured received intelligence of the capture on the 10<sup>th</sup> of July, and did not abandon until December; it was held to be too late, and that although the underwriters may be notified of the capture, they are not bound to hasten the assured in making his election, nor offer to pay before it is demanded”.<sup>495</sup> *Mauran v Insurance Company* confirmed *Goss v Withers*, in that the insurer was liable for a loss by capture whether or not the property was transferred. In every case of illegal capture, title was not transferred, but the effect was “the same as in case of a capture by an enemy in open war”.<sup>496</sup>

In *Rhineland v The Insurance Company of Pennsylvania (the Manhattan)*,<sup>497</sup> The *Manhattan*, a neutral ship, was captured by a belligerent. She was carried into port, and libeled as prize of war, but afterwards acquitted. Marshall CJ, used the language a ‘real’ loss in contradistinction to a ‘legal’ or a ‘technical’ loss. He confirmed that ‘capture by one belligerent from another constitutes, in the technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may afterwards be recaptured and restored’. That was the rule, not any test of uncertainty. He explained that the right to abandon immediately existed ‘because the hope of recovery is too small and too remote to suspend the right of the insured in expectation of that event’.

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<sup>493</sup> Sherman, *Marine Insurance* (1841), 105; *Duval v The Commercial Ins Co* 10 Johns Rep 278

<sup>494</sup> *ibid*

<sup>495</sup> Sherman (1841), 259-260; *Calbraith v Gracie* 1 Wash CC Rep 198, 219, 2 Condry’s Marsh on Ins, 599

<sup>496</sup> (1867) 73 US 1; 18 L Ed 836; 6 Wall 1, 19

<sup>497</sup> (1807) 8 US 29, (1807) 4 Cranch’s Reports 29



Further, he explained that there were situations in which the delay of the voyage, and the deprivation of the right to conduct it, produced inconveniences to the insured for the calculation of which the law affords and can afford no standard, and could not properly compensate. In such cases there was, for the time the peril lasted, a total loss. While that lasted the insured might abandon to the underwriter, who stood in his place and to whom justice was done by abandonment, allowing him to receive all property recovered. Enemy capture and an embargo by a foreign power were known to fall within that rule. He held a complete arrest by a belligerent not an enemy seems in reason be treated the same. This confirmed the presumption of total loss even for an embargo. He stated further, “[i]f a neutral ship be captured as enemy property, the taking is unquestionably with a design to deprive the owner of it, and the hope of recovery is in many cases remote, since it may often depend on an appellate court, and though not equally improbable as in the case of capture by an enemy, is not so certain as is stated in argument by the counsel for the defendants”. This illustrates a conflict between the intention of the person taking it, and the laws that would be upheld by their government. The availability of a remedy in law by prize proceedings did not suspend the right of abandonment. The fact that capture of neutral vessels was unlawful, and ought always to result in restitution, did not mean that as restoration should follow, the insured would not recover.

The American law was confirmed in *Marshall v Delaware Insurance Company*, where Marshall CJ stated a presumption of total loss on capture, detention and embargo, worth recalling fully:

“...the voyage may be really broken up without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are for the time total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage or ruin the assured by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment and a recovery for a total loss”.<sup>498</sup>

This was not stated as a test of irretrievability; any element of uncertainty justified the claim, but this uncertainty was presumed, and did not need to be pleaded or determined. This instant right of abandonment conformed to English law at the time. In *Insurance Company v*

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<sup>498</sup> (1808) 8 US 4 Cranch 202

*Glosser*<sup>499</sup> Clifford J further endorsed the presumption of loss on capture. He noted that ‘utterly lost’ was a strong expression intended to distinguish the situation where the vessel was ‘technically lost’ as after an abandonment. He noted a ship was not ‘utterly lost’ while in the hands of owners. However, a vessel taken by an enemy “*would have been utterly lost to the owner*”, unless there was recapture or restoration, and this was akin to destruction by fire or wreck, absent salvage of any remaining parts.<sup>500</sup>

Further, authority confirmed that it was the fact of the vessel being restored at the time of abandonment that worked to undo the loss, and there was no test of ‘uncertainty’ applied. Statements such as the following were typical: *‘it is well settled that the right to abandon depends upon the state of facts existing at the time the offer is made and not on the information of the assured; and it is equally well settled in cases of capture, that if, before abandonment, the vessel is restored, the underwriter is not liable for a total loss, unless the voyage be lost, or not worth pursuing, or the salvage exceeds half the value.’*<sup>501</sup> Such dicta nowhere contained reference to the length of time a capture or loss of possession lasted.

Those rules were supported by early American academic authorities. Sherman confirmed that: To constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against, but this total loss may be either real or legal.<sup>502</sup> Importantly, a capture gave an instant right to abandon, notwithstanding subsequent events: “*A capture from one belligerent by another constitutes a total loss in the technical sense of the phrase, and gives the insured an immediate right to abandon to the insurers, although the vessel may be afterwards recaptured or restored*”.<sup>503</sup> The same presumption applied to a broader range of situations than legal capture: “*A capture by a friend or the carrying a neutral vessel into port for the purpose of adjudication as contradistinguished from a capture by an enemy is a good ground for abandonment... And such a capture is prima facie evidence of a total loss and the insured may abandon immediately on receiving intelligence of it*”.<sup>504</sup> To circumvent this underlying law, in America it became standard for policies to specify the time before which abandonment could be made on capture, eg by the clause:

*“Warranted not to abandon in case of capture, seizure, or detention until after condemnation of the property insured, nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or*

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<sup>499</sup> 96 US 645, 24 L Ed 863 (October Term 1877) (Error to the Circuit Court of the United States for the District of Massachusetts), citing *Insurance Company of Pennsylvania v Duval et al* 8 S&R (Pa) 138

<sup>500</sup> *Insurance Company of Pennsylvania v Duval* 8 S&R (Pa) 138

<sup>501</sup> *Marshall v Delaware Ins Co* 4 Cranch US Rep, 202

<sup>502</sup> Sherman, *Marine Insurance* (1841), 220

<sup>503</sup> *ibid*, 220

<sup>504</sup> Sherman (1841), 8; *Murray v The United Ins Co* 2 Johns Cases 263

*blockade, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage”*.<sup>505</sup>

Such clauses prevented insureds from refusing to use their best efforts to recover their property. The clause suggests the underlying law must have been that on capture, seizure or detention alike, the insured could regard the property as lost and abandon at once.<sup>506</sup> This encouraged insurers to protect their interest by particular wording in policies, eg where ‘...*the policy contained the usual printed clause to be free from any loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade and also the following written clause warranted not to abandon if turned away nor if captured until condemned*’.<sup>507</sup> If the law did not make those assumptions of total loss – ie an instant right of abandonment – such a clause made little commercial sense. Rather, it appears that the law on capture was once identical in England and American States; there was a presumption of total loss.

### **iii. On “seizure”**

In English decisions, did seizure likewise grant the insured a *prima facie* right to abandon? The peril was less frequently considered than capture, perhaps because the perils were not clearly distinguished. Nevertheless, unanimously, *dicta* in pre-Act cases suggest so. In *Mullett v Shedden (the Martha)* on capture, ‘*No circumstance has happened since the seizure to make the original detention less than a total loss*’.<sup>508</sup> In *Lozano v Janson*,<sup>509</sup> counsel for the insurer argued: ‘*At all events, the seizure did not prima facie constitute a total loss*’. Crompton J replied, ‘*I think that it did; and that the onus of shewing the contrary rests upon the underwriters*’.<sup>510</sup> Further supporting *dicta* appear in *Dyson v Rowcroft*,<sup>511</sup> *The Friendship*,<sup>512</sup> and *Kaltenbach v MacKenzie*.<sup>513</sup> The *spes* remained untested, either as ‘uncertainty’ or ‘unlikelihood’. The simple issue was factual possession at the time of abandonment.

In *Mellish v Andrews (The Minerva)*,<sup>514</sup> where insured cargo was removed by the Swedish government on 7 December 1811, abandonment given on 17 January was out of time –

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<sup>505</sup> Solomon Stephen Huebner, *Marine Insurance* (New York, Appleton 1922), 73

<sup>506</sup> *ibid*, 73

<sup>507</sup> *Speyer v The New York Ins Co* 3 Johns Rep 88; Sherman, *Marine Insurance*, 16

<sup>508</sup> (1811) 13 East 304, (1811) 104 ER 387 (Bayley J)

<sup>509</sup> (1859) 2 E&E 160

<sup>510</sup> (1859) 121 ER 61, 172

<sup>511</sup> (1803) 3 Bos& Pul 473, 477, (1803) 127 ER 257 (CP)

<sup>512</sup> *Cologan and another v The Governor and Company of the London Insurance* (1816) 5 M&S 446, (1816) 105 ER 1114

<sup>513</sup> (1878) 3 CPD 467, 474

<sup>514</sup> 15 East 13

incidentally illustrating that a wait-and-see approach is unworkable for insureds. Where cargo was ultimately sold in April by the Swedish government, it was possible to abandon without notice of abandonment. Here, sale following seizure appeared to be an actual total loss, and there was no break in causation.

In *Naylor v Palmer*, the mutiny of those who took the vessel but abandoned it and showed no desire to keep it, was ‘seizure’. It was held that the mutineers’ abandonment of the vessel did not amount to a restoration to the owners. The taking of the vessel was as much a cause of the loss as if it had been taken by strangers, and abandoned. If the cargo had consisted of wild animals who had escaped, or let lose, and could not be regained until after the captors abandoned possession.<sup>515</sup> It is clear that this was a case of seizure, given the absence of intention to permanently deprive. Nevertheless, total loss was found. Confirmation of this presumption appeared in the *Minden*, *Wangoni*, *Halle* where the approach was wholly different to that in *Fooks*, in that the right to claim immediately was recognised, and similar facts were considered akin to capture:

*“Prima facie, when once it is accepted that there has been a seizure or capture of the goods, there is ‘the right of abandoning immediately’ and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea”.*<sup>516</sup>

In *Alexander v Baltimore Insurance Company (the John and Henry)*,<sup>517</sup> while prosecuting her voyage, the vessel was seized on 2 October 1803 by a French privateer and carried into port, where the cargo was taken by a French garrison. The vessel was restored to the possession of the master, who remained in port awaiting payment for the cargo taken. On 4 November, she was seized by a British vessel and condemned as prize. The policy was on the vessel only, not the cargo. It was held that there was no total loss “...during the existence of such a detention as amounts to a technical total loss, the assured may abandon, but it has also been decided that the state of the fact must concur with the state of information to make this abandonment effectual”.<sup>518</sup>

The vessel’s return ended the total loss on the hull. In all situations of seizure, as in *The Romulus*, the rule was clear: ‘The ship was a total loss from the moment she passed into the possession of the [captors]’.<sup>519</sup> Where captors had ‘possession’, because the free use and disposal was ‘suspended or rendered uncertain’, the situation was construed as total

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<sup>515</sup> *Naylor v Palmer* (1854) 8 Ex Rep 750, 751 (Pollock CB), 10 Ex Rep 381 (Colridge J)

<sup>516</sup> [1941] 3 All ER 62, 84; Phillips Vol II, 319

<sup>517</sup> (1808) 8 US 370

<sup>518</sup> 8 US 374, 378

<sup>519</sup> *ibid*, 342

deprivation,<sup>520</sup> and there appeared no conceptual difference in approach between capture and seizure. The case of *Fooks v Smith*,<sup>521</sup> where condemnation following Austrian seizure in anticipation of hostilities breaking out was found to be an event outside the ordinary consequences of restraint of princes, therefore stands in contrast to the earlier authorities, and it is difficult to see a good ground explaining the different outcome, in that the pre-Act rule was clear.

**iv. Displacing the prima facie right to abandon; recapture or release**

After recapture or release the parties reassessed whether the loss continued total. Recapture might not restore possession to the assured, and even after restoration of possession, the loss might continue to be total.

Recapture by a friendly ship might not restore possession to the insured where the insured had no agents to receive it.<sup>522</sup> Where perishable goods have spoiled during the capture possession was not restored.<sup>523</sup> To reduce a total loss, ‘...*The ship must be in esse in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it*’.<sup>524</sup> *Dean* was not, as suggested in *Masefield*, a case of capture *simpliciter*. It was deemed inevitable in *Dean* that recaptured property or proceeds of sale would be restored to the insured. This was ‘*immaterial*’.<sup>525</sup> The issue was whether when the action was brought the assured possessed the means of obtaining possession from the recaptors’ agent. The court unanimously held that it had not; recapture had not restored possession.

Restoration might be effective. In *Parsons v Scott (the Little Mary)*,<sup>526</sup> an insured vessel captured by the enemy French was liberated on payment by the master of ransom, on condition of his returning English prisoners to England to be exchanged for an equal number of French. On news of the capture - after her release - the owners abandoned her to their insurers. At Portsmouth, the captain refused to deliver her to the owners unless they reimbursed him. Refusing, the owners claimed for a total loss. On appeal, the claim was dismissed. By then, payment of ransom to an enemy was illegal,<sup>527</sup> and the master could not claim the

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<sup>520</sup> Marshall (1802), 484

<sup>521</sup> [1924] 2 KB 508

<sup>522</sup> *Mitchell v Edie (the Lady Mansfield)* (1787) 1 TK 609, (1787) 99 ER 1278

<sup>523</sup> *The Friendship* (1816)

<sup>524</sup> *Holdsworth and another v Wise and others* (1828) (Bayley J)

<sup>525</sup> (1854) 3 El&Bl 180, 191; cf presumption British prize court would apply the law correctly.

<sup>526</sup> (1810) 2 Taunt 363, (1810) 127 ER 1118

<sup>527</sup> Manning of the Navy Act 1805, 45 Geo 3, c 72, s 16

reimbursement. The owners could therefore take possession without reimbursing him. Lawrence J stated:

‘...wherever the voyage insured is defeated by any of the perils insured against, there is a total loss: ...no authority ... applies to the case where the ship was, or might have been in the hands of the owner, in the country where the owners reside’.

Significantly, the ship was actually in safety at the time of abandonment, so this did not undermine the presumption on capture *simpliciter*. Not all restoration to the home country would be effective, as where barratrously seized property was recaptured and sold for the recaptor’s benefit in England.<sup>528</sup>

*Dean* was cited in *Masefield* as the most apposite authority. Rather, *Dean* followed ‘*The Martha*’,<sup>529</sup> where the recaptured ship was sold before the action. The judgment ought to have been that she was a ‘loss without abandonment’ because of that sale. The operative issue was the factual situation at the time of the action. More relevant authority for *Masefield* was *Goss* and *The Romulus*. Although *Dean* was cited in *Masefield*, neither judge addressed what the real issue had been in *Dean*, or considered then contemporary authorities.

A loss is not adeemed merely on restoration,<sup>530</sup> and in *Goss*, on restoration, Mansfield LCJ established different tests of loss to those applicable on capture *simpliciter*, namely whether: (i) the insured lost his voyage, (ii) repairing her was un-commercially expensive, and (iii) cargo had physically spoiled. In *The Selby*, after restoration of a lightly damaged vessel, where the voyage was not significantly interrupted, and the salvage costs low, the tests from *Goss* were confirmed.<sup>531</sup> After restoration, losses only continued total where: (i) the cost of repair was prohibitively high (*The Selby*; *The Hope*<sup>532</sup>), and (ii) on destruction or decomposition of the property. In every authority where the loss was partial, the insured abandoned after restoration. It is only in this context, with possession actually restored, that a test of foreseeability, or a hope of inexpensive repair, applied to total losses.

Although not discussed in English authorities, Emerigon considered that a release of a vessel by captors, even after 24 hours safe possession (so transfer of title) would restore possession to the assured. However, if abandonment had been made before that release, the vessel would be taken by the insurer, and the total loss would not be undone.<sup>533</sup>

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<sup>528</sup> *Dixon v Reid* 5 B&Ald 597 (Tenterdon LJ); Arnould (1<sup>st</sup> edn, 1848), 1117

<sup>529</sup> (1811) 13 East 304, (1811) 104 ER 387

<sup>530</sup> Francis Rose, *Marine Insurance; Law and Practice* (2<sup>nd</sup> edn, 2012, Informa), [21.47]ff

<sup>531</sup> 2 Burr 1199, 1209

<sup>532</sup> (1779) 1 Doug 231

<sup>533</sup> Emerigon (1850 edn), Ch XII, s XXIII

v. *Effect of condemnation or sale*

English authorities

A loss by loss of possession may be actual or constructive. The House of Lords stated in *the Minden; Wangoni; and Halle* that it could not be doubted that a constructive total loss of goods might arise when they were taken from the possession of the insured or his bailee, for example by pirates, rovers or thieves. If there could be an actual total loss in such cases, there was no reason why the law would not recognise a constructive loss under s 60 of the Act.<sup>534</sup> Condemnation by a competent court, or sale, transfers the property. Arnould recorded that condemnation was effectively actual total loss – that is, that the claim could be made without giving notice of abandonment. The law appeared to be that an insured, on seizure and confiscation of goods, might claim a loss without a notice of abandonment, but if restoration of any part took place he could only recover an average loss. “*in order to recover as for a total loss under such circumstances, in any event, he must give due notice of abandonment*”.<sup>535</sup> This clearly recorded a presumption of total loss, and made no reference to any change of circumstances after the action was commenced.

Concerning sale, the first case on abandonment in English law,<sup>536</sup> in 1744, was that where the vessel was sold to pay salvage, the insured could recover for a total loss, ie the loss was not caused by any inability of the insured to pay.<sup>537</sup> The draftsmen’s guidance notes stated that judicial sale following a vessel’s desertion on a sinking condition was an actual total loss, despite subsequent salvage:<sup>538</sup> ‘... *after the sale under the decree of the Court of Admiralty there was an actual total loss. ..., it is as much a total loss as if it had been totally annihilated*’.<sup>539</sup> The pre-Act authorities indicate sale justified total loss without abandonment.

American authorities

It was held in America that where the policy provides that a constructive total loss claim may only be made after loss of possession for six months, condemnation justified a claim for an actual total loss at once:

*“Where a policy contained the like clause, “warranted not to abandon in case of capture or detention, until six months after notice thereof to the insurers,” and the vessel was condemned in less than one month after her capture, and the insured*

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<sup>534</sup> *The Minden; Wingoni; Halle* [1942] AC 50 (HL), [1941] 3 All ER 62

<sup>535</sup> (1<sup>st</sup> edn, 1848), 1008; (3<sup>rd</sup> edn, 1866), 887

<sup>536</sup> Marshall, (1<sup>st</sup> edn, 1802) 560

<sup>537</sup> *Pringle v Hartley* 3 Atk 195

<sup>538</sup> *Cossmann v West* (1887) 13 App Cas 160 (PC); Chalmers and Owen, *The Marine Insurance Act 1906* (1<sup>st</sup> edn, 1907, William Clowes & Sons Ltd), 79-80

<sup>539</sup> *Le Cann* [1886-90] All ER Rep 957, 961-2

*thereupon abandoned: it was held, that the insured had a right to abandon immediately after the condemnation, inasmuch as the warranty was limited to the case of capture and detention only*".<sup>540</sup>

The right to abandon following condemnation was something more than a continued loss of possession. It was a new event, justifying total loss without abandonment. In no sense was ultimate condemnation a clarification of the earlier loss of possession. Rather, "*A Capture is a constructive total loss, for which the assured may lawfully abandon, and a subsequent condemnation is but an aggravation of the capture*".<sup>541</sup> Other authorities simply held that condemnation was a total loss, without clarifying whether that was actual or constructive.<sup>542</sup>

### 4.3 Capture and causation

Where the occurrence of a peril specified in the policy is followed by capture, issues of causation arise. In *Cory & Sons v Burr*, Field J analysed the doctrine of causation in relation to an act of 'barratry' followed by an act of seizure. The policy contained the FC&S clause. Citing *Livie v Janson*<sup>543</sup> and *Green v Elmslie*<sup>544</sup> he stated:

*"[where] the ship, being by perils of the seas placed in such a position as to be exposed to capture, is captured, the loss is to be assigned to the proximate cause – the capture, and not the remote cause, - the perils of the seas, and so is within the exception [FCS]"*.<sup>545</sup>

In *Green v Elmslie* "*the Fly*", insured against capture only, was driven by a gale onto the enemy French coast. Without having received any material damage by the stranding, she was captured. This was held to be a loss, not by perils of the sea as the insurer contended, but by capture. Lord Kenyon held that: "*the case was too clear to admit of argument; this was a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety*".<sup>546</sup> The capture was not seen as a foreseeable consequence of stranding caused by weather. The capture was not part of a chain of causation beginning with the stranding. The capture was the proximate cause of the loss.

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<sup>540</sup> Sherman, Marine Insurance, 1841, 25; *Ogden v The Columbian Ins Co* 10 Johns Rep 273

<sup>541</sup> *Dorr v The New England Insurance Company* 10 Johns Rep, 231

<sup>542</sup> eg *Thurston v Koch* 4 US 348 (1800); 4 US 348 (Dall), the US Supreme Court decided case on condemnation of insured cargoes following capture by a French privateer and subsequent condemnation. Simply decided as a total loss.

<sup>543</sup> (1810) 12 East 648

<sup>544</sup> (1794) 1 Peake 278

<sup>545</sup> (1881-82) LR 8 QBD 313, 315

<sup>546</sup> (1794) 1 Peake 278



In *Livie v Janson*<sup>547</sup> the American vessel “*Liberty*” sailed on a voyage in 1808 from New York to London with the aim of breaking the American embargo. She was driven onto the American shore by ice and damaged. Her crew deserted her. She was taken by officers of the Customs House, and ship and cargo were condemned for breach of the embargo. The policy was warranted free from American seizure. The insured claimed for the partial sea-damage. Ellenborough LCJ held that the insured could not recover for the partial loss, as there was no right to recover for the later total loss. He followed *Green v Elmslie* in finding that the proximate cause of the loss was capture. This rule – that partial loss not made good overtaken by subsequent total loss restricts an insured for recovery of the later total loss – was codified by s 77(2) of the Act.<sup>548</sup>

In *Cory & Sons v Burr*, the master had taken an illegal consignment of tobacco which was to be smuggled into Spain. The vessel and crew were arrested by the Spanish authorities, who took steps to condemn and confiscate her. The owners made a payment into court to prevent this, and claimed this sum back from their insurers. In light of *Green v Elmslie* and *Livie v Janson*, Field J held: “*Until the seizure by the Spanish authorities, although a barratrous act had been committed, there had been no loss, and had he Captain not been overhauled, there would probably have never been any. It was the seizure that brought the loss into existence*”.<sup>549</sup> It followed that the seizure was the proximate cause of the loss, falling within the FC&S clause.

Contrastingly, in *Hahn v Corbett* under a policy on goods containing the FC&S clause, the vessel stranded a few miles from the destination port. The goods, which would otherwise have become lost by perils of the sea, were taken out and carried off by Spanish Soldiers from a nearby garrison. Best CJ in Common Pleas held this to be a loss by perils of the sea, not capture. In *Coolidge v The New-York Firemen Ins Co*<sup>550</sup> the hull policy contained a variant of the FCS clause, “*warranted free from any loss by the British or Americans; but in case of capture, the usual sea-risks to continue*”. She was captured by the British, and while detained by the captors was lost in consequence of their negligence; it was held that if the loss had been occasioned by a sea-risk strictly so called, the insurers would have been liable. But inasmuch as the immediate and proximate cause of the loss was an act of the captors, which if it had been done by the insured would have exonerated the insurers, the insurers were protected by the warranty.<sup>551</sup> Arnould confirmed that if a ship insured under a policy with an FC&S

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<sup>547</sup> (1810) 12 East 647

<sup>548</sup> Chalmers and Owen, (1906), 122

<sup>549</sup> (1881-82) LR 8 QBD 313, 316

<sup>550</sup> 14 Johns Rep 308

<sup>551</sup> Sherman, Marine Insurance (1841), 103 *Coolidge v The New-York Firemen Ins Co* 14 Johns Rep 308

warranty be lost by the perils of the sea as a proximate cause, though also in the hands of the enemy, the warranty would not protect the insurer. Conversely, if a ship were already damaged by the seas, and thereby exposed to seizure, the capture and condemnation would be the proximate cause, and the warranty would be effective.<sup>552</sup>

Where there was barratry, which exposed the vessel to a risk of seizure, seizure was held to be the proximate cause, and the barratry the remote cause. The policy on the vessel contained the FCS clause. The master engaged in smuggling, and consequently the vessel was seized by Spanish revenue authorities. The proximate cause of the loss was seizure, not the barratry of the master; the insurer was not liable:<sup>553</sup> There was no loss by barratry. The barratry created a liability to forfeiture or condemnation, but might prove harmless. However, the seizure, an active step towards confiscation, was the direct and immediate cause of the loss, and not because of barratry, but because of a violation of the revenue laws of Spain.<sup>554</sup> Such a rule made it difficult for an insured to retain cover for acts of barratry, as these would more easily fall within the FCS clause.

#### 4.3 Presumption on capture and seizure before 1906

Early editions of Arnould separated the test for constructive loss into two issues; has the insured a *prima facie* right to give notice; and whether right to recover subsisted until the action. The first question was upon what intelligence the assured might give notice of abandonment. *Primá facie*, an insured might give notice on receiving intelligence of any such marine casualties as capture, seizure arrest. These perils “*do not involve the absolute destruction or irretrievable loss of the thing insured, yet, render its destruction highly probable, or its ultimate recovery very doubtful; and these are... casualties which can justify a notice of abandonment*”. Contrastingly no amount of difficulty in regaining possession which did not involve an absolute temporary privation of ownership, or alienation of property,<sup>555</sup> could make a case of constructive total loss,<sup>556</sup> indicating that the perils of loss of possession were well understood as requiring consideration that differed from cases of stranding.

What amounts to an absolute temporary privation of ownership, or alienation of property?  
This must be an alternative expression of the presumption of total loss on loss of possession.

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<sup>552</sup> Arnould (3<sup>rd</sup> edn, 1866) Vol II, 767; *Livie v Janson* 12 East 649; *Green v Elmslie Peake* 212; cf *Ionides v The Universal Mar Insur Assoc* (1821) 106 ER 1133, (1821) 5 B&Ald 107

<sup>553</sup> Chalmers and Owen, *Marine Insurance Act 1906*, 75; *Cory v Burr* (1883) 8 AppCas 393

<sup>554</sup> (1883) 8 AppCas 393, 406 (Fitzgerald LJ)

<sup>555</sup> *Thorneley v Hebson* 2 B&Ald 513

<sup>556</sup> Arnould (1<sup>st</sup> edn, 1848), 1053

The contemporary understanding of capture is expressed in Arnould,<sup>557</sup> approved in *Masefield*:

*"Capture is prima facie a case of total loss which gives the assured an immediate right to give notice of abandonment. The loss cannot, as a rule, be said to be irretrievable at the moment of capture, so as to entitle the assured to treat it as an actual (as distinct from a constructive) total loss for there is no immediate loss of title. It has long been the established rule that the property does not pass, after capture, to a vendee or recaptor, so as to bar the original owner, until there has been a regular sentence of condemnation..."*<sup>558</sup>

Before 1906, it was possible to recover on a capture or seizure at once, and the *spes recuperandi* would not be argued. Clear authority from *Goss* in 1758 to *the Romulus* in 1908 established a presumption of total loss arising on capture. If the ship remained captured on the date of the action, where abandonment was given promptly, there was a total loss. Recovery was allowed in situations where there was a strong hope of recovery, as in *Goss*. Despite the criticism of the approach in Arnould,<sup>559</sup> and Michael Kerr QC's later observation in the Dawson's field arbitration, that it was "*dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery*",<sup>560</sup> the approach of the courts including the House of Lords prior to 1906, was exactly that. In *the Friendship*, the *ratio* was, '*Capture operates as a total loss, unless it be redeemed by subsequent events*'.<sup>561</sup> It is not possible to draw a factual distinction between cases of 'capture' and 'seizure' in this regard. The pre-1906 cases illustrate that the simple issue was whether there had been an effective restoration. The idea that either the *spes recuperandi* had to be considered, or a 'wait-and-see' approach adopted, is fundamentally incompatible with the idea that an insured could abandon immediately.

Although Mansfield LCJ recognised that ransom would restore possession, tellingly, not a single subsequent case considered the possibility of a ransom being made. This silence in the reported cases strongly suggests that courts, prior to *Masefield*, never considered ransom undermined a subsisting total loss on capture. Contrastingly, an insured might pay prize to a recaptor, which was a proper method of regaining possession. It is dangerous to confuse those two issues. At common-law, *Masefield* would have been able to claim constructive total loss: capture would be construed to be permanent, regardless of the *spes recuperandi*. This was constructive total loss, as there was always a requirement for a notice of abandonment, except where after a sale.

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<sup>557</sup> Arnould (17<sup>th</sup> ed, 2008), [24-17]

<sup>558</sup> [2011], [55]

<sup>559</sup> (17<sup>th</sup> edn, 2008), [28-03]

<sup>560</sup> *Dawson's Field* (1972)

<sup>561</sup> (1816) 5 M&S 446

The contemporary summary in Arnould, however, applies to actual total losses. Arguably, the consideration is incomplete, as it should additionally be recorded that capture always permitted an insured to recover for constructive total losses. That, however, is not how the pre-1906 law is recalled in later cases, and the change was arguably due to: (i) conflating statements on whether a notice of abandonment was necessary with the test of whether a loss had occurred, (ii) from errors citing the earlier law; and (iii) pleading without reference to a presumption of total loss at all. Accordingly, authority from *Goss* in 1758 to *the Romulus* in 1908 clearly applied a presumption of total loss arising on subsisting loss of possession. If the ship remained captured on the date of the action, where abandonment was given promptly, there was a total loss. The right was equally recognised in American laws.<sup>562</sup> While never stated as a ‘presumption’ of total loss, it is clear this was how it, in effect, operated. In essence, while the capture or seizure lasted, the *spes* was not tested.

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<sup>562</sup> *Livingstone v Marl Ins Co* 6 Cranch 280; Phillips (5<sup>th</sup> edn, 1867), 446

## 5 PRESUMPTION OF TOTAL LOSS ON ARREST, RESTRAINT AND DETENTION

The underlying definitions of arrest, detention, and restraint of princes were settled to the extent these included circumstances where property was taken by state authority where it might be returned eventually to the insured, or alternatively the insured would be compensated for confiscation by the state authority (Chapter 2, ante). At the moment of loss of possession, such circumstances could seldom be described with certainty as irretrievable loss, and might not satisfy a test even of unlikelihood of recovery. During these perils, title was retained, though ‘free use and disposal’ would be lost. Was, as suggested in *Polurrian*, a test of ‘unlikelihood’ applied to these perils before the 1906 Act? Arguably, a presumption of total loss arose on ‘capture’ and ‘seizure’ that was recognised by Emerigon, and applied in English law until the 1906 Act. Arguably, a similar presumption also operated on arrest, restraint and detention. This appeared in early treatises and academic commentary. However, its application in England became haphazard, and significantly restricted after the 1906 Act.

### 5.1 Presumption stated by treatise writers

From an early date French law recognised that an interruption by an arrest justified abandonment. Emerigon provided that since that commercial ventures required certainty not delay:

*“The Ordonnance desiring... to reconcile the public interest with that of individuals, allows those whose vessels are arrested by the order of a sovereign to make in certain cases, and after the lapse of certain periods, ruled by the distance of places, abandonment to their insurers”.*<sup>563</sup>

Emerigon provided that both ‘capture’ and ‘arrest of princes’ equally justified the insured giving abandonment. No test of ‘uncertainty’ or ‘wait-and-see’ as to return of the property was recorded by him, or stated to be an appropriate test on either peril. The insured had only to show the fact of loss of ‘domain’ or free use and disposal for the fixed period to make the claim. The explanation for this presumption, even on simple ‘arrest’ was *“that for the merchant the property tied up and uncertain is often considered as if it no longer existed”*.<sup>564</sup>

Unlike capture, where claims could be made instantly, Emerigon stated that on some perils, such as arrest of princes, French law permitted abandonment only after a passage of ‘a certain

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<sup>563</sup> Emerigon XII, [XXX]

<sup>564</sup> Emerigon XVII, 672

time' without restoration.<sup>565</sup> This period of time was fixed, giving certainty to otherwise unpredictable circumstances:

*"The delays of six months or of a year, established by Art 49 in the case of arrest of princes, and extended to the case of innavigability by the Declaration of 1779, are a kind of grace accorded to the insurers, who my renounce it".*<sup>566</sup>

Where English law was silent on an issue, Emerigon's exposition of French law might provide persuasive authority and a 'certain time' rule might apply. Yet Emerigon stated that in England, a presumption of loss applied, allowing abandonment to be made instantly in such circumstances of loss of possession. Likewise, later English academic works documented that this *prima facie* right to abandon arose on arrest, detention or embargo. This was comparable to that presumption arising on capture or seizure; and consequently arising on any peril amounting to the loss of the free disposal of the *specie*. Marshall later endorsed Emerigon's approval of this English rule over the French, by quoting Emerigon directly:

*"In England, the rule is more just... from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to total deprivation; it is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo".*<sup>567</sup>

In *Peele*, the leading case on stranding in American and English laws, Storey J noted the *prima facie* presumption of total loss applied as much to restraints or detentions, as to embargoes, blockades and arrests. He made no reference to the duration such a restraint had to exceed before a total loss claim became justified. Unlike French law:

*"The right of abandonment has been admitted to exist ...where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority..."*<sup>568</sup>

Following English law, he made no reference to the degree of unlikelihood of restoration, or of the time loss of possession had to have lasted or be expected to last, before a claim could be made. Instead, the right to abandon arose at once. Arnould cited *Peele* to explain arrest or embargo, stating:

*"There is a right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo may be of long, or, at all events, of very uncertain continuance".*<sup>569</sup>

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<sup>565</sup> Emerigon XVII; 672

<sup>566</sup> *ibid*

<sup>567</sup> Marshall, *Law of Marine Insurance* (4<sup>th</sup> edn, 1861), 403

<sup>568</sup> *Peele v Merchants Insurance Co* (1822) 19 Fed Cas 102

<sup>569</sup> Arnould (2<sup>nd</sup> edn, 1857), 1083

Innovatively, this stated that subsisting arrest or embargo might not allow insureds to abandon instantly, but required an additional element to be satisfied – the apparent probability that the arrest might be long or unpredictable. Given that no judicial authority supported this, Arnould’s innovation was questionable. Further, the ‘long time’ necessary was undefined; ultimately permitting the ‘bidding’ between counsel in *The Bamburi* that one year would suffice. It did not introduce a requirement to ‘wait-and-see’ what the result would be, although such an approach is consistent with the spirit of that ‘long and unpredictable’ test, although such was unsupported by pre-Act authority.

Rather, Arnould’s alternative consideration of embargo mirrored the settled presumption of total loss on capture. This did not refer to any test of uncertainty of restitution, either at all, or simply as to time:

*“An embargo laid by a foreign government on the ships or goods of any other than its own subjects, entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought, to recover as for a total loss”.*<sup>570</sup>

Arnould endorsed a presumption of loss on embargo that continued to the time the proceedings were issued, and a right to abandon at once. This was an identical approach to that on capture, notwithstanding any difference in captor’s intention. For example:

*“...where a neutral ship and stores were insured “at and from” an enemy’s port, and there detained, before sailing, by an embargo laid on by the enemy, in the port of loading, and continuing down to the time of action brought, it was held that the assured might recover as for a total loss, in our courts, in respect of the ship and stores of which he had been so deprived, under a count alleging the loss to be by “arrest and restraint of princes”.*<sup>571</sup>

Evidently, the presumption supporting an instant right of abandonment stated by Emerigon was repeated in academic works. Arnould explained that arrest and capture were distinguished by the intention of the party taking the property. Yet, importantly, notwithstanding any such intention being absent, there was no guarantee on arrest that property would be restored. Foreseeably, on arrest, the value in money, not the property, might be returned. There might be an eventual sale or confiscation. Why would sale and compensation after arrest differ from adjudication or sale by order of a prize court following capture or seizure?

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<sup>570</sup> *Rotch v Edie* 6 T Rep 413; Arnould (1<sup>st</sup> edn, 1848), 813

<sup>571</sup> *ibid*

How was this right applied in decisions on situations of embargo, arrest and detention? The presumption that a total loss arose on ‘arrest restraint or embargo’ is illustrated in the following factual classes of loss of possession:

- i. Where arrest resembled capture;
- ii. Embargoes on vessel in port;
- iii. Detention without direct application of force.

The presumption did not, however, apply to:

- iv. Embargoes on destination ports;
- v. Condemnation following arrest or detention.

## 5.2 Application

### *i. Where arrest resembled capture*

Early authorities defined certain arrests and detentions as closely resembling capture. These permitted the insured to abandon at once. In *Fowler and another v The English and Scottish Marine Insurance Company (the Ernest Jacob)*,<sup>572</sup> by a valued policy on a Prussian vessel and cargo from Riga to London, the insurers agreed to pay for a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation. The vessel was held under embargo from 3 February 1864 in a Danish port when war was declared between Prussia and Denmark, and released on 17 March after which she was restored to the assured. News of the embargo reached the insured on 4 February. Notice of abandonment was given on 5 February. Earl CJ held that the insured might recover. He noted the policy term. However, he noted that this was not a temporary embargo, but one in war having a permanent character. Byles and Montague Smith JJ concurred, finding that the term was to protect the assured. Its meaning would be clearer had it merely stated that the insured *could* recover after 30 days. Interestingly, here was recovery for a total loss where the property had been restored at the time of the action.

