in my opinion right in not giving effect to it. I concur with your Lordships in what has been said as to the cases referred to by the Sheriff. I am of opinion that the Sheriff erred in the conclusion to which he came, and that his interlocutor should be recalled and the interlocutor of the Sheriff-Substitute affirmed.

LORD LOW was absent, and LORD ARDWALL was taking a proof.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for Pursuer (Appellant)—Murray, K.C.—Christie. Agents—Mylne & Campbell, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Dickson, K.C.)—Lippe. Agents—Guild & Guild, W.S.

Saturday, July 16.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

"GUNFORD" SHIP COMPANY, LIMITED, AND LIQUIDATOR *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED.

Insurance — Marine — Warranty of Seaworthiness — Total Loss — Competence of Master.

Circumstances in which *held* that a sailing ship which became a total loss was not unseaworthy in respect of the alleged incompetence of the master.

Insurance — Marine — Facts Material to Risk—Master's Record—Non-Disclosure—Warranty—Marine Insurance Act 1906 (6 *Edw. VII, cap.* 41), *secs.* 18 (3) (*d*), 33 (3), *and* 39 (1).

Held that a policy of insurance on the hull of a sailing ship was not voided by non-disclosure to the insurers of the fact that the master had not been at sea for twenty-two years, and on the last occasion on which he had acted as master had lost his ship and had his certificate suspended for six months, in respect that these were matters which were covered by the warranty of seaworthiness.

Insurance — Marine — Facts Material to Risk—Non-Disclosure—Over Insurance.

Held that a valued policy on the hull of a sailing ship was not voided by non-disclosure to the insurers of concurrent policies on freight and disbursements, and of honour policies taken by the managing owner in favour of himself as an individual.

The Marine Insurance Act 1906 (6 Edw. VII, cap. 41) enacts—Section 17—"A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party."

Section 18—"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract. (2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (3) In the absence of inquiry the following circumstances need not be disclosed, namely—(*a*) Any circumstance which diminishes the risk; (*b*) any circumstance which is known, or presumed to be known, to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (*c*) any circumstance as to which information is waived by the insurer; (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied warranty. (4) Whether any particular circumstance which is not disclosed be material or not, is in each case a question of fact."

Section 32—"(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest, or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance. (2) Where the assured is over-insured by double insurance—(*a*) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act; (*b*) where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured. . . ."

Section 33—". . . (3) A warranty . . . is a condition which must be exactly complied with whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of the warranty, but without prejudice to any liability incurred by him before that date."

Section 39—"(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. . . ."

The "Gunford" Ship Company, Limited, in liquidation, and Thomas Greig Hardie, shipowner, Glasgow, the liquidator thereof, raised an action against the Thames and Mersey Marine Insurance Company, Limited, for payment of a sum of £2000, being the amount underwritten by the defenders

on the hull of the "Gunford" sailing ship, which was wrecked on the coast of Brazil on 10th November 1907. Twelve similar actions, all arising out of the loss of the "Gunford," were at the same time raised by these pursuers against other marine insurance companies. All the thirteen actions were called before Lord Salvesen (Ordinary). Of these, one, against the Southern Marine Mutual Insurance Association, Limited, was also taken along with the present action by reclaiming note to the Inner House, and the two cases were heard together.

The defenders averred that the loss of the vessel was due to incompetent navigation, for which the pursuers were responsible in that they had appointed to the command of a ship a master who had not been at sea for twenty-two years, and who when last at sea had lost his ship and had his certificate suspended for six months. They averred that these were facts material to the risk which pursuers had concealed from the insurers, and further, that they had concealed from the insurers the fact that the vessel was insured to a material extent in excess of its real value.

The pursuers pleaded—"(1)The defenders having insured said vessel to the amount sued for, and the said vessel having become a total loss, they are now liable to pay said sum to the pursuers."

The defenders pleaded—"(1) The contract of insurance is void, in respect that at the inception of the voyage the vessel was not seaworthy, and the defenders should be assoilzied. (2) The contract of insurance is voidable, in respect that the same would not have been entered into by the defenders but for the concealment by the pursuers of the material facts condescended on, and the defenders fall to be assoilzied. (4) *Esto* that any valid and effectual contract of insurance was entered into, the same and any risk covered thereby were terminated by the actings of the pursuers as condescended on, and the defenders fall to be assoilzied. (5) The sending of the vessel to sea by the pursuers without making proper inquiry as to the qualifications of the master being wrongful, and their failure to do so being gross neglect, and the same having contributed to her loss, the defenders should be assoilzied. (6) The loss of the vessel being due to the wrongful act of the pursuers, and not to any of the perils insured against, the defenders should be assoilzied. (7) The pursuers having no real insurable interest in the subject-matter insured, the defenders fall to be assoilzied."