Clarifying situations of improper arrest, while further confirming the presumption of total loss for capture, Marshall expanded:

*“...if a neutral ship be arrested at sea, and carried into a port belonging to one of the belligerent powers, under pretence that she belongs to the enemy, or that she is laden with enemy’s goods; this must be considered as a capture, because it is done as an act*

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<sup>572</sup> (1865) 2 Mar Law Rep 202, (1865) The New Reports 66



*of hostility, and the ship's being afterwards restored, will not change that which was originally a capture into a detention of princes".*<sup>573</sup>

An attempt to condemn property fell within the rules applying to 'capture'. This statement conflicts with an understanding that attempted condemnation was 'detention' to which 'wait-and-see' applied pending the outcome of prize adjudication. Arnould likewise provided situations where simple detention was treated as capture; there was a *prima facie* right to abandon, where a neutral ship was arrested by a belligerent cruiser, in order to search for and condemn enemy cargo, whether or not such was on board.<sup>574</sup>

However, this rule was not uniform. Confusingly for insureds, some 'captures' were treated as detention only, and gave no ground for abandonment. In the underlying French exposition there was a distinction between hull and cargo interests. Marshall repeated a case given by Roccus where a Genoese ship laden with corn was seized by Venetian vessels. The cargo was compulsorily purchased. The insurers' successful defence was that this was not a 'capture' of the vessel, but a detention of princes from public necessity: "*Diversia facta fuit, non ad capiendam navium, se do publicam utilitatem grani consequendi causa. Licuit frumenta accipere, soluto pretio* – this was held to be a good defence".<sup>575</sup> Accordingly, where captors intended to take cargo (which would be deemed lost at once, as in *Stringer*), there might be no loss of the vessel. This rule later conflicted with *the Lady Mansfield*,<sup>576</sup> and definitions elsewhere in Marshall, unless a fine distinction – nowhere advocated in court – existed separating cases where there was an intention to seize enemy cargoes without payment, and an intention to compulsorily purchase cargoes. Nevertheless, English authorities established a variety of cases where arrest appeared akin to capture, granting an instant right of abandonment. It is difficult to reconcile general rules in *the Lady Mansfield* with the developing distinction between ship and cargo.

In *Murray et alia v The United Insurance Company*<sup>577</sup> plaintiff cargo-owners abandoned to their insurer after learning their brig had been captured. Kent J, following *Mumford v Church*, confirmed "*The general rule is that the insured has a right to abandon immediately upon hearing of a detention, and his claim to indemnity is not suspended by the chance of a future recovery, because, by the abandonment, that chance devolves upon the insurer*". This applied widely, to 'all cases of foreign detention', from 'necessity', 'embargo', or 'for the purpose of a judicial inquiry'. The interruption to the voyage was the paramount consideration. He

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<sup>573</sup> Marshall (1<sup>st</sup> edn, 1802), 434ff; in fact referring to *Saloucci v Woodmass* (1784) 99 ER 688

<sup>574</sup> (3<sup>rd</sup> edn, 1866) Vol II, 707; Emerigon (edn 1827), 537

<sup>575</sup> Marshall (1802), 434-435

<sup>576</sup> (1787) 1 TK 609

<sup>577</sup> (1801) 2 Johns Cas 263; (1801) NY Lexis 36 (Supreme Court of Judicature New York)

confirmed that “*English law does not require a delay, in imitation of some foreign rules. The activity of trade rather demands decision and certainty, and that the capital and business of the merchant should not be kept in suspense*”. Accordingly, early authority indicated that because of the uncertainty, a right to abandon existed in a wide variety of circumstances. As on capture, uncertainty was unpleaded and untested; the peril itself established a *prima facie* presumption of loss. In American works, there was little 20<sup>th</sup> century commentary. A right to abandonment was doubted on a hull policy, the hull surviving *in specie*, but the right existed in “proper cases”, citing *Rhineland*. In practice, this would be prevented by a FC&S clause.<sup>578</sup> Consequently, there is little authority restricting the right to abandon supporting such restrictive statements in commentary.

**ii. Embargo on vessel in port**

English authorities

Early authorities considered *obiter* whether embargoes caused total losses at once, but were indecisive. In *Robertson v Ewer*<sup>579</sup> it was not doubted there *could* be total loss from embargo, but it was decided only the hull policy did not cover seamen’s wages or wastage of provisions, and the effect of abandonment was unresolved. In *Bond v Nutt*,<sup>580</sup> it was not that the embargo only lasted eight days that prevented the insured from claiming on embargo, but that no abandonment was made during the embargo, and the total loss resulted from subsequent capture. Nevertheless, it strongly suggested that prompt abandonment could have justified total loss. In *Rotch v Edie*,<sup>581</sup> where a French embargo on vessels in their loading port lasted perhaps three years, the insured recovered for total loss. The authority for recovery on embargo was held to be *Goss v Withers*. Although more specific situations of embargo were raised in argument these formed no part of the judgment.

A clear application of the right to abandon during embargo as authority distinct from *Goss* emerged in *Barker v Blakes*<sup>582</sup> where the policy covered an American cargo of oil laden on an American vessel. The vessel was detained on 17 August under British embargo. The Admiralty court ordered the oil to be restored on 8 October, but from 6 September the destination port had come under a blockade. The insured abandoned on 14 October. It was held the detention and embargo amounted to a total loss of the voyage. However, the insured could not recover as their abandonment was made out of time. It had been argued by the

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<sup>578</sup> Lord, ‘The Hull Policy: Actual Total Loss and Abandonment 41 Tul. L. Rev. 347 (1966-1967), 349

<sup>579</sup> Park (5<sup>th</sup> edn, 1802), 87, 88

<sup>580</sup> 2 Lord Ray 840

<sup>581</sup> (1795) 6 TR 413; Arnould (3<sup>rd</sup> edn, 1866), Vol II, 707-8

<sup>582</sup> (1808) 103 ER 581; 9 East 281

insurer: “...where the voyage is lost, but the property is saved, the owner must abandon, if at all, in the first instance; and cannot wait to see whether he can prosecute the voyage to advantage...” This was accepted. Nevertheless, it was clear that interruption to the voyage by detention justified a total loss claim with timely abandonment. It was unclear however, whether this was put as a deemed loss of the property during the embargo, or a deemed loss of the voyage only. The requirement that the insured give notice at once aided certainty. However, fairness must require reciprocal speed by the insurer, as it appears comparatively unjust to allow the insurer time to let the situation develop before payment where this is denied to the insured.

Few other early English authorities concerned circumstances where an insured vessel was inside a blockaded port, or a port under an embargo, and accordingly American authorities help clarify the law. It was noted in 1873 that: “*There are few English cases to be found of English goods blockaded in a foreign port, but there are several cases where the question has arisen as to goods which were prevented by a blockade from getting in*”.<sup>583</sup> Arguably, albeit evidence for this situation is necessarily in the negative, much as there were few reported decisions on capture *simpliciter*, the rule that such situations justified a total loss provided a clear, workable rule that discouraged litigation.

#### American authorities

American authorities clarified that embargo justified instant abandonment, regardless of any existing chance of release, and when that release might occur: “*If, after the voyage is commenced, the vessel is stopped and detained in consequence of an embargo laid by the government of the United States, whether for a limited or indefinite period, the insured may abandon for a total loss*”.<sup>584</sup> Academic texts confirmed this, Sherman stating simply that in American law: “*An embargo or detention by a foreign friendly power constitutes a total loss, and warrants an immediate abandonment*”.<sup>585</sup> No test of the likely length of detention appeared. These rules were applied in *Symonds v The Union Insurance Company*,<sup>586</sup> where policies covered vessel and cargoes ‘*at and from New-York to Cape Francois with liberty to proceed to another port, should Cape Francois be blockaded, and the vessel prevented entering that port, from that, or any other, cause, and at and from thence back to New-York.*’

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<sup>583</sup> (1873) LR 8 CP 649

<sup>584</sup> *McBride v The Marine Ins Co* 5 Johns Rep 299; *Walde v the Phoenix Ins Co*, 5 Johns Rep 310; *Ogden v The New-York Firemen Ins Co* 10 Johns Rep 177, 12 Johns Rep 25; Sherman, *Marine Insurance* (1841, New York), 10

<sup>585</sup> Sherman (1841), 220

<sup>586</sup> 4 US 417 (1806), 4 US 417 (Dall)

The policy provided further '*that the assured is not to abandon, if she cannot enter the Cape from blockade or other cause, but liberty is given to proceed to some other port*'. The master, proceeding for Cape Francois, was informed by a British vessel of a blockade of St Domingo. The vessel was ordered to sail with an English frigate, and escorted to Kingston, where the cargoes were unloaded and sold at a low price. The insured claimed on his cargo policies for total loss, arguing that the voyage insured was destroyed by the superior force of a foreign power, and that, independent of the means taken to prevent a breach of the blockade, the vessel had been constrained, against the express desire of the captain, to proceed to a particular port, in exclusion of every other. The defence was that there was no direct application of force by an enemy or by the embargo; the only loss was an economic loss caused by the lower market at Kingston. The insured was permitted to recover. Arguably, a clear rule that embargo – without further facts - justified total loss was emerging. A test of unlikelihood of recovery within a reasonable time was conspicuously absent.

### *iii. Detention without direct application of force*

Overlapping with situations of embargo, but also encompassing blockade or arrests, in some circumstances, detentions restricted the insureds' free use and disposal of their property, without direct application of force. Where force was not used, arguments arose that such detention and embargo was not covered by the policy. Generally, in early authorities, a total loss was permitted. This was because suspension of 'free use and disposal' was usually considered a loss of property, although the authorities conflicted on whether 'possession' was additionally lost. Do such situations give a right to abandon at once? Arguably they did, although this test has changed significantly after the 1906 Act.

#### Early authorities

In the United States, there was some early uncertainty whether blockade was an insured peril. In *Olivera v Union Insurance Company*<sup>587</sup> it was observed that *Barker v Blakes* established that blockade had constituted a total loss by the detention of the vessel, but that abandonment had not been made in a reasonable time after notice of the loss. Given that finding, it was doubted whether the blockade was itself an insured peril had been definitively decided. Decisions from New York and Massachusetts conflicted on whether blockade caused a total loss; therefore the matter was not then settled in America. Accordingly, reference was made to English authorities, which provided: "*An embargo is admitted to be a peril within the policy. But as has been already observed, the sovereign imposing the embargo is virtually in*

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<sup>587</sup> (1818) 16 US 183

*possession of the vessel, and may therefore be said to arrest and detain her*".<sup>588</sup> Although the vessel remained in the actual possession of the master/owner, there was effectively a direct application of force on the vessel. The danger of violating an embargo and running a blockade were comparable. Consequently "*if the word "restraint" does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible confinement of a vessel in port and the forcible prevention of her proceeding on her voyage. If so, the blockade is in such a case a peril within the policy*".<sup>589</sup> Accordingly, American authority established at an early date that a vessel blockaded in port justified abandonment to insurers.

Forcible confinement, alternatively 'loss of free use and disposal', afforded a right to abandon at once:

*"A vessel in a port which becomes blockaded after the commencement of her voyage, prevented thereby from proceeding thereon, sustains a loss by a peril within that clause in the policy which insures against arrests, restraints, and detainments &c., for which the underwriters are liable. And if the vessel so prevented is a neutral, and has on board a neutral cargo, which was laden before the blockade was instituted, the restraint is unlawful"*.<sup>590</sup>

*Olivera* was confirmed in England in *Rodocanachi and others v Elliott*, where the court expressly approved the US Supreme Court's decision, and endorsed that "*the inhabitants of a besieged town or the ships in a blockaded port may be properly said to be "restrained" from coming out by the action of the besieging army or the blockading force*".<sup>591</sup> Accordingly, it might be thought that *Olivera* provided a persuasive precedent for how the 'warehouse' cases of detention should have been decided, ie contra the results in *Moore v Evans*<sup>592</sup> and *Mitsui v Mumford*.<sup>593</sup> Indeed, the principles were followed in the leading English pre-1906 example of loss of free use and disposal, *Rodocanachi and others v Elliott*.<sup>594</sup> Although the insured cargo was not seised, it was prevented from being forwarded to its destination by the German army's blockade of the cargo in Paris. The policy insured against 'arrests, restraints, detainments of all kings, princes and people'. The policy was endorsed to provide that goods were to be shipped by steamers of three specified shipowner companies only. The consignment arrived in Paris on 13 September 1870. By that date, the Prussian army had seized sections of railway where transit had been contemplated, and subsequently surrounded the city. The situation remained unchanged at 7 October, when the insured abandoned. The court found total loss by

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<sup>588</sup> 16 US 194

<sup>589</sup> *ibid*

<sup>590</sup> *Oliveira v The Union Ins Co* 3 Wheaton 183; cf on restraint, Sherman, *Marine Insurance* (1841), 236

<sup>591</sup> *Rodocanachi and others v Elliott* (1874) LR 9 CP 518, 523

<sup>592</sup> [1918] AC 185

<sup>593</sup> [1915] 2 KB 27

<sup>594</sup> [1874-80] All ER Rep 618, (1874) LR 9 CP 518

restraint, despite the lack either of actual seizure or arrest of the goods, or a specific order prohibiting the transport of goods from the city, because “...*the city in which the goods were besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army*”.<sup>595</sup>

This was treated as a ‘detention’ not capture. The principal reason for the distinction between that and ‘capture’ was that the insured’s agents remained in control of the cargo at all time (cf the treatment of restrained vessels in *The Bamburi*<sup>596</sup>). Nevertheless, a total loss was found, where there had been no intention on behalf of the German army to capture and take the goods. Further, there was no consideration given to the amount of time the loss would continue. The French rule that detention had to last six months was clearly considered, since it was observed that positive regulations in different countries fixed a precise time before the insured could abandon. Fixing a precise time proved the general principle that the circumstance gave a right to claim total loss. Further *Rotch v Edie* was an authority to the same effect. There was no fixed time in English law for the giving of notice but it must be within a reasonable time, regard being had to the nature and circumstances of each case. Subject to that, and there being a “restraint of princes,” the assured had a right to abandon his goods to his underwriters.<sup>597</sup>

Importantly, in distinction to French law, the right arose at once; there was no wait-and-see. Detentions may result in no loss to the insured, where they end and allow property to be restored. *Marshall v Delaware Insurance Company*<sup>598</sup> further considered a situation novel to English law, namely what would happen if the foreign appellate prize court restored the vessel before the action. It was established that a final decree of restoration, from which there was no appeal, would undo the total loss, as further delay in restitution of property could not be foreseen. As on capture, the correct approach appeared to be to question whether the detention subsisted at the date of the action.

#### Detentions; embargo, infringement of customs and revenue laws

Governments have the power to stop and search vessels, and this would clearly be temporary detention only, unless there were grounds for condemnation or capture. Marshall confirmed that these temporary detentions justified abandonment. In *Saloucci v Johnson*, after the master refused the submit to search by the Spanish navy, a vessel was arrested and taken to Spain for that resistance, the insured recovered on his policy for ‘improper detention’:

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<sup>595</sup> *ibid*, 522 (Bramwell B)

<sup>596</sup> [1982] 1 Lloyd’s Rep 312

<sup>597</sup> (1873) LR 8 CP 649, 667

<sup>598</sup> (1808) 8 US 4 Cranch 202

*“And though it has since been determined, both in the court of King’s Bench and the court of admiralty, that resisting a search is a lawful cause of capture and confiscation yet the above case of Saloucci v Johnson, may nevertheless, I conceive, be considered as an authority to prove that if a neutral ship be unlawfully arrested and detained by a belligerence cruiser for any pretended offence against the law of nations, this would be a detention of princes”.*<sup>599</sup>

These must be total losses, for partial losses during a stop-and-search would be easily characterised as for ‘delay’. Actual infringement of customs regulations was an even stronger ground for recovery. It was considered in *Roche v Thompson* that: “where a vessel arriving in a hostile port with simulated papers had her papers immediately taken and her hatches sealed down by the officers of government, although she was not formally condemned until afterwards, it was held that she had not been moored in safety for twenty-four hours, because she was in effect within the twenty-four hours taken from her owners by the foreign government”.<sup>600</sup> *Roche* would additionally have justified a total loss for seizure. In *Roche*, there was no suggestion that total loss did not occur on seizure for breach of customs regulations, although if the breach of customs regulations led to her seizure after 24 hours’ undisturbed possession, the seizure occurred after the termination of the risk.<sup>601</sup> It was argued in *Lidgett* that in *Roche*<sup>602</sup> there had been no submission that detention in port under French embargo (during time of war) would not allow recovery for total loss: the case was decided on the ground that the policy had ended after the vessel was twenty four hours in safety. Parsons noted *Roche* being an example of a total loss occurring after termination of the risk.<sup>603</sup>

In *Miller v Accident Insurance Company* (“*The Bellevue*”)<sup>604</sup> an infringement of customs laws resulting in a detention in a port was held a ‘restraint of princes’. This restraint justified a total loss. The prior authorities of *Cory v Burr*, *Robinson Gold Mining Co v Alliance Insurance Co*<sup>605</sup> and *Rodocanachi v Elliott* were approved, in that where the master “...of his own accord, or in obedience to the orders of the officers of the Queen, abstains from entering a blockaded port, the causa proxima is not the blockade, but the voluntary act of the master”.<sup>606</sup> However, ships or goods within a blockaded port fell within ‘restraint’. In the circumstances the master had not acted voluntarily. If, when about to enter the destination port, the master had been informed of the customs law restricting landing of the cattle, and decide to go to another port, the case would be like *Hadkinson v Robertson*, and there would have been a voluntarily

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<sup>599</sup> Marshall (1802), 434ff; referring to *Saloucci v Woodmass* (1784) 99 ER 688

<sup>600</sup> *Horney v Lushington* (1870) LR 5 CP 190, 200, 15 East 46

<sup>601</sup> *Lockyer v Offley* (1870) LR 5 CP 190, 201

<sup>602</sup> (1779); *Weskett on Insurance* (1781), 196

<sup>603</sup> Parsons (1868) Vol 2, 67

<sup>604</sup> [1903] 1 KB 712

<sup>605</sup> [1902] 2 KB 489

<sup>606</sup> [1903] 1 KB 712, 723

abandonment. However, in this case, the master had gone as far as he could towards the completion of the venture, and desisted when the Government actually intervened. That rule was considered to accord with charterparty frustration, where the charter became impossible by “*blockade which rendered access to a port commercially impracticable*”.<sup>607</sup> Critically, ‘*the Bellevue*’ had entered the port, albeit she was stopped before reaching her destination birth. She went as far as was possible to her destination, so this could be distinguished from anticipatory abandonment of the voyage, before the port was entered. This distinction, essentially an issue of fact, appears unworkably narrow. It provides a less certain rule than a presumption of impossibility of continuing the voyage, and a prudent master, attempting to minimise losses for all concerned, may result in the insured not recovering for a total loss, where a less prudent master entering the port, might allow for the full recovery..

**iv.     *Embargo on destination port; loss of the voyage***

Whether an embargo or blockade on the destination port while the vessel is at sea causes a total loss of the voyage is considered more fully in the following chapter. It is settled that such circumstances never amount to a deemed loss of the property. In *Hadkinson v Robinson*,<sup>608</sup> there was no loss where the master of the vessel, on learning that the destination port was closed to English shipping by an embargo, diverted to a safe port. Likewise, in *Forster and Others against Christie*,<sup>609</sup> there was no loss within the policy where a Royal Navy vessel ordered the insured vessel to abandon the intended voyage, as there was a Russian embargo on British vessels at the destination port. In both cases, this was abandoning the voyage to avoid the risk, which was the remote cause of the loss. The facts necessary to constitute the direct application of an embargo to the *specie* really means entry to the embargoed port, even if the actual arrest of the vessel in port occurs the day after arrival.<sup>610</sup> In *Butler v Wildman*,<sup>611</sup> the master believed the vessel’s capture was inevitable; he threw a quantity of dollars overboard to prevent their capture. It was held that the loss was caused by capture. Where it was inevitable that the vessel would be subject to an embargo, if the voyage were further prosecuted, there might be a total loss, but this would be a potential loss of the voyage only, and it would not be considered to be a loss of the *specie*.

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<sup>607</sup> *ibid*, 723

<sup>608</sup> (1803) 3 Bos&Pul 388

<sup>609</sup> (1809) 103 ER 982, (1809) 11 East 205

<sup>610</sup> *Parsons* (1868), Vol 2, 59; cited in argument in *Lidgett and another v Secretan* (1870) LR 5 CP 190

<sup>611</sup> (1820) 106 ER 708, 3 B&A 398



In *British and Foreign Marine Insurance Co v Sanday & Co*<sup>612</sup> it was argued that a 'restraint of princes' only operated where force was used, not where action was taken to avoid the physical restraint. In the House of Lords, Earl Loreburn held, in relation to whether the declaration of war was a 'restraint of princes', that he dismissed the argument that force was neither exerted nor present. Force was held in reserve behind every state command. It would be a strange law that deprived the assured of his indemnity on the ground that he had not resisted until force was actually used, an order which he was duty bound to obey.<sup>613</sup>

In *Sanday*, where the issue concerned supervening illegality, it was confirmed that an insured could abandon where the voyage was abandoned, before there was any physical restraint. The court drew a distinction between legitimate and illegitimate force, which conflicts with general definitions of the peril, in that "*If it were an order which he was not bound to obey, and which he might have successfully resisted either by violence or by process of law, a question might arise whether or not there had been in fact a restraint. But that is outside the present case, and I say nothing of it*".<sup>614</sup> Nevertheless, he held that owners were bound to obey the orders of their own sovereign, and that the declaration of war did result in an interruption of the voyage by a restraint, in that the declaration created a state of war, which in turn created a prohibition from trading with the enemy. In applying the doctrine of *proxima causa*, he considered *whether "the interruption directly come from the declaration or from the law which it awakened? In a sense it came from both, but we must choose which was the proximate cause, for one is the subject of insurance and the other is not"*.<sup>615</sup> Finally, *Furness, Withy & Co v Rederiakt Banco*<sup>616</sup> confirmed that the threat of force need not be immediate. There, the Swedish government prevented a Swiss vessel from trading at certain ports. That the master was then outside the jurisdiction of Sweden did not matter, as the government could at some time have enforced the restraint on the persons having custody of the ship. While the distinction might seem fine to insureds, it is clearly established that illegality was distinguished from embargo.

#### **v. *Condemnation following Arrest or Detention***

In capture cases, sale following capture arguably ought to permit a claim for an actual total loss (Chapter 8.1, below). Does the same principle apply to arrest or detention? Contrastingly

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<sup>612</sup> [1916] 1 AC 650

<sup>613</sup> *ibid*, 660

<sup>614</sup> [1916] 1 AC 650, 660

<sup>615</sup> *ibid*

<sup>616</sup> [1917] 2 KB 873, 87 LJKB 11

to *Le Cann*,<sup>617</sup> that sale following ‘restraint’ or ‘detention’ is a *novus actus interveniens*;<sup>618</sup> authorities on ‘detention’ and ‘embargo’ appear unpersuasive guides on capture situations. For example, in *Fooks v Smith*, where the peril was ‘restraint of princes’:

“The total loss was due, not to the fact that the voyage had been frustrated but to an entirely independent act of the Austrian Government, not at all sufficiently related to the original peril, the restraint of princes”.<sup>619</sup>

Accordingly, this broke the chain of causation. The Austrian government had desired to protect Austrian ships from danger on the high seas of destruction or capture. However, the ultimate seizure and capture was held not to flow from this restraint. It was held instead that the seizure and sale were a *nova causa superveniens*, and not the necessary and direct result of the restraint of princes.<sup>620</sup> This appears to contrast to *Stringer*, where there was a right to recover without a notice of abandonment, indicating an actual total loss. *Fooks* creates a potential injustice: if combined with a test of uncertainty, the claim would not be successful at first. If followed by sale, the consequence might be too remote from the seizure. If wait-and-see was adopted, there might be a finding that abandonment was out of time.

### 5.3 Express Terms

A variety of terms expressly cover losses by loss of possession, partly as a result of the lack of clarity from the 20<sup>th</sup> century cases. For example, the *Institute War and Strikes Clauses, Detainment Clause 3* provides:

*‘In the event that the vessel shall have been the subject of capture, seizure, arrest, restraint, detainment, confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the vessel for a continuous period of 12 months, then for the purpose of ascertaining whether the vessel is a constructive total loss the Assured shall have been deemed to have been deprived of the possession of the vessel without any likelihood of recovery’.*

In *Sunport Shipping Ltd and others v Tryg-Baltica International (UK) Ltd and others*,<sup>621</sup> the insured vessel was detained under Greek law following the discovery of cocaine. She was detained long enough to be deemed a constructive total loss under the terms of the policy (the decision turned on a separate point – whether there was an exclusion of cover for detention relating to customs laws). The relevant clause in the policy, cl 3, stated that detention beyond six months meant that the insured ‘shall be deemed to have been deprived of the possession of the vessel without any likelihood of recovery’. Although the case was pleaded and

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<sup>617</sup> [1886-90] All ER Rep 957, 961-2

<sup>618</sup> *Fookes v Smith, (the Stambul)* [1924] 2 KB 508

<sup>619</sup> [1924] 2 KB 508, 516

<sup>620</sup> *ibid*

<sup>621</sup> [2003] EWCA Civ 12

considered on the basis of a constructive total loss, the presumption established by the detainment clause is arguably sufficient to allege an actual total loss. On first appeal, it was observed *obiter* that the detention was not avowedly of a short period, so that it would inevitably be released.

#### 5.4 Presumptions on Restraint, Detention and Embargo before 1906

Clearly, authorities indicated total loss might accrue from the moment perils of restraint, detention and embargo occurred without investigation of future events. These each permitted a right to abandon at once, save in two situations: (i) where premature action was taken to avoid the peril; and (ii) where there was attempt to confiscate the cargo only, rather than the vessel, the hull might not be held lost.

Marshall confirmed Emerigon in that on detention, restraint or embargo, there was a right to recover at once for total loss, on the basis that the law merchant viewed a right of disposal that was suspended or rendered uncertain as equivalent to total deprivation.<sup>622</sup> The presumption applied in a like manner to that on capture; English law permitted an instant right to abandon. The right was recognized, as forming part of the test of losses, in *Peele* by Storey J, and American laws confirmed that an insured could abandon at any time during the continuance of a detention, as in *Livingstone v Marl Ins Co*.<sup>623</sup> Later, it was confirmed in *Arnould*.<sup>624</sup>

While the word “uncertainty” was used, it would nevertheless be a mistake to treat this as incorporating a test of whether the return of the *specie* was ‘uncertain’. To do so would be to ignore that the right existed if free disposal was ‘suspended’. The factual tests in the cases considered above suggest that the ‘suspension’ was the right actually tested judicially.

Frequently, ‘arrest’ was treated as ‘capture’ so that the same presumption of total loss applied to these circumstances,<sup>625</sup> and this was recognised academically.<sup>626</sup> A like rule applied in America.<sup>627</sup> Abandonment made while embargo continued was good, and there was no

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<sup>622</sup> Marshall, *Law of Marine Insurance* (4<sup>th</sup> edn, 1861), 403

<sup>623</sup> 6 Cranch 280

<sup>624</sup> *Rotch v Edie* 6 T Rep 413; *Arnould* (1<sup>st</sup> edn, 1848), 813

<sup>625</sup> ‘*the Ernest Jacob*’ (1865) 2 Mar Law Rep 202, (1865) The New Reports 66

<sup>626</sup> *Arnould* (3<sup>rd</sup> edn, 1866) Vol II, 707; Emerig Tom I, 537

<sup>627</sup> *Murray et alia v The United Insurance Company* (1801) 2 Johns Cas 263; (1801) NY Lexis 36 (Supreme Court of Judicature New York)

investigation into the length of any embargo in England,<sup>628</sup> or in America.<sup>629</sup> Blockade, without actual seizure, justified abandonment. This was confirmed in *Olivera v Union Insurance Co*, where property in a besieged town, where not actually confiscated, was properly treated as ‘restrained’ or ‘detained’ by the application of force.<sup>630</sup> This was followed in *Rodocanachi and others v Elliott*,<sup>631</sup> where such events established ‘detention’. Further, total loss arose at once for detention/seizure on infringement of customs regulations.<sup>632</sup> Perhaps because these losses on restraint or detention were better characterised as losses of the voyage, rather than deemed losses of the subject matter, the presumption was not as well articulated. Difficulties arose where embargo was imposed on a destination port – this might lead to loss of voyage, but not the physical *specie*. Finally, it gave greater scope for a test of ‘uncertainty’ to evolve. “Uncertainty” was a word introduced into discussions of these situations, although arguably no test of ‘uncertainty’ was applied in court until after the 1906 Act.

Equally, in America, Arnould’s statement was approved in that where a vessel is detained, but absent any specific intention to detain the cargo on board, that detention nevertheless constituted a detention of the cargo. Despite the lack of intention, the effect is the same for the insured, so the situations should not be and were not distinguished.<sup>633</sup> Further, *Northern Feather International v London Underwriters subscribing to the Policy No JWP108 through Wigham Poland Ltd*<sup>634</sup> held that lawful detention by civil authorities constituted ‘detainment’, and this fell within ‘seizure’ for the meaning of the FC&S clause. There, *Resin Coatings Corp v Fidelity and Casualty Company of New York*<sup>635</sup> was applied, where detainment by Arabian customs officials of goods where papers had not been forwarded was a ‘seizure’ within the FCS clause. There was no discussion in either case whether there was any detention to permanently deprive, and the issue does not appear relevant for total losses in the American courts.

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<sup>628</sup> *Barker v Blakes* (1808) 103 ER 581; 9 East 281

<sup>629</sup> *McBride v The Marine Ins Co* 5 Johns. Rep 299; *Walde v the Phoenix Ins Co*, 5 Johns Rep 310; *Ogden v The New-York Firemen Ins Co* 10 Johns Rep 177, 12 Johns Rep 25; Sherman, *Marine Insurance* (New York, 1841), 10

<sup>630</sup> *Rodocanachi and others v Elliott* (1874) LR 9 CP 518, 523

<sup>631</sup> [1874-80] All ER Rep 618, (1874) LR 9 CP 518

<sup>632</sup> *Roche v Thompson Miller Ins* 20; *Miller v Accident Insurance Company* [1903] 1 KB 712

<sup>633</sup> *Commodities Reserve Co v St Paul Fire & Marine Insurance Co* 1989 AMC 2409, 2417; Arnould (16<sup>th</sup> edn, 1981), [889]

<sup>634</sup> 1989 AMC 1805 (USDC, New Jersey)

<sup>635</sup> 489 F Supp 73 (DS Fla 1980)

## 5.5 Whether Generalising test undermined presumption

What evidence was there for any test of ‘uncertainty’ before 1906? Tests reconsidering the *spes* evolved gradually after *Goss*. Ellenborough CJ innovatively suggested that the court assess future chances in *the Confiance*, ‘... *there is not any case nor principle which authorises an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment*’.<sup>636</sup> The words ‘*in the highest degree probable*’ indicated that an insured might anticipate total loss. This *dictum* was widely copied in textbooks, and entered New York law in *Peele v Merchants Insurance Company (the Argonaut)*<sup>637</sup> where Storey J formulated a general test of constructive (“*technical*”) total loss. The *Argonaut* stranded and her owners abandoned her. Her destruction was considered so inevitable – ‘9 out of 10’ and ‘*certain*’ – that even her rigging was removed. Unexpectedly, the weather eased; underwriters re-floated and repaired her, and denied total loss. Storey observed that stranding presented a novel situation in insurance. Consequently, he formulated a general test of total loss applicable to novel situations.

Having considered the capture cases and restated Ellenborough’s *dictum*,<sup>638</sup> he formulated three tests justifying a total loss where that loss is prospective; ‘*the highest degree probable*’, ‘*the high probability*’ that the loss will be total, and ‘*if the insured may*’ pay too much for repairs after restoration.<sup>639</sup> Applied to the novel situation of stranding, as on damage, the court would not presume total loss, but investigate the probability of the vessel being wrecked or re-floated. In his new general rule, intended to test novel situations, Storey J blurred the distinction between the different specific examples of total loss he had previously summarised:

*“If there be any general principle, ... the right to abandon exists, whenever ..., the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost...”*<sup>640</sup>

Arnould adopted this as the paradigm definition of constructive total loss and it remained unchanged in the edition cited in *Masefield*.<sup>641</sup> Storey J intended to apply existing law, not

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<sup>636</sup> (1813) 2 M&S 240

<sup>637</sup> (1822) 19 Fed Cas 102

<sup>638</sup> *The Confiance*, 248; (1822) 19 Fed Cas 102, 110

<sup>639</sup> Citing *M’lver v Henderson* 4 M&S 576, 584; cf *Bell v Nixon* (1816) 1 Holt 423

<sup>640</sup> *Peele v Merchants Insurance Company* (1822) 19 Fed Cas 102, 111-112; *The Manhattan* (1807) 8 US 29, (1807) 4 Cranch 29; *Marshall v Delaware Ins Co* (1808) 8 US 4 Cranch 202

<sup>641</sup> (2<sup>nd</sup> edn, 1857); (17<sup>th</sup> ed 2008), [29-01]

change it. Applied to capture, his test conflated the established rule (immediate right of abandonment) with the justification for the rule (uncertainty of restitution).

*Peele* established a rule on stranding, not capture, and policy considerations arising on these perils differed. No immediate right to abandon arose on stranding because master and crew retained possession and control. While uncertainty as to restoration in both situations existed, nevertheless on capture “*the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the spes recuperandi to the insurer who will have the benefit of a recapture, or of any other accident by which the thing may be recovered*”.<sup>642</sup> Despite not modifying the existing law, Storey’s test attracted significant academic attention during the nineteenth century to the exclusion, in textbooks, of the law applied in capture cases. Textbooks blurred the tests applicable to separate classes of factual situation. Arnould, citing *Peele*, explained the perils of arrest and/or embargo, not stranding or capture, there was a right of abandonment “*in all cases where there is an apparent probability that the owner’s loss of the free use and disposal of his ship, once total, by the arrest or embargo may be of long, or, at all events, of very uncertain continuance*”.<sup>643</sup> Critically, in the ratio of *Peele*, there was nothing to dilute the established rule on capture.

Later, Storey J’s general test for novel situations was expressed in textbooks as applicable to established situations. Arguably, established authorities on capture and seizure situations could not be changed by generalising tests stated in textbooks. By *Kaltenbach v MacKenzie* – a damage case – Brett LJ followed textbooks citing *Peele* rather than fact-specific judicial tests. His judgment suggested an assessment of the ‘chance’ of a loss being total: ‘*Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss; as, for instance, if he hears his ship is captured in time of war, it must be obvious to everybody, unless the ship is recaptured, it would be a total loss*’.<sup>644</sup> Read in context at that date, it should not undermine the presumption of total loss. Nevertheless, a general test of ‘uncertainty’ in novel situations entered the literature in both England and America, and permitted the decision in *Polurrian v Young*. To the perils of loss of possession, no test of ‘uncertainty’ was ever applied. A final, overlooked, factor is that while *Peele* established a test of ‘uncertainty’ for novel situations, there was a second alternative, that recovery be ‘*unreasonably distant*’, and consideration of that test scarcely appears in subsequent discussion. Equally, it was never stated ‘unreasonably

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<sup>642</sup> Marshall (1802), 481

<sup>643</sup> Arnould (2<sup>nd</sup> edn, 1857), 1083

<sup>644</sup> (1878) 3 CPD 467, 473-474

distant' displaced what appeared elsewhere to be a settled presumption, but instead provided an additional recognition of such a presumption where dispossession was *deemed* to be permanent.<sup>645</sup> Consequently, as the House of Lords confirmed in 1898, the simple test for all perils of loss of possession was not only whether possession was lost, but also if in between notice of abandonment and the commencement of legal proceedings there was a change of circumstances reducing the loss from a total to a partial one, or, if at the time of action the circumstances are such that a notice of abandonment would not be justifiable, the assured could only recover for a partial loss.<sup>646</sup>

Arguably, the test for all perils of loss of possession was identical. The first issue was whether there was a *prima facie* right to abandon. Secondly, if there was, the court looked only to the situation at the relevant time, being the action in England, or the notice of abandonment in America. From that critical time, future chances of recovery, on the specific perils of loss of possession, were not considered. The rules for perils of dispossession differed from the test applicable to standing, and over time, to shipwreck. On each peril causing loss of possession, while it lasted, there was a right to abandon and recover for total loss. Where free use and disposal was lost, but possession retained, as on stranding, there was no such right. Embargoes and detentions were generally treated as akin to losses of possession, and the presumption was stated to apply equally to them. Situations where the peril did not cause a loss of possession, did not engage the presumption.

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<sup>645</sup> For example in *Calmar Steam-ship Corp v Scott* 345 US 427 (1953) 1951 AMC 936, where allied requisition was deemed to be permanent.

<sup>646</sup> *Blairmore v Macredie* [1898] AC 593, 611 (Herschell LJ)

## 6 LOSS OF THE VOYAGE

In addition to covering the physical safety of the *specie*, voyage policies on hull or cargo cover the performance of contemplated voyages. Hull or cargo time policies ostensibly cover the property remaining safe for a time.<sup>647</sup> Freight policies cover freight becoming payable either on the completion of a voyage, or the vessel remaining on hire. In *Manning v Newnham*, Mansfield considered issues of loss on a cargo voyage policy where the vessel was damaged by sea-perils and unnavigable, where no other vessels were then available to ship the cargo. It had been possible to ship a portion of the cargo on to the intended port and make a profit. Nevertheless, Mansfield held the adventure frustrated and consequently freight totally lost, explaining:

*“If the voyage in contemplation is lost, or is not worth pursuing, this is a total loss. Here the voyage in contemplation is of a large Dutch ship, loaded with sugar, at Surinam, to come from Tortola to London. ... Here she is condemned as totally unfit to proceed; and there is no ship to be had. Must the insured wait?”*<sup>648</sup>

The court apparently tested the price of the goods at the time, and the court held that the insured should not have to wait until they were able forward the whole of the cargo:

*“We are therefore all of opinion that this is a total loss. It agrees with all the cases; and we are afraid much confusion will arise from too great nicety in examining what is a total loss of a voyage”.*<sup>649</sup>

Although clear definitions of what constitutes loss of the voyage are hard to identify, cover for the voyage remains in contemporary law. It is settled that, at least for goods policies, claims may be made either for ‘loss of goods or loss of adventure’.<sup>650</sup> Contrastingly, it is no longer thought that insurances on hulls cover loss of the voyage in the same way, and the hull underwriter is ‘not liable in respect of loss of adventure’.<sup>651</sup>

It was confirmed in *Sanday*, that where ‘the chance of arriving at the port of destination, and the consequent loss of the market appear to be unavoidable, there would be a constructive total loss of the subject-matter’.<sup>652</sup> What extra dimension does this venture add to total loss claims on loss of possession? Why is the vessel treated differently? How does this cover for the voyage relate to the exclusion of losses for delay? In what circumstances might the loss of the voyage assist a claim for total loss on loss of possession? How does ‘loss of market’

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<sup>647</sup> *Manning v Newnham* Trin 1782 (Mansfield LCJ); *Wilson v Royal Exchange Co* (1811) 2 Camp 623

<sup>648</sup> *ibid*

<sup>649</sup> *ibid*

<sup>650</sup> *Rickards v Forestal Land* [1942] AC 50, 69 (Viscount Maugham)

<sup>651</sup> *ibid*

<sup>652</sup> [1916] 1 AC 650, 664



interact with the principle that insurance does not cover losses by delay, or by the rise and fall in the market? To address these issues, the following issues are considered:

- i. Loss of voyage in wagering policies;
- ii. Interruption to an ultimately completed voyage;
- iii. 'Disappointment of arrival';
- iv. Loss of the voyage on hull policies;
- v. Supervening Illegality;
- vi. Proximate Cause; voyage abandoned before peril engaged;
- vii. Total loss of freight.

## 6.1 Loss of voyage in Wagering Policies

The earliest reported English authorities concerned wagering policies, where the assured was not required to have an interest in the subject matter.<sup>653</sup> These introduced the concept of 'loss of the voyage' in addition to the loss or destruction of the property as an integral part of marine insurance. In *Dapaiba v Ludlow*,<sup>654</sup> the vessel was captured by a Swedish pirate. Nine days later she was retaken by an English vessel. Proceedings were issued while she was still at sea. Subsequently her recaptor took her into an English port. The court held the insurer liable for total loss. The interruption of the voyage was enough to allow the plaintiff to recover: *'...though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted ; and the question is not whether the plaintiff had his ship and did not lose his property, but what damage he sustained...'* *Dapaba* established that, for wagering policies, a loss occurred whenever the voyage was interrupted (surprisingly, *Dapaba* was later cited in *Pole v Fitzgerald (the Goodfellow)*<sup>655</sup> for the opposite proposition). Assurances protected trade, not static property, and the 'loss of the voyage' expressed that aspect.

Interruption of the voyage by detention was held a total loss of the venture. In *Pond v King (the Salamander)*,<sup>656</sup> the policy covered a cruise of three months on a privateer part owned by the plaintiff. She was captured by the French, subsequently recaptured, and taken to a port in neutral Spain. Lee CJ, in the King's Bench, contrasting English law with civil law, said *'the insurance is to be understood for the voyage for three months, and in common sense it cannot be otherwise; so whenever the voyage is broken or interrupted it is at an end. Safety during*

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<sup>653</sup> Identified by term 'interest or no interest' or alternatively by not assigning the benefit of salvage to the insurer, or occasionally by drafting error on a valued policy.

<sup>654</sup> *Dapaba v Ludlow* (1721) 1 Comptns 361, (1721) 92 ER 1112 (CB), incorrectly cited as (1719) Comyn Rep 360 in *Pole v Fitzgerald* (1750) Willes 640; 1 TR 187; (1750) 125 ER 1362 (Exchequer Chamber)

<sup>655</sup> (1750) Willes 641, (1750) 125 ER 1362 (Exchequer Chamber)

<sup>656</sup> (1747) 1 Willes KB 191, (1747) 95 ER 567

*the three months is what is meant, but it appears the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss...'*. The owner did not pay salvage, which would have ensured the return of the vessel; the terms of the policy preventing the insured from making that payment. *The Salamander* confirmed *Dapaba* that the interruption of the voyage allowed the insured to recover the value stated in the policy, ie total loss. Similarly, in *Dean v Dicker (The Dursley)*,<sup>657</sup> the insured vessel was captured by a Spanish privateer, and kept for eight days in a Spanish port before being recaptured by an English vessel. Lord Lee CJ held that the plaintiff was entitled to recover on the wager for a total loss.<sup>658</sup> Likewise, in *Whitehead v Bance*,<sup>659</sup> where the vessel was taken by a French privateer and carried into port for twelve days before being recaptured by an English ship and restored to the owner, who paid the salvage and sold the ship, the plaintiff established loss of the voyage, and recovered for total loss. Those four authorities record a rule on wagering policies: where the voyage was interrupted, there occurred a total loss of the voyage, regardless of whether property was restored. This test was separate from whether the property was, or might ever be, recovered or restored.

*The Goodfellow*<sup>660</sup> doubted that the insurance covered any aspect of the venture, and specifically doubted *The Salamander*. There, the crew's barratry prevented the ship from leaving its home port to commence the voyage. Lord Willes CJ held that the loss of a voyage would not enable the insured to recover as for the loss of the vessel. He held that the notion of insurance '*for a voyage*' was absurd, and would be a '*double insurance*'. Accordingly a policy insuring a voyage would be '*illegal and unreasonable*'. He had to distinguish the established contrary authority. He noted the policy in *Pond* prevented the insured from paying the salvage necessary to recover it – this meant that although she was back in England, the insured was not capable of recovering his property without forfeiting the policy. *The Goodfellow* distinguished *Pond*, on the basis the insured was entitled to possession. He stated *Depaba* held there was no insurance on the voyage, contra the surviving report. In the House of Lords, Lord Hardwick confirmed that the '*cruze*' was not covered. *The Goodfellow* was cited in 1814<sup>661</sup> as authority that a claim for total loss could not be established on a policy covering a ship where it was undamaged, though that has been doubted.<sup>662</sup>

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<sup>657</sup> (1745) NP 2 Strange 1250, (1745) 93 ER 1162

<sup>658</sup> Marshall (1802), 426

<sup>659</sup> NP BR Mich 1749, Park 77; Marshall (1802), 426

<sup>660</sup> *Pole v Fitzgerald* (1750) Willes 641, (1750) 125 ER 1362 (Exchequer Chamber); confirmed (1754) Amb 214, (1754) 27 ER 142 (HL)

<sup>661</sup> *Falkner v Ritchie*, 2 M&S 289, 293 (Ellenborough LCJ)

<sup>662</sup> *Hudson and another v Harrison* (1821) 3 B&B 97

Decisions on wagers conflicted over whether an interruption to an ultimately completed voyage by a peril depriving the insured of possession constituted loss of the wager. *Dapaba*, *The Salamander*, *The Dursley* and *Whitehead* supported the rule that such events constituted total loss. *The Goodfellow* provided that such interruption alone was not, and was supported by two authorities: (i) *Spencer v Franco*,<sup>663</sup> where no report survives; and (ii) *dicta* in *Kulen Kemp v Vigne*.<sup>664</sup> *The Goodfellow* conflicted with then established authorities providing for loss of voyage on a marine policy. Arguably it is too simplistic, since both lines of authority were later cited with approval in decisions on valued policies, to regard the House of Lords decision in *Pole* as settling the law.<sup>665</sup> Realistically, their later treatment indicated the law was unsettled, and cover for the voyage survived. Marshall attempted to reconcile *Dapaba* with *Pole*, suggesting Mansfield erred in treating the policy as a wager, and arguing that it was plain from the judgment that the court considered the plaintiff to have an interest in the ship.<sup>666</sup> This appears incompatible with the surviving report, and no commentary addressed adequately the problematic issue that the *Goodfellow* conflicted with the great majority of decisions supporting the existence of voyage cover, and in view of this must be open to doubt.

Wagers remain significant for contemporary law because they introduced ‘loss of the voyage’ to English law. Regardless of whether loss of the voyage applied to hull policies, it was clear from *Dapaba v Ludlow* onwards that under wagering policies, if the voyage was interrupted by a peril of loss of possession, the voyage was deemed lost, and the insured amount was recoverable.

## 6.2 Interruption to an ultimately completed voyage

Statute banned wagering policies on public policy grounds<sup>667</sup> in 1745.<sup>668</sup> The law governing policies for interest diverged from that governing wagering policies. Mansfield observed because ‘*the insured had no interest, so there could be no indemnity; and the only question was, whether the event had happened; and to determine this, it was necessary to set up something as making a total loss between third persons, though the ship was safe, in order to determine the question upon the wager*’.<sup>669</sup> Valued policies generally compensated insureds for the actual loss suffered, while wagering policies questioned whether, simply, the event had occurred so the premium was recoverable. Valued policies were contracts of indemnity, while

<sup>663</sup> This was a case where there was no transfer of property after a long dispossession by capture.

<sup>664</sup> (1786) 1 TR 304

<sup>665</sup> eg J P M De Koning, *An Hiatus in English Insurance Law* (1998) 9 ILJ 187, *passim*

<sup>666</sup> (1802), 414

<sup>667</sup> De Koning (1998) 9 ILJ 187

<sup>668</sup> 19 Geo 2 cl 39; Magens, Vol II, 341

<sup>669</sup> *Goss v Withers* (1758) 96 ER 1198, (1758) 2 KENY 325, (1758) 2 BURR 683

wagers were not, and consequently, in *Goss* Mansfield LCJ distinguished wagering from valued policies and clearly reached his decision on independent grounds. Did the law on valued policies follow wagering cases in finding total losses where the voyage was interrupted but ultimately completed?

i. English authorities

That there could be a loss of the voyage on a valued policy was confirmed in *Goss* and reinforced in *Mitchell v Edie (the Lady Mansfield)* where it was said, ‘*A total loss is of two sorts: one, where in fact the whole of the property perishes; the other where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it*’.<sup>670</sup> While recognised in theory, this general statement was limited, principally by application of the test of proximate cause. What sort of interruptions demonstrated that the voyage was lost? On valued policies, blockade of the vessel inside port could frustrate the voyage. In *Barker v Blakes (the Hannah)*<sup>671</sup> the voyage was restrained by a blockade. Ellenborough CJ held:

“...first, that a loss of the voyage (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so,) was occasioned by the detention in question, which continued until and after the blockade took place, which rendered the prosecution of the voyage to Havre no longer practicable...”

What consideration was there of the chance of the voyage eventually being completed? Early authorities considered the speed at which goods could be brought to the destination port relevant to the loss of the voyage on goods policies. In *Goss*, Mansfield LCJ noted that by the arrival, the ‘*lent-season for the sale of fish was over*’.<sup>672</sup> In *Manning v Newnham*<sup>673</sup> he said that an insured was not obliged to wait for a ship to carry insured cargo if the first ship was too damaged, so could claim for a total loss. Mansfield considered that insurance covered the particular voyage contemplated. Implicitly, late arrival caused by an insured peril constituted a loss of that voyage, justifying abandonment for a total loss. Of course, in *Goss* the fish had also rotted, but importantly, the court noted the limited season for the sale of fish at a higher value, which had passed. Accordingly, the particular voyage insured was understood by Mansfield LCJ to refer to the intended seasonal market. Missing this provided separate grounds for abandonment to the cargo’s deterioration.

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<sup>670</sup> (1787) 99 ER 1278, (1787) 1 K 609

<sup>671</sup> (1808) 9 East 281

<sup>672</sup> (1758) 96 ER 1198, (1758) 2 Keny 325, (1758) 2 Burr 683

<sup>673</sup> (1782) 3 Dougl 130, (1782) 99 ER 575 (KB)

The completion of the voyage had to be for the benefit of the insured. Where cargo was barratiously sold by the crew, and eventually was forwarded to the destination port, this was not a completion of the voyage for the benefit of the insured, and there was a total loss by the barratious act of seizure.<sup>674</sup> Loss of possession appeared to be presumed a total loss of the voyage for the benefit of the insured.

ii. American authorities

Following English law, American authorities indicated that the voyage would be lost where further progression was impossible. If the voyage began, and further progression of the voyage by leaving an invested port would result in a capture, the assured could abandon for restraint of princes: *"If, in the course of her voyage, a vessel puts into a port where she is permitted by the policy to stop, and while she is there the place is closely invested with cruisers of the enemy of the country to which she belongs, so that if she should attempt to escape she must inevitably be captured; this is a restraint of princes and of men-of-war, within the risks enumerated in the policy, and the insured may break up the voyage and abandon for a total loss, although there is no direct application of physical force to the subject. And an abandonment made under such circumstances, is not liable to the objection that it was made quia temet"*.<sup>675</sup> This confirmed situation of investiture or blockade, such as *Moore v Evans* should properly be understood as an insured peril.

Interestingly, some American authorities suggested predicted profit, or regulatory capacity, not simply the physical possibility of the voyage continuing, to be relevant. Where after capture, the vessel was deprived of papers, recaptured, and restored upon payment of salvage: *"...the insured was justified in breaking up the voyage, and that there was a total loss by capture, inasmuch as the ship was not in a legal capacity to perform her voyage after having lost her papers"*.<sup>676</sup> The voyage was not a commercial prospect to pursue in *Gilfert v Hallet and Bowne*,<sup>677</sup> where pirates took over half the value of cargo from a vessel. In deciding whether the abandonment was justified, where the cargo was valued at \$12,000, and pirates took all but \$3,701, *"the cargo [was] so greatly diminished by the piracy... the voyage may be deemed to have been broken up, and not worth pursuing. The expense of pursuing it would have exceeded the benefit arising from it. The remains of the cargo could not justify the re-equipment of the vessel and a continuance of the voyage..."* The material issue there was whether the expense of pursuing it would have exceeded the benefit arising from it. This was

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<sup>674</sup> *Dixon v Reid* 5 Barn & Ald 597; William Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia* (1824, Baldwin Craddock and Joy), 385

<sup>675</sup> *Saltus v The United Ins Co* 15 Johns Rep 523; Sherman, *Marine Insurance* (1841, New York), 18

<sup>676</sup> *Post v The Phoenix Ins Co* 10 Johns Rep 79; Sherman (1841), 104

<sup>677</sup> 2 Johns Cas 296; 1801 NY Lexis 53 (Supreme Court of Judicature, New York)(Kent J)

separate from the loss of most of the cargo. This does not appear to in the English law of constructive total losses, where such pure financial considerations are not relevant.

### 6.3 ‘Disappointment of arrival’ not insured

This rule that interruption to the voyage established total loss had rigidly defined limits, usually expressed by the rule that ‘disappointment of arrival’ was not covered. Contrasting with the American authorities allowing a total loss of the voyage for commercial reasons, *Anderson v Wallis (the Confiance)*<sup>678</sup> indicated that an insured could not claim for total loss on the basis the voyage became commercially unviable. The policy covered cargo for a voyage, where vessel and cargo were damaged by heavy weather. The cargo was landed for the season. The vessel was repaired and completed the voyage the next year. It was argued that the loss of the voyage that season amounted to a loss of the voyage. Ellenborough LCJ held that the mere retardation of a voyage could never amount to a total loss, nor could it authorize an abandonment, saying; ‘*disappointment of arrival was a new head of abandonment in insurance law*’.<sup>679</sup> This restriction of the loss of the voyage doctrine reflected his view of *the Goodfellow*, but conflicted with *Goss*. The distinction between this and *Manning v Newnham* was that the vessel in *Manning* was totally lost, and the insured was waiting for the arrival of another vessel, rather than in *Anderson*, waiting for repairs of unknown duration.

In *Falkner and Others v Ritchie* (1814),<sup>680</sup> the policy covered the ship on a voyage from Cadiz to ports in Africa and back. The crew seized her in an African port, and sailed her to South America, where they plundered the cargo. The following year, she was taken by an American ship, itself then captured by a British privateer. A British prize crew took control. The owners discovered the loss and the recapture at the same time, and issued proceedings. Ellenborough CJ questioned ‘*what has the loss of the voyage to do with the loss of the ship?*’ Applying *the Goodfellow*, he ruled that the owner could not recover for a total loss. His reasoning was that the vessel was a total loss while captured, but that on recapture it became a partial loss only (applying *the Confiance*,<sup>681</sup> doubting *Goss*). He noted that in *Anderson v Wallis*, the loss of the voyage just as complete. That case concerned a policy on goods; the vessel had been driven by stress of weather into an intermediate port and the goods re-landed, and the voyage was lost for the season. The issue was whether the insured could abandon. It was held that a retardation of the voyage was not a ground of abandonment, as the goods still subsisted in

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<sup>678</sup> (1813) 2 M&S 240, (1813) 105 ER 372

<sup>679</sup> *ibid*, 247

<sup>680</sup> (1814) 2 M&S 289, (1814) 105 ER 389

<sup>681</sup> (1813) 2 M&S 240, (1813) 105 ER 372

specie. Further, in *Everth v Smith*...<sup>682</sup> the Court recognized *Anderson*, and applied that rule to a freight policy, holding that a loss of the voyage contemplated by the assured was not a loss of the freight, the freight having been afterwards earned. He doubted whether *Goss v Withers* was similar to the present case suggested there was a looseness and generality in the expressions borrowed in argument from *Goss*. He asked ‘What has a loss of the voyage to do with the loss of the ship?’ and observed he saw good sense in the judgment of CJ Willes in *the Goodfellow*, and thought that provided the better authority. In *Falkner*, Bayley J referred to *the Little Mary*,<sup>683</sup> but his judgment is not recorded.

*Falkner v Ritchie* was later doubted in *Hudson and another v Harrison*, where Park J said “*I think that some of the cases on that subject cannot be supported to their full extent. I, for one, have never been able to comprehend the case of Falkner v Ritchie, which I have the less hesitation in avowing, inasmuch as the Lord Chancellor and Lord Redesdale have expressed themselves to labour under the same difficulty*”.<sup>684</sup> Save for being doubted in *Hudson*, *Falkner* does not seem to have received significant treatment in later authorities. Later, in *the Friendship*,<sup>685</sup> Ellenborough LCJ noted with regard to the loss of a vessel that the voyage had been lost while it was captured, though he did not expressly hold that to be a ground for abandonment of the vessel. In these examples, the voyage had been performed by the time of the action.

If the master discovers an embargo of the destination port, and accordingly abandons the voyage to avoid the peril, will there be a total loss of the voyage on insurance? It appears to have been settled by the early nineteenth century that: (i) the abandonment of the voyage was seldom a loss within any insured peril; and (ii) that this usually did not amount to a loss of the voyage. The earliest authority on these facts was *Hadkinson v Robinson*.<sup>686</sup> The policy covered a perishable cargo of fish on ‘the Paxaro’ from Cornwall to Naples in January 1800. During the voyage, it became known on 16 March that the Kingdom of Naples had signed a treaty with France and was closed to English vessels. The vessel and cargo would be liable to confiscation if it entered the port. The vessel diverted to Minorca where there would be better intelligence of the situation. The cargo was sold by order of the Vice-Admiralty court there. The cargo owners gave notice of abandonment on 23 April. The owners contended that the voyage was lost by detention or restraint of princes. Alvanley LCJ held that the circumstances did not justify total loss:

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<sup>682</sup> (1814) 2 M&S 279, (1814) 105 ER 385

<sup>683</sup> (1810) 2 Taunt 363, (1810) 127 ER 1118

<sup>684</sup> (1821) 3 B&B 97

<sup>685</sup> (1816) 5 M&S 446, (1816) 105 ER 1114

<sup>686</sup> (1803) 3 Bos&Pul 388

*“But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured”.*<sup>687</sup>

Alvanley LCJ recognised the rule in *Goss v Withers* that the insured could recover if the voyage is defeated, but held that the peril must act immediately and not circuitously. Accordingly, he held that sale of the property at a neutral port was not a loss within a peril in the policy. He suggested a separate approach to the different classes of factual cases. He noted that in *Manning v Newharn* Lord Mansfield expressly decides the case on the ground of the voyage being lost by one of the perils insured against, namely, by tempestuous weather, and that: *“The words of Lord Kenyon in M'Andrews v Vaughan, in which he lays down that the insured may recover for a total loss if the voyage be lost, must be taken with reference to the case before him, in which the injury arose from capture”.*<sup>688</sup> Accordingly, the cases of loss of a voyage by capture, perils of the seas and restraint were considered separately. The result in the case was supported by sound policy:

*“...it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and, by giving notice of abandonment, to throw a loss upon the underwriters to which they are not liable by the terms of the policy”.*<sup>689</sup>

*Lubbock v Rowcroft (the Nelly)*<sup>690</sup> concerned a policy on a cargo of pepper consigned to Messina. When the vessel arrived, it was discovered that the port was blockaded by the French, or in their possession. The owner gave notice of abandonment for a total loss. The opinion was given by Ellenborough LCJ that this would not be any loss. He considered that the abandonment was from an apprehension of capture, and not from a peril within the policy. The claimant was non-suited for other reasons, so the case did not determine the issue.

In *Miller v Law Accident Insurance Company*<sup>691</sup> the policy covered cattle shipped to Buenos Aires, a port of destination which was the only place commercially worthwhile to sell the cargo. In consequence of the impossibility of landing the cattle at Buenos Aires it was argued that the adventure was defeated, and the underwriters were liable for total loss. The court held the issue of the decree by the Argentine Government, under which the landing of the cattle was forbidden, was an act of State, within the words ‘restraints of people’.

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<sup>687</sup> (1803) 3 Bos&Pul 388, 392

<sup>688</sup> *ibid*, 392

<sup>689</sup> *ibid*, 393

<sup>690</sup> (1803) 5 Esp 50

<sup>691</sup> [1902] 2 KB 694, [1903] 1 KB 712



To claim for constructive total loss, the loss must be caused proximately by an insured peril. Disappointment of arrival by the interruption of commerce is not insured. Arnould provided that the English law of abandonment, meaning the doctrine of constructive total loss, only applied to cases that were proximately caused by an insured peril, and observed that disappointment of arrival by the interdiction of commerce, or being turned away from the destination port, were not risks insured by the SG policy, and were no ground of abandonment.<sup>692</sup>

In *Roura Forgas v Townend* and others it was indicated the test for loss of the voyage would be similar to the test of charterparty frustration, noting that in “*Russian Bank for Foreign Trade v Excess Insurance Co*”<sup>693</sup> ...the adventure or voyage upon which certain goods were to be despatched, and on which they were insured, was frustrated. The cause of frustration was not a capture or loss of the ship, as it was here, but a requisition of the ship amounting, at most, to a restraint. Moreover, in that case the subject-matter of insurance and the thing for which a loss was claimed was a quantity of goods”.<sup>694</sup> Different rules on causation applied to other perils of the seas, which slowed the rate of sailing. It was said in *Field SS v Burr* that the inability to recover for loss incident to delay under a policy on ship may also be rested on the ground on which it was placed by Lord Denman in *De Vaux v Salvador*, that the sea peril cannot be regarded as the proximate cause of such a loss:

*"These losses," says Mr. Lowndes, "result not from the damage but from the delay incident to the damage". Here... the real sea damage was to the cargo; the incidental consequence is that the ship cannot be used again till the damaged cargo is removed, and is therefore, on the same reasoning, not due to a sea peril as the causa proxima".*<sup>695</sup>

On a cargo policy, does requisition of the contemplated vessel cause loss of the voyage? In *Russian Bank of Foreign Trade v Excess Insurance Company*<sup>696</sup> the plaintiffs insured with the defendants barley on board the *Wolverton* at Novorossisk for carriage to Falmouth. The policy covered loss from restraints of princes and consequences of hostilities, but excluded claims due to delay. Owing to the closing of the Dardanelles the ship could not leave Novorossisk, and while she was there on March 5, 1915, her owners were directed by the Admiralty to place her at the disposal of the Russian Government. The plaintiffs informed their insurance brokers on 5 March: "*Wolverton requisitioned by British Government account Russian Government. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk and*

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<sup>692</sup> Arnould (1848), 1058; *Hadkinson v Robinson*, 3 Bos&Pul 388; *Lubbock v Rowcroft* 5 Esp 49; *Blackenhagen v London Ass Comp*, 1 Camp 454; *Parkin v Tunno* 11 East 22; *Foster v Christie*, 11 East 205

<sup>693</sup> [1918] 2 KB 123

<sup>694</sup> [1919] 1 KB 189, 197-8

<sup>695</sup> [1899] 1 QB 579, 591-2 (Collins LJ)

<sup>696</sup> [1916 R 828]-[1919] 1 KB 39

*insured value.*" The insured claimed constructive total loss of the barley. Bailhache J held: (i) the telegram of 5 March was a good notice of abandonment; (ii) that the requisition by the Admiralty was *ultra vires*, and therefore not a restraint of princes; (iii) that the closing of the Dardanelles was a restraint of princes; but (iv) that the claim was a claim due to delay, and therefore excluded by the policy. On appeal, the Court of Appeal held there was no valid notice of abandonment, and expressed no opinion on the other grounds. This first-instance judgment is doubtful, for an *ultra vires* act clearly could amount to restraint of princes, supported by the wide meaning of unlawful capture.

In *Becker, Grey and Company v London Assurance Corporation*,<sup>697</sup> the plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraints of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master, on being informed of that fact, put into a neutral port to avoid the risk of capture by hostile cruisers and with the intention of suspending the further prosecution of the voyage until after the termination of the war, and the voyage was thereupon abandoned. The plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. There was no evidence that the ship had been chased by any hostile cruiser, but, in the opinion of the Lords of the Admiralty, she would have been in peril of capture if she had proceeded on her voyage. It was held, distinguishing *Sanday*,<sup>698</sup> that the frustration of the adventure was caused, not by a peril insured against, but by the voluntary act of the captain – the plaintiffs could not recover for loss of the voyage.

It was impossible to reconcile this distinction with the underlying permissive authority of in *Emerigon*. Further, Arnould noted, in respect of both French and American laws, that in the maritime law of every country other than England, the compulsory abandonment of the voyage occasioned by the interdiction of commerce with the destination port, or by the hostile occupation, blockade or embargo of it, was a risk within the policy, within 'restraint of princes'<sup>699</sup> or 'compulsory change of voyage'. or under the words "*compulsory change of voyage*".<sup>700</sup> However, the English position was restricted, in that:

*"...neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts to a risk for which English underwriters are answerable*

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<sup>697</sup> [1918] AC 101; [1916] 2 KB 156

<sup>698</sup> [1916] 1 AC 650

<sup>699</sup> *Emerigon*, Ch XII, [31] Vol I, 533; 3 Kent, Comm 292-294; 1 Phillips Ins XIII, [10]

<sup>700</sup> Arnould (1886) Vol II, 682; Vaucher H, *A Guide to Marine Insurance* (1834, London); *Hadkinson v Robinson* 2 B&P 388; *Lubbock v Rowcroft* 5 Esp 50; *Blackenhagen v London Ass Co* 1 Camp 454; *Parkin v Tunno* 11 East, 22; 2 Camp. 59; *Forster v Christie* 11 East 205

*under the common form of policy, either as an “arrest, restraint, and detention,” or in any other way whatever”.*<sup>701</sup>

English law had restricted the right to recover, but this restriction never extended, before 1906, to prevent recovery where possession was lost. This restriction dealt with situation where possession was at all times in the owner.

#### 6.4 Loss of the voyage on hull policies

This conflict of early authority on wagers contributes to the contemporary divergence over whether it is possible to claim for a ‘loss of a voyage’ on a ship, or just cargo, and what that means in practice. Eventually, the majority view on wagering policies prevailed, following *De Paiba v Ludlow*.<sup>702</sup> The earliest cases, e.g. *Goss*, and textbooks on valued policies suggest, in opposition to *the Goodfellow*,<sup>703</sup> that there could be a loss of voyage on hull policies. Marshall noted the various *dicta* in *Cazalet v St Barbe*:<sup>704</sup>

*‘In ... Jenkins v Mackenzie though the ship was brought into port yet the capture as between the insurer and the insured was a total loss. The true way of considering this case is that it was an insurance on the ship for the voyage and if either the ship or the voyage be lost it will be a total loss but here neither was lost. The case of [the Selby]<sup>705</sup> is decisive’.*<sup>706</sup>

There was no total loss in *The Little Mary*,<sup>707</sup> where a vessel insured from England to Portugal and back was captured by the enemy French. It was liberated on payment by the master of ransom of \$3,000, on condition of his returning English prisoners to England to be exchanged for an equal number of French. On news of the capture, but after the ship had been released, the owners abandoned the ship to the insurers. After her arrival at Portsmouth, the captain refused to deliver her to the owners, unless he were reimbursed the ransom money. The owners refused to pay the ransom costs, and claimed for a total loss. On appeal, the claim was dismissed. The payment of ransom to an enemy was by statute illegal,<sup>708</sup> and accordingly was not an expense the master could claim from the owners. Therefore, the owner was entitled to take possession without making the payment, so suffered no recoverable loss. The ship-owners argued that the voyage, for a cargo of salt which had a seasonal market, had been lost.

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<sup>701</sup> Arnould (1886) Vol II, 682; *Hadkinson v Robinson* 2 B&P 388; *Lubbock v Rowcroft* 5 Esp 50; *Blackenhagen v London Ass Co* 1 Camp 454; *Parkin v Tunno* 11 East, 22; 2 Camp 59; *Forster v Christie* 11 East 205

<sup>702</sup> (1721) 1 Comtns 361

<sup>703</sup> (1750) Willes 640

<sup>704</sup> Samuel Marshall, *Treatise on the Law of Insurance* (1<sup>st</sup> edn 1802 Butterworth), 503

<sup>705</sup> (1761) 1 Black W 277, (1761) 97 ER 787

<sup>706</sup> (1786) 1 TR 187, (1786) 99 ER 1044

<sup>707</sup> (1810) 2 Taunt 363

<sup>708</sup> 45 Geo 3, c 72, s 16

This was rejected; Lawrence J stated authority provided, ‘...wherever the voyage insured is defeated by any of the perils insured against, there is a total loss: but I find no authority which applies to the case where the ship was, or might have been in the hands of the owner, in the country where the owners reside. The passage from the *Guidon*, c 7, s 1, which was the original authority on which Lord Mansfield relied in the case of *Goss v Withers*, does not apply to the ship...’ In *Goss*, it had been held that the voyage had been lost both on ship and cargo. It was stated that the case was ‘even stronger’ as for the cargo, but Mansfield also found a loss of the voyage on the ship. Nevertheless, Lawrence J in *The Little Mary*, following the arguments in *The Goodfellow*, found that there could not be loss of the voyage on the vessel.

In a series of cases where perils of the sea resulted in delays, the additional expenses, such as crew wages or provisions, were not recoverable on the policy.<sup>709</sup> This line of authority was not, at first, applied to prevent total loss claims for loss of possession situations. However, by *De Vaux v Salvador*<sup>710</sup> it was considered that as the hull underwriter was not liable for these expenses, the hull underwriter did not insure the voyage on the vessel. This was developed in *Field SS v Burr*<sup>711</sup> where perils of the sea caused the cargo to spoil: Collins LJ considered the nature of hull insurance, by questioning “...whether the assured on hull and machinery can throw upon the underwriters the expense of discharging at the port of destination a cargo which, having become putrid by the action of the perils of the sea, has lost its identity, and in respect of which, therefore, no freight is payable by the consignee.” He held that the insured could not recover: “...How can the presence of a putrid cargo in the ship be said to be a damage to the hull? The fabric of the ship is not injured by it. So far as it affects the ship at all it is by interfering with its use until the cargo is removed.” He held that marine insurance did not cover a hull owner’s business interests: “This is not damage to hull which is the interest insured, but, as counsel for the defendant pointed out, damage to the shipowner in his business as carrier.” While it might be more accurate to view a vessel as a freight-carrying instrument, rather than an object having an intrinsic value, so that interference with its ability to carry freight was damage to the shipowner, English law had not adopted that view.<sup>712</sup> Accordingly, “Damage by delay is clearly not damage to ship...”<sup>713</sup> That is the ground on which *Fletcher v. Poole, Eden v. Poole*, and *Robertson v. Ewer* were decided. “Here,” says Buller J. in the latter case, “the ship itself was safe; and the Court only looks to the thing itself which is the subject of insurance; and the wages and provisions...” This conclusion appeared well entrenched,

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<sup>709</sup> *Fletcher v Poole* (1769) 1 Park 115; Francis Rose, *Marine Insurance, Law and Practice* (2<sup>nd</sup> edn, 2013, Informa), 441 fn 4

<sup>710</sup> (1836) 4 AD&E 419

<sup>711</sup> [1898] 1 QB 579

<sup>712</sup> Lowndes, *A Practical Treatise on the Law of Marine Insurance* (1881, Stevens & Sons), [158], [189]

<sup>713</sup> *ibid* [126]; *De Vaux v Salvador* 4 A&E 431

but it did conflict with part of the justification for recovery given by Mansfield in *Goss*, namely that the delay caused a loss of seasonal market for the fish.

In 1942 it was held that the law had probably ceased to apply the doctrine of the loss of the voyage to a vessel:

*“The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. Lord Mansfield insisted on applying the same rule to an insurance on the ship, but his view was rejected and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure”.*<sup>714</sup>

*The Minden; Wangoni; Halle* further indicated that that goods underwriters still insured the voyage, and contrastingly, the voyage continued to be protected for goods. The owner’s commercial interest in the voyage could be separately be insured on a freight policy:

*“Freight is regarded in ordinary practice as a separate interest capable of being separately insured in addition. As to goods, it is indeed true that profits can be separately insured by an appropriate policy, and also that the insurable value on goods under an open policy is their value, plus charges on shipment, not their arrived value; s. 16, sub-s. 3, of the Marine Insurance Act 1906. But it has long been recognized that in a valued policy on goods it is permissible and indeed usual to value the goods so as to exceed their value on shipment”.*<sup>715</sup>

In *The Bamburi*, where one year’s continued deprivation was held a constructive total loss, this distinction between ship and cargo was noted. *The Minden; Wangoni; and Halle* was quoted, ‘in the case of a policy on goods in normal form the owner can claim either for loss of goods or loss of adventure, while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure (Viscount Maugham)’.<sup>716</sup> *The Bamburi* questioned whether the distinction was logically sustainable; why is a ship less of a loss than the cargo? However, the arbitrator concluded that the distinction was too entrenched to change, and ‘[in] any case, if loss of the adventure did still give rise to a claim under a voyage policy on ship, it would remain doubtful whether it gave rise to a claim on a time policy’.<sup>717</sup>

The right to recover on hull policies was recognised in American law, for example by Storey J in *Peele*. However, a contrary indication, that ‘the loss of the voyage as respects the cargo is not a loss of the voyage as to the ship’ was given academically by 1841,<sup>718</sup> and it appears that the modern American laws similarly restrict this right in following English laws.

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<sup>714</sup> *The Minden, the Wangoni, the Halle* [1942] AC 50 (HL), [1941] 3 All ER 62, 91

<sup>715</sup> *ibid*

<sup>716</sup> [1982] 1 Lloyd’s Rep 312, 318

<sup>717</sup> *ibid*

<sup>718</sup> *Church v The Marine Ins Co* 1 Mason 341; Sherman, Marine Insurance (1841), 221

Some rationalisation for the different rules may be that the early authorities were wagers and not contracts of indemnity. It has been suggested that the hull policy, because it is a contract of indemnity, insures the vessel, not the voyage.<sup>719</sup> The suggestion that simply because the loss of the voyage cases are old, they are not relevant to the modern policy, for example that '*The loss of voyage is a negligible and perhaps totally irrelevant factor in a constructive total loss claim under the modern hull policy*'<sup>720</sup> seems unsatisfactory without further justification. While the significantly greater value of ship compared to individual cargoes might justify a different approach to hulls is recognised, there exists little satisfactory explanation for why the law ignores loss of the voyage. Herbert Lord offered an unsatisfactory justification for the lapse of the rule, essentially stating that loss of the voyage was understandable in relation to wooden ships where there were insufficient salvage facilities and long anticipated journey times, factors not applicable to modern hulls.<sup>721</sup> In fact, the right of abandonment for the voyage on hulls was demonstrably applied to short voyages (eg *Goss*), and the generalisation that most pre-20<sup>th</sup> century insured voyages were long is unfounded. The notion that the business of the shipowner was not covered, whereas cargo interests would be, is partly mitigated by the evolution of cover for freight, albeit that the possible existence of additional, separate cover is an unsatisfactory basis for understanding the rule change. Where there would be no loss on a freight policy, the harm may not be compensated, and the shipper may suffer loss without possibility of compensation from his insurer.

## 6.5 Supervening Illegality

In *British and Foreign Marine Insurance Co v Sanday & Co* the plaintiff British corn merchants contracted to sell to Hambourg merchants linseed and wheat, shipped in July, 1914, on board two British ships, the *St Andrew* and the *Orthia*, and obtained cover from the defendant. On 4 August 1914, a declaration was made that a state of war existed between Britain and Germany. That rendered illegal all trading with Germany without the Sovereign's permission. On 5 August, a Government Proclamation warned all persons not to permit any British ship to leave for, enter, or communicate with any port or place in the German Empire without the Sovereign's permission. The penalty for trading with Germany after the Declaration of 4 August and the Proclamation of 5 August included the imprisonment of the master and confiscation of goods and vessel. The master of one vessel received notice from

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<sup>719</sup> Herbert Lord, '*The Hull Policy: actual and constructive total loss and abandonment*' 41 Tul L Rev 347 1966-1967); 2 Philips, 246, [1522]

<sup>720</sup> Herbert Lord, (1966-1967), 531; *Alexander v Baltimore Ins Co* 8 US (4 Cranch) 370, 377-78

<sup>721</sup> Herbert Lord, 351

his owners by cable and consequently put into a British port. The other vessel, on arrival in the Channel, was signalled by a French cruiser to enter a British port. Both vessels discharged the insured goods at ports in the United Kingdom. There being no prospect of the war terminating and the goods being forwarded to their German destination within a reasonable time, the plaintiffs gave notice of abandonment and sued upon the policies as for a total loss. Bailhance J held that situations where the venture was illegal at the beginning were distinguished from those where it became illegal during the voyage:

*“If the assured persists in the venture after it has so become illegal, and as a consequence his goods are seized, he is uninsured. The seizure is due to his violation of English law. If, however, in consequence of such supervening illegality he abandons the venture and thereby suffers loss, that loss... so far falls within the restraint of princes clause, and, apart from any possible question of causa proxima, the assured is covered. If it were not so an assured would indeed be in a sorry plight, for whether he obeyed or disobeyed the law he would equally be uninsured”.*

Insureds were not put in that impossible position, and policies covered situations where voyages were abandoned to obey government orders or prohibitions. In that case, at first instance, the situation fell within the restraint of princes clause. Nor did the doctrine of proximate cause undermine the total loss. This was not the same as a case of avoiding a risk of capture or seizure. A peril-specific test applied and the two lines of authority were separate (see chapter 2, above). In *Sanday*, the restraint was by the common-law, and once it was clear that actual force was not necessary to constitute restraint of princes, an owner who diverts a vessel to a home port to obey his own government’s proclamation was not avoiding, but submitting to the peril.<sup>722</sup> Further, because the law provided that while in peacetime the adventure was legal, and during hostilities, the adventure was illegal, *Hadkinson v Robinson* and *Kacianoff v China Traders Insurance Co* were distinguished. In those cases, “*All that happened was that, in pursuit of a lawful adventure, the master did not go into a position of peril. He never was restrained. His own country did not restrain him, and he took care not to put himself in danger of being restrained by another country. Illegality according to the law of another country does not affect the merchant. In the present case the adventure was illegal according to the law of the country of the owner of the goods. And it was the declaration of war that made it illegal*”.<sup>723</sup>

A number of authorities concerned the situation where the voyage is abandoned by the master because of a contemplated peril. For example, it might be clear that a port has become closed by an embargo, and that the vessel, if the voyage continues to the intended port, would be

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<sup>722</sup> [1916] 1 AC 650

<sup>723</sup> *ibid*, 672-3

confiscated. Does the doctrine of the loss of the voyage offer any assistance to the insured, where the voyage is lost, although the vessel stays under his control?