The *facts* of the case are given in the opinion of the Lord Ordinary, who on 20th July 1909, after a proof before answer, pronounced the following interlocutor:—"Repels the defences: Decerns against the defenders for payment to the pursuers of the sum of one thousand eight hundred and four pounds seventeen shillings and sixpence, with interest thereon at the rate of five per centum per annum from the 10th day of December 1907 until payment."

Opinion.—"This is one of a series of thirteen actions at present in dependence before me, all arising out of the loss of the sailing ship 'Gunford' belonging to the pursuers. Decree is sought for a sum of £2000, being the amount underwritten by the defenders on the hull of the 'Gunford.'

"The policies, which are dated 30th and 31st August 1907, are in the usual terms, and applied to a voyage from Rotterdam to Hamburg and thence to Santa Rosalia. The 'Gunford' was valued *in gremio* of the policies at the sum of £18,500. The total insurance effected by the pursuers on the hull was £19,500, but it is admitted that not more than £18,500 can be recovered, the remaining £1000 being an over-insurance the existence of which reduces proportionately the defenders' liability. In addition there was insured upon freight a sum of £5500, on disbursements £4600, on master's effects £200, and on P.P.I. or honour policies £6500. All the policies were in the name of Messrs Francis Briggs & Company, the managers for the pursuers, who were themselves large shareholders, and had besides disbursed various sums on the company's account. The honour policies were according to the evidence (which I see no reason to doubt), effected for the personal account of the managers and not for behoof of the pursuers. Including these, however, the total insurances effected on the vessel, and payable in the event of a total loss, amounted to £35,800, but as at the date of the loss one half of the freight (estimated at £4800) had been paid in advance and so was not at risk, the pursuers do not contend that they are entitled to recover under the policies insuring freight more than the amount actually at risk. The market value of the 'Gunford' if she had been brought to sale did not exceed £10,000, and accordingly the defenders represented that if the policies were all paid in full the pursuers would recover more than three times the value of what was actually at risk. This is not an accurate way of stating the facts, for the pursuers do not claim that they can recover more than £18,500 in respect of the hull, £2500 in respect of the freight, and £4600 in respect of disbursements; although it is also true that if the vessel had not been lost they would have required to look to the freight for repayment of the disbursements. Thus it is certain that it was very much more profitable for them that the vessel should be lost if they are entitled to recover under their policies to the extent which they claim, than that she should arrive safely at her destination. There is no averment, however, of any fraud on their part; and even if there had been, the facts proved completely negative any such suggestion. The vessel, her freight and disbursements, had been insured for smaller sums for at least two years before her loss, and while in certain earlier years she had been valued at £18,000 in the policies, she had at first been insured for a sum of £21,000, which amount had been greatly reduced as she grew older and became depreciated in value.

"The 'Gunford' sailed from Rotterdam

in ballast and arrived safely in Hamburg, where she lay for a couple of months before she was fully loaded. On 13th October 1907 she left Hamburg and proceeded on her voyage to Santa Rosalia. On 10th December she stranded on a reef near Cape San Roque, Brazil, and became a total loss. Underwriters to the amount of £12,000 have paid their proportion of the loss, but all the remainder, including the defenders, resist payment.

The first defence is that the vessel was unseaworthy when it started on the voyage, in respect that her master was incompetent. It is proved that for twenty-two years before he was engaged as master to the 'Gunford' Captain Sember had not been at sea but had acted as stevedore and worked at other shore employment. When last at sea he had lost his ship and had his certificate suspended for six months. The evidence of incompetence on which the defenders further rely is, in their view, completed by the manner in which he navigated the vessel, whose loss, they maintain, was entirely due to his want of skill. They give him credit for having acted with the best intentions; but they say, nevertheless, the ship was lost in circumstances under which she would not have been lost if she had been in command of a competent navigator.

"There is no doubt that in law the owners warrant the seaworthiness of a ship under a voyage policy, and that a ship is not seaworthy unless she is supplied with a competent master. The law of marine insurance has now been codified by the Act 6 Edw. VII, cap. 41, and it would rather appear from section 33 (3) that if this warranty is not complied with the insurer is discharged from liability as from the date of the breach of warranty. Accordingly, if the 'Gunford' was unseaworthy at the commencement of the voyage by reason of the incompetency of the master in charge, it would appear that the defenders would be relieved from liability even if her actual loss had no relation to the special form of unseaworthiness alleged. It is not necessary, however, to consider this matter further, or as to whether the Act has made alterations on the previously existing law in this respect, because if the master was incompetent and the loss of the ship arose, as is admitted, from an error of judgment on his part (to put it no higher), it would be safe to infer that the two things were correlated as cause and effect.

"The first circumstance that is relied on by the defenders, namely, that the master had had his certificate suspended for six months, has in my opinion very little to do with the question of his competence. If the tribunal which suspended the certificate had deemed him incompetent to command a sailing ship they should not have suspended the certificate merely but cancelled it. The fact that they permitted him after an interval of six months to resume command of a ship conclusively demonstrates that the suspension was imposed by way of penalty for some fault, which was quite consistent with his being a thoroughly competent navigator. As regards the other material fact, that he had been twenty-two years on shore, no absolute inference can be drawn from this circumstance alone. A good many instances were given in the course of the evidence of masters of vessels who had been ashore for many years and had afterwards resumed their employment at sea in the command of steamships and sailing vessels. No doubt it may be assumed that a sailor who remains ashore for twenty-two years may get somewhat rusty in the arts of navigation, but the soundness of the inference depends in each case upon the individual man, the manner in which he has employed himself, and the extent to which he has kept up his seafaring knowledge. Captain Sember had a long record of service at sea before his certificate was suspended and he took to earning his livelihood on shore. He went to sea at the age of thirteen, and served in the capacities of ordinary seaman, bo'swain, second mate, first mate, and master. He took his second mate's examination at the age of seventeen; at twenty he passed as first mate, and in 1874, when he was only twenty-five years of age, he obtained his master's certificate. From about 1876 till 1885 he served sometimes as master and sometimes as first mate on sailing vessels, and for the last six years he was master of the 'Perthshire,' a large sailing vessel belonging to Messrs Thomas Law & Sons. The 'Perthshire' was lost off the Falkland Islands, and it was in connection with her loss that his certificate was suspended. After this he found employment ashore as stevedore, chiefly of the ships belonging to Messrs Law. He had thus been some thirty years in their employment before he was engaged by the pursuers' manager, although during the first eight of these only was he at sea. It is noteworthy that Captain Sember's whole experience at sea had been in connection with sailing vessels, a somewhat rare circumstance in these days, when steamers have so largely taken the place of sailers.

"The very long period during which Captain Sember had been ashore predisposes one to infer that he may have lost some of that skill in navigation which he had undoubtedly formerly possessed. If, therefore, shortly after leaving port he had made some inaccurate observations or committed some other gross blunder which had resulted in the vessel's loss, it would not have been hard to conclude that he had lost his competency as a master. The facts, however, are the other way. Nothing happened to the 'Gunford' for nearly two months after she had been at sea, and during that period Captain Sember displayed all the qualities of a competent and skilful navigator. The 'Gunford' left Hamburg in tow of a tug, but owing to bad weather she was cast adrift and had to be brought up at anchor near Orfordness. The skilled evidence for the pursuers (and there is nothing to contradict it) indicates that the circumstances under which he had to bring his

vessel to anchor, and afterwards to navigate the Channel, were such as to be a fair test of seamanship, and although he had favourable winds thereafter until he neared the Equator the course which he steered was a proper course and one which could not have been steered successfully by a person who was not capable of taking accurate observations and who had not ample knowledge of the sailing directions applicable to the voyage which he was making. There has been much criticism of the log by the defenders' experts, notably with regard to some omissions of entries as to dead-reckoning and currents; but while these criticisms are to some extent well founded the log appears to me to be on the whole quite a creditable record of the voyage and to have been kept with reasonable care and accuracy. Captain Sember intended, according to his own evidence, to cross the Equator at a point 30° west. In point of fact he crossed it 32° 49′, which is certainly further west than it is desirable to cross the line on a voyage round Cape Horn. On the other hand, the log says that this course was forced upon the Captain by the prevalence of southerly winds, and this is apparent from the log if it be true—as both he and the chief officer assert—that the 'Gunford' could not sail closer to the wind than 7 points. The defenders' experts point out that on several occasions the log records that the vessel was sailing 6 or 6½ points from the wind, and it is probably true that if she had been kept on a course half-a-point or so more to windward she would have cleared Cape San Roque, even crossing the line at 32° or 33° west. In my opinion, however, the log cannot be taken too literally, and the bulk of the entries in it, and the only parole evidence on the subject, are to the effect that the 'Gunford' could not sail closer than 7 points to the wind if she was to make reasonable headway. As the Captain was accurately ascertaining his position from day to day, and as it was in the highest degree important to him that he should clear the Cape, I cannot imagine any reason why he should deliberately keep the vessel to leeward more than was absolutely necessary.

"The maritime guides that prescribe the course for a vessel bound round Cape Horn are not at one as regards the proper point at which to cross the Equator. In the months of November and December, at all events, I do not think Captain Sember committed any error in judgment in crossing at nearly 33° west. Indeed, from a table prepared by Captain Mauray, it would appear that the majority of vessels in these months cross between 30° and 33°. The expectation of Captain Sember, who had on many previous voyages followed the same course, was that the wind would draw more easterly as he approached Cape San Roque. He was disappointed in this, but held on until he was, on the 24th of November, within sight of land. Finding that he could not clear the Cape he put about on the starboard tack. Some short time afterwards a slight shock was felt, which some of the crew attributed to the ship having touched a rock, but which the master and the mate both attribute to a heavy sea.