In *Miller v The Accident Insurance Company*, where the policy covered cattle shipped to Buenos Aires, it was held that an insured was required to go as far as was possible before confiscation would become inevitable. The decree of the Argentine Government prohibiting the landing of the cattle was an act of state within the phrase ‘restraints of people’.<sup>724</sup> Stirling LJ held the master had not acted voluntarily, and *Hadkinson v Robinson* and similar authorities were distinguishable, and accordingly the voyage had not been abandoned before the peril was engaged.

Finally, in *Tatsuuma Kisen Kabushiki Kaisha v Robert Dollar Co*,<sup>725</sup> the American court found the voyage frustrated by the closure of the destination port to Japanese vessels. It was held: “the clause insuring these goods insures their safe arrival at Hamburg, and the destruction of that adventure was directly caused by His Majesty's declaration. It was therefore a loss within the clause which insures these goods at and from losses against restraint by kings, princes, or peoples”.<sup>726</sup> In other cases, insurers have argued successfully that abandonment was premature.

## 6.6 Proximate Cause: Voyage Abandoned Before Peril Engaged

Claims for loss of the voyage may be met with the defence that action taken to avoid the peril was taken voluntarily or precipitately. Where the subject matter is abandoned prematurely, the loss is caused by the abandonment rather than by an insured peril and the assured cannot recover<sup>727</sup>. If the voyage is abandoned due to an anticipated peril, the insurer's liability depends on whether the abandonment was justifiable or premature. In the latter case, the proximate cause of any loss is the assured's own conduct. In the former case, there is a total loss and no notice of abandonment is required. The principle applies to hulls, cargo and freight policies alike.<sup>728</sup> Likewise in America, fear of enemy action is not the same as the actual risk.<sup>729</sup>

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<sup>724</sup> [1903] KB 712 (Vaughan Williams LJ)

<sup>725</sup> 31 F 2d 401 (CCA 9th, 1929)

<sup>726</sup> *Sanday* [1916] 1 AC 650, 661

<sup>727</sup> *Becker, Grey & co v London Assurance Corporation* [1918] AC 101; *Lind v Mitchell* (1928) 31 Lloyd's Rep 70; Merkin, *Marine Insurance Legislation* (4<sup>th</sup> edn, 2010), 74

<sup>728</sup> Merkin, *Marine Insurance Legislation* (3<sup>rd</sup> edn, 2005), 64

<sup>729</sup> *Betesh v Fire Assn of Philadelphia* 187 F 2d 526 (2d Cir 1951); *America v Globe Rutgers Fire Ins Co* 263 US 487; *Baker Castor Oil Co v Insurance Co of North America* 2 Cir, 157 F 2d 3, certiorari denied 329 US 800, 67 S Ct 494, 91 L Ed 684



In *British and Foreign Marine Insurance Co v Sanday & Co*<sup>730</sup> two British vessels carrying goods belonging to British merchants for sale in Germany were enroute to Hamburg when war broke out between the United Kingdom and Germany. The further prosecution of either voyage became illegal under English law. The cargo owners had insured their goods on both vessels by identical voyage policies on the Lloyds SG form. The insured perils included restraints of princes. Shortly after war was declared each vessel was directed (one by a French cruiser, the other by the shipowners at the suggestion of the Admiralty) to proceed to British ports, which they did. The cargo owners warehoused their goods and served notice of abandonment to their underwriters, claiming a constructive total loss. The court considered inter alia whether the declaration of war was a restraint of princes within the meaning of the policies, acting directly on the insureds. *Hadkinson v Robinson* and *Lubbock v Rowcroft* were distinguishable. In those cases the only deterrent was the risk of ultimate capture if the ships proceeded to their destination. Both vessels prudently resolved not to incur that risk. In *Sanday* the deterrents were the penalties incurred by the violation of the criminal law. This was present and immediate, if the ship proceeded at all towards her destination with a view of trading with the enemy.<sup>731</sup>

*“Actual capture was in these cases the peril insured against. The apprehension of capture is an entirely different thing and was not insured against. Well, it is clear that the war is of uncertain duration. Nobody could with any confidence conjecture when it would terminate. A long delay appeared most probable before the voyage could be resumed”.*<sup>732</sup>

Also mirroring the English law, in America an insured would be justified in abandoning a voyage where it would be certain to be condemned: *“A law of the country to which a vessel is bound, which subjects vessels arriving there under certain circumstances, to confiscation, is not a just cause for breaking up a voyage, unless it appears, with moral certainty, that the law applied to the case in question, and that if the ship had arrived it would have been enforced against her”.*<sup>733</sup>

Avoiding action could be taken where the peril currently existed: *“He did not deviate from his course in order to avoid a future peril to which he might become liable, but because the peril was actually present and operative at the time when he turned his vessel from Hamburg to the home port”.*<sup>734</sup> Behind every prohibition there was the threat of force: *“Every State*

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<sup>730</sup> [1916] 1 AC 650

<sup>731</sup> *ibid*, 663-4

<sup>732</sup> *ibid*

<sup>733</sup> *Craig v The United Ins Co* 6 Johns Rep 226; *Saltus v The United Insurance Co* 15 Johns Rep 523; *Sherman, Marine Insurance* (New York) 1841, 18

<sup>734</sup> [1916], AC 650, 671 (Parmoor LJ)

*ultimately enforces obedience to its laws by force. Restraint is equally imposed when obedience is given by reason of the existence of force in reserve as when it is given by reason of force employed*".<sup>735</sup> This confirmed the realistic assessment of the risks at first instance: *"When once it is admitted that force is not necessary to constitute restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation..."*<sup>736</sup>

In *Kacianoff and others v China Traders Insurance Company Limited*<sup>737</sup> the Russian plaintiffs insured a cargo of beef with the defendant underwriters from San Francisco to Vladivostok via Nagasaki, not excluding capture. During the Sino-Japanese war, the Japanese imposed a blockade of Vladivostok. The defendants telegraphed to the plaintiffs that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs' deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who desired to minimise the loss to the underwriters, suggested the cargo should be discharged at San Francisco and sold elsewhere, which was done. Subsequently the notice of abandonment was given to the underwriters, who refused it. The plaintiffs' claim was dismissed, as it was held that the loss was not caused by capture, and there was no total loss at the time of abandonment.<sup>738</sup> *The Knight of St Michael*<sup>739</sup> and *Butler v Wildman*<sup>740</sup> were distinguished, and *Hadkinson v Robinson* was applied. Consequently, the doctrine of proximate cause meant the loss was not covered, as it was not a loss occasioned by capture: *"The vessel never was in risk of capture, because she determined not to undergo the risk, the cargo never underwent the risk, because it was determined to discharge the cargo so as to avoid the risk. Therefore, never having come under the risk and the risk never having begun to operate, no claim can be made on this policy"*.<sup>741</sup> Lush J expressed the principle: *'What was done in discharging the cargo was really done to prevent the ship ever coming into the peril; it was not done to arrest the consequences of any peril in which the ship actually was.'* The court, and the parties, proceeded on the basis that if the ship had sailed into the Japanese blockade, it would have been totally lost by capture. Whether that was to be a constructive or an actual total loss was not expressed.

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<sup>735</sup> *ibid*, 672-3

<sup>736</sup> *ibid*, 672 (Bailhache J)

<sup>737</sup> [1914] 3 KB 1121

<sup>738</sup> [1913] 3 KB 407; [1914] 3 KB 1121

<sup>739</sup> [1898] P 30

<sup>740</sup> (1820) 3 B&Ald 398

<sup>741</sup> [2014] 3 KB 1121, 1129

## 6.7 Total loss of Freight

### Freight

No reported authority appears to demonstrate constructive, as distinct from actual, total loss of freight. However, this is not necessarily impossible. In *James Rankin and Others v Lewis Potter and Others*<sup>742</sup> Brett J indicated situations in which he considered that notice of abandonment should be given. The types of losses recoverable under an ordinary freight policy were summarised, where he stated that a partial loss of freight might arise: (i) on a general average situation caused by an insured peril; (ii) by a total loss of part of the cargo; or (iii) where cargo was transhipped after the total loss of the insured ship; or (iv) where there is a total loss of the cargo, the vessel earned some freight in respect of other goods carried on the insured voyage.<sup>743</sup>

There might be an actual total loss of freight:

*“... if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured”.*<sup>744</sup>

Accordingly, where a policy covered freight payable under a charterparty or other contract of affreightment which had been frustrated, total loss would be recoverable under the terms of a policy on freight.<sup>745</sup> So an actual total loss of freight can occur where the adventure is frustrated, such that the shipowner is freed from his obligations under the carriage contract, even though the ship, and possibly the goods, remain in existence. Where the adventure is frustrated by an insured peril, and freight is thereby lost, the insurer is liable.<sup>746</sup> Where a ship was delayed by the operation of perils of the seas, and the charterer justifiably refused to load, there was a loss of freight by perils of the seas.<sup>747</sup> Effectively, freight insures the voyage, not the *specie*. Freight is a total loss where, by perils insured, the right to freight is lost, so that there might be a total loss of freight where the shipowner was physically prevented from

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<sup>742</sup> (1873) LR 6 HL 83, 102–103

<sup>743</sup> *ibid*, 99–100

<sup>744</sup> (1872) 6 HL 83, 99–100

<sup>745</sup> *Jackson v Union Mar Ins Co Ltd* (1873) LR 8 CP 572; *Sanday v British and Foreign Mar Ins Co* [1916] 1 AC 650; *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88; Arnould (17<sup>th</sup> ed, 2008) [24–19]

<sup>746</sup> *Re Jamieson* (1895) 2 QB 95

<sup>747</sup> *Chalmers and Owen*, Marine Insurance Act 1906, 77; *Jackson v Union Mar Ins Co* (1874) LR 10 CP 125, Ex Ch; *The Alps* (1893) P 109; *The Bedouin* (1894) P 1 (CA)

performing the contract of affreightment by a total loss of ship or cargo caused by marine perils insured.<sup>748</sup>

Because hull and the freight policies are different aspects of property, there may be a total loss of freight by frustration of the charterparty by perils insured against, where there is no total loss under the hull policies. This frustration could occur, inter alia, through delay, or by the vessel suffering such damage as to render it commercially impracticable to incur the expense of repair. In those cases the right to freight is destroyed. Likewise, there was a total loss under a policy on commissions or profits if the goods are totally lost by perils insured against.<sup>749</sup>

How was capture treated in freight policies? Arnould provided that there was a presumed total loss of freight on capture without restoration, and this made no reference to an investigation into the chance of any subsequent restoration. On the contrary, a capture before loading was deemed to be permanent:

*“On the same principle, if the event, on which the earning of the entire freight is made to depend under the charterparty, be the ship’s arrival at her port of ultimate destination with a certain description of cargo, and the happening of this event is rendered hopeless by the capture of the ship (undredeemed by subsequent restoration), before this particular description of cargo is loaded on board, this is a clear case of total loss on the whole freight”.*<sup>750</sup>

In freight cases, issues potentially arise as to whether loss of freight is due to a maritime peril or to a fall in the market price for the chartering of vessels, as illustrated by *Continental Grain Co v Twitchell*<sup>751</sup> and *Cepheus Shipping Corporation v Guardian Royal Exchange Assurance plc*,<sup>752</sup> where the loss of earnings was due to the vessel being off-hire and would have occurred independently of damage to the vessel.

The exclusion of recoverability for losses due to delay extends to total and partial losses of the physical subject matter, hull and cargo, but was not at common-law extended to freight. In *Jackson v The Union Marine Insurance Company Ltd*,<sup>753</sup> the plaintiff shipowner entered a charterparty in November 1871 by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the freight for the

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<sup>748</sup> Halsbury’s Laws, Volume 60 (2011), [432]

<sup>749</sup> *ibid*, [432]

<sup>750</sup> *Atty v Lindo* 1 B&PNR 236; Arnould (1866 Vol II), 912

<sup>751</sup> (1945) 78 Lloyd’s Rep 251

<sup>752</sup> [1995] 1 Lloyd’s Rep 622

<sup>753</sup> (1874) LR 10 CP 125

voyage. The ship grounded in January of 1872, and repairs could only be completed by August, so the vessel could only reach the loadport in mid 1872. On 15 February, the charterers repudiated the charter and chartered another vessel to carry the rails which were wanted for the construction of a railway. The plaintiff claimed on his policy of insurance on the chartered freight. The jury in Common Pleas found that the time necessary for repairing the vessel put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers. On appeal the Exchequer Chamber confirmed the judgment, finding that there was a loss of the freight by perils of the sea. It was considered that, ‘*If the charterer be ready as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at Newport in time for it is necessarily a condition precedent... Where no time is named for the doing of anything, the law attaches a reasonable time*’.<sup>754</sup> Clearly, the contract of carriage was understood in the context of the charterer’s commercial interests:

“...the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive “there at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterer should not be at an end but in existence.” That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract”<sup>755</sup>

This indicated that the voyage must begin within a reasonable time, in that case, perhaps about 5 or 6 months. The judgment went on to consider the commercial realities accompanying the contemplated voyage: Bramwell B approved *Tarrabochia v Hickie* in that a voyage would be understood to be in a particular season, so there was a clear difference between a spring voyage and an autumn voyage, and that a voyage intended to carry a cargo of fruit in the fruit season would be required to start in time to make the seasonal market:

“To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit, at a time of year different from what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner, is so extravagant when the consequences become apparent that it could not be”.<sup>756</sup>

This reasoning is closely bound with issues of frustration of the charter. Bramwell’s judgment continued, considering the hypothetical situation where: “a charter [undertook to] fetch a cargo of ice from Norway, entered into at such a time that the vessel would reach its destination with reasonable dispatch in February, when there was ice, and bring it back in June when ice was wanted, and by perils of the seas it could not get to Norway till the ice was

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<sup>754</sup> *ibid*, [1874-80] All ER Rep 317, 322

<sup>755</sup> *ibid*, 322

<sup>756</sup> (1784) LR 10 CP 125, [1874-80] All ER Rep 317, 322; *Touteng v Hubbard* (1802) 3 Bos & Pul 292

*melted, nor return till after ice was of no value*".<sup>757</sup> Such a voyage would be of no use, as the voyage would be frustrated:

*"It was argued that the doctrine of causa proxima spectatur non remota, applied, and that the proximate cause of the loss of freight here was the refusal of the charterer to load. But, if I am right, the voyage, the adventure, was frustrated by the perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement; but, even if not, the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost unless the charterer chooses to go on. He does not"*.<sup>758</sup>

The choice is significant; charterers could decide not to elect to follow a commercially disadvantageous course of action, and wait for an event that remained possible. Frustration may take account, therefore, of commercial reality.

In *The Bedouin*,<sup>759</sup> it was argued that 'although the hire was suspended by a breakdown of the machinery through a sea peril, yet there is no loss falling on the policy, because all that happened was to postpone the earning of the charterer's money to a later date, and that the shipowner ultimately got, under the charter, the whole freight, just as if there had been no delay.' This argument was rejected, the court holding that as a matter of fact the shipowner does not get the freight during a particular period. He does not get his money at the time he ought to get it, and his ship takes longer to earn the amount of freight which she has to earn for him'.<sup>760</sup> This was a loss falling within the policy occurring 'then and there'.<sup>761</sup> Freight was either earned or not earned by the date expected, and this rule for freight permits recovery for total loss caused by delay.

Cleasby B's dissenting judgment in *Jackson* exposed practical policy difficulties with applying different rules to commencing a late voyage as on delay in the course of the voyage. He recognised that, practically, an insured was interested in the arrival of cargo at the destination, and the distinction between a voyage being started late, or being extended would be immaterial to the insured. He recognised that the law reached the opposite result, in situations which were, from the insured's perspective, identical. The example he gave was where, if after the cargo was loaded at Newport, the vessel had grounded the day after leaving that port, whatever the length of the delay, the shipowner would be entitled to repair the vessel, and earn the freight. The result might be a delay of years, but the charter would continue in

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<sup>757</sup> *ibid*

<sup>758</sup> [1874-80] All ER Rep 317, 325

<sup>759</sup> [1894] P 1; Merkin, Hjalmarsson, *Compendium of Insurance Law* (2013, Informa), 765; Merkin, *Marine Insurance Legislation* (4<sup>th</sup> edn, 2010), 68

<sup>760</sup> [1894] P 1, 8-9

<sup>761</sup> [1894] P 1, 9

force throughout.<sup>762</sup> Importantly, the aspect of loss of the intended market was of no assistance to insureds. He noted that if the goods were intended for a particular market or a particular purpose, it would not be a question whether an unreasonable time had been occupied, or whether the commercial speculation of the charterparty was at an end. The charterers' commercial speculation must have been ruined by the delay. Likewise so far as the shipowner was concerned, save in so far as he was indemnified by insurances, or, possibly, by means of valued policies, was making a profit of each disaster. The agreement would continue, because nothing had happened except what was provided for.<sup>763</sup>

Contrastingly to cases where the voyage was lost and recovery on the freight policy, in *Inman v Bischoff (City of Paris)*,<sup>764</sup> a policy was made on "freight outstanding". The ship was chartered by the Admiralty, the charterparty provided that if the ship became inefficient, the charterers might make such abatement out of the freight as they saw fit. The vessel stranded, and charterers made an abatement from the freight. The insurers were not liable, as it was held that the loss was caused not by perils of the seas, but by the action of the Admiralty.<sup>765</sup> The line here is difficult to draw, and the market responded by special clauses, with a warranty preventing any claims consequent on loss of time.<sup>766</sup>

The Institute clauses now in operation<sup>767</sup> exclude freight claims "consequent on loss of time". This was held in *Naviera de Vanarias SA v Nacional Hispanica Aseguradora SA*<sup>768</sup> to mean any delay – whether or not the proximate cause – excluded recovery. After this decision, it appeared that loss of freight as a result of delay is recoverable only where the adventure has been frustrated, delay being the inevitable consequence of frustration; the position is that if the assured has to show delay independently of frustration he will be unable to claim. The cases illustrating frustration here appear to be cases of physical damage caused by perils of the sea causing delays to the voyage.<sup>769</sup>

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<sup>762</sup> (1874) LR 10 CP 125, 129-130

<sup>763</sup> *ibid*, 129-130

<sup>764</sup> (1882) 7 AppCas 670; see *Manchester Liners v British and Foreign Mar Ins Co* (1901) 7 Com Cas 26)

<sup>765</sup> Chalmers and Owen, Marine Insurance Act 1906, 77

<sup>766</sup> *Bensaude v Thames and Mersey Ins Co* (1897) AC 609; *Turnbull v Hull Underwriters Association* (1900) 2 QB 402; Chalmers and Owen, Marine Insurance Act 1906, 77

<sup>767</sup> *ie* Institute Time Clauses (freight), cl 14; Institute Voyage Clause (Freight), cl 12

<sup>768</sup> [1978] AC 873

<sup>769</sup> *Re Jamieson and Newcastle SS Freight Insurance Association* [1895] 2 QB 90; *Roura & Forgas v Townend* [1919] 1 KB 189; *Carras v London and Scottish Assurance Corp Ltd* [1936] 1 KB 291 (CA); *Petros M Nomikos v Robertson* [1939] AC 371; *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88, contrastingly, *Bensaude & Co v Thames & Mersey Marine Insurance Co* [1897] AC 609; *Turnbull, Martin & Co v Hull Underwriters Association* [1900] 2 QB 242; *Russian Bank for Foreign Trade v Excess Insurance Co* [1918] 2 KB 123; Merkin, *Marine Insurance Legislation* (4<sup>th</sup> edn, 2010), 68

In *Bensaude & Co v The Thames and Mersey Marine Insurance Company* a time policy of insurance upon freight contained a clause, "warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." After the commencement of a voyage the main shaft of the steamer was broken from a peril of the sea, and she returned to her port of loading. Repairing the ship necessitated a delay which frustrated the object of the venture; and the charterers, as they were entitled to do by the law of Portugal, which was applicable, cancelled the charter, and the freight was lost. At first instance,<sup>770</sup> it was held that the claim of the plaintiffs could not be described as a claim "consequent on loss of time," but was a claim consequent on the disabling of the vessel by a peril of the sea, and arose at once before any loss of time had taken place, and gave judgment for the plaintiffs. On appeal, upheld in the House of Lords, it was held that claim was consequent on loss of time:

*"That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability".*<sup>771</sup>

In *Roura and Forgas v Townend*, the defence that the losses arose by delay were considered. Here, a possible difference in approach to causation was suggested between the perils of 'capture' and 'restraint'. The defendant insurers relied on *Russian Bank for Foreign Trade v Excess Insurance Co*, a case of requisition by the British government, for the submission that the length of time in German hands was a delay within the exception in the policy. The case was distinguished from the facts in *Roura*, where the voyage was frustrated. *"In that case, the adventure or voyage upon which certain goods were to be despatched and on which they were insured was frustrated. The cause of frustration was not a capture or loss of the ship as it was here, but a requisition of the ship amounting at most to a restraint. Moreover, in that case the subject-matter of insurance and thing for which a loss was claimed was a quantity of goods."* Having distinguished the situation, the court in *Roura* ruled that the vessel was lost, though it was afterwards found and recovered, the venture was lost. The claim to recover for that was not a claim caused by delay, but the loss of the venture.

There evolved a divergence between English and American authorities, in respect of men-of-war, enemies, and restraints of princes, in that, *"[if] the expression "men-of-war, enemies and restraints of princes," as used in a policy of insurance, had to be considered for the first time, it might not be difficult to say that the adventure in this case was frustrated by the outbreak*

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<sup>770</sup> [1897] 1 QB 29

<sup>771</sup> [1897] AC 609, 614 (Herschell LJ)



*of war and, that being so, to hold that it fell within the words as above. This indeed is the result at which the jurists of the Continent and of America have arrived*".<sup>772</sup> It could not be said, either for hull or goods policies, or freight policies, that the mere outbreak of war frustrated the adventure, at least in English law. For insureds, the distinction between this situation, and the contrary result and right to recover in *Sanday* must have appeared narrow. Incidentally, this reinforces the merits of an historical and comparative approach, as proposed by this study, to the interpretation of the policy, even subsequent to 1906.

Phillips<sup>773</sup> considered whether losses consequent upon the imminency of a capture, arrest, restraint, or detention, fell within the risk assumed by insurers. Following Emerigon, Phillips provided that, "*Where, after the risk has begun, the voyage is inevitably defeated by blockade, or interdiction at the port of departure, or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended: and also that an assured on the cargo has a right to abandon*".<sup>774</sup> The justified deviation and the right to abandon on the cargo policy marched together, and opened the way for a claim at least for a partial loss of freight in such circumstances.

## 6.8 Loss of the Voyage

Later, there was some question, whether the loss of the voyage doctrine survived the passage of the 1906 Act. The voyage was not mentioned in relation to constructive total loss in the 1906 Act. In *Sanday*, it was noted that the pre-act law was clear that it was covered. However, notwithstanding that it did not appear in the Act, the court held that the law still afforded it cover. The court applied *Rodocanachi*, and accordingly found there was a constructive total loss of the voyage.<sup>775</sup> This settled the law that the loss of the voyage doctrine survived into the modern law. The important distinction was that while a loss of profit was not covered, a 'loss of market' was covered, being "*a failure to transport the goods to their destination, that failure being established by detention of them through one of the perils insured against, so prolonged as to amount to a destruction of the contemplated adventure. This may be so. It is a rational explanation. I think none other was given*". While there was no definition of 'subject-matter' in s 57, "*Sect. 26, sub-s. 1, provides that the subject-matter insured must be designated in a marine policy with reasonable certainty, and sub-s. 4 that in the application*

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<sup>772</sup> *Becker, Grey & Co v London Assurance Corp* [1918] AC 101, 107

<sup>773</sup> Phillips, *On Insurance*, Ch 13, s x, [1115]

<sup>774</sup> *Becker, Grey & Co v London Assurance Corp* [1918] AC 101, 107

<sup>775</sup> *Sanday v British and Foreign Marine Insurance Co* [1915] 2 KB 781 (Bailhache J)

of this section regard shall be had to any usage regulating the designation of the subject-matter. By the word "designation" is... meant identification or description.<sup>776</sup> Accordingly, it was held the law was here unchanged by the Act, so that: "*if the loss of the voyage, the loss of the chance of arriving at the port of destination, and the consequent loss of the market appear to be unavoidable, there would be a constructive total loss of the subject-matter... in the insurance of goods, the law as it stood before the Act of 1906, in reference to the subject of constructive total loss, remains unchanged*".<sup>777</sup> There remains the difficulty in identifying what this covers in addition to the cover for constructive loss of the physical *specie*. The law is settled that hull policies do not cover for the loss of the voyage, and indeed hull interests are capable of effectively doing so by the separate freight policy. The interesting issue is what cover is added on goods policies by this doctrine. The contemporary opinion is perhaps that it adds little to hull insurance.

Cargo interests are harmed by delay to the voyage. The authorities establish that where perils of the sea cause a voyage to be late in starting, there may be a loss of the voyage.<sup>778</sup> This is a clear and pragmatic example of the voyage covering the commercial needs of the insured. However, the doctrine does not extend to cases where perils of the sea retard the voyage during its course. These losses fall within the exclusion for delay<sup>779</sup> now codified in s 55 of the 1906 Act. In respect of losses of possession, it is difficult to see the doctrine of the loss of the voyage contributing significantly, separate to the underlying loss of the *specie*. Though this well established, it is surprising that the doctrine does not extend to cover late arrival on cargo policies. It appears that late arrival, if the market has gone, might once have been held to be covered. The discussion of the 'fruit season', where there was a recognised seasonal market, should arguably allow the insured to recover where the commercial utility of his venture is lost for the season. To hold otherwise, where the insured will have to wait a year until the return of the season, is to deprive the doctrine of the 'voyage' of practical cover for cargo interests' commercial needs.

Further, the doctrine's limits in respect of voyage abandoned by the venture becoming illegal due to outbreak of war, or danger of capture, are significant. The defence that a venture has been abandoned unjustifiably, or has never come into contact with the marine perils leaves a gap, in English law, in the cover for 'the voyage'. Arguably, the more complete cover

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<sup>776</sup> [1916] 1 AC 650, 664 (Atkinson LJ)

<sup>777</sup> *ibid*

<sup>778</sup> (1874) LR 10 CP 125

<sup>779</sup> (1869) LR 4 CP 206

suggested by Emerigon, and adopted at one stage in American laws, provides a more consistent cover for insureds.

In the *Masefield* judgements, the losses were considered to flow from delay, not the marine peril. While, unquestionably, there exists an exclusion from cover for delay, the origins and extent of this exclusion are worth exploring. Where a vessel is taken but may be released by payment of ransom or fines which are not made, what is the proximate cause of the loss? Arguably, a presumption of total loss, or instant right to abandon, arose in English and American laws on capture (Chapter 4, ante) and restraint and detention (Chapter 5, ante), and on any peril of loss of possession which interrupted the voyage (Chapter 6, ante). What arguments concerning causation have insurers deployed countering these presumptions? When might losses be attributed to delay, and excluded from cover? When might the proximate cause of the loss be failure to pay parties taking possession of property, or any other wilful act or default of the insured? Does causation operate equally in respect of each of the separately defined maritime perils, or take a different approach to the factual classes of peril? These questions are answered first by considering the origin of the exclusion for delay, and secondly by analysing the doctrine of proximate cause as applied to capture cases.

Further, as a separate issue of causation, will refusing to pay ransom demands, or court fines or bribes, ever be ‘unreasonable’, preventing an insured from recovering for a *prima facie* total loss?

### 7.1 Exclusion for losses flowing from delay

How and why did losses caused by delay come to be excluded from cover? Section 55(2)(b) of the 1906 Act aimed to codify *Taylor v Dunbar (the Leopard; the Ostrich)*.<sup>780</sup> ‘The Leopard’ carried a cargo of carcasses consigned to the claimant butcher on a voyage from Hambourg to London, expected to last 50 hours, and loaded on 3 November 1866. Bad weather delayed the voyage commencing, which was initially aborted; she eventually departed on 8 November. By 10 November, the cargo had become putrid, and was jettisoned. ‘The Ostrich’ carried a similar cargo on the same route. Her voyage started on 6 February 1867. She was detained in an intermediate port by storms between 6 and 10 February. By 11 February, the cargo had become putrid and likewise was jettisoned. Neither cargo was damaged by sea-water. Both naturally decayed. The claimants asserted that their losses were caused by ‘perils of the seas’, and issued proceedings. Keating J decided their claims on both ‘proximate cause’ and policy grounds: ‘no case ... has held that a loss by the unexpected duration of the voyage, though

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<sup>780</sup> (1869) LR 4 CP 206

*that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to... [the claimant's] argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed.'* Montague Smith J commented in argument, '*The present case ... resembles Tatham v. Hodgson. There, upon an insurance of slaves against perils of the sea, their death by failure of sufficient and suitable provisions, occasioned by extraordinary delay in the voyage from bad weather, was held not to be a loss within the policy*'. He held, '*If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions.*' He further stated that the case did not fall within the class of case where the goods were physically damaged by the physical motion or vibration of the seas.<sup>781</sup>

Two early authorities considered delayed voyages, both concerning high mortality in cargoes of slaves. In *Gregson v Gilbert*,<sup>782</sup> due to errors in navigation prolonging the voyage, there was insufficient water for the slaves. There had been sufficient water for the voyage anticipated, absent negligent navigation. The underwriter was not liable. Then, insurance law provided that the underwriter was not liable where the loss was immediately referable to (ie proximately caused by) the negligence of the crew. The example cited was that where insufficient length of cable – “crew’s negligence” – led to the vessel grounding as the tide receded, the insurers were not liable. Arguably, this *ratio* turned not on delay, but on the crew’s negligence.<sup>783</sup> Accordingly, *Gregson* did not create a general rule governing delay to the voyage. The second, *Tatham v Hodgson*,<sup>784</sup> concerned a cargo of slaves insured on a voyage expected to last between six and nine weeks. It lasted over six months after the vessel’s rudder was damaged by grounding. The ultimate cause of that damage, whether perils of the sea or negligent navigation, was unreported. *Tatham* was cited in argument in *Ionides v Universal Marine Insurance Co*, *Lawrence v Aberdeen*,<sup>785</sup> and *Taylor v Dunbar* to be a case on extraordinary delay by unforeseen bad weather, but the actual report suggests that there

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<sup>781</sup> Where motion of the seas caused animals to be injured and thus lost, the insurer was liable, *Lawrence v Aberdeen* 5 B&Ald 107; *Gabay v Lloyd* 3 B&C 793

<sup>782</sup> (1783) 3 Doug KB 232

<sup>783</sup> Negligence is in contemporary law neutral in effect, so that an insurer is liable where losses are caused by an immediate cause, though remotely by the negligence of the assured or his agents, *Busk v Royal Exch Ass Co* 2 B&Ald 73, and the authorities between that and *Redman v Wilson* 14 M&W 476; *Green v Elmslie*, Peake’s NP 212; *Heyman v Parish* 2 Camp 149; *Arcangelo v Thompson* 2 Camp 620; *Livie v Janson* 12 East 648; *Hahn v Corbett*, 2 Bing 205; Arnould (17<sup>th</sup> edn, 2008), [22-11]; Marine Insurance Legislation (3<sup>rd</sup> edn, 2005), 67

<sup>784</sup> (1796) 6 TR 656

<sup>785</sup> (1821) 106 ER 1133; (1821) 5 B&Ald 107

had been insufficient food even for the ordinarily anticipated length of the voyage.<sup>786</sup> The insured did not recover.

*Tatham* and *Gregson* were difficult cases, and it is arguably wrong to consider they established a general rule protecting the insurer from delay to the voyage. It is unclear to what extent the reasoning in *Tatham* and, *Gregson* was of general application. In *Lawrence v Aberdeen*<sup>787</sup> it was stated that the losses in *Tatham* were caused by perils of the sea as a remote cause, and by mortality of the slaves as the proximate cause. Statute provided no loss should be recoverable on account of the mortality of slaves.<sup>788</sup> Conceivably, the losses would have been recoverable had the statute not been enacted. *Tatham* did not establish a general applicable to all livestock; rather statute prevented recovery where slaves died of natural causes.<sup>789</sup> The courts were keen on both occasions to punish negligent or inhumane slaveowners, and were guided by strong humanitarian concern in applying the statute. If owners recovered after taking insufficient care of their human cargoes, insurance became open to serious abuse that statute would be ineffective in preventing. Arnould noted that the position prior to *Taylor v Dunbar* was not as clear-cut as was later suggested, as the reasoning is inconsistent with early cases on loss by mortality in livestock.<sup>790</sup> Rationally, the mortality of slaves is comparable to the inherent vice of perishable cargo. Without the Acts, this would have been recoverable. Arguably, the better view is that *Taylor v Dunbar* established an entirely new rule, independent of the earlier cases, excluding compensation for delay where the inherent vice of perishable cargo became manifest following delay to a voyage, even where that delay was caused by an insured peril.

The exclusion was explained in *Pink v Fleming*<sup>791</sup> where the vessel, carrying a cargo of fruit, was damaged by an insured peril. The cargo was discharged to allow the repair, and on arrival found to be partly spoiled. *Pink* supported the rule that the insurer on ship or goods is not liable for loss proximately caused by delay, although the delay is caused by a peril insured against.<sup>792</sup> It was decided on the basis of ‘proximate cause’ (Lord Esher MR), then understood as being the cause last in time; the loss there was caused in part by handling of the cargo of fruit, and in part by the perishable nature – inherent vice – of the fruit. Nothing in *Pink v Fleming* explicitly stated a general rule protecting insurers from liability for all losses for

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<sup>786</sup> *ibid* (Lawrence J)

<sup>787</sup> (1821) 5 B&Ald 107, 111 (Abbott CJ); Robert Merkin, Johanna Hjalmarsson, Aysegul Bugra, Jennifer Lavelle, *Marine Insurance Legislation*, (2014, Informa), 96

<sup>788</sup> 34 Geo 3, c 80, s 10

<sup>789</sup> Slave Trade Act 1790, 30 Geo 3, c 33 s 8; Slave Trade Act 1794, 34 Geo 3 c 80

<sup>790</sup> Arnould (17<sup>th</sup> edn, 2008), 954, fn 309

<sup>791</sup> (1890) 25 QBD 396 (CA)

<sup>792</sup> cf Halsbury’s Laws Vol 25 (2003) 350

delay howsoever caused. In both *Pink v Fleming* and *Taylor v Dunbar* the losses were effectively physical losses, caused by the perishable nature of the cargo – its inherent vice – where the length of the voyage was extended by the insured peril acting on the hull. These deal with inherent vice or damage evident to cargo on arrival. These authorities were on different facts and do not consider the situation where the cargo arrives undamaged, but later than anticipated, not due to perils of the seas generally, but for loss of possession claims arising from specified insured perils. They are far removed from situations where abandonment was given during any period of loss of possession.

It was apparently commonplace on the SG Policy to expressly exclude delay from cover. The effectiveness of such an exclusion rule derived from the then prevalent ‘last in time’ doctrine of proximate cause, where delay would inevitably be last in time. This former approach to proximate cause was ended by *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*,<sup>793</sup> following which the courts look for the ‘real and efficient’ cause of the loss. This leaves the effect of delay to be determined on a case-by-case basis,<sup>794</sup> and accordingly reduces uniformity and predictability. The exclusion for delay in *Pink* and s 55(2)(b) is well-settled; it is not suggested that it should be modified. However, since this exclusion developed later to and subsequently existed alongside rules governing total losses for delay, the claims allowing a recovery for total loss on loss of possession may be established exceptions to this exclusion, as they apply to different, separate classes of factual situations.

Arguably, the exception should be confined to situations concerning delays caused by weather, not the other perils. In *Magoun v New England Marine Insurance Company*,<sup>795</sup> the vessel was arrested and detained by authorities in New Granada, and restored. After her restoration, it was found that as she had been exposed to hot weather for an extended time, she was damaged to such an extent that she could not perform the voyage without extensive repairs. The cargo was likewise spoiled. The vessel was abandoned to insurers. The underwriters argued that the loss was due to delay, and exposure to the climate. Storey J held otherwise: “*the argument is that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; ... and that the underwriters are not liable for injury ... by delays in the voyage. ... this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against... are properly attributable to the peril itself*”. This was approved in

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<sup>793</sup> [1918] AC 350

<sup>794</sup> Robert Merkin, Johanna Hjalmarsson, Aysegul Bugra, Jennifer Lavelle, *Marine Insurance Legislation*, (2014 Informa) 96

<sup>795</sup> 1 Story 157, Fed Cas 1861

*Lanasa Fruit Steamship v Universal Insurance Company*,<sup>796</sup> where it was held that where the voyage was made protracted by a peril of the sea, in consequence of which protraction a cargo spoiled, the proximate cause was the peril of the sea, not delay. It was considered, noting English authority, that storms were an exception to this, “*we lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstance give rise*”.<sup>797</sup>

A survey of English and American authority together suggests that the exception for delay is narrower than it at first appears. Arguably, losses of possession fall outside it, just as ‘stranding’, and ‘collision’<sup>798</sup> cases fall outside the exclusion for losses by delay. The American position appears to be the same as the English. For example, it appears that the loss in *Intermondale Trading Co v North River Insurance Company of New York*,<sup>799</sup> where insured cargo on vessel detained in Gibraltar for 6 months, and sold by authorities to pay for freight, was a loss due to detention, and would have constituted a total loss were it not excluded by the FC&S clause. There, the lack of discussion of whether the loss flowed from delay indicates that the exception, in American law, is equally narrow.