"The courses which the vessel thereafter took have been laid down by Captain Macintosh for the pursuers and Captain Burns for the defenders on separate charts. It is not necessary to go into details. It is sufficient to say that from the 24th to the 27th the 'Gunford' stood out to sea. She then turned and again made to pass Cape San Roque, but although she got a considerable distance to the east of the point reached on the 24th she was still unable to weather the headland. On this occasion the vessel undoubtedly struck on a submerged rock, from which, however, she was got off without apparent damage; and she then again stood out to sea on a long tack which took her across the Equator. Under ordinary circumstances the 'Gunford' should have been able easily to have weathered Cape San Roque after this tack, but unfortunately the prevailing southerly winds and the westerly current again frustrated the attempt, and the 'Gunford' came back on a course considerably to the westward of that which she had followed on the previous occasion. Captain Sember, observing that he could not clear the Cape on 10th December, again put the ship about, but as the deck had buckled and the vessel was making water, no doubt as a consequence of the stranding of the 29th of November, his crew objected to his again proceeding out into the open sea and demanded that he should take the vessel close in shore. He had no alternative but to do so, and set a course for the two-mile channel, which is frequented by the local traffic, intending to anchor and to obtain assistance from passing ships. He stood in too far, however, and grounded on a reef marked on the chart, with the result that the vessel was totally lost.

"It is impossible to exonerate Captain Sember from blame in connection with these manœuvres.

"In the first place, I think that he went in too close to the shore on the 29th of November, although, if his evidence and that of the chief officer be accepted, the ship then grounded on a reef of which there is no indication on the chart, and of the existence of which no warning was given by the soundings taken. On the 10th of December, moreover, I think he should not have attempted to get to an anchorage during the night, and at all events ought to have proceeded with more caution than he displayed. On the other hand, it is certain that the luck all the time was against him, and that but for the persistence of the southerly winds he might easily have cleared Cape San Roque, when there would have been no further difficulty in navigating to Cape Horn. At the same time, the error which he committed was not such as, in my opinion, to demonstrate any initial incompetence on his part as a navigator, but was just such an error as is constantly made the subject of inquiry by local tribunals at the instance of the Board

of Trade. It is not to be left out of view that the chief officer, against whose competence as such nothing is alleged, gives him a very high character for skill in handling the ship and there is no counter evidence. As regards the expert evidence, I prefer that which was given by Commander Mackintosh to that of Captain Burns, and on the whole I think there is nothing in the record of the ship's voyage from Hamburg which is not consistent with Captain Sember being a reasonably capable and skilful navigator, although his desire to make a quick voyage in the interest of the owners, and his previous successful experience of the same course, may have led him to take his ship nearer the shore than was prudent. I may add that having seen Captain Sember I formed a very favourable opinion of his physical fitness, alertness, and general intelligence. I accordingly reach the conclusion that the defenders (and on them the *onus* rests) have failed to prove that the 'Gunford' was unseaworthy by reason of the captain's incompetence.

"The next defence is that the policies are voidable on the ground that there was not a disclosure by the assured in terms of section 18 of the Marine Insurance Act 1906. It is said that it was the duty of the owners to inform the underwriter of the master's past record and especially of the fact that he had been twenty-two years on shore, and several underwriters have been called to say that in their view this was a material fact, and if known would have prevented them from underwriting the risk. The pursuers on the other hand found on sub-section 3 of the same section (*b*), (*c*), and (*d*) whether the exceptions apply depends partly on the practice of the underwriters, and it is conclusively established by the evidence (*first*) that the name of the master is not inserted in the policy at all but is always left blank, (*second*) that it is only on very rare occasions that the underwriters make any inquiry as to his name or history, and that they rely on the shipowners to engage a competent master, (*third*) that a register is kept at Lloyds which is accessible to underwriters, and which they often consult, containing a complete history of the service of every British shipmaster. It is said that in this particular case it would have been difficult for the underwriters to ascertain the name of the master because he had been so recently appointed, and that it would be impracticable from a business point of view for them to consult the register owing to the rapidity with which they have to decide as to whether they will take a line that is offered. I am afraid that neither of these considerations can receive any weight. If the record of a master is a matter which the insurer in the ordinary course of his business has the means of knowing, as I think is obvious from the fact that a special register is kept for the purpose and regularly posted up at short intervals, there is no duty on the shipowners to disclose it. Again if the underwriter chooses to rely on the general reputation of the shipowner, and makes no inquiry as to the master, I think he must be held to have waived the information. Further, as there is a warranty of seaworthiness, it would seem to be superfluous to disclose any circumstance with regard to the record of the master, as the shipowners impliedly guarantee his fitness for the position and must suffer if he proves to be unfit. It may well be that some underwriters would refuse to insure a vessel under the command of a man who had had his certificate suspended. If so, they can ascertain this for themselves or by inquiry at the owner. In the present case Mr Briggs was unaware of the suspension, although he no doubt could easily have obtained the information, but I think it would be making the contract of insurance far too precarious from the shipowners' point of view if it were held to be his duty to obtain a complete record of the master's past career, and then communicate to the underwriter every circumstance in it which might affect his mind.