## 7.2 Development of the Doctrine of Proximate Cause

That marine insurance ignores remote causes of loss became settled at an early date. Lord Bacon stated the general principle that law would be unworkable “*...if it were infinite for the law to consider the causes of causes, and their impulsions one on another, therefore it contenteth itself with the immediate cause*”.<sup>800</sup> In *Naylor v Palmer* that generality was confirmed: “*The proximate cause, and not the remote, cause of the loss is always considered, according to the well-known legal maxim expounded by Lord Bacon, causa proxima non remota in lege spectator*”.<sup>801</sup> Insurance law added to this, ‘*The proximate cause is that which is proximate in efficiency*’, and “*Unchallenged and unchallengeable authority shows that this is a question to be answered applying the common sense of a business or seafaring man*”.<sup>802</sup> Gradually, in application, it seemed that the English courts looked for the cause of the loss

<sup>796</sup> 302 US 556 (1938), 1938 AMC 1

<sup>797</sup> *ibid*, 1938 AMC 1, 14

<sup>798</sup> *eg Brandyce v United State Lloyds (Corsicana)* 207 App Div 665 (1924), 1924 AMC 65, where potatoes spoiled during storage while collision damage repaired, proximate cause of cargo damage was the collision damage to vessel not delay.

<sup>799</sup> (1951) AMC 936

<sup>800</sup> Lord Bacon, ‘Maxims of the Law’, *Works* (Johnson J editor, 1803, Crowder and Hemsted) Vol VII, 327; *De Vaux v Salvador* 4 A&E 431 (Denman LJ); *cf Ionides v The Universal Marine Insurance Association* 14 CBNS 259, 32 LJ (CP) 170

<sup>801</sup> (1854) 8 Ex Rep 750 (Pollock CB); 10 Ex Rep 381 (Colridge J)

<sup>802</sup> *T M Noten BV v Harding* [1990] Lloyd’s Rep 283, 286-287 (Bingham LJ); *Global Process Systems* [2011] UKSC 5, [2011] 1 Lloyd’s Rep 560, [19]



last-in-time. So, where a vessel met with sea-damage, that slowed her rate of sailing, as a consequence of which she was taken by an enemy which otherwise she would have escaped, even though she would have arrived safe but for the sea-damage, the loss was attributed to the capture, on the basis that *causa proxima non remotur spectator*.<sup>803</sup> There, previous sea damage, potentially causing an excluded loss by delay, caused a covered loss by capture. The cause last in time was operative. A clear rule on causation was seen to reduce litigation, and to identify the applicable peril easily.

Tests of causation were variously expressed, eventually inspiring judicial criticism of the variety of tests, and in particular, of the apparent focus on the last cause in time; “*It must be admitted that the terminology of causation in English law is by no means ideal. It would be the better for a little plain English. I think "direct cause" would be a better expression than causa proxima. Logically, the antithesis of proximate cause is not real cause but remote cause*”.<sup>804</sup> Various similar phrases had been used to express the same idea as ‘proximate cause’, inter alia: “*causa causans*”;<sup>805</sup> “*immediate*” cause;<sup>806</sup> “*direct and immediate*” cause;<sup>807</sup> and “*direct*” cause.<sup>808</sup> The test, however, should always have been to identify the common-sense cause of the loss. Cause and effect were the same for underwriters as for other people. Proximate cause was not a device to avoid the trouble of discovering the real cause or the “common-sense cause.” While it should be rigorously applied in insurance cases, it should help the one side no more often than it helps the other.<sup>809</sup> A recent illustration of the ‘common-sense’ approach of the court is in the *Atlasnavios*, where it was held on appeal that was caused both by the malicious act of the drug smugglers and by the detainment of the vessel by reason of the infringement of customs regulations, which infringement was constituted by the concealment of the drugs.<sup>810</sup>

The last in time rule was criticised, as conflicting with this common-sense test of the real cause. The Supreme Court summarised the change deriving from *Leyland Shipping Co v Norwich Union Fire Insurance Society*:<sup>811</sup>

*“In the Victorian era, the “proximate” cause in marine insurance was readily associated with the last cause in point of time... The modern focus on the “real efficient cause” was finally established at the highest level after the enactment of the Marine Insurance Act 1906, in Leyland Shipping Co Ltd v Norwich Union Fire Insurance*

<sup>803</sup> *Livie v Janson* (1810) 12 East 647, 654 (Ellenborough LCJ)

<sup>804</sup> *Becker, Grey and Company v London Assurance Corporation* [1918] AC 101

<sup>805</sup> *Gordon v Rimmington* (1807) 1 Camp 123 (Lord Ellenborough)

<sup>806</sup> *Walker v Maitland* (1821) KB 5 B&A 171 (Abbott CJ)

<sup>807</sup> *Cory v Burr* (Lord FitzGerald)

<sup>808</sup> *Sanday's Case* (Lord Loreburn)

<sup>809</sup> *Becker, Grey and Company v London Assurance Corporation* [1918] AC 101

<sup>810</sup> [2016] All ER (D) 24 (Aug), [32]

<sup>811</sup> [1918] AC 350

*Society Ltd [1918] AC 350. From that moment, the proximate cause became a matter of judgment and less easy to identify with certainty”.*<sup>812</sup>

In holding the torpedo to be the proximate cause of the loss rather than sea perils, the House of Lords there confirmed and emphasised that the last cause is not necessarily the proximate cause, rejecting this in favour of a testing the “effective” cause. Consequently, the ‘last-in-time’ authorities became questionable.<sup>813</sup> The Supreme Court confirmed the ‘real efficient cause’ test. While some authorities before 1906 appeared to proceed on the basis that the cause closest in time was the relevant cause, it was now settled that that was not the test for proximate cause, which was rather that which was ‘proximate in efficiency’<sup>814</sup>, and that “*Unchallenged and unchallengeable authority shows that this is a question to be answered applying the common sense of a business or seafaring man*”.<sup>815</sup>

The changing approach makes the exclusion of losses for delay resulting from perils of the sea, or named perils, doubtful. An early example of a real and efficient cause approach, although on freight, was *Jackson v Union Marine Insurance Co Ltd*<sup>816</sup> where it was held that where a vessel ran aground necessitating such lengthy repairs that the voyage was frustrated, the proximate cause of the lost freight had been perils of the sea.<sup>817</sup> Arguably, since the collision was an ‘effective’ cause in *Pink v Fleming*, the two decisions appear irreconcilable,<sup>818</sup> and *Pink* may no longer be of general application. Accordingly, applying an ‘effective cause rule’, a loss attributable to delay consequent on another insured peril might be recoverable.<sup>819</sup> Contrastingly, these arguments should be balanced against the wording of s 55(2)(b) of the 1906 Act, which intended to reflect decisions and not *Leyland Shipping*.

The last-in-time rule on causation was never fully adopted in America. *Sheffelin v The New-York Insurance Company (the Dean)*<sup>820</sup> concerned a policy on goods on a voyage from New York to Bremen, against “*dangers of the seas only*”. As a result of perils of the seas, the vessel sprang a leak and put into a port. There, she was detained by embargo and ordered to Amsterdam, where part of the cargo was taken by the government while it was being re-loaded for transhipment on another vessel. When released from the embargo, the vessel put to sea, but was run aground in a storm, and so damaged to be not worth repairing. The remaining

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<sup>812</sup> *Global Process Systems v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5, [49] (Mance SCJ)

<sup>813</sup> Howard Bennett, *The Law of Marine Insurance* (1996, OUP) 225

<sup>814</sup> *T M Noten BV v Harding* [1990] Lloyd’s Rep 283, 286-287 (Bingham LJ)

<sup>815</sup> [2011] UKSC 5, [19] (Saville SCJ)

<sup>816</sup> (1874) LR 10 CP 125

<sup>817</sup> Perhaps explaining why the 1906 Act was silent as to this in respect of freight, Bennett, *The Law of Marine Insurance* (1996, Oxford University Press) 226

<sup>818</sup> *Ibid*, 226

<sup>819</sup> Arnould (17<sup>th</sup> edn, 2008), [22-22], [22-23]

<sup>820</sup> (1812) 9 Johns NY Rep 21

cargo was seized by the government and carried to Amsterdam. Was seizure or the stranding the cause of the loss? Kent CJ identified two possibilities, either the proximate cause, ending all enquiry into the previous loss, was stranding; or the seizure ended the power of the captain to forward the goods to another vessel. He held “*the voyage was lost by seizure preventing the captain from sending on the cargo, and that the defendants are entitled to judgment*”. The American court looked behind the last-in-time cause, to the real cause, and held that capture, not stranding, a later cause of delay, was the cause of the loss.

American courts were never constrained by a rule equivalent to 55(2)(b) of the 1906 Act. Consequently, the effect of *Leyland Shipping* was to more fully liberate American courts from the last-in-time doctrine. In *Lanasa Fruit Steamship & Importing Co Inc v Universal Ins Co*,<sup>821</sup> *Leyland* was followed, and *Pink v Fleming* expressly doubted. There, the issue was “*whether loss by natural deterioration, during a delay in the voyage caused by a sea peril, is a loss by sea perils, within the meaning and intent of the policy of insurance*”. A fact-sensitive approach applied; “*We lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstances give rise*”. Consequently, natural deterioration of a cargo of bananas was held to be within the policy, where the vessel was stranded and the voyage consequently protracted.<sup>822</sup> *Brandyce v US Lloyd's*<sup>823</sup> confirmed that different approaches applied to cases of protraction of the voyage by wind and wave from delays caused by other perils of the seas, such as stranding or damage. Where the vessel was damaged, so that the cargo, because of inherent vice, would be capable of reaching the destination port, was consequently sold at an intermediate port, there was a total loss of the goods.<sup>824</sup> Clearly, in America, *Lanasa* established opposite rules to those in *Pink v Fleming* and s 55(2)(b). The important point is that there is no universal rule, but rather a fact sensitive approach that distinguishes protraction of voyages by mere action of wind and wave. This reinforces the argument that separate rules should apply to each of the three classes of losses; delay by wind and wave, stranding and damage, and losses of possession. Following *Lanasa*, the American markets responded with the “delay clause”, intending to protect the insurer from any claim consequent on loss of time, ‘whether arising from an insured peril or not’. The effectiveness or otherwise of such a clause confirms the underlying position, that the doctrine of causation was not as restrictive as s 55 indicates.

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<sup>821</sup> 302 US 556 (1938)

<sup>822</sup> “*The case is not one of the mere lengthening of a voyage due to the ordinary vicissitudes of wind and wave against which the underwriter does not insure, Jordan v Warren Insurance Co Fed Cas No 7,524, 1 Story 342, 352, and we are not called upon to determine in what circumstances other than those now presented delay may be considered to be due to a peril of the sea within the meaning of the policy*”.

<sup>823</sup> 207 App Div 665 (1924)

<sup>824</sup> cf *Williams v Smith*, 2 Caines 1; *Tudor v New England Mutual Marine Ins Co*, 12 Cush [Mass] 554; *Musgrave v Mannheim Ins Co* 32 NS 405 [1899]

Accordingly, in these different ways, the courts of both England and America test the real and efficient cause. Arguably, following *Lanasa* and *Leyland*, the application of s 55(2)(b) should be confined to cases where the voyage was retarded by wind and wave. This, and *The Leopard*; *The Ostrich*, should be seen as applying to situations where the only cause of the loss has been wind and wave in retarding the voyage. Arguably, the rule should not be seen as wider in scope.

For a time, popular clauses did not invoke the common-law rule, but contained express clauses different in effect. Clearly, the *causa proxima* rule could be modified by policy terms. Where a vessel insured on a policy containing the FCS clause, specifically excluding ‘*the consequences thereof in her port of loading*’, ran to sea before she was loaded to avoid these perils, and was wrecked, the underwriters were not liable. However, the freight on the same vessel was separately insured, and the policy did not contain a like warranty. The freight insurers were liable for the same loss. The distinction was based on the “*word “consequences” to be found in the warranty contained in the first and not present in the second*”.<sup>825</sup> Excluding all ‘consequences’ implied a different approach to the *causa proxima* rule,<sup>826</sup> and the warranty excluded the former events. In *Bensaude v Thames & Mersey Marine Insurance Co Ltd*<sup>827</sup> a peril of the sea caused the main shaft to fail, necessitating a return to the load port for repairs. The delay in commencing the voyage frustrated the adventure, and the charterers terminated the contract. A claim for loss of freight failed on the basis of a policy clause excluding ‘any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise’:

“...if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability”.<sup>828</sup>

This was followed in *Russian Bank for Foreign Trade v Excess Insurance Co Ltd*,<sup>829</sup> but doubted in *Atlantic Maritime Co Inc v Gibbon*.<sup>830</sup> The Modern Institute Clauses cover losses by arrest, restraints and detainments, and do not contain exclusions for losses “consequent upon” delay, so the common-law rules will apply. The significance of this discussion is to demonstrate that the presumption of total loss predated, and coexisted with, the rule in *Pink*

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<sup>825</sup> *Powell v Hyde* 5 E&B 607; *Kleinwort v Shepard* 1 E&E 447, 28 LJ(QB) 147; *O’Reilly v Royal Exch Ass Co* 4 Camp 246; *O’Reilly v Gonne* 4 Camp 249; Arnould (3<sup>rd</sup> edn, 1866), 768

<sup>826</sup> Arnould (3<sup>rd</sup> edn, 1866) 768

<sup>827</sup> [1897] AC 609

<sup>828</sup> [1897] AC 609, 614

<sup>829</sup> [1918] 2 KB 123

<sup>830</sup> [1954] 1 QB 88

now codified in s 55(b), and accordingly the exclusion should not be retrospectively understood to apply to exclude the presumption.

### 7.3 The Duty to Sue and Labour

After a casualty, insureds are under a duty to ‘sue and labour’ to minimise any loss. When might failure to act undermine a right to claim instantly for total loss, on the basis that this duty has not been fulfilled? In particular, on a capture or seizure, the insured may make efforts himself to ensure the return of his property, most obviously by ransom, or by formal legal processes. Does the availability of these avenues of mitigating his loss undermine his entitlement to claim for a total loss?

It is settled that a writ agreement as to when the parties’ rights are considered settled does not end the duty of the insured to sue and labour, nor is the position settled even when civil proceedings, have been issued. Those issues are independent of the parties’ respective rights as to whether a total loss has occurred, although the policy aim of the writ agreement protecting the *insured’s* position from a change in circumstances is noted.<sup>831</sup> Three types of mitigation potentially allow an insured to recover his property, but the insured was under no obligation to participate in any: (i) ransom; (ii) security; (iii) litigation; yet (vi) disparate situations nevertheless existed where the insured’s inaction defeated their claims.

#### *i. By ransom*

While the history of law of ransom was considered superficially in *Masefield*, a more detailed consideration provides arguments undermining *Masefield* as authority for the ‘wait and see’ approach on a capture. Two material issues emerge, whether: (i) for insurance purposes ransom implies that title has changed to the captor; and (ii) whether the payment is a ‘proper means’ which an insured should sue-and-labour to recover property, the availability of which suspends a right to claim for total loss. To answer this the following issues are considered:

- a. Ransom as a new title by purchase?
- b. How is ransom treated by criminal laws?
- c. Is ransom recoverable under sue and labour?

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<sup>831</sup> “The writ agreement protects the insured from prejudice in the event of change of circumstances and obviates the need to issue proceedings at the time a notice of abandonment is rejected...”; “Since therefore recovery after action brought does not affect the total loss indemnity to which an assured is entitled as of that date, that also seems to me to be an appropriate date at which to find that an assured’s right (and correlative duty under s 78(4) of the MIA) comes to an end, *Kuwait Airways Corporation and another v Kuwait Insurance Company SAK and others* (1996) (Rix J)” *Atlasnavios* [2014] EWHC 4133 (Comm), [343]

- d. Is it a general average expense?
- e. Is ransom a proper means for an insured to use to recover property?

*a      Ransom as a New Title by Purchase*

Emerigon noted ransom *could* be offered by the insurers, and if accepted, property became theirs. While acknowledging postliminity in respect of the owners' title, if ransom was offered by the insurer, the return of the property to them was a new title,<sup>832</sup> distinct from a situation of recapture and restoration of title by postliminity. Subsequent authority in English law is sparse. In the separate context of whether the voyage has ended by capture, illustrated by situations before the 1894 Act where freight was still the 'mother of wages', and the voyage was lost, it was confirmed *obiter* that ransom was a new purchase. Repossession was not under postliminal rights of original ownership, but a new purchase:

*"The ransom," said he, "is a new purchase of the ship, and it will deserve great consideration before it is determined, that after a ransom the owners shall be liable to pay wages for the time which elapsed before the capture".*<sup>833</sup>

Further support for ransom being a simple contract which recognises possession and control, ie de facto ownership, in the captor derives from *Anthon v Fisher & Another*, where it was argued:

*"Dr. Wynne answered, that, though the contract of ransom happens to be connected, in point of time, with the capture as prize, it does not necessarily arise out of it, but is, in truth, a mere simple contract of sale, between individuals, who, at the time, and for the purpose of the contract, are considered as not being the subjects of hostile States".*<sup>834</sup>

This contention was not disputed. Accordingly, general *dicta* before *Masefield* recognise that ransom payments treat the property as having passed on the capture. This understanding is more consistent with a presumption of total loss and less consistent with recognising continuing *postliminity*, and arguably reflects a settled proposition that ransom was a new purchase. The single contrary authority, *Parsons v Scott*,<sup>835</sup> described the release of the vessel on payment of ransom as a 'liberation'. Nevertheless, new title remains the better understanding, and no recent express rule contradicts this. It is apparent from American authority that paying sums to secure the release of the vessel indicates recognition of *de facto* ownership, and supports idea of new title in the captor.<sup>836</sup>

<sup>832</sup> Emerigon, XII, XXI, Valin, art 67

<sup>833</sup> *Yates v Hall* 1 Term Rep 79; Arthur Browne, *A Compendious View of the Civil Law and the Law of Admiralty, being the substance of course of lectures read in the University of Dublin by Arthur Browne* (Butterworth 1802), 548 ([http://maritimelawdigital.com/uploads/PDFs/Browne\\_Admiralty\\_vol2.pdf](http://maritimelawdigital.com/uploads/PDFs/Browne_Admiralty_vol2.pdf), accessed 29 February 2016)

<sup>834</sup> T 22 Geo 3

<sup>835</sup> (1810) 2 Taunt. 363, (1810) 127 ER 1118

<sup>836</sup> *Republic of China v National Union Fire Ins Co* 151 F Supp 211 (D Md 1957)

b     Ransom in criminal law

In *Masefield* the claimant's comparison to criminal laws was quickly rejected at first instance<sup>837</sup> and on appeal.<sup>838</sup> Nevertheless, this remains worthwhile as consistency across different areas is desirable. The word 'theft' is to be construed in a business sense, rather than a criminal meaning, should there be inconsistency.<sup>839</sup> Nevertheless, Lord Denning MR considered the criminal law in a similar context to capture in *Shell International Petroleum Ltd v Gibbs (the Salem)*, on a conspiracy to steal a cargo of oil in a port, before the insured voyage:

*"It was larceny by a trick: see all the authorities such as Rex v Aickles (1794) 1 Leach 294... I make no apology for referring to the old criminal law in this context".*<sup>840</sup>

The comparison with criminal cases and the Larceny Act 1916 informed his understanding of the thief's intention for insurance purposes:

*"Larceny was always spoken of as a "taking."... The concept of "takings" in this policy is the same as the concept of "taking" in the old law of larceny. It involves a change of possession. As Atkin LJ in Lake v Simmons [1926] 2 KB 51, 71 said: "This is not a technicality of the criminal law, but a principle as old as the common law, and governs civil rights and procedure as much as obligations and procedure in matters of crime"."*<sup>841</sup>

Arguably, where insurance matters were informed by criminal law in appellate jurisdictions in 1980, it remains useful. No detailed reason for the refusal to adopt such considerations in *Masefield* was given.

Does criminal law provided a presumption of irretrievable deprivation, where the thief intends to sell back or ransom the property to its owner. The starting point is the Larceny Act 1916, which used the phrase 'permanently to deprive', a comparable phrase to 'permanently deprive' in s 60 of the 1906 Act, stating:

*'(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof'.*

So the Larceny Act contained a test of intention to permanently deprive the owner of property.

That section was explained in the codifying Theft Act 1968. Section 6(1) provides:

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<sup>837</sup> [1983] 2 AC 375 [65]

<sup>838</sup> *ibid* [57]-[60]

<sup>839</sup> *Masefield* at [60]; Arnould (17<sup>th</sup> edn, 2008) [23-30], fn 184

<sup>840</sup> [1982] QB 946, 987-8; [1982] 1 All ER 1057

<sup>841</sup> [1982] QB 946, 987-8; [1982] 1 All ER 1057; *Lake v Simmons* [1927] AC 487, [1927] AC 487, 509-510 (Viscount Sumner)

*‘A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights...’*

Section 6(1) reflects the common-law, and was intended to explain earlier authority. Recently, in *R v Raphael and Another*,<sup>842</sup> it was observed that *‘the section itself demonstrates that the necessary intention may sometimes be established when the person appropriating property belonging to another does not in fact intend that its true owner should be deprived of it permanently. It is properly described as a deeming provision. As Lord Lane CJ observed in Lloyd... “...It must mean, if nothing else, that there are circumstances in which a Defendant may be deemed to have the intention permanently to deprive, even though he may intend the owner eventually to get back the object which has been taken”<sup>843</sup>.’* Applying s 6(1) in *R v Raphael and Another*,<sup>844</sup> the Court of Appeal held that where defendants had taken a motor car and demanded £500 for its return, the *mens rea* of theft was established, namely an intention to irretrievably deprive the owner under s 6(1) of the 1968 Act.

As noted in *Raphael*, the common-law was explained in *R v Hall*,<sup>845</sup> where an employee of a tallow-maker stole candle-fat, offering it for sale back to the maker at full value. His defence was that there had been no larceny, as he had never intended to permanently deprive his employer of the fat. He submitted: *‘It is almost a contradiction in terms to say, that there was an intent to deprive the owner of his goods in specie, the intent being to deprive him of the value of them in money’*. That argument was rejected. Lord Denman CJ held *‘The question here is, whether there was an intent to deprive the owner of his property permanently. How could that be done more effectually than by selling it? It is no matter to whom it is sold’*. Concurring, Parke B stated: *‘The intent of the party here was not only to deprive the owner of his goods, but to commit the impudent fraud of making him buy his own goods, and pay for them’*. The other judge concurred. Although in *R v Hall*, the fat had been offered for sale at full value, the judgments of Denman CJ and Parke were expressed more widely so that they embraced a sale, without reference to the price requested. In *Raphael* it was also noted that it had been said in *Lloyd*:

*“...The first part of section 6(1) seems to us to be aimed at the sort of case where a Defendant takes things and then offers them back to the owner for the owner to buy if he wishes. If the taker intends to return them to the owner only upon such payment, then, on the wording of section 6(1) that is deemed to amount to the necessary intention permanently to deprive...”<sup>846</sup>*

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<sup>842</sup> [2008] EWCA Crim 1014

<sup>843</sup> [1985] QB 829, [1985] 2 All ER 661, [1985] 3 WLR 30

<sup>844</sup> *Raphael* [2008] EWCA Crim 1014, [45]

<sup>845</sup> (1849) 1 Den 381, 169 ER 291

<sup>846</sup> [46], from *Lloyd*, 836



That reinforced that there was no difference between a demand for ‘full’ value and any demand for payment; no mention of a requirement of full value was implied from the test. The judgment continued to note that there were other cases of ‘similar intent’. The following example was expressed of showing the necessary criminal intention, “*I have taken your valuable painting. You can have it back on payment to me of £X000. If you are not prepared to make that payment, then you are not going to get your painting back*”. This is clearly a situation where a criminal gang would not normally ask for a full open market price for a painting, where such a price would be a difficult and subjective task to assess.

Finally, in *R v Raphael* a smaller sum was demanded than the value of the car. That is much more comparable to *Masefield* than the earlier cases. The court did not distinguish earlier cases on the basis that a conceptual difference distinguished a demand for a full payment from one for a token payment. It had been noted in *Raphael* that asking for a small sum in relation to the total worth of an item would be an assumption of only part of the rights of the owner – a ransomer could easily ask for more. However, *Chan Man-sin v Attorney General of Hong Kong*,<sup>847</sup> was approved, where it was said concerning fraud:

*“Ownership, of course, consists of a bundle of rights and it may well be that there are other rights which an owner could exert over the chose in action in question which are not trespassed on by the particular dealing which the thief chooses to assume. In R v Morris [1983] 3 All ER 288, [1984] AC 320, however, the House of Lords decisively rejected a submission that it was necessary, in order to constitute an appropriation as defined by s 3(1) of the 1968 Act, to demonstrate an assumption by the accused of all the rights of an owner”.*

Accordingly, although *Hall* can be distinguished from the situation in *Raphael* and *Masefield* by the essential difference that the employee intended to demand a full value for the property from the owner, the criminal law never distinguished between these scenarios. An intention to permanently deprive was implied into both. Therefore, the criminal law took the conceptual approach rejected by Steel J in *Masefield*,<sup>848</sup> that where a person offers the owner the chance to pay a ransom, he treats the property as his own, and is deemed to intend permanently to deprive the owner of his property, even where he offers the true owner the property back for a small ransom. Finally, In *Masefield*, the submission was not made that ‘piracy’ as defined in both domestic laws and customary international law included ‘robbery’.<sup>849</sup> In both a

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<sup>847</sup> [1988] 1 All ER 1

<sup>848</sup> [2010] EWHC 280, [65]

<sup>849</sup> eg Barry Dubner, ‘Piracy in Contemporary National and International Law’ 21 Cal W Int'l LJ 139 (1990-1991), 141ff

domestic and international context, where a ransom was demanded nothing was left undone by the pirates to ‘complete’ their act as constituting the crime.

Although the criminal law is supportive of the insured’s interests, it is conceded that it is not decisive. Insurance law, since *Goss*, has been separate from property law. Criminal law must be a separate branch of law again. However, consistency across the different branches of law is desirable. Property law must apply separate principles from the criminal law: if title never transferred on a theft, how could a suspect ever be prosecuted if criminal law did not treat the deprivation as irretrievable theft. It is arguably desirable that criminal law and insurance law should be consistent on theft or capture.

*c      Ransom and the sue-and-labour clause*

Difficulties potentially arise where ransom payments are prohibited. The Ransom Act 1782<sup>850</sup> prohibited ransom payments to an enemy. Unsurprisingly, English courts subsequently considered few ransom situations. Potentially, the Act prohibited ransom payments to pirates, as pirates were deemed to be *hostium gentibus*, which definition ultimately from Cicero was adopted by the court in *Goss*, and by the criminal law relating to the universal jurisdiction to prosecute pirates. However, this was never argued; it appears that the academic opinion of the Victorian profession was that ransom was permitted to pirates. Arnould considered that while ransom to an enemy was prohibited by statute, this extended only to enemies, and not to pirates or other plunderers, and as a consequence monies paid by the master to them to liberate the ship and cargo would be a general average expense.<sup>851</sup> The adoption of this view settled the position that ransom payments are recoverable expenses under the sue-and-labour clause.

In *Royal Boskalis Westminster NV v Mountain*, Stuart-Smith and Phillips LJ cited with approval,<sup>852</sup> the summary of the law as stated by Arnould that ‘*payment to recover property from pirates or hijackers must, it is submitted, in general be recoverable. Similarly, where payment is made to the authorities in a country to obtain the release of property detained by them it can generally make no difference whether or not the laws there in force have been properly applied*’.<sup>853</sup> Stuart-Smith LJ considered difficulties arising from *Aitchison v Lohre* that suggested ransom, which could not be valued on a *quantum meruit* basis, and is paid by

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<sup>850</sup> Act 22 Geo III c 25

<sup>851</sup> Arnould (1<sup>st</sup> edn, 1848) 337, 916

<sup>852</sup> [1999] QB 674 at 684/55 and 719-720, [1997] 2 All ER 929, [1998] 2 WLR 538 respectively; approved in *Masefield v Amlin Corporate Member* [2011] EWCA Civ 24 [64]

<sup>853</sup> (16<sup>th</sup> edn, 1981) [913A], (17<sup>th</sup> edn, 2008) [25-21]

the shipowner, not to his agent for his exertions in saving the ship but to a stranger who is detaining it, cannot be recovered under the sue and labour clause.<sup>854</sup>

*“...I have found some difficulty in fitting this proposition into the notion of recovering reasonable expenses for the exertions in saving the vessel, since the ransom payment obviously bears no relation to the exertions involved. It might merely consist in the transfer of a sum of money ... But Mr Aikens has persuaded me that unless the payment of a ransom is illegal, it is recoverable from underwriters and although the precise basis for the recovery is not altogether clear, it does seem to be accepted that it can be under the sue and labour clause. This, at any rate, appears to be the view of the editors of Arnould”.*<sup>855</sup>

Further, *Goss and Berens v Rucker*,<sup>856</sup> both predating the Ransom Acts, indicated that insurers would be liable to reimburse ransom payment. The Ransom Acts prohibited otherwise lawful payments. Accordingly, while the precise rationale remains uncertain, longstanding custom provided that ransom payments were recoverable under the sue-and-labour clause.

Section 15(3) of the Terrorism Act 2000 would prevent payments where the payments might be used for terrorism, but this factual issue has not yet been argued, and ransom payments made in the context of ‘private ends’ piracy, with no political aspect, would not be prevented by the Act.<sup>857</sup>

American laws likewise provided that ransom was recoverable, but added the refinement that what is a reasonable ransom was relevant to the insurer’s assessment of whether compensation should be paid for the ransom sum; there being compensation if it is reasonable.<sup>858</sup> Further, where property is captured, condemned and sold, if the master repurchases it without *prior* authority, the underwriters are liable for a total loss, supporting the idea of sale and ransom being new title.<sup>859</sup>

#### *d      Ransom and general average contributions*

The cost of a ransom payment made by the hull interest may be recoverable as a general average contribution from cargo interests. This was hinted at in *Masefield*, and subsequent

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<sup>854</sup> (1879) 4 App Cas 755 (Blackburn LJ; Earl Cairns LC)

<sup>855</sup> [1997] 2 All ER 929, 940 (Stuart-Smith LJ)

<sup>856</sup> (1760) 1 Wm BI 313, 96 ER 175

<sup>857</sup> Jonathan Wenckers, ‘Issues of modern piracy in marine insurance law: a comparative study of English and German law’ JIML 18 (2012) 5, 372, 385

<sup>858</sup> *Douglas v Moody & Al* 9 Mass 551

<sup>859</sup> *Sawyer & Al v The Maine Fire and Marine Insurance Company* (1815)

(<https://books.google.co.uk/books?id=paVJAAAYAAJ&pg=PA7&dq=Sawyer+%26+Al+v+The+Maine+Fire+and+Marine+Insurance+Company+1815&hl=en&sa=X&ved=0ahUKEwjvjo6Ut53LahUIrXoKHbMNAKUQ6AEIIzAB#v=onepage&q=Sawyer%20%26%20Al%20v%20The%20Maine%20Fire%20and%20Marine%20Insurance%20Company%201815&f=false>, accessed 29 February 2016), 291

practice appears to indicate that this is the view of the market.<sup>860</sup> However, merely because it could be a general average expense is a different issue from whether an insured is bound to pay ransom, or forfeit recovery. There is little general guidance. Arnould stated that certain expenses in addition to repair might be recoverable from the underwriter, including the wages, provisions and expenses paid in ransom, or expenses to liberate cargo from detention. These would be contemplated as being within the ordinary services of the voyage which were payable out of freight, and gave insureds a claim against the underwriters of ship or cargo, whichever was responsible for the detention. Further, where “*the services of the master and crew are thus given for the joint benefit of both ship and cargo, as they are when both are the subject of detention, the expense incurred gives a claim to average contribution, and only falls indirectly on the underwriters*”.<sup>861</sup>

In circumstances such as in *Masefield*, the cost of negotiating ransom to Somali pirates, and incidental expenses thereto, might constitute general average events. A general average act must be an *extraordinary* sacrifice or expenditure. Rule A of the York-Antwerp Rules 1974 provided that “*there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred*”. If part of the cargo is voluntarily, without fraud or cowardice given to a pirate by way of composition or ransom, to induce him to spare the vessel and the residue of the goods, or if a sum of money be agreed to be paid to a pirate or enemy by way of ransom, then it appeared settled that such a loss would be general average.<sup>862</sup>

Payment of ransom might therefore be a general average expense. If properly so treated, the payment may not be treated as a sue and labour expense.<sup>863</sup> If correctly characterised as an extraordinary cost incurred so as to ensure the continuation of the common venture, the ransom payment and related costs would appear recoverable in General Average for cargo’s proportion, assuming an absence of actionable fault on the part of the shipowner. So far as enforcement of the right to general average is concerned provided that a successful release of the ship and cargo is secured, general average security should be collected in the usual way prior to the discharge of the cargo at destination.<sup>864</sup> It has been noted that ransom for the purpose of releasing crew – the primary motive justifying the morality of such payments in

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<sup>860</sup> *Mitsui & Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and another* [2014] EWHC 3445 (Comm)

<sup>861</sup> Arnould (3<sup>rd</sup> edn, 1866), 731

<sup>862</sup> David MacLachlan, *A Treatise on the Law of Merchant Shipping* (6<sup>th</sup> edn, 1926, Sweet and Maxwell), 540; cf *Hicks v Palington* (1590) Moore 297; Justinian’s Digest 14.2.23

<sup>863</sup> ITC 1983 clause 13.2

<sup>864</sup> Ince and Co Law, <http://incelaw.com/en/documents/pdf-library/shipping/piracy-off-aden-and-somalia-an-overview-of-legal-issues-for-the-insurance-industry.pdf> (accessed 31 March 2016)

*Masefield*, rather than specifically the *specie* potentially means that such a ransom would not be a sue and labour expense or a general average sum under the hull policy.<sup>865</sup> This argument has yet to be determined.

General average expenses, to be recoverable, must be ‘reasonable’. While “*At least in one sense, no ransom payment could ever be described as “reasonable”. Pirates are criminals engaged in extortion and their demands are unlawful and deplorable... The idea of a “reasonable ransom” is radically misconceived and the term an oxymoron*”,<sup>866</sup> the real issue was whether it was reasonable for owners to pay the sum, and reasonable to expend money in negotiating the ransom down. The correct approach was to test this by the sums expended in relation to the value of property – in the *Mitsui* case, the expenditure was held to be reasonable as it totalled about one sixths of the value of the property. Accordingly, the ransom and negotiation expenses were allowed in general average, and recovered from cargo interests by the owners. While suggesting that failure to ransom might be a breach of the sue and labour clause,<sup>867</sup> given that the courts do not see a ransom as ‘reasonable’, the better view seems to be that courts could not find it ‘unreasonable’ to refuse to pay.

*e*     Whether Ransom a proper means an insured must employ to recover for total loss

The discussion of whether ransom was ‘legal’, concluding that the person paying ransom will be an ‘innocent’ party,<sup>868</sup> as addressed in *Masefield*, did not address the question of whether failure to pay this would undermine a constructive total loss. The question of illegality might be a problem in future cases. President Obama’s executive Order of 13 April 2010, and Council Regulation (EC) No 356/2010 potentially raise issues of illegality in relation to future ransom payments. Insurers on the London market adopted clauses preventing any contravention of any UN, US or EU resolutions or sanctions or laws,<sup>869</sup> so the issue now potentially arises in English law.

Does a refusal to pay ransom prevent an insured from claiming for total loss? Nothing in Emerigon’s extensive discussion on ransom and general average indicates that a master was

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<sup>865</sup> Paul Todd, ‘Piracy for ransom: insurance issues’, JIML 15 (2009) 4, 307, 321

<sup>866</sup> *Mitsui & Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG* [2014] EWHC 3445 (Comm), [98]

<sup>867</sup> Gotthard Gauci, ‘The obligation to sue and labour in the law of marine insurance - time to amend the statutory provision?’ The International Journal of Shipping Law, Part 2, 2000, 87, 87-92; Gotthard Gauci, ‘Piracy and its legal problems: with specific reference to the English Law of Marine Insurance’ 41 JMLC 4 (2010) 541, 553

<sup>868</sup> J Dunt, *International Cargo Insurance* (2012, Informa), 58

<sup>869</sup> Joint Cargo Committee Circular JC 2010/014 of 11 August 2010

ever required to negotiate ransom,<sup>870</sup> and the issue was little treated in later academic discussion. In *Royal Boskalis*, as in *Masefield*, no consideration was given as to whether the possibility of ransom payments postponed any claim for recovery by the insured. Instead, *Royal Boskalis* left open issues of public policy on ransom payments. It was expressly left unresolved “*whether a sue and labour clause covers payments made under threats of total loss, from whatever source, which are totally repugnant to English law notions of legality. Is the payment of a type the law should recognise as entitling the payer to claim as sue and labour, given a public interest in the issue of extortion of money from shipowners in circumstances of duress and illegality?*” It was acknowledged that payment under such a threat might be reasonable for the purposes of s 78(4) of the 1906 Act, but knowledge that the insurers would be liable, and that there would therefore be money to be paid, might encourage such threats.<sup>871</sup>

*Masefield* answered these issues by finding that a ransom payment was not contrary to public policy, so that it was a proper means that an insured might use to restore recovery. *Masefield* went further than prior authority on the point that an insured could not recover on his policy if a ransom payment would be accepted. Interestingly, the judgment does not record any reference to arguments that Somali piracy extorted ransom payments under threat of total loss. Conceivably, were the point more fully argued, it is far from clear that a future tribunal would come to Rix LJ’s conclusion on the public interest point in, effectively, requiring such payments to be made.