"The other matter which was not disclosed, and the failure to disclose which is said to void the policy, is the extent to which the vessel was over-insured, and reference was made to two cases—the '*Ionides*,' 1874, L.R., 9 Q.B. 531, and *Rivaz* v. *Gerussi*, 1880, 6 Q.B.D. 222. The '*Ionides*' was a case of goods being insured very much above their real value without a disclosure of the over-valuation to the underwriter, and it was held to be proper to leave to the jury whether the valuation was so excessive that it was material to the underwriter to know of it. I can well understand that in the case of a cargo with regard to which the underwriter has and can have no information, but it does not apply to a ship like the "Gunford," the market value of which the defenders were just as capable of appraising as the pursuers. All the materials necessary to form an opinion on this question were before the defenders at the time when the policies were effected, and they knew quite well that a sailing ship fifteen years old was not worth in the market more than £4 to £5 per ton. The fact is that the responsibility for over-insurance of ships rests with the underwriters and not with shipowners. Underwriters habitually decline to insure vessels at their market value, or indeed substantially below the cost price. The reasons why they adopt this course in their own presumed interests (although it would seem to furnish a motive to the shipowner to be less careful of the safety of the ship) are disclosed in the proof. All such policies are free of particular average under 3 per cent. When the 3 per cent. is calculated on a small sum—say £10,000—all average above £300 has to be paid for by the underwriter; whereas if the same ship is insured on a declared value of £20,000 he escapes all claims below £600. The same principle applies in cases of constructive total loss. Underwriters have therefore deliberately adopted the policy of declining to insure vessels at their market value, and they prefer to run the

risks of the owners being careless or dishonest rather than have to meet the claims which they would otherwise avoid, or to materially raise the annual premiums. It is said that the pursuers made a practice of over-insuring their vessel. So far from that being a point against them, it seems to me to be evidence of their good faith. Apart from all this, the statute provides that a valued policy is in the absence of fraud conclusive evidence of the insurable value of the subject intended to be insured. The defenders had been on the risk for many years, and had drawn premiums based on the 'Gunford' having a much higher value than her market value. It is vain, therefore, for them to contend that the vessel was over-insured because they chose to insure her at twice her market value.

"The defenders, however, contended further that if they had known of the other policies on freight and disbursements they would not have taken a line upon the hull of the 'Gunford,' and that the failure to disclose that these policies were being concurrently effected voids the policy. I cannot see that there is any duty whatever on the part of the assured to disclose to the underwriter on hull, who accepts the vessel at a declared value, that he is also effecting insurances upon freight and disbursements. These may be effected long after the policy on hull, and indeed in one of the cases before me this was the case. There can be no implied warranty when the shipowner asks an underwriter to take a line on a vessel that he is not also going to cover the freight and disbursements. Here, if I leave out of view for the present the honour policies, there seems to me no evidence whatever that the freight and the disbursements were over-insured; and I cannot follow the defenders when they contend that an insurance on hull must be held, in the absence of a statement to the contrary by the owners, to cover any freight or disbursements which may be at risk. No doubt the honour policies are in a different position, but I have already held that the pursuers are not concerned with these, and that the fact that their manager entered into contracts which are not legally enforceable, for his own behoof and without their authority, is, in the absence of fraud, as irrelevant as if an outsider had had a gamble on the fate of the 'Gunford.' Moreover, I think it is not in accordance with 'the principles and calculations on which underwriters in practice act' that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept. The only evidence that inquiry is ever made on this subject is where the underwriter on hull is anxious to secure a share of any policies effected on freight or disbursements, and no instance is forthcoming of any underwriter on hull ever exacting an undertaking as a condition of his insurance that the shipowner should not take out policies on freight and disbursements.

"The result is that in my opinion the defences fall to be repelled."

The defenders reclaimed, and argued—There was here concealment by the insured of (1) gross over-insurance, and (2) incompetence of the captain, and concealment of these facts rendered the policies voidable under section 18 of the Marine Insurance Act 1906 (6 Edw. VII, cap. 41). The contract of marine insurance was one of indemnity against maritime loss, and it required absolute *bona fides* and put the duty of disclosing all material facts on the insured—Arnould on Marine Insurance, 8th ed., secs. 575, 578, 579, 591. The idea underlying marine insurance was that no person was to get out of the insurance more than the value of the risk—*Hamilton* v. *Mendes* (1761), 2 Burrows 1198, *per* Lord Mansfield 1213, foot; *Blackburn, Low, & Company* v. *Vigors*, 1887, 12 A.C. 531, *per* Lord Halsbury 536; *Ionides* v. *Pender*, 1874, 9 Q.B. 531, *per* Lord Blackburn 534, and 1 Aspinall 432, *per* Mr Justice Hannen. The effect of these cases was that it must be proved by underwriters whether from the ordinary normal underwriter's point of view there was concealment of a material fact. This was also expressed in the Act—section 18, sub-section 2. The policy of the law was not to allow gaming. It would not indemnify a man who would be worse off if the ship arrived, but a man who would be better off. As to the over-insurance, the question as stated by authority was—Was the over-insurance an incentive to loss rather than a protection against it? The present case was primarily one of over-insurance and not of over-valuation, but the distinction was really immaterial. Anything, whether over-insurance or over-valuation, which acted as an inducement to loss was material to the risk. In *Ionides* v. *Pender*, *cit. sup.*, though the question was one of over-valuation, the Court took into account that other insurances had been made and over-valuation was only the means by which the Court arrived at the cardinal test, which was—Was the insured going to be benefited by the loss? The tremendous premiums paid in the present case made it absolutely certain that there would be a debit balance if the vessel arrived safely, not only on a series of years but on the single voyage, and thus the over-insurance of the vessel was a direct incentive to loss. It was material for the underwriter to know this, the question being—Was this a special or an ordinary risk? That over-insurance was material to the risk appeared quite clearly from the case of the *Tynedale Steamship Company* v. *Newcastle Home Trade Insurance Company*, 1891, 7 T.L.R. 81 and 544. This case stated quite clearly two grounds of exception (1) over-valuation, (2) over-insurance, and in considering the latter it laid down that regard would be had not only to what the owner did but to what the manager and shareholders did. This case was a clear judgment by Mr Justice Day on the law as to over-insurance, and also by the Appeal Court to this extent—that the defence was a relevant defence. This argument was enforced by the case of *Herring* v. *Janson and Others*, 1895, 1 Com. Cas. 177. The

standard to be followed was the conduct of a prudent underwriter—*Rivaz* v. *Gerrusi* (1880), 6 Q.B.D. 222. Further, the contract was one of *uberrima fides*, and every material fact in the knowledge of the insured or his employees should be disclosed—*Baker & Adams* v. *Scottish Sea Insurance Company*, February 28, 1856, 18 D. 691, per Lord President 700; *Hutchinson & Company* v. *Aberdeen Insurance Company*, May 23, 1876, 3 R. 682, 13 S.L.R. 456; *Russell* v. *Thornton*, 1859, 29 L.J.Exch. 9; *Bates* v. *Hewitt* (1867), 2 Q.B. 595; *Blackburn, Low, & Company* v. *Haslam* (1888), 21 Q.B.D. 144; Arnould on Marine Insurance, section 616. On the evidence there was over-insurance such as would affect a prudent underwriter, and thus there was concealment of a material fact. The hull was only worth £9000 and the disbursements were included in freight. As to the captain, the fact that his certificate had been suspended and that he had not been at sea for more than twenty years ought to have been disclosed. It was no answer that the defenders could have got this information from Lloyds' books, because the duty of disclosure was by the Act expressly laid on the insured—*Bates* v. *Hewitt, cit. sup.*; *Morrison* v. *Universal Marine Insurance Company*, 1 Aspinall 503, L.R., 8 Exch. 40 and 197. Nor was it an answer that the warranty of seaworthiness made disclosure superfluous, because the above facts were collateral and altogether independent of seaworthiness, and were such as would affect the mind of a prudent underwriter. Such a collateral fact had been taken into account in *Hutchinson & Company* v. *Aberdeen Insurance Company, cit. sup.* But in any event at common law the insured was bound to give a seaworthy ship, and this implied a competent captain—Arnould, sections 721, 722. On the evidence it was proved that there was gross incompetence.