In *Ikerigi Compania Naviera SA v Palmer*, *Global Transeas Corp v Palmer*, *The Wondrous*<sup>872</sup> – in a passage approved in *Handelsbanken ASA v Dandridge and others (The Aliza Glacial)*<sup>873</sup> and *The Atlasnavios* – the court considered whether concerned whether an insured’s refusal to pay ransom would deprive him of a claim, on the basis that the failure to sue and labour became the proximate cause of the loss. Comparison was made to clauses excluding cover for losses arising from ‘any financial cause’. This was rejected: “*Wide as the words 'any financial cause' are... they must have some limitation. Suppose that a vessel was seized by a terrorist organisation wanting to raise money, a ransom demand was made for a million pounds and the owner declined to pay the money: could it be said that the detention of the vessel thereafter was through a financial cause? In a literal sense, it could, but no one would suggest that such*

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<sup>870</sup> Emerigon (1850 edn), Ch XII s XLI, ss9

<sup>871</sup> [1997] 2 All ER 929, 940, 954

<sup>872</sup> [1992] 2 Lloyd’s Rep 566

<sup>873</sup> [2002] 2 All ER (Comm) 39

*a conclusion would accord with the spirit of the policy".*<sup>874</sup> While *obiter*, this strongly supports the construction that a refusal to pay a ransom demand would not break the chain of causation, and the cause remains the original seizure. Policy considerations do not prevent an insured from claiming where the ransom is demanded by terrorists. If that is settled, it is difficult to see that non-terrorist capture provides a satisfactory distinction for an insured. How, for example, would the line between terrorist and non-terrorist be drawn? Such a rule would appear to be commercially undesirable.

*Masefield* indicated that payments are not treated as a 'bribe' to obtain an improper advantage.<sup>875</sup> This is significant, as bribery payments were discounted as things a prudent shipowner should have done in *Pannamanian Oriental*. It is difficult, however, to distinguish the potential payments into court in *Pannamanian* from ransom, since the aim of both payments was to release insureds' own property.

American laws provided certain rules applicable to ransom situations. The act of the master in ransoming the vessel from a captor could not undo a total loss where abandonment had already been made, reinforcing the certainty accorded to the assured on serving notice. Where an insured vessel was captured and condemned, notice of abandonment was given and refused by insurers, and where after condemnation the master made a compromise with the captors and secured the vessel's release, it was held that the total loss was fixed by the abandonment. Therefore, it was not in the power of the master by any act of his to change the total into a partial loss, without the subsequent assent of the insured. Accordingly, the purchase of the vessel by the master was for the benefit of the insurers, if they chose to take it, but even if they did not, still their refusal to do so could not affect the abandonment.<sup>876</sup> Clearly, the possibility of compromise existed but did not undermine the total loss. Following *Masefield*, on this express authority, there appears to be a distinction to English law. Arguably, the rule that the act of the master in ransoming be held to be the act of the insurer is desirable in providing a certain rule. The alternative construction, that the situation will be understood by a doctrine of 'relating back' a later act to the initial seizure clearly involves an element of uncertainty (cf *Pollurian*<sup>877</sup>).

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<sup>874</sup> *Handelsbanken v Dandridge (The Aliza Glacial)* [2002] EWCA Civ 577; [2002] 2 Lloyd's Rep 421; considered in *The Atlasnavios* [2014] EWHC 4133 (Comm), [254]

<sup>875</sup> [2011] EWCA Civ 24, [73]

<sup>876</sup> *Jumel v The Marine Ins Co* 7 Johns Rep 412; Sherman, Marine Insurance (1841), 30

<sup>877</sup> [1915] 1 KB 922

It remains arguable that while the possibility of ransom payments being accepted means that there is no actual total loss, claims for constructive total loss might still be made successfully. The appeal in *Masefield* was confined to actual total losses:

*“The fact that there may be no duty to make a ransom payment does not turn a potential total loss which may be averted by the payment of ransom into an actual total loss: any more than the fact that there is no duty to spend an extravagant sum seeking to save a vessel driven onto the rocks means that there is an ATL (as distinct from a potential CTL) if, quite sensibly, the money and effort are not expended on such a forlorn and in every way undesirable venture. In any event, all such questions of reasonableness are pertinent to CTL, but not to the incidence of ATL”.*<sup>878</sup>

The difficulties of this decision can be reconciled by appreciating that Rix LJ’s judgment applies to actual total losses, and that the arguments in relation to constructive total losses remain open to insureds.

The precedent of describing ‘no ransom payment as reasonable, leaves the issue to be determined finally – notwithstanding the first-instance decision in *Masefield* – that it was a reasonable means an insured might use to recover property, by an appellate court in relation to a constructive loss. Indeed, a strict analysis of *Masefield* is that it concerned a situation where another party would probably offer ransom, not a situation where ransom was not offered *by the insured*, and for actual, not constructive loss.

## **ii. By litigation**

It was observed in *Masefield* that in *Stringer* the plaintiff was involved in the litigation in the American Admiralty Court to recover his property, and the English court investigated the chances of his success. However, no requirement rested on insureds to issue claims, however meritorious. Instead:

*“In general, whenever a ship is taken by the enemy, the insured may abandon, and demand as for a total loss; and he is not bound to make any claim or appeal in the enemy’s courts of admiralty, or to litigate there the validity of the capture”.*<sup>879</sup>

*Goss* anticipated this. An instant right of abandonment upon capture had no meaning if the insured was required to commence litigation. In *Lozano v Janson*,<sup>880</sup> the court considered whether an insured should have provided security to a prize court holding his goods. In the circumstances, providing security was ‘un-commercial’, so that no reasonable merchant would have done so. The principle hinted at, that an insured might be required to give security,

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<sup>878</sup> [2011] EWCA Civ 24, [72]

<sup>879</sup> Marshall (1<sup>st</sup> edn, 1802), 429; *Goss* (1758) 96 ER 1198; *Tyfon v Gurney* (1789) 3 Term Rep 477

<sup>880</sup> (1859) 2 E&E 160



was never followed, even in *Stringer*.<sup>881</sup> In *Stringer*, when the ship was first taken, and it was inevitable that capture would be adjudicated before an American prize court: ‘...upon the capture of the ship, it was competent for Walsh, the owner of the goods, if he had thought fit so to elect, to treat the case as a total loss’.<sup>882</sup> Whether security should have been given was a consideration only *after* insureds had decided to initiate legal process, indicating his wish to treat the property as his own, establishing an estoppel that prevented him from claiming for total loss.

The master was under a duty when the vessel was captured, to put in a claim to recover it,<sup>883</sup> and this duty was widely recognised.<sup>884</sup> It did not suspend the insured’s right to claim for total loss, otherwise this would have been noted in academic works. The argument that the master should make efforts to recover property was not made, e.g. in *Mellish v Andrews*<sup>885</sup> the insured cargoes were seized and carried off by persons purporting to exercise governmental authority in the port of Carlshamn. There was no defence advanced that there should have been an attempt to retrieve them by any means.

In American jurisdictions failure to litigate would not defeat the claim, and there was no requirement to litigate on capture.<sup>886</sup> *Marshall v Delaware Ins Co* was followed in *Adams v Delaware Ins Co*,<sup>887</sup> where the insured did not recover for total loss where notice of abandonment was given while the vessel was captured, but, unknown to insured, an order for restoration had been made by the prize court. The Supreme Court of Pennsylvania confirmed that the insured would have recovered for a total loss if abandonment was given before order for restoration, notwithstanding the obvious likelihood of restoration on the facts as subsequently known.<sup>888</sup> Likelihood of restoration, even, evidently a certainty of restoration, would not have defeated the claim if made in time.

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<sup>881</sup> (1870) LR 5 QB 599

<sup>882</sup> *ibid*, 601-2 (Kelly CB)

<sup>883</sup> *Marshall v The Union Ins Co* 2 Wash CC Rep 557

<sup>884</sup> *Sherman* (1841), 281

<sup>885</sup> 16 East 312

<sup>886</sup> *Russell v Union Ins Co* 4 Dall (US) 421, Joyce JA, *A Treatise on Marine, Fire, Life, Accident and All Other Insurances* (1897), Vol 4, [3005]

<sup>887</sup> 4 Binney 287

<sup>888</sup> Clark Hare JI, Wallace HB, *American Leading Cases: Being Select Decisions of American Courts, in Several Departments of Law; with Especial Reference to Mercantile Law* (3<sup>rd</sup> edn, 1852), 338

**iii. By paying salvage or security**

Policies might contain clauses preventing recovery for total loss where there has been a failure to provide security. The *Atlasnavios*<sup>889</sup> considered failure to provide security where the vessel was confiscated in contravention of local anti-drugs laws, when, unknown to her crew, concealed drugs were smuggled under her hull. The insurers relied on cl 4.1.6 of the Institute War and Strikes Clauses, and contended the loss of the vessel arose from failure on the part of the owners to provide security. It was accepted the security in question must be reasonable security:

*"In this connection, however, if it be shown that it was not reasonable for the owners to provide the surety demanded in respect of the vessel because the sum required exceeded the full value of the ship and would otherwise enable her to be treated as a constructive total loss, the exclusion should be treated as inapplicable".*<sup>890</sup>

In *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd*,<sup>891</sup> the Egyptian court attempted to fine a vessel for compensation for environmental damage done by another vessel, in a process that was neither ordinary nor judicial. The insured's decision not to give security, but to challenge the lawfulness of the arrest, did not amount to a breach of the sue and labour clause.

Comparison to the South African position indicates a strict approach is taken to the payment of court fines. In *Incorporated General Insurance Ltd v Fisheries*,<sup>892</sup> the Supreme Court of South Africa, Appellate Division held: *The Mozambican tribunal imposed a fine. Had that fine been paid the loss would not have resulted. In my view the confiscation did not result from the arrest of the trawler, it resulted from the failure to pay the fine. That failure was therefore the proximate cause of the confiscation of the trawler. The fact that the plaintiff was unable to pay the fine is irrelevant.*" Given the findings of fact, that the insured was unable to pay the fine, the strict application of *causa proxima* created a harsh result for the insured. Given the result, it was unsurprising that no link was made to the long history of similar cases in argument or the judgment. As this point was not fully argued with reference to early English authorities, it is questionable whether contemporary English courts would follow the South African decision. The issue has been considered in other contexts, of whether the insured's election not to take a step to recover property is the proximate cause.

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<sup>889</sup> [2014] EWHC 4133 (Comm)

<sup>890</sup> *ibid*, [324]; *The Aliza Glacial* [2002] EWCA Civ 577; [2002] 2 Lloyd's Rep 421, [62] (Potter LJ)

<sup>891</sup> [2011] EWHC 181 (Comm)

<sup>892</sup> (133/86) [1986] ZASCA 127

Arguably, these authorities are inconclusive. For example, in *Pringle v Hartley*,<sup>893</sup> on recapture the vessel was sold as no person appeared to answer for the moiety to satisfy the salvage. This was held to be a total loss justifying abandonment, so that the failure of the insured to act did not defeat the claim, or break the chain of causation from the original peril. Contrastingly, in *Powell v Gudgeon*<sup>894</sup> perils of the sea caused damage to the ship. For want of funds to make repairs, the cargo was sold. It was held (per Ellenborough CJ) that the proximate cause of the loss was the sale, not the perils of the sea, and accordingly the insured did not recover. This was stated not to be a general rule, and the cases of jettison or general average were expressly left out of consideration.

Naturally, an insured may wish to recover the vessel, and in certain circumstances these efforts to sue and labour do not undermine a constructive total loss. In *Suez Fortune Investments Ltd v Talbot Underwriting Ltd*, where the vessel was boarded by pirates, and – in circumstances that remained in dispute – in the course of defending the vessel a fire started in the engine room that caused the ship to be a constructive total loss, the expenditure on tugs so as to prevent the vessel from being a hazard to shipping, and to tow it to a port where the cost of repairs could be valued, were recoverable sue and labour expenses. The fact this expenditure was undertaken did not undermine the notice of abandonment.<sup>895</sup> At all times, the intention to abandon must be clear, and this activity did not undermine that abandonment.

#### *iv. By the insured's election*

Conversely, the insured's election might break the chain of causation. In *Inman Steamship v Bischoff*,<sup>896</sup> by a charterparty dated 20 February 1879, by which the Admiralty chartered for three months a steamship owned by the appellants, the owners covenanted that the ship should at all times during the continuance of the charter be in every respect seaworthy, and it was also provided that if at any time the ship became incapable, from any cause whatsoever, to perform efficiently the service contracted for, "*it shall and may be lawful to and for the [charterers] ... to put the ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable*". On 22 February the appellants effected a time policy on "freight outstanding" against the ordinary marine perils including perils of the sea. On 21 March, during a voyage to South Africa, the ship struck a rock, and sustained damage which rendered her unfit to perform the chartered service.

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<sup>893</sup> (1744) 3 Atk 195

<sup>894</sup> 5 M&S 431

<sup>895</sup> [2015] EWHC 42 (Comm), [280]ff

<sup>896</sup> (1882) 7 AC 670, [1881-85] All ER Rep 440

The charterers thereupon put her out of pay as respected the remaining period of the charter. It was held that the cause of the loss of freight was, not a peril of the sea, but the exercise by the charterers of the special power conferred on them by the charterparty; loss through the exercise of that power was a distinct and different risk from that of loss by perils of the sea; the appellants were insured against the latter risk but not against the former; and, therefore, they were not entitled to recover on the policy.

**v. Other issues**

In the case of freight policies, the common-law established that where a vessel was lost and abandoned to hull insurers, there could be no claim for loss of freight if the freight were subsequently earned by hull insurers, the loss of freight to the assured was caused not by a peril of the sea but rather by abandonment of the vessel to the hull underwriters.<sup>897</sup> Under the Institute Hulls Clauses, hulls underwriters now waive their right to freight. A similar situation may arise under a hull or cargo policy, where the master determines in the case of emergency to sell the subject-matter following damage: if the sale is unjustified in that there is no actual total loss, the assured will be confined to claiming for a partial loss.<sup>898</sup>

A final note of caution is that a master, in endeavouring to have his vessel released, might void the policy. Prize law, old authority but nowhere overruled, provided that, “*If the captain of a neutral vessel which has been captured by a belligerent, attempts to rescue her, it is a sufficient cause for condemnation, inasmuch as it is contrary to the law of nations, and if the attempt to do so is caused by any misinformation by the captors, it will not, as between the underwriter and the insured, excuse the act*”.<sup>899</sup> Accordingly, potential traps exist for an insured who has chosen to see if property can be recovered. While this has not arisen in recent authorities, it is possible to contemplate situations where the insured’s efforts effectively make an uncertain situation more difficult. How the courts would resolve issues of causation remains unknown.

Overall, the courts consider the cause of the loss on a common sense basis. On perils of the sea preventing the voyage from starting, it was argued in *Jackson* that the doctrine of *causa proxima, non remota, spectetur*, applied, so that the proximate cause of the loss of the freight

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<sup>897</sup> *M’Carthy v Abel* (1804) 5 East 388; *Scottish Marine Insurance Co v Turner* (1853) 4 HL Cas 312

<sup>898</sup> *Tanner v Bennett* (1825) Ry&M 182; *Somes v Sugrue* (1830) 4 C&P 276; *Roux v Salvador* (1836) 3 Bing NC 266; *Knight v Faith* (1850) 15 QB 649; *Navone v Hadden* (1859) 9 CB 30; *Kaltenbach v Mackenzie* (1878) 3 CPD 467

<sup>899</sup> *Sherman* (1841), 270; *Dederer v The Delaware Ins Co* 2 Wash CC Rep 61

was the refusal of the charterers to load. However, it was held that the voyage or adventure was frustrated by perils of the seas. Both parties were discharged; a loading of cargo in August would have been a new adventure. Even if that were not the case, the maxim did not apply. Perils of the seas did not cause something that caused another event. The freight was lost *unless* the charterers choose to go on, which they did not.

The law appears to take a commercial view of the loss. Applied to a loss of possession situation, prior to *Masefield*, it would have been difficult to argue that non-payment of ransom or court charges amounted to a break in the chain of causation. This should be understood alongside the definitions of the perils. These perils were complete when possession was lost, as there was no relation back. Failure to pay a ransom could hardly, especially after observations in *Mitsui*, be said to be an unreasonable refusal, regardless of the sums demanded. It is arguably unlikely that such should break the chain of causation. Arguably, if there were a refusal to pay ransom, then the chain of causation from the peril of loss of possession would not be broken. This adds weight to a presumption of total loss, and the exclusion of recoverability for losses flowing from delay should not undermine the presumption.

The presumption that insureds could recover on perils of loss of possession immediately was once settled. In *M'Iver v Henderson*<sup>900</sup> where recapture occurred after proceedings were instituted, it was indisputable that there was sufficient ground of abandonment on capture.<sup>901</sup> Yet in *Masefield*, after capture lasted over a month, the insured did not recover. Rather, “*It was a typical “wait and see” situation. The facts would not even have supported a claim for a CTL, for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery*”. How were settled presumptions lost, so the *spes recuperandi* become relevant to total loss? *Dicta* and academic commentary stating that the *spes* was tested had not, by 1906, replaced the presumption. The draftsmen intended that insureds could recover on loss of possession where circumstances were ‘uncertain’, although demonstrably a test of ‘uncertainty’ had never applied. After the 1906 Act the chance of recovery was usually assessed, and the presumptions largely ignored. The statutory tests played a significant part in destroying the presumptions, but it was arguably consistent with the Act to preserve them, and it is suggested that there remains limited scope for parties to rely on the presumption. In American laws, no such statutory change occurred, and while there are few recent American authorities, the better understanding is that American courts would continue to apply the presumptions, which is consistent with finality and the discouragement of litigation.

### 8.1 Pre-1906 Act Classification; Notice of Abandonment

In *Masefield* the insured pleaded both constructive and actual total loss. Was this an accurate reflection of the pre-Act law? Were perils causing loss of possession treated as actual or constructive total losses pre-1906? This is answered by reviewing situations in which notice of abandonment was unnecessary. Notice of abandonment indicates that the insured intends to allege total loss, protecting insurers from late claims and affording them the opportunity to attempt to preserve/recover the *specie*. While in *Kaltenbach v MacKenzie*, abandonment was described as the custom of insureds, only later becoming a condition precedent to recovery,<sup>902</sup> the eighteenth century reports imply that notice was expected and given in all cases on valued policies,<sup>903</sup> with ‘actual total loss’ developing as the exception. In *Goss*, Mansfield LCJ noted

<sup>900</sup> (1816) 4M&S 575, (1816) 105 ER 947 (KB)

<sup>901</sup> *ibid*, 583

<sup>902</sup> *ibid*

<sup>903</sup> *Kulen Kemp v Vigne (The Emanuel)* (1786) 1 TR 304, (1786) 99 ER 1109; Marshall (1802) suggested that Mansfield misunderstood the case and erred in treating it as a wager. Marshall’s suggested his reasoning was appropriate to a valued policy. The report clearly shows the policy took effect as a wager.

that ‘in all cases the insured may chuse not to abandon’,<sup>904</sup> the sense ‘give notice of abandonment’<sup>905</sup> being supported by *The Selby*, *The Lady Mansfield*,<sup>906</sup> and *Tunno v Edwards*.<sup>907</sup> By *Davy and another v Milford* the more specific rule emerged that notice was necessary where the property survived *in specie*<sup>908</sup> capable of being restored.<sup>909</sup> In practice, notice was invariably given until at least the 1850s.<sup>910</sup>

Exceptions permitting recovery without notice appeared during the early nineteenth century. First was physical destruction of the *specie* by shipwreck. Three plaintiffs argued unsuccessfully that total loss without abandonment arose on capture by comparison to shipwreck.<sup>911</sup> The second was the justifiable sale of the vessel by the insured following stranding or damage,<sup>912</sup> or damage where repair was uncommercially expensive.<sup>913</sup> Third, in *The Martha*<sup>914</sup> notice of abandonment was unnecessary after property had been sold by a prize court, and similarly in *Cossman v West*; *Cossman v British America Assurance Co (Le Cann)*.<sup>915</sup> In *Stringer*, judicial sale established total loss without notice of abandonment.<sup>916</sup> Commentary related the requirement for notice to the *spes*: total loss was “either total per se, or that which may be rendered so by abandonment”,<sup>917</sup> and further:

“...abandonment, in such cases, is ... to exclude any inference that the insured still intend to adhere to it as their own.” *Tunno v Edwards*<sup>918</sup> laid down the doctrine distinctly, that wherever the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment”.<sup>919</sup>

These cases re-introduced property law considerations (“has property been sold?”), excluded by *Goss*, but in the limited context of whether notice was necessary. This left unchanged the circumstances where the insured had the right to abandon. Other textbooks went further than the authorities. Arnould stated: ‘If the privation exists as at the time the action is brought, the

<sup>904</sup> (1758) 2 Burr 698

<sup>905</sup> 2 Burr 1198, 1211 (Mansfield CJ)

<sup>906</sup> (1787) 1 TK 609, 615 (Buller J)

<sup>907</sup> (1810) 12 East 488 (Ellenborough LCJ)

<sup>908</sup> (1812) 15 East 559; (1812) 104 ER 954 (KB)

<sup>909</sup> *Holdsworth v Wise* (1828) 7 B&C 792, 799 (Ellenborough CJ)

<sup>910</sup> *Mellish v Andrews* (Ellenborough LJ); Arnould (2<sup>nd</sup> edn, 1857), 1016; (3<sup>rd</sup> edn, 1866), 882

<sup>911</sup> *Tunno* 12 East 490, 490; *Goldsmid v Gillies* (1813) 4 Taunt 802; *The Minerva* (1812) 104 ER 749 (KB)

<sup>912</sup> *Idle v Royal Exchange Assurance Company (the Ajax)* (1819) 8 Taunt 755; (1819) 129 ER 577

<sup>913</sup> *Cambridge v Anderton (The Commerce)* (1824) 2 B & C 694; (1824) 107 ER 540, citing *Read v Bonham* (1821) 3 Brod&B 147; (1821) 129 ER 1238, where the captain brought news of the necessary sale, as repairs could not be made. Abandonment was made properly one day after his return (Dallas LCJ, Park J)

<sup>914</sup> (1811) 13 East 304

<sup>915</sup> (1887) 13 AC 160, [1886-90] All ER Rep 957

<sup>916</sup> (Kelly CB, Martin B), following *Idle v Royal Exchange Assurance Company* (1819) 8 Taunt 755; (1819) 129 ER 577; *the Martha* (1811) 13 East 304

<sup>917</sup> Smith, *Compendium of Mercantile Law* (1834, London), 348

<sup>918</sup> 12 East, 488

<sup>919</sup> Smith (1834), 381

*assured may recover for an actual total loss, even though he has given no notice of abandonment*'.<sup>920</sup> *M'Iver v Henderson*,<sup>921</sup> cited for this, does not support that rule. There, the vessel was captured, damaged, brought to a port in England and proceedings instituted before a prize court, and abandonment given in time. The guidance notes on s 61 of the 1906 Act provided that after capture the insured will have to give a notice of abandonment,<sup>922</sup> suggesting absent sale, loss of possession would be a potential constructive total loss only. Nevertheless, the procedural requirement to serve notice of abandonment did not disturb any substantive presumption of total loss.

Arguably, situations of sale following loss of possession should be considered actual total loss. In *Fooks v Smith*, it was noted the headnote to *Cossman v West* had stated: "...it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated".<sup>923</sup> Total destruction would be actual total loss, and the lack of requirement for notice of abandonment for situations of sale indicated an analogous approach.

The requirement to give notice of abandonment prevents insureds from invoking any wait-and-see approach for constructive total loss. Insureds must give notice to the insurer '*with reasonable diligence after the receipt of reliable information of the loss*'.<sup>924</sup> A similar requirement is found in American laws.<sup>925</sup> A '*reasonable time*' is interpreted strictly, meaning '*as soon as they were informed of events*',<sup>926</sup> or at the '*first opportunity*'.<sup>927</sup> Where master or recaptor continued to act for the insured's interest after the casualty, where the insured was notified, failure to abandon was construed as adopting the acts of the master/recaptor, effectively estopping abandonment. The requirement promptly to serve notice prevailed over the 'sue and labour' clause. In *Kaltenbach v MacKenzie*<sup>928</sup> the election had to be made when the insured was aware that '*there is imminent danger of its becoming a total loss...*'<sup>929</sup> While

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<sup>920</sup> (2<sup>nd</sup> edn, 1857)

<sup>921</sup> (1816) 4M&S 575

<sup>922</sup> Notice of abandonment given after restoration is out of time – *The Mary* 10 East 329, (1808) 103 ER 800 (KB); *Dean v Hornby* (1854) 3 El&Bl 179, 190: if before restoration it is in time – *Ruys v Royal Exchange* (1897) 2 QB 135

<sup>923</sup> [1924] 2 KB 508, 516

<sup>924</sup> Section 62(3) of the 1906 Act

<sup>925</sup> *Sherman* (1841), 259-260; *Calbraith v Gracie* 1 Wash CCRep 198, 219, 2 Condly's Marsh on Ins 599

<sup>926</sup> *The Lady Mansfield* (1787) 1 TK 609, (1787) 99 ER 1278 (Buller J); *Davy v Milford* (1812) 15 East 559, (1812) 104 ER 954 (KB)

<sup>927</sup> *The Lady Mansfield* (Ashhurst J)

<sup>928</sup> (1878) 3 CPD 467

<sup>929</sup> *ibid*, 473-474



suggesting a test of foreseeability, this did not change the substantive test of what facts gave the right to serve notice. The general rule remained that insureds must abandon quickly.

While in the *The Bamburi* notice of abandonment was held valid when served a year after the detention,<sup>930</sup> there is no authority granting the insured this much time. Previously, the longest period appeared to be two months; where an obsolete battleship stranded in December, and only in February was the claim for total loss and notice of abandonment given, this was made within a reasonable time.<sup>931</sup> The only general dictum supporting a waiting-period is *Roux v Salvador*: “*If in the event the loss should become absolute, the underwriter is not the less liable upon his contract because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain which was uncertain before*”,<sup>932</sup> but contextually, what was apparently meant was that if a constructive loss was followed by an actual total loss, the insured could still recover, not that he could recover after any period of waiting on a constructive loss. The right to abandon may arise on a change of circumstances,<sup>933</sup> but not where this is brought about by an action of the insurer.<sup>934</sup> It seems clear that a simple extension of a detention would seldom be classified as a ‘change in circumstances’, but instead as a continuation of the peril. *Stringer* endorsed Phillips’ opinion<sup>935</sup> that notice for perils of detention should be given at once, indicating that wait-and-see is a difficult doctrine to apply. If he delays, the insured loses the right to abandon. He expressed the opinion that “*if an embargo or other detention were, in the result, to turn out much longer than was reasonably anticipated, the assured, though he might in the first instance have elected to treat the loss as partial, might, on discovering this, treat it as total, unless something had occurred in the interval to prejudice the underwriters in consequence of the delay, although the detention had never changed its nature, and by condemnation or sale been turned into a total destruction of the thing*”. This was not fully endorsed in *Stringer*, and the idea that an insured could abandon later was confined to situations where “*the delay occasioned by the detention is much greater than could have reasonably been anticipated at the time of the election*”. In the circumstances of *Stringer*, the length of the litigation by the further appeal could have been reasonably anticipated, and there was no change of facts through the length of the peril.<sup>936</sup>

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<sup>930</sup> [1982] 1 Lloyd’s Rep 312

<sup>931</sup> *George Cohen Sons & Co v Standard Marine Insurance Co Ltd* (1925) 11 LRep 30

<sup>932</sup> *Stringer* (1869) LR 4 QB 676, 690

<sup>933</sup> *Stringer*; Chalmers and Owen, *Marine Insurance Act 1906*, 91

<sup>934</sup> *Sailing Ship Blairmore v Macredie* [1898] AC 593

<sup>935</sup> *Phillips on Insurance* (3rd edn, 1853), 367-379; (5th edn, 1867), 357

<sup>936</sup> (1869) LR 4 QB 676, 690

This sets a potential trap for insureds since if ‘wait-and-see’ applies early abandonment might be premature. Conversely, abandonment is out of time if they wait. For example, in *Fooks v Smith* abandonment was held late when it was given only when the facts were eventually known to the insured, long after the actual loss. The facts were not known, so far as the frustration of the voyage was concerned for seven years. The seizure and sale were discovered only five years after the event. There, “*it could not be suggested that a notice of abandonment given seven years after the event could by any possibility be a good notice*”.<sup>937</sup> Notice of abandonment served even one month later may be too late. Where the insured was informed of a loss on 7 February, and on 23 February told what sum she would fetch if sold, an abandonment on 10 March was too late.<sup>938</sup> If insureds waited for the delay to last as long as expected at the outset, it would be difficult for them to then serve notice of abandonment.

A large number of American authorities confirmed that the insured *must* not await results,<sup>939</sup> and in particular, American authorities confirmed that abandonment 2 months after knowledge of condemnation of the vessel was too late,<sup>940</sup> and even only 5 days after knowledge of condemnation.<sup>941</sup> The argument that a longer time is permitted to insureds in capture or detention cases, while considered possible in 19<sup>th</sup> century American commentary, is doubted. The argument was founded on statements in American cases that loss must ‘continue to the time of abandonment’,<sup>942</sup> and it was suggested this indicated that if the loss did continue to time of abandonment, months or even years were allowed for the insured to abandon. Such a rule would have contradicted the rule that insureds must abandon at once, and no authority supports the granting of insureds any longer time to consider whether to abandon.<sup>943</sup>

Wait-and-see is incompatible with this requirement for insureds to act promptly. The pre-Act authorities clearly suggest that notice of abandonment was required, and that loss of possession situations were usually constructive total losses, unless there had been condemnation or sale. That clear understanding makes the litigation strategy in *Masefield* difficult to understand, as the better argument was abandoned on appeal. If wait-and-see is a proper doctrine for marine perils, practically it appears to be a one-sided doctrine favouring insurers by granting time denied to insureds (further, issues of the recoverability of damages

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<sup>937</sup> [1924] 2 KB 508, 512

<sup>938</sup> *Kaltenbach v Mackenzie* (1878) 3 CPD 467

<sup>939</sup> eg *Cohen v Charleston etc Ins Co* Dud L (SC) 147; 31 Am Dec 549; *Chesapeake Ins Co v Stark* 6 Cranch (US) 268, 273

<sup>940</sup> *Taber v China Mut Ins Co* 131 Mass 239

<sup>941</sup> *Hunt v Royal Exchange Ins Co* 5 M&S 47; Joyce JA, *A Treatise on Marine, Fire, Life, Accident and All Other Insurances* (1897), Vol 4 [2961]

<sup>942</sup> eg *Lawrence v Sebor* 2 Caines NY, 203 (Kent CJ); *Roget v Thurston* 2 Johns Cas (NY) 248 (Radcliffe J)

<sup>943</sup> JA Joyce, *A Treatise on Marine, Fire, Life, Accident and All Other Insurances* (1897), Vol 4 [2961], [2969]

for late payments aside<sup>944</sup>). Where notice has been given, and the action issued, it is contrary to the requirement of certainty if the insurer could at that stage invoke ‘wait-and-see’ before paying any sum on the policy, where the insured is not granted any waiting period. Wait-and-see to the extent that it is a proper doctrine, must necessarily be a one-sided right to wait, favouring the insurer.

## 8.2 Constructive total loss

### i. *Polurrian v Young*

*Polurrian v Young*,<sup>945</sup> the first post-Act authority on constructive total loss, indicated that the statutory test of constructive total loss modified a former test of ‘uncertainty’ of recovery to ‘unlikelihood’ applicable to all perils. Arguably, this was incorrect. In *Polurrian* the insured vessel was seized in 1912 by the Greek Navy, Greece being at war with Turkey. The Greeks appropriated the cargo of coal, stating that the vessel would be put before a prize court. The owners abandoned on 26 October, by agreement taken as the date of the writ. She was released on 8 December. The owners claimed constructive total loss, relying on *Goss* and *The Romulus*. At first instance and on appeal, the *spes recuperandi* was treated as a relevant consideration. Kennedy LJ held that, before the 1906 Act, she would have been a constructive total loss:

*“[before] that Act, the seizure or arrest or detention of a vessel for that which was either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by Arnould on Marine Insurance, 9<sup>th</sup> ed, vol ii s.1108, from Emerigon, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner’s action to enforce his notice of abandonment, a taking which still continued in operation, and the owner’s loss of the use and disposal of the ship, once total, was at that date one which might be permanent, and was, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss”.*<sup>946</sup>

Kennedy LJ’s consideration of the prior rule repeated an error in Arnould. The case from Emerigon was not authority for the rule that an apparently temporary capture gives no ground of abandonment. Contrastingly, Emerigon stated:

*‘..., on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and after taking out and paying for the corn let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment to the assured on ship’.*<sup>947</sup>

<sup>944</sup> A related issue, that of the injustice caused by late payments of claims by insurers, was recently recognised by the Law Commission, and indicates that it is recognised law unfairly weighted in insurers’ interests, currently proposals to provide a remedy for late payments are included in the Enterprise Bill of 16 September 2015.

<sup>945</sup> [1915] 1 KB 922 (CA), (1913) 84 LJKB 1025, [1914-15] All ER Rep 116

<sup>946</sup> [1915] 1 KB 922 (CA), 936

<sup>947</sup> Roccus, *Notibilia* 60, 1 Emerigon (1850 edn), Ch XII [30]

Detention was over by the date of action; this situation was materially identical to *The Little Mary*,<sup>948</sup> not *Polurrian*. Accordingly, the Genoese case was cited for a rule it never supported. Emerigon stated English law to be the opposite of that stated in Arnould and cited in *Polurrian*, ie that insureds were *considered* as having lost their property, on account of the uncertainty, and having an instant right to recover'.<sup>949</sup> Emerigon's other statements on capture supported the presumption: '*Piracy is presumed to be fatal. The insurer is liable for it*',<sup>950</sup> and similarly on unlawful captures by allies it was presumed fatal.<sup>951</sup> Nothing in Emerigon's extensive discussion on ransom and general average indicated a master was ever required to negotiate ransom,<sup>952</sup> or to litigate to recover property for the insured to recover on his policy. It was therefore incorrect to suggest that the issue had ever been whether the detention "was at that date one which might be permanent, and was, at any rate, of uncertain continuance," A subsisting detention was presumed to be permanent.

Kennedy LJ then addressed s 60. The errors stating earlier law resulted in his finding that the s 60 test had changed:

"...statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition, but I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things - the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases and have been unable to find it used judicially in any of them. But there it stands in the section of the Act of Parliament; its meaning is quite clear".

Any such change to the law was unintentional. The draftsmen's guidance notes to the 1906 Act enshrined the definitions of actual and constructive total loss stated in *Roux v Salvador*.<sup>953</sup> This framed primarily the distinction between physical and mercantile impossibility. The guidance referred predominantly to actual total loss on wreck and constructive total loss arising from sea-damage. Neither the Act nor the guidance notes to ss 57 or 60 stated whether capture or seizure *simpliciter* was actual or constructive total loss. Nevertheless, a presumption of total loss on capture was nevertheless in the contemplation of the draftsmen. *Le Cann*, cited in the notes to s 57, quotes *De Mattos v Saunders*, in that: '*The cases cited of*

<sup>948</sup> (1810) 2 Taunt 363, (1810) 127 ER 1118 (see 4.2, ante)

<sup>949</sup> Emerigon XVII, 672; Marshall, *Law of Marine Insurance* (4<sup>th</sup> edn, 1861), 403 (see 5.1, ante)

<sup>950</sup> Ch XII, [28]

<sup>951</sup> Emerigon Ch XII s XVIII

<sup>952</sup> Emerigon Ch XII s XLI, ss9

<sup>953</sup> Chalmers and Owen, *Digest of the Law of Marine Insurance* (1901 William Clowes & Sons Ltd); Chalmers, *The Marine Insurance Act 1906* (1st edn, 1907, William Clowes & Sons Ltd)

*hostile seizure and condemnation by a prize court ... In such a case, the original seizure is prima facie a total loss; ...*<sup>954</sup> In the guidance notes to s 60 the presumption was confirmed in relation to 60(2)(i) by the example:

*“Insurance on goods from Bombay to London with Liberty to send them through France. On arrival in Paris they are detained in consequence of the siege, and it is uncertain what will become of them. The assured may treat this as a constructive total loss”.*<sup>955</sup>

There was no attempt to substitute a stricter test to apply to the situation of *Rodonacci v Elliott*. The draftsmen clearly never intended a test of ‘unlikelihood of recovery’ to apply. Instead, the draftsmen intended that the presumption would continue.

Different pleading in *Polurrian* might have followed and thereby preserved the presumption. Arguably, the facts in *Polurrian* fell within the ordinary meaning of the words of s 60(1) as a loss which ‘appeared to be unavoidable’. The court was bound by s 92 to consider all the different constructions of s 60(i), and follow any that preserved the common-law. In focusing on the word ‘unlikely’ Kennedy LJ ignored the word ‘appeared’ and did not consider the construction compatible with the prior established law. Arguably the Act allowed for the survival of this presumption; the draftsmen’s guidance notes envisaged that it would survive. It was precisely Mansfield LCJ’s intention to avoid testing that *spes* which provided the *ratio* in *Goss*. There was never a test of ‘unlikelihood’ on capture to be modified by s 60. Accordingly, *Polurrian*, contradicted 150 years of established cases following a presumption of a total loss. These were neither distinguished nor considered. Arguably, as Kennedy’s decision was founded on a new rule, introduced via the error in *Arnould*, that the court would consider the length that any detention or capture would last, the decision was *per incuriam*.

## **ii. Capture**

This test of ‘unlikelihood’ was subsequently applied strictly. In *Marstrand Fishing Co Ltd v Beer (The Girl Pat)*<sup>956</sup> the policy covered a trawler fishing the North Sea near her home port in March 1936. The captain had other ideas. When proceedings were issued, she had been last sighted at Dover, and missing for over a month. Subsequently, she was reported in Spain, then West Africa, and finally detained - disguised and heavily altered - in South America. Porter J dismissed the owners’ claim, applying the ‘unlikelihood’ test. It is difficult to imagine a more concerted attempt to steal a ship, or evidence establishing *prima facie* ‘capture’. It is difficult,

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<sup>954</sup> (1887) 13 AC 160, [1886-90] All ER Rep 957, 967

<sup>955</sup> Chalmers & Owen, *The Marine Insurance Act 1906*, 84, citing *Rodonacci v Elliott* (1874) LR 9 CP 518

<sup>956</sup> [1937] 1 All ER 158 (KB)

if *The Girl Pat* was correctly decided, to foresee claims succeeding for loss of possession, short of an actual sale (unless a policy contained an express ‘frustration clause’). Since sale would arguably be an actual total loss, it is difficult to see, if *The Girl Pat* applied the test of unlikelihood accurately, that s 60 retained much meaningful application to capture cases.

Two wartime cases mitigated Porter J’s stringent test. *The Minden; Wangoni; and Halle*<sup>957</sup> concerned three joined appeals by British cargo-owners whose goods were loaded on German flagged vessels at the start of the War. German captains had orders to put into a neutral port, then return to Germany. If caught by the British blockade of Germany, they were to scuttle their vessels. Two ships were scuttled, the third reaching Germany. The policies contained a frustration clause, excluding claims for loss of the voyage.