Argued for the pursuers—There was here no suggestion of fraud from beginning to end, and therefore it was necessary to deal with the case on the footing that the insurances were honest. This imposed a heavy *onus* on the defenders. Nobody maintained that the pursuers intended to recover more than the amount at stake, and the Act itself provided for mere over-insurance as perfectly legitimate—section 32. The defenders had failed to distinguish between over-insurance and over-valuation. The law quoted by the defenders had little or nothing to do with the present case. *Ionides* v. *Pender, cit. sup.*, was really a case of over-valuation. It was not a case of concealment but of misrepresentation to the insurer by declaring a value known to be false. *Tynedale Steamship Company* v. *Newcastle-on-Tyne Home Trade Insurance Association, cit. sup.*, was not a satisfactory report; *Herring* v. *Janson & Others, cit. sup.*, was the case of a valued policy sought to be reopened on the ground of fraud; *Rivaz* v. *Gerussi, cit. sup.*, was a plain case of fraud; *Bates* v. *Hewitt, cit. sup.*, was only relevant to the knowledge of the insurer; *Hutchinson & Company* v. *Aberdeen Insurance Company, cit. sup.*, and *Blackburn, Low, & Company* v. *Vigors, cit. sup.*, were not in point. The Court was therefore face to face with a novel proposition, not supported by authority, that the massing of insurances over the real value was such a concealment of material facts as to void the policy. There was, however, no authority for the proposition that a person who takes out a particular insurance on a ship is bound to disclose other insurable interests. It was further a perfectly good insurable interest to insure not only the value of the ship but also the capital which the shareholders had invested in the company. Thus Arnould considered that as the ship grew older, what was insured was not the ship, but the instrument for earning freight *plus* the break-up value. The underwriters knew this, and it was the only practical way of doing. The law was that the owner and everybody else with an insurable interest was entitled to insure every insurable interest he could qualify up to the full amount. This did not mean over-valuation but over-insurance. Here there were four separate insurances concerned, viz., hull, freight, disbursements, and manager's policies. As to the hull, the underwriters had full means of knowledge themselves, and further, the whole insurance was necessary to replace it. The Act entitled the insured to treat freight as a separate interest. So with disbursements, though these ought to be covered by freight. At the most it might be that a particular interest had been twice covered, and the penalty would be that the surplus could not be recovered—*Roddick* v. *Indemnity Mutual Marine Insurance Company*, [1895] 2 Q.B. 380, *per* Lord Esher, 384. Then as to the manager's P.P.I. policies, these might be a wager on the ship, but if he chose to take out policies on his own account this did not affect the owners and the ship got no benefit from it. As to the captain, there were two facts which it was said ought to have been disclosed—(1) his suspension, and (2) that he had been twenty years on shore. But there was no authority either in law or in the practice of underwriters to raise any such duty, and the conclusive answer to defenders' contention was that any such disclosure would be superfluous because it was covered by the express or implied warranty of seaworthiness. The effect of insisting on the necessity of such disclosure would be to wipe out section 18 (3) *d*, from the statute. So far as this distinction went there could be no difference between man and ship. The warranty of seaworthiness was a warranty that the vessel would be reasonably fit, but only for ordinary perils, and not for anything out of the way. "Seaworthiness" might cover many facts, some relevant only to seaworthiness and others relevant also to other matters material to the risk. But if a fact was relevant to seaworthiness and to nothing else disclosure of it was superfluous. Thus the captain's qualifications here were relevant only to seaworthiness, and could never be material to the risk except so far

as they put seaworthiness in doubt. There might be other departments than seaworthiness material to the risk, *e.g.*, the case of *Bates* v. *Hewitt, cit. sup.* (the "*Georgia*" case); *Haywood* v. *Rogers* (1804) 4 East 590; *Baker & Adams* v. *Scottish Sea Insurance Company, cit. sup.*; Arnould, sections 618, 619. It was impossible, however, to maintain here that the vessel was unseaworthy, and, in any event, the *onus* of proving unseaworthiness was very great —*Pickup* v. *Thames and Mersey Marine Insurance Company, Limited,* (1878) 3 Q.B.D. 594. There was no evidence that the captain was incompetent. At the most he was only guilty of an error in judgment. The pursuers were entitled to decree, but the interlocutor of the Lord Ordinary was at fault, because, according to the well-known rule of law, if they had not recovered their 20s. in the £ they were entitled to decree for the full sum concluded for, and not for a fraction, against any one underwriter, leaving him to work out his claim against the other insurers—*Newby* v. *Reed,* 1763, 1 W. Bl. 416.

At advising—

LORD PRESIDENT—In this case I am entirely satisfied with the very full and careful note of the Lord Ordinary, and I have really nothing to add to what his Lordship has there said. As, however, the case has been very anxiously pled I shall simply say a few words upon each of the crucial points.

It is said, first, that these policies are bad upon the ground that the vessel was unseaworthy, in respect that she was provided with a captain who had not the requisite qualifications. Now I agree with the Lord Ordinary in the result he has there come to. I think upon the proof the captain showed that he had the requisite qualifications of seamanship throughout the voyage, and I think it would be impossible for this Court to hold that the mere fact — because I think it comes to no more than that — that he eventually lost his ship was enough to enable one to say that he was not possessed of a proper seaman's qualification.