The vessels became actual total losses by scuttling (Viscount Simon LC), but possession was lost when the orders of the German government were acted upon, the master holding ships and cargo as agent for the German Government (Wright LJ). Once these orders were executed:

*‘Prima facie, when once it is accepted that there has been a seizure or capture of the goods, there is ‘the right of abandoning immediately’ and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea’.*<sup>958</sup>

This ‘right of abandoning immediately’ is the presumption of irretrievable deprivation. Arguably this rule correctly followed the pre-Act authorities. This House of Lords *dictum* should have been binding upon Steel J and Rix LJ. It was not cited by either, supporting the argument that their decisions on constructive total loss are *per incuriam*. However, Wright LJ then restated the test of unlikelihood citing *Polurrian* – seemingly ignoring its incompatibility with an instant right of abandonment. Either there is an instant right of abandonment ignoring a test of any remaining *spes*, or there is an investigation into the parties’ rights, potentially inviting a ‘wait-and-see’ approach. This tension in the authorities has attracted little academic attention. Further, the presumption is still acknowledged, eg where Templeman<sup>959</sup> suggests that irretrievable deprivation, ie actual total loss, may be caused by ‘capture or seizure’.<sup>960</sup> The definition of seizure has never included an intention to permanently deprive, and undermines the applicability of a wait-and-see approach.

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<sup>957</sup> [1942] AC 50 (HL)

<sup>958</sup> *ibid*, [84]; Phillips (1<sup>st</sup> edn, 1802), Vol II, 319

<sup>959</sup> R J Lambeth (ed), *Templeman on Marine Insurance* (6<sup>th</sup> edn, 1986, Lambeth)

<sup>960</sup> Gauci, ‘Total Losses and the Peril of Piracy in English Law of Marine Insurance’ WMU J Marit Affairs 11, 115, 118

### iii. *Restraint and detention*

After the 1906 Act, authorities suggested that this presumption operated only by the loss of the venture. *Fooks v Smith* suggests that the voyage might be a constructive total loss on actual restraint. There, the German government restrained cargo in wartime. The cargo was sold one year after the restraint, and notice of abandonment was given after seven years, when the insured discovered what had happened. It was stated that a policy on goods insured, or was intended to insure, their safe arrival at the port of destination. The policy of insurance covered the adventure. If therefore the adventure was prevented by a peril specified in the policy there was a claim on the insurers. If the risk was such that the adventure was frustrated, but that the goods remain in safety and uninjured, there was a constructive not an actual total loss. In order that to be enabled to claim for a constructive total loss, notice of abandonment was necessary and must be given as soon as there was a reasonable opportunity for ascertaining the facts. In the circumstances, it was held that with due diligence sufficient facts might well have been ascertained long before they were".<sup>961</sup> Accordingly, notice of abandonment was held to have been served well out of time. It is unclear, from the report, why the requisition and sale – arguably an actual total loss – was held a loss within the Lloyd's war risk policy, as a separate ground for total loss, but the judgment does not address that issue, and it appears that the argument was not made, albeit a difficult issue for the claimants would have arisen that the loss might have been outside the limitation period if it were deemed to have occurred at once.

In American works, *Rononacci* was approved that where goods are trapped in a city and can not be sent to their destination, that amounted to total loss, although temporary detention would not be sufficient.<sup>962</sup> This suggests that American lawyers continued to observe a presumption that war would be of indefinite and protracted duration. Despite this, and the authority of *Rodonacci* and *Miller*, the contrary, irreconcilable, result was reached in *Mitsui v Mumford*,<sup>963</sup> where timber stored in a warehouse in Antwerp was overtaken by the German occupation of Antwerp. Bailhache J held that there was no loss of the timber. He said, in a passage later approved in *KAC v KIC*:<sup>964</sup>

*"Now goods of private persons on shore are, by the law of nations, not liable to confiscation, and I ought not judicially to assume that the Germans will commit a breach of international law. No doubt the timber might be taken by the Germans for the purposes and necessities of war, but I must not assume that they would not pay for it. Even if I make these assumptions which the plaintiffs desire, the timber is at present in the hands of the plaintiffs' agent, no loss by confiscation has happened, there has*

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<sup>961</sup> [1924] 2 KB 508, 513

<sup>962</sup> William Eldridge and Harry Atkins, *Eldridge on Marine Policies* (3rd edn, 1938, Butterworth)

<sup>963</sup> [1915] 2 KB 27

<sup>964</sup> *Kuwait Airways Corp v Kuwait Insurance Co (KAC v KIC)* [1996] 1 Lloyd's Rep 664 (QB)

*been no seizure by the Germans, and the policy has expired. Without seizure the plaintiffs cannot lay any foundation upon which to support this claim, and it fails".*<sup>965</sup>

This was used to support the conclusion that there was no total loss arising on the moment of loss of free use and disposal. However, this isolated extract ignores that there was no contract of sale. The timber was stored in the warehouse awaiting an opportunity to sell. For this reason, *Mitsui v Mumford* was distinguished from *Rodoconachi v Elliott*, and similar cases where there might be a loss of the voyage. It was held ‘impossible to apply’ the notion of the loss of the venture.<sup>966</sup> Implicitly, had *Mitsui v Mumford* been a marine policy covering a cargo in transit, there would have been a constructive total loss on the same facts. The extract relied upon by Rix J applied to the plaintiff’s alternative case, that it appeared likely that the goods would in fact be confiscated at a future time. Importantly, the above *dictum* did not apply to the existing fact of the occupation applied to a marine policy, which would have justified a total loss on a marine policy, albeit by this time understood to be a claim under loss of the voyage, rather than loss of the physical subject matter.

In *Wilson Brothers Bobbin Company Ltd v Green*<sup>967</sup> a cargo was declared contraband by a belligerent government. The plaintiffs’ policy covered a cargo of wood laden on a Norwegian ship for a voyage from a Baltic port to an English port. The policy was against war risk only, and excluded all claims arising from delay. Soon after sailing in November 1914, the vessel was stopped by a Kaiserliche Marine vessel, and the master was informed that wood had been declared contraband by the German Government, and that the vessel would not be allowed to pass the Sound. The vessel was diverted into a neutral port in Norway, where the cargo was discharged, and stored. Ultimately, the cargo was reshipped on another vessel. The insured brought an unsuccessful action claiming loss of the voyage. The attitude of the Norwegian government was critical, as they first gave a guarantee to the German government that the cargo would not be transhipped to England during the war, but in February 1915 it became apparent that the plaintiffs were free to arrange the transhipment, which was only arranged after September on two different vessels.<sup>968</sup> In July, the action was heard on the claim to recover as for a constructive total loss. Bray J then held that on 3 December 1914, it could not be said that the total loss of the venture was unavoidable, or that it was unlikely that the goods could reach their destination in England. He accordingly decided that the claim for a constructive total loss failed. Given that the cargo was initially declared contraband and

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<sup>965</sup> *ibid*, [34]

<sup>966</sup> [1915] 2 KB 27, 34

<sup>967</sup> [1915 W 173]-[1917] 1 KB 860

<sup>968</sup> *ibid*, 862



accordingly liable to confiscation, it is difficult to understand why this case was not treated as part of the settled category where detention resembled capture.

In *Moore v Evans*, heard in 1918, where jewels were overtaken by the German occupation of Belgium during the Great War, a strict approach was likewise applied. It was thought that the loss could only be described as an inability of the insured, as a consequence of hostilities, to access their goods, and that there was a probability that this state of things would continue ‘for some considerable time’. This was, in contrast to the pre-1906 marine authorities, held not to be a loss within the policy. A similar interpretation applied to this non-marine policy as that applied to the policy in *Mitsui*, namely that it did not cover the venture separately to the physical goods,<sup>969</sup> and it could not be argued rationally that the cover extended to the voyage.<sup>970</sup> It was an important part of the reasoning in *Moore* that marine authorities provided no precedent for land-based contracts,<sup>971</sup> and the court in *Mitsui* was criticised for appearing to apply the doctrines of constructive total loss, and the 1906 Act, to non-marine circumstances to which these did not apply.<sup>972</sup> Inability to access the cargo, which had supported a total loss in similar circumstances in *Rodocanachi and others v Elliot*,<sup>973</sup> was held insufficient to justify a total loss claim, but suggests in that case, that the loss was only a loss of the voyage.

Further significant change in approach appeared by *Kuwait Airways Corp v Kuwait Insurance Co (KAC v KIC)*.<sup>974</sup> There, Rix J noted *Mitsui v Mumford* and *Moore v Evans*, and the *Dawson’s Field* arbitration. In each, the loss of possession was not sufficient to claim a total loss. Rix J noted that in *Dawson’s Field*, the above authorities were applied, and it was held that a ‘wait-and-see’ approach should apply to loss of possession cases, to see whether the property was lost. This suggested that an insured should “allow for the lapse of a period of time to form a view about the prospects of recovery”.<sup>975</sup> The approach of the three cases treated by Rix J in *KAC v KIC* amounts to a clear reversal of the previous decisions on embargo and loss of possession situations, if these are applied to govern claims on marine policies. First, the idea that abandonment or a claim should be made at once has changed to wait-and-see. Secondly, the reasoning that marine cases were of no application applies in reverse: these situations were not applicable to marine policies. Arguably, it is an error to refer to non-marine policies as definitive interpretation of a marine policy. For those reasons, it is

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<sup>969</sup> [1917] 1 KB 458, 465

<sup>970</sup> [1918] AC 185, 191

<sup>971</sup> [1917] 1 KB 458, 470

<sup>972</sup> [1918] AC 185, 197

<sup>973</sup> [1874-80] All ER Rep 618, (1874) LR 9 CP 518

<sup>974</sup> [1996] 1 Lloyd’s Rep 664 (QB)

<sup>975</sup> Unreported, 29 March 1972

suggested the *dicta* in these authorities are unpersuasive guides to the interpretation of a marine policy. At most, they might clarify the nature of a loss on the marine policy, that the right to abandon at once should be understood as referring to the loss of the voyage. Later, these authorities were applied in *Masefield*, in support of the conclusion that there was no total loss.

The most recent consideration of detention without application of force was *The Bamburi*, where claimant shipowners successfully claimed damages for a constructive total loss by restraint of princes. In September 1980, the vessel was detained in Shatt-al-Arab during the war between Iraq and Iran. The state authorities ordered the vessel not be moved. The claimant served notice of abandonment a year later, and issued arbitral proceedings seeking damages for a total loss. Strictly, the arbitral award does not provide binding authority,<sup>976</sup> but the decision was published as it raised issues common to about 70 other vessels detained during in the same conflict. The test of unlikelihood of recovery was applied. The factual background was one of restraint of princes, and not capture. Crucially, possession was not lost, so the situation was not one of ‘capture’ or ‘seizure’. In *The Bamburi*, the arbitrator first found that the loss fell within the peril of ‘restraint of princes or peoples’ clause, and it was not a loss by detention or any other peril. The next issue was whether there was a total loss by that peril within the meaning of the 1906 Act. It was found that there was no loss of legal possession in the sense of property law. The relevant part of the judgment concerned whether there could be a loss by a ‘restraint of princes’ which could found a claim within s 60 of the Act. The arbitrator held that there could be a ‘*loss of possession*’ within the meaning of the Act where there was a ‘loss of free use and disposal’.<sup>977</sup>

When considering the likelihood of recovery, there was some discussion<sup>978</sup> whether the time ran from the moment of the casualty, or from the issue of the notice of abandonment. Expressing no conclusive view, the arbitrator held that the time to be considered was after the notice of abandonment. This is doubtful authority, as it unclear from where speculation on this issue derived. Overall, it was held ‘within a reasonable time’ meant 12 months, not counting time that had run before the notice. Again, it is unclear what authority that relied upon, other than ‘bidding’ between the counsel. In the circumstances, it was not likely that the vessel would be recovered. Arnould subsequently questioned whether *The Bamburi*

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<sup>976</sup> [1982] 1 Lloyd’s Law Reports 312, 314

<sup>977</sup> *ibid*, 320

<sup>978</sup> *ibid*, 321

establishes any general guidance<sup>979</sup> — while noting that temporary obstruction measured in weeks rather than months would not be sufficient.<sup>980</sup>

**iv. *Masefield; the contemporary tests***

Steel J's judgment that there was no constructive total loss contained three difficulties. First, he relied on definitions of total loss from textbooks, ultimately deriving from stranding and damage cases, not tests of total loss judicially expressed. Authorities for the presumption of total loss on capture were not mentioned. Secondly, he reintroduced property law considerations into the test of total loss by his 'fact sensitive' approach, without reference to the binding authority excluding property law. Inconsistently with the pre-Act law, he ruled that captures are 'fact sensitive' cases.

Steel J's reliance on authorities on damage or stranding, rather than on authorities on capture, is illustrated by his reliance on *Roux v Salvador*,<sup>981</sup> stating:

*"[t]he need to draw a distinction between a claim for an ATL where property is beyond recovery and a claim for a CTL with an associated requirement for notice of abandonment where recovery is uncertain was well established in the early 19<sup>th</sup> century".*<sup>982</sup>

*Roux* was a case of sea-damage to cargo, and capture cases contemporary to *Roux* do not suggest that this procedural requirement for notice ever implied that the insured had to prove an unfavourable *spes* in relation to a subsisting capture. A requirement for notice of abandonment did not necessarily mean that the test was ever 'uncertainty'. Steel J erred in following that the summary of *Roux* changed the test for loss 'without abandonment'.

The second difficulty is that his finding that the legal consequences of a capture are fact sensitive reintroduces property law considerations, contra *Goss* and *The Romulus*:

*"(i) Where a vessel is seized as a prize and condemned in a prize court, property is transferred and on any view the former owner is irretrievably deprived of the vessel. Mere seizure by pirates without more has no impact on the proprietary interests in the vessel. The suggestion in regard to the present case that in demanding a ransom the pirates were requiring the owners to repurchase the vessel and cargo is a felicitous but inaccurate summary of the situation. What has been transferred is possession and not title and the question thus arises, in my judgment, as to whether recovery of possession is legally or physically impossible.*

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<sup>979</sup> (17<sup>th</sup> edn, 2008) 1373, fn127

<sup>980</sup> *Forster v Christie* (1809) 11 Est 205; *Polurrian v Young* [1915] 1 KB 922

<sup>981</sup> (1836) 3 Bing (NC) 267, 132 ER 413 (Exchequer Chamber)

<sup>982</sup> [2010] EWHC 280 (Comm), [41]

(ii) of course, where possession is lost, recovery will often be unlikely... whereby the threshold requirement for a CTL claim may be established... ”<sup>983</sup>

Considering title as relevant is an error of law in light of *Goss* and *the Romulus*. Furthermore, it conflicts with his citation from *Panamanian Oriental Steamship Corporation v Wright*,<sup>984</sup> where judicial condemnation was not ‘irretrievable deprivation’. Only five paragraphs after citing *Panamanian Oriental*, Steel J concludes that condemnation would be actual total loss, (neither Steel J nor Mocatta J referred to earlier reported authorities on capture) that being plainly inconsistent with *Panamanian*, and indicating that the authorities on total loss were not fully explored.

By importing a distinction between actual and constructive total losses from *Roux* into the mid-nineteenth century law, Steel J’s interpretation of *Dean v Hornby* was flawed. He considered that since notice of abandonment was served, the claim therefore one for constructive total loss, and must therefore include a test of ‘unlikelihood’. Steel J ignored that the court in *Dean* ought properly, on then contemporary authorities, to have found a total loss where abandonment was unnecessary, following *The Martha* and *Le Cann*, consistent even with *dicta* in *Stringer*. He erred in finding that because notice was given, a test of ‘unlikelihood’ had necessarily been considered.

Thirdly Steel J held that ‘abandonment’ in s 60(1) meant abandonment of any *spes recuperandi* or property to the insurer,<sup>985</sup> citing *The Lavington Court*<sup>986</sup> that the phrase ‘abandoned on account of its actual total loss appearing to be unavoidable’ meant the same as ‘abandoned by a master’— meaning the physical desertion of the vessel by the crew and not the service of a notice of abandonment.<sup>987</sup> He observed that such abandonment by the crew never occurred.<sup>988</sup> However, ‘notice of abandonment’ was meant in s 60.<sup>989</sup> The distinction attributed to *The Lavington Court* neither appears in the draftsmen’s guide to the Act<sup>990</sup> nor in the 6<sup>th</sup> edition of Arnould, used in drafting s 60.<sup>991</sup> Contrastingly, the guidance notes clarified that ‘abandonment’ in ss 60-62 meant not the notice, but ‘*the voluntary cession by*

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<sup>983</sup> *ibid*, [39]

<sup>984</sup> *ibid*, [49]; cf *KAC v KIC* [1996] 1 Lloyd’s Rep 664 (QB), 685

<sup>985</sup> *ibid*, [54]

<sup>986</sup> (1945) 78 Ll L Rep 390; [1945] 2 All ER 357

<sup>987</sup> Expressed as ‘given up for lost’, not abandoned to the underwriters, eg 25 Halsbury’s Laws (4<sup>th</sup> edn 1994), [292], fn 1

<sup>988</sup> [2010] EWHC 280 (Comm), [55]

<sup>989</sup> ‘appears to be unavoidable’ appears a codification of the presumption of total loss deprivation. It could cover situations like *Roux v Salvador* (1836) 3 Bing NC 266, where the cargo was abandoned as its degeneration as a result of damage made the loss appear to be unavoidable, as much as it covered a loss by capture, which equally appears unavoidable

<sup>990</sup> Chalmers & Owen, *The Marine Insurance Act 1906* (1907, William Clowes & Sons), 81

<sup>991</sup> Arnould (6<sup>th</sup> edn, 1887), 951-3

*the insured to the insurer of whatever remains of the subject matter insured*'.<sup>992</sup> Further, *the Lavington Court* nowhere provided that abandonment under s 60 *has* to have that meaning, only that the decision to abandon pursuant to s 60 '*may and very often must be by the master in exercise of his authority ... but usually pursuant to his general powers of agency...*'<sup>993</sup>. This can only be understood against the Crown's unsuccessful submissions in *Lavington Court*, that abandonment under s 60 could exclusively be made by the insured, never the master. The decision *permitted* the master to abandon a vessel with the accompanying legal consequence of abandoning vessel to the insurer under s 60, but did not *exclude* the insurer from abandoning, and they clearly retain that capability.<sup>994</sup> In *Masefield*, it was physically impossible for the master and crew to desert the vessel upon the capture with the legal effect in s 60, even had they wanted to do so – and further there is a rule that leaving a vessel under compulsion or violence cannot have that effect.<sup>995</sup> Finally, the claimant in *Masefield*, as a cargo interest, did not have an agent on the vessel to physically abandon its interest. Accordingly, *the Lavington Court* does not support Steel J's interpretation that 'abandonment' within s 60(1) must be the act of the master.

Finally, Steel J held that his finding that an actual total loss was not unavoidable applied equally to the constructive total loss claim.<sup>996</sup> While clearly the *spes* remained, Steel J did not deal with the presumption. Accordingly, Steel J's judgment on constructive total loss is open to doubt. On appeal, Rix LJ did not revisit Steel J's findings on constructive total loss. He simply concluded that, under the terms of the policy, '*deprivation of possession was only covered in the case of an ATL, ie in the case of irretrievable deprivation*'.<sup>997</sup>

## v. *Overview of Constructive Total Losses*

Emerigon and early authorities were clear that loss of possession *simpliciter* permitted an insured to abandon to the insurer. The definitions of the perils of arrest, restraint and detention clearly included situations where it was foreseeable that the property might be returned to the insured. This ongoing possibility of restoration did not prevent abandonment to the insurer. Unlike the French laws, English law permitted an instant right of abandonment. This was recognised in situations where the 'authority' intended to deprive the assured of possession, where the circumstances were akin to a capture. Additionally, they included situations where

<sup>992</sup> *Robertson v Petros M Nomikos* [1939] AC 371 (Wright J)

<sup>993</sup> [1945] 2 All ER 357, 364

<sup>994</sup> eg *Irvin v Hine* [1950] 1 KB 555; *the Minden*; *Wangoni*; and *Halle* (Viscount Simon LC)

<sup>995</sup> *the Lavington Court* (1945) 78 Ll L Rep 390; *Bradley and others v Newsum, Sons & Co, Ltd* [1919] AC 16

<sup>996</sup> [57]

<sup>997</sup> *Masefield* [2011] EWCA Civ 24, [18]

there was a simple embargo, and this allowed an abandonment. It was clear that, under an embargo or detention, the master might be left in actual possession of the property. However, there was still a recognised right of abandonment. The early authorities on this were not clear whether this was considered a loss of the property – as a capture – or a loss of the voyage. Arguably, the view better fitting the language of the earlier authorities was that it was deemed a loss of the property, because of the uncertainty.

The 20<sup>th</sup> century cases changed this understanding. It appears that the right to abandon for arrest or embargo is now understood as a loss of the voyage only. It is unclear to what extent *Mitsui v Mumford* and *Moore v Evans* properly apply to marine claims. However, both authorities received approval in *KAC v KIC* and *Masefield*. Interestingly, in the *Bamburi*, the insured was held to have lost ‘possession’, where the master remained in control of the vessel. This conflicts with the ratio in *Mitsui*, where there was held to be no loss of possession. The key issue, loss of possession, was not explored as a potential ground of distinction between these cases. Arguably, the better view is that where possession is in fact lost by an embargo, this is considered a loss of the property aside from any loss of the voyage. However, this is not compatible with the analysis of *Masefield*. The idea that a vessel has to remain out of the possession of the insured for 12 months or more to claim a constructive total loss derived from the *Bamburi*, and provides an unclear rule. Might it be possible to claim for a shorter period of dispossession, absent a particular term in the policy? The overriding theme is one of declining certainty.

The investigation into the hope of recovery in *Masefield* contradicted the rule established in *Goss v Withers*, and *the Romulus*. As the former case was decided by Mansfield LCJ, and was settled law for over 150 years, and confirmed by the House of Lords in the *Romulus*, it ought to have been especially persuasive, and at least considered. The post-Act authorities, especially *Polurrian*, fail to address adequately the prior law, so that it is difficult to say that the court had consciously overruled the ‘old’ law in favour of a completely new test. In particular, it was nowhere considered whether the old law was consistent with a claim under s 60(1), and this failure means that the court’s approach, in making a ‘new’ test, is inconsistent with s 90(1) of the Act preserving the common-law. The argument that there should have been found a total loss under s 60(1) is supported by the House of Lords dictum in *the Minden*; *Wangoni*; and *Halle*:

“If there can be an actual total loss in such cases through ‘irretrievable deprivation’ under s 57, I can see no reason why the law should not recognise a constructive total loss under s 60(1)...”<sup>998</sup>

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<sup>998</sup> [1942] AC 50 (HL)

This ought to have been considered by Steel J, when he ruled that there could not be such a loss, as ‘abandonment’ in s 60(1) had to be an act by the master. This House of Lords *dictum* arguably makes his *per incuriam*. Arguably, Masfield could have claimed successfully under s 60(1).

### 8.3 Actual Total Loss

#### i. Capture

After *Polurrian* the test under s 57 was seldom considered. Common-law situations justifying total loss without abandonment might have become statutory actual total losses. However, in *Panamanian Oriental Steamship Corporation v Wright*,<sup>999</sup> Mocatta J stated *obiter* that the vessel detained by Vietnamese customs officials, and subsequently confiscated by an executive act - a military tribunal convened outside the ordinary judicial system<sup>1000</sup> - was not an actual total loss. He considered that by payments of fines and bribes, the vessel could have been released and concluded:

*“[The] claim for an actual total loss on the basis that the plaintiffs were irretrievably deprived of the Anita is somewhat academic. The question has to be answered as at the date of the writ. It may be true that the order of confiscation divested the plaintiffs of the legal ownership as is the case of a ship by a Prize Court. But the test of irretrievable deprivation is clearly far more severe than the test of unlikelihood of recovery of possession...”*<sup>1001</sup>

This disregards prior authorities on capture indicating that confiscation established loss ‘without abandonment’ before the 1906 Act, as would any condemnation or sale. Mocatta J’s strict test is problematic; short of total physical destruction what could satisfy the test for irretrievable deprivation? It is unclear what if any authority supports Mocatta’s view, which can only be explained by his considering the interpretation of ‘irretrievable deprivation’ *de novo*, without reference to established authorities.

In *KAC v KIC*, aircraft captured when Iraq invaded Kuwait in 1990 were later destroyed. Rix J noted that:

*‘In Rodocanachi v Elliott,*<sup>1002</sup> *Brett J described capture as ‘the hostile seizure of goods with intent to deprive the owner of them. In case of capture, because the intent is from the first to take dominion over a ship, there is an actual total loss straightaway, even though there later be a recovery: see Dean v Hornby (a case of piratical seizure), and Andersen v Marten’.*<sup>1003</sup>

<sup>999</sup> (1970) 2 Lloyd’s Rep 365, [1971] 2 All ER 1028

<sup>1000</sup> *Masfield* [2011] EWCA Civ 24, [21]

<sup>1001</sup> *ibid*, 383

<sup>1002</sup> (1874) LR 9 CP 518, [1874-80] All ER Rep 618

<sup>1003</sup> [1996] 1 Lloyd’s Rep 664 (QB), 687

Rix J stated that actual total loss arose where there was a capture with an intent to permanently deprive the owner of possession, but there made no mention of a hope of recapture. ‘Wait-and-see’ is an innovative, permutation of the test for actual total losses. If it is to be taken as the test to be applied, it conflicts with *Panamanian Oriental Steamship*,<sup>1004</sup> since, on any view, a tribunal ruling divesting the owners of legal ownership is plain evidence of a capture with an intention to permanently deprive the owner of possession. Rix J did not address that a test of the captor’s intention had been absent from all earlier cases of maritime capture. It is unclear from where Rix J derived that test into the captor’s intention, since the definition in *Rodocanachi*<sup>1005</sup> long postdates established authorities for capture, where insureds were not required to prove the captors’ intention.

**ii.     *Restraint and subsequent sale***

Sale following restraint would not necessarily be actual total loss, a reminder that the separate perils fall to be treated independently so it is dangerous to apply principles from restraint or detention to seizure or capture. In *Fooks v Smith (the Stambul)*,<sup>1006</sup> the plaintiff sold parcels of hides in Calcutta to a Bulgarian in Varna, under a contract dated April 1914. On July 31, 1914, in view of the imminence of hostilities, he insured against war risks, including restraint of princes. The ordinary course of transit was by ocean to Trieste, and thereafter by coasting steamer to Bourgas. The goods arrived at Trieste in July 1914, and were reshipped on the *Stambul*, an Austrian-flagged vessel. She left Trieste on July 30, but on 3 August the master was ordered by the Austrian government to return to Trieste. The court held that act constituted a restraint of princes (following *Sanday*<sup>1007</sup>). War between Great Britain and Austria was declared on 13 August 1914. The hides were discharged at Trieste in September, and remained there. They were requisitioned in 1916 by the Austrian Government and sold for a sum which, owing to the exchange, was small. The plaintiff discovered these events in 1921, and gave notice then. He claimed under his war risks policy for actual total loss, or alternatively for constructive total loss. Bailhache J’s analysis accepted that where ‘*by a peril insured against there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss - as, for instance, if there is a capture followed by confiscation...*’ there was a total loss. However, citing *De Mattos v*

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<sup>1004</sup> (1970) 2 Lloyd’s Rep 365

<sup>1005</sup> (1874) LR 9 CP 518

<sup>1006</sup> [1924] 2 KB 508

<sup>1007</sup> [1916] 1 AC 650



*Saunders*,<sup>1008</sup> *Stringer*, and *Le Cann* he held that the total loss had to be a consequence of the peril insured against. Although the sale could not have occurred without the detention, he held, ‘seizure and sale was a nova causa superveniens, and was not the necessary and direct result of the restraint of princes’.<sup>1009</sup> His reasoning relied on the question of whether it would have been possible to claim for a total loss if the ship had been destroyed by fire while at Trieste, and held that it would not. This decision was arguably *per incuriam* in light of *The Romulus*, which was neither cited in argument nor considered in the judgment. It remains doubtful whether there was such a fine distinction between cases of ‘seizure’ and ‘capture’ to permit such a different result. Effectively, this was a case of hostile capture – hostilities being anticipated – and the fact that the restraint of princes took place before the formal declaration of war (technically, a ‘capture’) is an unsatisfactory distinction; further restraint of princes followed by sale – absent a declaration of war – was an established ground of abandonment without notice. Where the sale had not appeared inevitable; in *Stringer*, where the insured had long hoped that the court would order restitution of his goods, sale provided a ground for abandonment. If the reasoning in *the Stanbul* is applied to *Stringer*, the eventual sale would not have been a total loss. Finally, there was no ‘novus actus interveniens’ in *the Minden*; *Wangoni*; *Halle*, which was decided in similar circumstances, establishing a constructive total loss – yet the *Minden* did not provide sale was *not* an actual total loss. Arguably, the sale established loss without notice of abandonment under the pre-Act law – and the Act should not have changed this.

### iii. *Masefield*

Rix LJ’s judgment primarily concerned actual total loss, as the appeal in relation to constructive loss was abandoned at the hearing, albeit the cases considered were cases illustrating constructive losses. He repeated in substance Steel J’s assessment of Mocatta J’s *obiter* statement in *Panamanian Oriental*,<sup>1010</sup> although conceding that the statement was not necessarily very helpful to the insured, as the ‘facts were obscure and the matter was treated lightly’.<sup>1011</sup> Rix LJ relied primarily on *Dean v Hornby* as the most relevant authority. He stated that no reported authority found a total loss where the insured could have paid ransom,<sup>1012</sup> and distinguished the cases on that ground. The reference to the possibility of ransom payments in submissions in *Goss* was ignored – even though by their exclusion from the judgment where ransom payments were lawful and common-place, Mansfield LCJ had clearly dismissed that

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<sup>1008</sup> LR 7 CP 570, 579

<sup>1009</sup> [1924] 2 KB 508, 516

<sup>1010</sup> *ibid*, [21]

<sup>1011</sup> *ibid*, [22]

<sup>1012</sup> *ibid*, [26]

consideration. Rix LJ held that *Dean v Hornby* was inconclusive,<sup>1013</sup> and referred to several cases concerning capture. The first case he referred to was, however, not a capture case, but *Roux v Salvador*. Arguably, the test in *Roux*, formulated later than the test in capture cases, could not have changed the established rules for capture cases. When Rix LJ considered *Stringer*,<sup>1014</sup> he did not fully articulate the significance of the insured's choice not to abandon. The paragraphs that he cited refer to the situation where the insured had chosen to keep the *spes* in the property for many months. Further, he noted that the sale by the Prize Court in *Stringer* was a situation of actual total loss,<sup>1015</sup> thereby undermining the authority of Mocatta's *dicta* in *Panamanian Oriental*.<sup>1016</sup> However, Rix LJ did not acknowledge that the plaintiff in *Stringer* could have successfully abandoned and claimed for constructive total loss within a reasonable time of the capture.

A further material distinction between *Stringer* and *Masefield* was that the claimant in *Masefield* was essentially passive. Cargo interests seldom participate in the negotiation process, which is ordinarily conducted by the hull owner. Consequently, the insured had no say in or control over the ransom process. Contrastingly the shipowner had decided to instigate the process of negotiation, therefore placing himself in a position akin to the plaintiff in *Stringer*. This reflects different policy interests; a vessel is a valuable asset expected to be owned for years if not decades, cargo is normally expected to be sold at the end of the voyage. Rix noted that in *Cory & Sons v Burr*<sup>1017</sup> the test for a total loss was whether the assured 'but for their own fault' might get the property back. Whether the insured would be 'at fault' in not making a ransom payment is doubtful (Chapter 7.3 ante). He noted a statement of the law in *Arnould's* 17<sup>th</sup> edn suggesting capture ordinarily gives rise to constructive total loss. Having surveyed the *dicta inter alia* from *Dean v Hornby*, *the Romulus*, and *The Girl Pat*, Rix LJ concluded:

“...subject to ... the public policy of paying a ransom... where there was not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure recovery of both, was not an actual total loss. It was not an irretrievable deprivation of property. It was a typical “wait and see” situation. The facts would not even have supported a claim for a CTL, for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery. That is itself recognised by the insured's dropping of its CTL claim. ... In the circumstances, *Dean v Hornby*, is best explained as a case concerning CTL, which in any event reference there to the assured's notice of abandonment strongly suggests...”

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<sup>1013</sup> *ibid*, [32]-[33]

<sup>1014</sup> *ibid*, [36]

<sup>1015</sup> *ibid* [37]

<sup>1016</sup> (1970) 2 Lloyd's Rep 365

<sup>1017</sup> (1883) 8 App Cas 393

*Masefield* produces the opposite result to *Goss*. In *Masefield* the claimant failed because of the investigation into the hope of recovery. In *Goss* the plaintiff succeeded for a total loss claim despite there being a strong hope of recovery. Consequently, Rix LJ reached the right result on the appeal for an actual total loss, as even under the pre-Act law the insured would have been required to serve a notice of abandonment. Arguably, *Masefield* remains doubtful in its treatment of constructive total losses.

#### 8.4 A new consensus?

The most recent cases indicate that insureds no longer argue total loss in England on events of capture. Conceivably, *Masefield* itself is seen to have provided a new rule.<sup>1018</sup> Is this fair to the insured?<sup>1019</sup> At this point, it is worth considering the American position. There are apparently no reported cases of loss of possession in any American jurisdiction where the issue of ‘unlikelihood’ of recovery was argued, after the 1906 Act was passed in England. Although an argument from silence, it is a powerful indication that the American position, both on the effect of giving notice, and of the ongoing presumption of total loss, provides much greater certainty, and is effective in preventing disputes.

Problematically, the *Masefield* interpretation potentially creates injustice, in particular to the CIF buyer. These purchase all risks cargo cover taken out by the seller, and property will pass to them on shipment, but they may be left exposed to an uninsured risk of loss by piracy where the same results in delay to arrival of cargo. Simply, where frustration does not operate to relieve sellers of obligations under a sale contract, the lack of compensation for total loss on a loss of possession situation leaves insureds unable to obtain cover. Further, the approach applied in the *Bamburi* provides little clarity. For example, where a vessel were detained for a year, and the parties decided to ‘wait-and-see’, if the insured then gave notice of abandonment, there would then be a test of whether he were likely to recover. If, at that time, restoration were considered a possibility, he might not be able to abandon. He could be deprived of his property for a considerable period of time, and not be able to purchase effective cover. The difficulties inherent in the contemporary approach would be avoided, certainty increased, and precedent respected, if there were a way the presumption could still operate.

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<sup>1018</sup> *Mitsui & Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and another* [2014] EWHC 3445 (Comm)

<sup>1019</sup> *Suez Fortune Investments Ltd v Talbot Underwriting Ltd and others (The Brillante Virtuoso)* [2015] EWHC 42 (Comm) (Flaux J)

## 9 CONCLUSIONS

### 9.1 Delay and Contemporary Total Loss Claims

*“Remember that TIME is Money”.*<sup>1020</sup>

Claims on loss of possession concern situations where insureds, having lost and possibly regained possession of their property, will suffer financial loss by interruption to their business. Mansfield’s and Ellenborough’s observation that delays in and interruption to commerce are particularly harmful to cargo interests remain applicable.<sup>1021</sup> Clearly, interruption to a voyage causes financial loss to parties engaged in trade. Where possession is not regained, a wait-and-see approach means insureds conceivably suffer further by late payments under the policy.<sup>1022</sup> Where property is released, an approach that categorises insured’s losses as flowing from delay means they will be uncompensated. To what extent should the exclusion, preventing compensation for delay, restrict recovery for total loss, if the insured issues a claim during the duration of the peril? This thesis has aimed to demonstrate a presumption of total loss that arose on perils of loss of possession, and which remains arguable under the 1906 Act.

### 9.2 The Lost Presumption

English law recognised a legal presumption of total loss on all subsisting perils causing loss of possession or free use and disposal. Since the 1906 Act this presumption has been applied only once in England, and is ignored in recent English authorities. This stricter rule diverges from American laws, and arguably leads to less commercially advantageous outcomes. The best argument that this presumption still applies to claims of constructive total loss on capture and subsisting detentions, notwithstanding the statutory changes of 1906, has not been made. It remains to be judicially considered. This presumption is, *prima facie*, compatible with the Act. If it were recognised, English law and usage would be more in harmony with the American market. It would provide greater certainty of outcome, and it would discourage litigation.

Insurance law is the interpretation of the contract. While it is always open to parties to draft their contracts with foresight as respects potential situations of total loss, recent authorities

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<sup>1020</sup> Benjamin Franklin “Advice to a Young Tradesman, Written by an Old One” (New-Printing-Office, 1748, Philadelphia)

<sup>1021</sup> Chapter 1.4.iii (above), fn 124

<sup>1022</sup> On effects of late payments on insureds, see Law Commission 2014 Report, ‘Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment (Law Comm No 353)

indicate significant delays in the determination of disputes on loss of possession. An underlying law encouraging quick resolution of these issues has greater commercial merit.<sup>1023</sup> Presumptions of total loss potentially may provide greater litigation certainty, and may work to discourage disputes.

The underlying issue is ‘when can the insured recover’? The issue of when an insured can expect to make a claim for compensation under his policy for a loss of possession is not the subject of direct recent English judicial commentary. The answer as to *when* has to be identified by a series of rules standing as exceptions to the general rule that insureds will not be compensated for any losses caused by delay – albeit that these ‘exceptions’ were settled by the time when the exclusion for delay was established. The survey of insurance authorities indicates a position that changed significantly in the early 20<sup>th</sup> century, although on arguably doubtful authority.

Claims for loss of possession, where the insured property is eventually recovered, reveal difficulty in striking a fair balance between insureds and insurers. For insurers, it is accepted that: “*the mere retardation of the adventure, and the consequent inconvenience and expense arising from it are not a substantive cause of loss where the particular thing assured has not received damage*”.<sup>1024</sup> Clearly, this applies to situations where storms protract the voyage. These must be ordinary risks expected on any charter. Nevertheless, considerations that arise on loss of possession arguably fall outside this general rule.

If applied in future cases, the presumption ought arguably to reflect a return to long-established industry norms. It would have the key practical effect of encouraging quick payments to cargo interests, where possession was lost for a time. This would reflect the nature of a traders’ business, which often requires quick turnover of goods transported, and in some markets sales while a vessel is at sea. Mansfield’s observation that a trader’s capital locked up during a long period of uncertainty continues to apply, and the presumption if applied would protect traders from this situation. Since traders are not generally required to be involved in the resolution of any loss of possession of a vessel – save for contributing to general average expenses, for which they in turn may be reimbursed, there appears little disadvantage in this. The increased premiums that would be necessary would properly share the risk across the market.

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<sup>1023</sup> Though an extreme example, delays exceeding 8 years before judgment on a loss of possession case are known; “*This is not satisfactory either from a commercial point of view or for the purposes of administration of justice. It cannot be in the interests of any participant in the insurance market that there should be such uncertainties and delays.*” *Kuwait Airways Corp and another v Kuwait Insurance Co SAK and others* [1999] 1 All ER (Comm) 481, 487 (Hobhouse LJ)

<sup>1024</sup> *Everth v Smith* (1814) 2 M&S 278 (Lord Ellenborough CJ)

The larger potential change relates to hull insurance. The owners – during a loss of possession scenario – face losing the freight expected, and the future use of their vessel. This frees owners from the anxiety caused in fixing future voyages, where the vessel’s possession is lost. The vessel owners are normally responsible for arranging for a vessel’s release from a loss of possession situation (although in *Masefield*, and presumably frequently in relation to capture and hostage situations, negotiations may be conducted by other government agencies). This may require insurers, rather than owners, to engage negotiators, but this activity is not a core business of an owner, just as it is not an insurer. There is no reason why the insurer should not, in appropriate cases, undertake this role. A wider survey of the opinion of the market on whether there should be prompt payments for loss of possession is outside the scope of a survey of the law. Nevertheless, given it was an argument in *Masefield*, it arguably reflects some recent market opinion.

### 9.3 Wait and See or Presumption of Loss

The idea of the presumption of total loss is supported by two statements of law. First, that there was a *prima facie* right to abandon. Secondly, that situations of restoration were universally described as bringing the loss to an end, ie that losses were established while the perils lasted, and never, until ‘wait-and-see’ evolved as evidence that a loss was not ‘complete’.

Resolution of total loss claims, actual or constructive, involves two competing ideologies. First, as expressed in *Masefield*, is ‘wait-and-see’, doing justice to the insurer by waiting to see what the ultimate event of the peril is. Almost inevitably, this will apply to a capture situation, as the intention of the captor will best be illustrated by the event. Contrastingly, there is an analysis of total loss claims based on probabilities, which is entirely opposed to a ‘wait and see’ construction. The disadvantage of waiting for condemnation or sale was recognised by Mansfield, and there remains considerable justification in presumptions of total loss, on all the marine perils covered by the policy. Emerigon provided on loss of possession:

*“As against the merchant, the property tied up and uncertain is considered in some manner as if it no longer existed”.*<sup>1025</sup>

This was understood in English law, where at the moment of capture, or the moment possession was lost, *‘then, in fact, a total loss has occurred.’* ... *‘...once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining*

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<sup>1025</sup> Emerigon, (1850 edn), 670-671

*such restoration*'.<sup>1026</sup> Further, it was confirmed ... '*though the ship was brought into port, yet the capture, as between assurer and the assured, was a total loss*'.<sup>1027</sup>

This analysis was set out fully in *Roura and Forgas v Townend*. It was noted that restoration of a captured ship before action prevented an owner from alleging constructive total loss. In *Roura, dicta* collecting suggestions that there was no constructive total loss until the fate of the vessel was finally known, such as *Tunno v Edwards*,<sup>1028</sup> but these were disapproved. In particular, this 'wait-and-see' approach was "*contrary to a large body of decisions; see in particular Andersen v Marten and ... Polurrian Steamship Co, Ltd v Young*". Further, although the test under s 60 was noted, the view was that there was a loss while the peril subsisted:

*"... What is perhaps more important is that the argument is contrary to the Marine Insurance Act, 1906, s 60, which makes probability and not the event the test. The true view, in my judgment, is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot under a contract of indemnity, although he may at one time suffered a loss, recover in respect of such loss if before action it has already been made good to him".*<sup>1029</sup>

This is perhaps the correct understanding of total loss claims for 'loss of possession' situations. In particular, it recognises that the loss was suffered while the peril persisted, and further, discounts correctly any doctrine of 'relation back'. Nothing additional was needed to make the loss 'complete'.

While there is merit in the pragmatic rule that there should be a wait-and-see, presumptions have a long-established place in insurance laws. Emerigon observed, in relation to whether property could be salvaged in part from a shipwreck, that "*It is possible that the goods insured may be saved from shipwreck without having suffered any alteration; but this case is rare; in the meanwhile a general rule is wanted to prevent disputes*".<sup>1030</sup> Clearly, salvage technology has so evolved that that presumption has little contemporary application.<sup>1031</sup> However, the considerations on 'loss of possession' cases appear to turn on factual patterns that have little changed, as recognised in the survey of authority in *The Bamburi*. Given that consistency the guidance that a rule discouraging disputes is still relevant, and the rules in capture cases remain pertinent. In *Global Process Systems* it was reaffirmed that "*In marine insurance it is*

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<sup>1026</sup> *Dean v Hornby* (1854) 3 El&Bl 180, 190

<sup>1027</sup> *Cazalet v St Barbe* (1786) 1 TR 187, 191 (Buller J)

<sup>1028</sup> 12 East 490

<sup>1029</sup> [1919] 1 KB 189; [1918-19] All ER Rep 341, 345

<sup>1030</sup> Emerigon, (1850 edn), Ch XII, s XII

<sup>1031</sup> *Captain J A Cates Tug and Wharfage Company v Franklin Insurance Company* [1927] AC 698, 28 Ll L Rep 161

*above all things necessary to abide by settled rules and to avoid anything like novel refinements or a new departure*".<sup>1032</sup> Further merit for this exists in the key difference between American authorities and the English, in that the American courts look to the position at the time of abandonment, and do not investigate matters subsequent to that date. This must be an effective method of discouraging disputes, and may account for the fact there are fewer American decisions in this area.

#### 9.4 Loss of Possession as an insured peril

The idea that loss of possession *simpliciter* was not an insured peril<sup>1033</sup> conflicts with early authority,<sup>1034</sup> and academic definitions of the perils.<sup>1035</sup> In any event, the imprecision of definitions between the different perils counts against a strict definition of losses under the same. Loss of possession *simpliciter* was an insured peril, and it was clear that certain perils were treated as a loss of possession at once. The competing understanding that an intention had to be inferred from the surrounding circumstances derives from non-marine cases<sup>1036</sup> considering the non-marine test of uncertainty<sup>1037</sup> and is arguably an error given the established marine authorities.<sup>1038</sup>

In non-marine cases it is clear that no doctrine of non-marine constructive loss ever applied. Instead, a test of 'uncertainty' was applied.<sup>1039</sup> Arguably, any test of 'uncertainty' derives from non-marine cases, and it is clear that the wait-and-see approach evolved as a development of the non-marine 'uncertainty' test. Arguably, the non-marine authorities were not strong authority for marine cases. Consequently, where established marine authorities expressly dealt with an issue of total loss, these should have been preferred. Consequently, the authority of the evolution of 'wait-and-see' as an approach is doubted. This study suggested care in identifying where 'uncertainty' was reintroduced to the marine insurance context. It argues that marine authorities, where different, provided more appropriate authority (Chapter 2.4, ante).

#### 9.5 Delay and causation

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<sup>1032</sup> *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, 502 (Lord Macnaghten); *Global Process Systems* [2011] UKSC 5, [66] (Mance SCJ)

<sup>1033</sup> Dawson's Field (Michael Kerr QC); *Kuwait Airways Corporation and Kuwait Insurance Company* [1996] 1 Lloyd's Rep 664 (QB) (Rix J)

<sup>1034</sup> *The Lady Mansfield* (1787) 1 TK 609; *Powell and Others v Hyde* (1855) 5 El&Bl 607

<sup>1035</sup> Emerigon (1850 edn), Ch XII, s XXI; Marshall (1802), 418

<sup>1036</sup> *Moore v Evans* [1918] AC 185; *Mitsui v Mumford* [1915] 2 KB 27

<sup>1037</sup> *Webster v General Accident* [1953] 1 QB 520

<sup>1038</sup> Applied in marine context only in *Masefield*

<sup>1039</sup> *Webster* [1953] 1 QB 520, following *Moore v Evans* 7 AppCas 49; [1918] AC 185; *Mitsui v Mumford* [1915] 2 KB 27



The prima facie position that losses flowing from loss of possession are necessarily losses by delay is an inaccurate summary of marine insurance law, that has expanded the proper operation of the exclusion to cover situations that historically it did not. It is important to note that the exclusion for delay evolved after the presumption of total loss on loss of possession. It was not initially understood as an absolute rule. First, it does not apply to situations where the voyage begins late. In those situations, such as in *Jackson*, the late commencement of the voyage will amount to a loss of the voyage. Although from the insured's perspective, the distinction between delay before and delay during the voyage is hardly satisfactory, this distinction is well settled. However, the exclusion for delay should arguably be confined to 'perils of the sea' such as wind and wave that might extend a voyage and should not apply to situations where possession has been lost. Arguably, the modern doctrine of causation means that the correct approach would be to identify the real cause of the loss as the loss of possession, and not the inevitable consequence of this act, which is delay. Arguably, the only way to understand the exclusion for losses for delay co-existing with decisions permitting total loss, is to recognise that in the pre-1906 law, a different approach was taken in relation to different types of loss. Further, as understood in contemporary law, the doctrine of proximate cause means that the exclusion for delay applies only in narrow circumstances.

## 9.6 Actual Total Loss

The understanding of actual total loss appears to have become less favourable to the insured over time. By the mid nineteenth century, the definition of actual total loss was not settled on whether it protected merchants from unreasonable expense. Arnould contained two contradictory definitions. The first was that actual total losses did protect merchants in such situations:

*"in matters of business a thing is said to be possible when it is not practicable; and a thing is impracticable when it can only be done at an excessive of unreasonable cost. A man may be said to have lost a shilling when he has dropped it in deep water, though it might be possible, by some very expensive contrivance, to recover it".*<sup>1040</sup>

However, this was contradicted by the example:

*"Thus, if a ship founders at sea, or goods go in bulk to the bottom of the ocean, so as to leave no reasonable chance of their recovery, this is a clear case of total loss. If, on the other hand, they be merely submerged in shallow water, so that there is a chance of getting them up again, but at a very considerable expense, this is only a constructive total loss, and the assured, in order to recover the whole amount of the insurance, must give due notice of abandonment".*<sup>1041</sup>

<sup>1040</sup> Arnould (3<sup>rd</sup> edn, 1866), 883; 2 Emerigon Ch XVII, [3], 213; *Moss v Smith* 9 CB 103 (Maule J); *Murray v Hatch* 6 Mass Rep 465 (Sewall J)

<sup>1041</sup> Arnould, (3<sup>rd</sup> edn, 1866) vol II, 885

Over time, the latter understanding of actual total loss appears to have been accepted, and is now beyond challenge.

## 9.7 Constructive Total Losses

The English law was widely understood to have been altered by the 1906 Act in respect of constructive total losses: “...*English Marine Insurance Act in requiring, where the assured is in possession of the ship or goods, that an actual total loss appear "unavoidable" rather than "highly probable," and, where the assured is deprived of possession, that recovery of the ship or goods be "unlikely"*<sup>1042</sup> *rather than merely "uncertain,"*<sup>1043</sup> *imposes more stringent requirements than either English*<sup>1044</sup> *or American common law rules*”.<sup>1045</sup> Both in respect of the lack of change intended to be made by the 1906 Act, as indicated by the guidance notes to s 60(2)(i),<sup>1046</sup> and in the American rule as to the time the parties rights are finalised, there is considerable superiority in the American rule: *Any other rule would furnish but a very imperfect indemnity to the assured if we regard either the character of these seizures and the irregularities attending them, or the trouble, expense, and delay consequent upon the duty or burden of proving in a court of justice the unlawfulness of the act. It is never, therefore, a question between the insurer and the insured whether the capture be lawful or not.*<sup>1047</sup> The difference between the English and American positions is of real practical significance. It was well-recognised that circumstances could arise, where the application of the English rather than the American rule would prevent the finding of a constructive total loss, and effectively bar recovery for that loss. If the policy of the doctrine of constructive total loss of goods was to insure greater stability and certainty in the maritime industry, it would be better fulfilled by the more permissive American rule. This tended to diminish delays in the shipment of other goods because of doubts as to whether abandonment for a constructive total loss was justified. Specifically, the requirement that subsequent events could not divest rights arising from a constructive total loss both accorded with that policy, but encouraged settlements. Insured would not be pressed to begin an action immediately after abandonment, and the insurer was less likely to delay a compromise although there may be a possibility of future recovery of the

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<sup>1042</sup> Citing the Marine Insurance Act 1906, s 60(2)(i); *Czarnikow Ltd v Java Sea & Fire Ins Co* 166 LT 104 (KB 1941); *Roura & Forgas v Townend* [1919] 1 KB 189 (1918)

<sup>1043</sup> Citing *Peele v Merchants' Ins Co* 19 Fed Cas No 10,905, 111-12 (CCD Mass 1822); *Polurrian Steamship Co v Young* [1915] 1 KB 922, 935

<sup>1044</sup> Citing *Polurrian Steamship Co v Young* [1915] 1 KB 922, 936-37

<sup>1045</sup> ‘Constructive Total Loss Doctrine in Marine Insurance’, 51 Columbia Law Review, No 4 (Apr 1951), 526, 527

<sup>1046</sup> (Chapter 8.2.1, above)

<sup>1047</sup> (1867) 73 US 1, [19]

goods.<sup>1048</sup> Consequently, it was seen as desirable that American laws are stipulated in an American policy.<sup>1049</sup> Even such statements contemplated that the situation would be settled as of the date of the action; allowing for uncertainty to persist beyond the date of the action, as in *Masefield*, further reinforces that policy argument.

The wide definition of capture supports the presumption of total loss. Early cases did not consider the intention of the captor. Contrastingly, the wait-and-see approach does consider the intention. This increased obligation on insureds to adduce motives of captor make a quick decision to claim difficult. After abandonment is given, where motive is unclear, the approach suggests that insureds will have to ‘wait’. In finding this wait-and-see doctrine applied, it was arguably surprising that non-marine cases were held to be a guide of when marine property should be considered lost. The law was derived from maritime authorities, and the law merchant; both encapsulated the practices of merchants, who themselves had established common principles to regulate their dealings. Marshall<sup>1050</sup> stated the policy aim of insurance was stated in the preamble to 43 Eliz c 12,<sup>1051</sup> that indicated that insured losses should not fall on individual merchants, but be shared by the market. Merchants themselves understand the consequences of delay: “*One can readily understand that those willing to adventure, who had possessed themselves of expensive but money-making chattels like ships for the purpose of their adventures, should, if they insured, be protected as far as possible from having their capital locked up unprofitably in ships whose fate they were unable actually to ascertain and prove*”.<sup>1052</sup> Significantly, the reasoning in *Scott v Copenhagen* points away from commercial certainty, and against the background of the marine authorities, the approach: *had the question been asked on 2 August “is the aircraft lost?” the answer would have been “I don't know. Wait and see”*<sup>1053</sup> was both novel and promoted uncertainty. The presumption of loss provided a commercially workable answer, and has a long history in marine authorities.

The wording of the policy was once understood to be inclusive, as indicated by perils *eiusdem generis* falling within the policy. It is conceivable that the large number of specified perils in the SG policy were included because the policy intended the insurer to be liable for all hurts to the vessel. The growth of law on this topic to radically narrow the scope of the cover, shows ever increasing restriction on cover, and does not fully consider the material facts that insureds

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<sup>1048</sup> Constructive Total Loss Doctrine in Marine Insurance, 51 Columbia Law Review, No 4 (Apr, 1951), 526, 528

<sup>1049</sup> *ibid*, 529

<sup>1050</sup> Marshall, (3<sup>rd</sup> edn, 1823), 3ff

<sup>1051</sup> See n 120, above

<sup>1052</sup> *Moore v Evans* 7 AppCas 49; [1918] AC 185, 194

<sup>1053</sup> *ibid*, [58]

successfully claimed upon in early authorities, which amounted simply to the fact of loss of possession simpliciter.

The presumption of total loss was established by Emerigon, and was stated most clearly on capture: “*As against the merchant, the property tied up and uncertain is considered in some manner as if it no longer existed. Hence, according to the Ordonnance, its loss is presumed to be total, and it is allowed to make abandonment to the insurers of the effects insured*”.<sup>1054</sup> This further reinforced the undesirability in preventing merchants from having access to their invested capital pending the outcome of an insurance dispute.

Later, the presumption was established also on embargo, “*An embargo laid by a foreign government on the ships or goods of any other than its own subjects, entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought, to recover as for a total loss*”.<sup>1055</sup> The presumption extended to detention. As stated in *Murray et alia v The United Insurance Company*:

“*Carrying into port denotes strong suspicion; it is good ground to calculate on a serious litigation, and it is prima facie evidence of total loss. In such cases the English law does not require a delay, in imitation of some foreign rules. The activity of trade rather demands decision and certainty, and that the capital and business of the merchant should not be kept in suspense*”.<sup>1056</sup>

The presumption that a loss is total while the *specie* is in the possession of others is endorsed by textbooks, in contrast to a situation where the loss had ended by recapture.<sup>1057</sup> Arguably, this was a practical commercial presumption, allowing quick and easy resolution of disputes, suitable “*in treating of a contract of practical indemnity against substantial losses*”.<sup>1058</sup> In relation to the variety of perils causing loss of possession, it has been observed that there was ‘[not] much difference between a restraint by a blockading force and a restraint arising under the operation of a sanitary law’.<sup>1059</sup> By extension, in all perils where the insured is no longer in control, the practical effect of loss of possession will be similarly dire. The underlying law points against both doctrines of ‘wait-and-see’ and ‘relation back’. Support from *Beale v Thompson*,<sup>1060</sup> was in the context of contract of employment, not of insurance. Insurance

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<sup>1054</sup> Emerigon (1850 edn), 670-671

<sup>1055</sup> *Rotch v Edie* 6 T Rep 413; Arnould (1<sup>st</sup> edn, 1848), 813

<sup>1056</sup> (1801) 2 Johns Cas 263; (1801) NY Lexis 36 (Supreme Court of Judicature New York)

<sup>1057</sup> Benecke W, ‘*A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia: And on Their Practical Application in Effecting Those Contracts, and in the Adjustment of All Claims Arising Out of Them*’ (1824, Baldwin Cradock and Joy, London), 355

<sup>1058</sup> Arnould (3<sup>rd</sup> edn, 1866) Vol II, 882

<sup>1059</sup> [1902] 2 KB 694, 700

<sup>1060</sup> 4 East 546, 561

authorities, including House of Lords, did not adopt the doctrine, such as in *Anderson v Marten*.<sup>1061</sup>

Importantly, there are no issues in recent reported decisions in America arising from considerations of unlikelihood of recovery. For example, *Tillery v Hull Co Inc*<sup>1062</sup> concerned a vessel confiscated by a Mexican court, where the loss was excluded as being due to barratry of the master which was not insured. Significantly, there was no consideration of unlikelihood. In *Commodities Reserve Co v St Paul Fire & Marine Ins Co*,<sup>1063</sup> where a cargo owner sought to recover costs of transshipment, so that the cargo was not detained and at risk of infestation at the port where the vessel was improperly detained in Crete, the cause of the loss was held to be the detention, not delay.<sup>1064</sup> Again, likelihood or otherwise of recovery was not an issue considered. The American FC&S clause was relevant because it excluded loss during detainment by customs that would otherwise be covered.<sup>1065</sup> The issue does not appear to be causing disputes in American laws, and arguably, this is because the underlying presumption continues, and discourages litigation.

## 9.8 Whether the presumption survives

Arguably, the presumption ought to have survived the Act in a presumption of constructive total loss. First, statutory tests may be supplemented to a limited extent by prior common-law rules. In *the Polurrian*<sup>1066</sup> the test under s 60(2)(i) was supplemented by the words ‘*within a reasonable time*’. Contrastingly, in *Hall v Hayman* (1912),<sup>1067</sup> a common-law rule was excluded by the new wording. In *Robertson*, Porter LJ addressed the issue of the completeness of s 60 directly, stating that s 60 was intended to be a complete section, and that the particular examples given in sss (ii) and (iii) were in addition to the more general words of sss (i).<sup>1068</sup> In *Irvine v Hine*<sup>1069</sup> the insured conceded that its claim was untenable under any of the heads specified in s 60 of the Act. However, it contended that the claim was justified at common-law, not inconsistent with s 60, and accordingly valid by virtue of s 91(2).<sup>1070</sup> Devlin J held that the wording of s 60 could not be modified to such an extent as to add a whole new ground of abandonment, notwithstanding the precedent of *Polurrian*. The difference between the two cases is significant. The common-law presumption of total loss arguably fell within the rule

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<sup>1061</sup> [1908] AC 334

<sup>1062</sup> 717 F Supp 1481 (MD Fla 1988)

<sup>1063</sup> 879 F 2d 640, 1989 AMC 2409

<sup>1064</sup> Simon Harter (ed) *Benedict on Admiralty* (2013 Princeton), [4-35]

<sup>1065</sup> *Ibid*, [4-36]

<sup>1066</sup> [1915] 1 KB 922 (CA)

<sup>1067</sup> [1912] 2 KB 5

<sup>1068</sup> [1939] AC 371

<sup>1069</sup> [1950] 1 KB 555, [1949] 2 All ER 1089

<sup>1070</sup> *ibid*, 1091

in s 60(1) as the loss *appeared* to be permanent, and arguably not within the exclusionary rule in *Hall v Heyman* or *Irvin v Hine*.

In *Polurrian* it was stated that the test across all perils, including capture or detention, was ‘unlikelihood’. If that was correct, a clear error in the statutory drafting occurred. Strikingly, the draftsmen published, in leading practitioner works, a statement of the law contrary to its construction in *Polurrian*. Further, the doctrine of the loss of the voyage should, at least for goods policies, support a presumption of total loss on loss of possession. The loss of the voyage is still a part of contemporary insurance. It is well recognised that goods at a destination port are often of a very different value to goods at their load port. The underwriter undertakes an obligation to compensate the insured if the goods fail to arrive at their destination uninjured by an insured peril. It is settled that the insurance covers the venture, and loss of the venture is a constructive total loss of goods.<sup>1071</sup>

From 1758, when policies for interest superseded wagers in the English market, there was a presumption of total loss on every peril causing a loss of possession. It was assumed that when the property was taken out of the control of the insured or his agents, that amounted to a total loss. This justified an instant right of abandonment (Emerigon; Marshall; early Arnould; *The Minden*; *Wangoni*; *Halle*). The parties’ rights settled on the date of issue of the writ, and it was possible that return by that date reduced the presumed total loss into a partial loss (where there was damage), or no loss at all (if undamaged, there being no compensation for any delay).

Other perils, such as stranding, prompted an investigation into the chances of the property’s recovery. To claim for a total loss, notice of abandonment was required, unless there had been subsequent destruction or on-sale, via-judicial condemnation or otherwise, and so these perils of loss of possession were constructive total losses. The draftsmen intended to preserve this in the 1906 Act. The leading post-Act authority on constructive total loss after capture (*Polurrian*) was *per incuriam*. First, the prior law was misstated; the court assumed that a test of unlikelihood applied where in fact this only applied after stranding or damage. Secondly, *Polurrian*, quoting an error in contemporary Arnould, stated that Emerigon provided that a capture avowedly for a temporary purpose gave no ground for abandonment. Instead, the authority concerned different circumstances where possession had already been restored. Emerigon clearly recorded the presumption of total loss in English law.

In *Polurrian*, the presumption was not apparently argued, and the court did not decide whether the presumption survived. *KAC v KIC* and *Scott v Copenhagen* further were not marine

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<sup>1071</sup> [1916] 1 AC 650, 673-4 (Wrenbury LJ)

insurance authorities. The better view must be that loss of possession justifies an instant claim for constructive total loss, and that the common-law presumption of constructive total loss survives.

The presumption arguably survives in American laws, since the parties' rights will be finalised as of the date of abandonment to the insurer. Comparison with English laws clarify that the American law in this respect is workable, and discourages disputes. It is more commercially sensitive than the English doctrine, which encourages litigation. A properly pleaded claim for constructive total loss on loss of possession in the English courts may allow the presumption to be revived, as it appears compatible with the Act, and in conformity with the American understanding. Commercial law should be simple and certain. It was well observed in the employment context that: "*When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long*".<sup>1072</sup> The presumption of total loss on perils of loss of possession is workable, prevents uncertainty. The presumption has not been argued for in post-1906 Act authorities, and accordingly has not been dismissed. It is supported by a body of pre-Act authority, and, if properly argued, it should be upheld. When should an insured be compensated for loss of possession by a marine peril? If the presumption is upheld, his entitlement to compensation arises at once on any peril causing, for the time, a loss of possession, and it continues while the loss of possession lasts.

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<sup>1072</sup> [1916-17] All ER Rep 81, 93-94

The 1906 Act, so far as material, provides:

- 3 Marine adventure and maritime perils defined.
- (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
- (2) In particular there is a marine adventure where—
- (a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as “insurable property”;
- (b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;
- (c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.
- “Maritime perils” means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.
- ...
- 55 Included and excluded losses.
- (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
- (2) In particular
- (a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;
- (b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;
- (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils
- 56 Partial and total loss.
- (1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.
- (2) A total loss may be either an actual total loss, or a constructive total loss.
- (3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.
- (4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.
- (5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.
- 57 Actual total loss.
- (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.
- (2) In the case of an actual total loss no notice of abandonment need be given.
- ...
- 60 Constructive total loss defined.
- (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
- (2) In particular, there is a constructive total loss—



(i)Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii)In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii)In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61 Effect of constructive total loss.

Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62 Notice of abandonment.

(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6)Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9)Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63 Effect of abandonment.

(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

91 Savings.

...

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

## FIRST SCHEDULE

### Form of Policy

#### Lloyd's SG policy

Be it known that as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship. upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at

upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

In Witness whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

The following table arranges the most significant cases in chronological order, grouped by the peril found to be operative. It notes time out of possession of claimant, time before abandonment, and the court's judgment on the issue of total loss.

### *Enemy Capture*

CASE	PERIL	SUBSEQUENT EVENT	TIME OF ABANDONMENT	TIME IN CAPTIVITY	RESULT
<b><i>Wagering Policies/ early policies:</i></b>					
<i>East-India Company v. Sands</i>	Enemy capture	Sold, resold, recapture, Restoration to original owner	Unrecorded	4 years (1691-1695)	No change of property
<i>Assievedo v Cambridge (the Ruth)</i>	Enemy capture	recapture	unrecorded	9 days	No change of property (no decision on the wagering policy)
<i>Berkley v Cullen</i>	Requisition by government	none	unrecorded	Until after end of voyage	Voyage lost (total loss on a wager)
<i>Dapaba v Ludlow</i>	Piratical Capture	recapture	unrecorded	9 days	Voyage lost; (total loss on a wager)
<i>Pond v King (the Salamander)</i>	Piratical capture	Recapture before taken into enemy port	Unrecorded	1 day	Voyage (of 3 months) interrupted; total loss established.
<i>Whitehead v Bance</i>	Enemy capture (French Privateer)	recapture	unrecorded	12 days (and carried into port)	Voyage interrupted – total loss of the voyage established.
<i>Dean v Dicker (the Dursley)</i>	Enemy capture (Spanish Privateer)	recapture	unrecorded	8 days	Voyage lost – total loss.
<i>Pole v Fitzgerald (the Goodfellow)</i>					No loss of the voyage – loss of voyage not applicable to vessel
<b>Valued Policies (Policies for interest )</b>					
<i>Goss v Withers (the David and Rebecca)</i>	Enemy Capture (French vessel) on 23 December 1756	Recapture on 31 December 1756, returned to England 18 January 1757	Abandoned 18 January	8 days	No change in property. Total loss of vessel Total loss of cargo (& Total loss of voyage)
<i>Hamilton v Mendes (The Selby)</i>	Enemy Capture	Recapture	Abandoned 1 month after return to England	17 days	Partial loss only – abandonment out of time.
<i>Milles v Fletcher (the Hope)</i>	Capture American Privateers on 23 May (1778?)	Recaptured. Taken to New York by 23 June. Voyage to London intended to be by July. Embargo at New York until December. Captain sold vessel. Insured informed in February following year.	Insured abandoned in February.	unclear	Total loss. Primarily, decided on ground of loss of the voyage. (also, damage to ship extensive).

<i>Mitchell and Others v Edie (the Lady Mansfield)</i>	Insurance on goods. Capture by American Privateer, early 1782	Stores, rigging and part crew removed. Vessel set at liberty. Impossible to complete intended voyage, deviation to nearer port. Insured goods sold by part-owner of vessel, who later became insolvent.	Abandoned after 3 years	A few days	Not a total loss. Abandonment out of time.
<i>Bainbridge v Neilson (the Mary)</i>	Enemy capture 21 September 1807.	Recapture 25 September. Insured informed of capture on 30 September. Informed of recapture on 6 October.	Abandoned on 1 October.	4 days	Partial loss. Ship recaptured at time of abandonment.
<i>Parsons v Scott (the Little Mary)</i>	Insurance on ship. Enemy Capture 29 March 1809.	Master made contract to sail as a cartel ship, and paid ransom for its liberation. Released on 19 April. Arrived on 13 May in England. Insured voyage (deliver a cargo salt within fishing season, not possible that year)	Abandoned on 1 May. Insured refused to reimburse master the ransom.		Owner entitled to retake ship, already safe in English port. No loss of the voyage on the ship. (obiter – may be loss of voyage on cargo?)
<i>McIver v Henderson</i>	Capture	recapture	Restoration after abandonment but before action		Total loss – possibility that repairs might be prohibitively expensive sufficient for constructive total loss.
<i>Mullett v Sheddon (the Martha)</i>	Insured cargo captured.	Condemned by prize court and sold.	unrecorded	months	Total loss. Abandonment unnecessary following sale.
<i>Brotherston and Another v Barber (the Fanny)</i>	Capture American Privateer 19 April 1814	Recapture by Royal Navy on 12 May 1814. Reached destination port on 26 September.	Abandoned 25 April 1814. Proceedings issued in Michaelmas 1814	24 days	No total loss. Restoration before issue of proceedings.
<i>Cologan and another v London Insurance (the Friendship)</i>	Insured cargo on vessel captured by American Privateer 22 October 1812	Recaptured by Royal Navy on 6 November 1812. Taken to Bermuda, where damaged part of cargo destroyed, and remainder held under embargo.	Abandoned on hearing news of part destruction and embargo.	16 days	Total loss. Cargo not restored at time proceedings brought.
<i>Dean v Hornby</i>	Insured vessel captured by Pirates in December 1851	Recapture by Royal Navy in January 1852. Taken back to load port. Afterwards, Vessel sold by Prize master in August.	Owner abandoned in April, on hearing of capture and recapture at same time. Action commenced in December for total loss.	c. 1 month	Total loss. Total loss while captured. Total loss on sale.
<b>Post-Act Decisions</b>					
<i>Roura and Forgas v Townend (the Igotz Mendi)</i>	Cargo interest insured charterparty on vessel captured in autumn 1917 by German ship.	Ship sailed to Denmark where it grounded. German crew abandoned her. Salvaged in March 1918.	Claim made on 14 March after vessel salvaged. Parties agreed that insured need not serve notice of abandonment.	3 ½ months.	Total Loss. Test on balance of probability as stated in <i>Polurrian</i> satisfied.
<i>Rickards v Forestal Land, Timber and Railways Co Ltd (the Minden); Robertson v Middows Ltd (the Wangoni); Kann v W W Howard Brothers &amp; Co Ltd (the Halle)</i>	Insured goods laden on three German vessels in 1939. Masters received orders on 3 September to put into neutral port and head back to Germany. If intercepted by Royal Navy, had orders to scuttle.	Two ships scuttled. Third reached German port.	Requirement to give notice of abandonment waived by insurers. Frustration clause prevented loss of voyage claims.	Various.	Constructive total loss as of 3 September.
<i>C Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd; Leslie &amp; Anderson Ltd v Java</i>	Perishable goods on German ships in Italian ports in August 1939.	One ship captured by British in 1941. Other vessel remained in Italian port.	October 1939	3 months	Constructive total loss on outbreak of war, abandonment in time.

<i>Sea and Fire Insurance Co Ltd (The Oder; the Lichtenfels)</i>					
Masefield v Amlin Corporate Member	Vessel captured by Somali Pirates 19 August.	Released after ransom negotiations on 28 September	18 September	41 days	No total loss.

## Barratry

<i>Falkner and others v Ritchie</i>	Insured ship victim of barratry of crew.	Recaptured by Royal Navy the following year.	Owner heard of loss and recapture at same time. Abandoned.	months	No total loss. Loss of the voyage does not apply to ship.
<i>Marstrand Fishing Co Ltd v Beer (the Girl Pat)</i>	Barratry of master in March 1936, taking vessel on local cruise in North Sea.	Sailed to Dover, Spain, Dakar, and reached British Guiana, where arrested on 19 June.	Proceedings issued when missing for a month,	3 months.	No total loss. Balance of probabilities unclear, so case for constructive total loss not made out.

## Seizure

<i>Andersen v Marten (the Romulus)</i>	Insured neutral German vessel captured by Japanese – intending to condemn contraband cargo (and vessel by alleging forged papers)	Wrecked while in control of captors. Japanese prize court condemned vessel and cargo.	Abandonment after condemnation	Not in issue	Total loss arises immediately on capture. (capture not covered by policy, so owner could not recover).
<i>Polurrian v Young (the Polurrian)</i>	Insured ship seized by Greek navy on 25 October 1912, intending to requisition cargo and possibly seize ship also.	Ship released on 8 December.	Owners abandoned on 26 October (taken as date of issue of writ).		No total loss. Could not show unlikelihood of recovery on balance of probabilities. Actual total loss not considered.
<i>Panamanian Oriental Steamship Corporation v Wright (1970)</i>	Ship condemned following infringement of Vietnamese customs regulations.				No total loss (obiter?)

## Embargo in port

<i>Rotch v Edie (1795)</i>	French Embargo on vessels in loadport				total loss
<i>Barker v Blakes (1808)</i>	American vessel detained 17 August by British Embargo. Restitution ordered on 8 October. From 6 September destination port under blockade				Abandonment on 14 October out of time.

## Frustration

<i>Hadley v Clarke (the Pomona) (1799)</i>	Embargo in friendly port by order of Council	Embargo lasted 2 years	No frustration of charterparty
<i>Touteng v Hubbard (1802)</i>	Swiss vessel detained by English Embargo for 6 months	Charterer refused to load as fruit season over	No frustration of charterparty
<i>Embiricos v Sydney Reid &amp; Co (1914)</i>	Voyage abandoned where Dardanelles closed to shipping by Turks in anticipation of war		Frustration of charter – war might be of unknown duration, construed as permanent
<i>Watts, Watts &amp; Company Ltd v Mitsui &amp; Company Ltd (1917)</i>	Voyage abandoned on 1 September 1914 in anticipation of British prohibition on vessels sailing into Black Sea		No frustration, as prohibition not issued until 26 September.
<i>Modern Transport Co v Duneris (1917)</i>	Requisition 1 month into 12 month time charter		No frustration (might have been frustration of single voyage charter - obiter)
<i>Edwinton Commercial Corporation &amp; Anor v Tsavliris Russ (Worldwide Salvage &amp; Towage) Ltd (The Sea Angel)</i>	Unlawful detention	Lasting 3 months on 20 day charterparty	No frustration
<i>Bank Line Ltd v Arthur Capel &amp; Co (1919)</i>	Time charter 12 months	Requisition by home government	Frustration

<i>F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd</i>	Time charter 60 months	Requisition by home government	No frustration
<i>Larrinaga &amp; Co, Ltd v Societe Franco-Americaine des Phosphates de Medulla (1923)</i>	Voyage contemplated in 1919 in charter 7 ½ years after signing of long-term charter prevented by requisition	Requisition	No frustration, although previous severable voyages were considered frustrated
<i>Hirji Mulji v Cheong Yue Steamship Co, Ltd (1926)</i>	Time charter 10 months	Requisition by home government	Frustration after wait-and-see demonstrated return would be slow.
<i>Assicurazioni Generali v SS Bessie Morris Company Limited (The Bessie Morris)</i>	Collision damage		No frustration – physically possible to repair
<i>W J Tatem Ltd v Gamboa (1938)</i>	Vessel seized by Spanish nationalists		Frustration of voyage charter
<i>Larrinaga &amp; Co, Ltd v Societe Franco-Americaine des Phosphates de Medulla</i>	Long term charter. Requisition of vessel during war		No frustration after 7 ½ years, although earlier severable charters had been frustrated.

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Naval Prize Act 1743	29 Geo 2, c 34
Theft Act 1968	1968 c 60
Merchant Shipping Act 1894	57 and 58 Vict, c 60
Larcenry Act 1916	1916, c 50
Slave Trade Act 1790	30 Geo 3, c 33
Slave Trade Act (1794)	34 Geo 3, c 80

### **American Codes**

Carriage of Goods by Sea Act Title 46 United States Code

Restatement (First) of Contracts

Restatement (Second) of Contracts

### **European**

Council Regulation (EC) No 356/2010 of 26 April 2010 imposing certain specific restrictive measures directed against certain natural or legal persons, entities or bodies, in view of the situation in Somalia

### **Clauses**

Institute Time Clauses Freight

([http://www.lmalloyds.com/Web/market\\_places/marine/JCC/JCC\\_Clauses\\_Project/Cargo\\_Clauses.aspx](http://www.lmalloyds.com/Web/market_places/marine/JCC/JCC_Clauses_Project/Cargo_Clauses.aspx), accessed 20 March 2016)

Institute Voyage Clauses Freight

([http://www.lmalloyds.com/Web/market\\_places/marine/JCC/JCC\\_Clauses\\_Project/Cargo\\_Clauses.aspx](http://www.lmalloyds.com/Web/market_places/marine/JCC/JCC_Clauses_Project/Cargo_Clauses.aspx), accessed 20 March 2016)

Institute War and Strikes Clauses

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