But besides that, the policy is impugned upon two other grounds, both falling under the same head in law, namely, concealment of a material fact. There is no dispute in regard to the law upon that matter, viz., that the insured must disclose any facts that are known to them that are in any way material to the risk. Now the first concealment that is alleged is that the insured did not communicate the fact that the captain had for a long time not been at sea. I confess that at first that argument struck me as a powerful one, because although it is true that a man may be a long time off a job and yet may be a competent man at that job, still one cannot help the natural feeling that one would at least like to have been told before one insured the ship that the captain had not been at sea for about twenty years—as this captain had not been. But in the argument before us I came to the conclusion in the end that the legal position which was taken up by the defenders here was correct, namely, that inasmuch as any deficiency in the captain only went to that general condition of efficiency of the ship which is denominated by the word "seaworthiness," and inasmuch as seaworthiness is the subject of a warranty, the rule of law must apply which lays down that there is no duty of disclosure of any facts which go to matters which are covered by an express warranty.

The other matter of concealment was what was called over-insurance. Now there I do not think the case is made out. The authorities upon which the reclaimers principally relied in this matter were the cases of *Ionides* v. *Pender* (L.R., 9 Q.B. 531) and *Rivaz* v. *Gerussi* (6 Q.B.D. 222). The latter case has but small application, because the circumstances were quite different, and, in particular, there was involved in it the matter of fraud. It has been pointed out by the Lord Ordinary as a distinctive feature of this case that no fraud is alleged. *Ionides,* however, is a case which upon the first blush is more like the present, but that was a case of over-valuation of goods, and I think when it is looked into over-valuation is quite a different thing from what, in the sense of this case, is called over-insurance. I do not mean to say that over-valuation does not necessarily bring with it over-insurance, because, of course, if you over-value goods and then insure those goods to the inflated value it is a perfectly accurate use of language to say that you have over-insured them; but that is a different class of thing from what is said to have been done here. What was done here was that the hull was insured on a valued basis at the sum of £18,500. The reclaimers here have admittedly confessed that they do not propose to touch and cannot touch this valuation of £18,500. They take it, by contract, that that is a good valuation between them. I could not help thinking that while they say that *in initio,* they, so to speak, forget they have said it when they come to talk about over-insurance, because the figure they make out upon over-insurance depends a great deal upon treating the vessel as not really worth £18,500, but worth about £9000. I do not think that in argument they can validly blow hot and cold in that way. They admit they must pay the £18,500, and they admit that although they know perfectly well the vessel is only worth in the market say £9000. At the same time, not only is the practice of such valuation unquestioned, but there is after all a good deal to be said for it. It is all very well to say—and it may be true—that if you sold the ship you would only get £9000 for it. But that is not at all the same thing as to say that £9000 will really put the shipowner in the same position with his ship lost as he would have been in with his ship extant, because he cannot go into the market and get for £9000 something that will do the same thing for him and earn the same profits as his old ship would have

done. This really opens a very wide question, because I do not suppose there is any property which is subject to quicker deterioration than ship property, and that not really because a ship necessarily wears out so very quickly, but because it is so extraordinarily easily made out of date by newer types of ships and improvements in building. I do not think anybody has yet said it is the law—which in one sense would be the strict view of the situation—that you could never recover in respect of a ship—I am using the word ship as meaning the hull, and I am not dealing with the question of freight or anything of that sort—that you could never recover anything more in respect of a ship than what you could actually have sold the ship for if you put it into the market. At any rate, the reclaimers here have not contended anything of that sort, because they have admitted they cannot quarrel with the £18,500.

Now if they cannot quarrel with the £18,500, and it is upon their own showing not taken as over-insurance or over-valuation, we next come to the freight. The freight was insured for full value. and as a matter of fact it was all upon the risk when the ship started. At an intermediate period of the voyage, which was soon after the start, a certain amount of the freight was paid, and of course that amount of freight was not on the risk when the casualty occurred. Now nobody says that the insured are going to be paid upon that, and therefore freight being neither here nor there upon the matter of over-insurance the only other matters are the P.P.I. or honour policies.

It seems to me that the proposition that the reclaimers would have to make good in law would be this—that an insurance upon the hull, because these cases before us are both policies on the hull, for a value as to which no objection is taken is to be bad if at the same time there are not communicated to the insurers all the honour policies which either the insured had made or proposed to make. I have always felt considerable difficulty in applying "*Ionides*" v. *Pender* to this case, even if the case were on all fours on other matters, because it is not quite easy to make out exactly the position of affairs there, as the report in that case does not set forth the documents, and we have here no access to the papers in the case. Still I think it must be taken from the judgment that it was held that the insured there had failed to communicate an over-valuation which at that time had been made, and which therefore he could have communicated. We have been furnished with lists of the precise dates of all the various policies by the parties in this case. In the case at least of one of the policies sued on a great many of these honour policies were still things of the future, and it is something surely quite new to say that you are bound not only to disclose what has already been done, but to disclose something which is still in intention, and which may not be done, as was the case here, until six months after the policy. I think there is another difficulty, that these honour policies as matter of fact were not nearly all taken for the ship, but were to a large extent taken for Briggs as an individual, and I feel difficulty therefore in holding that a policy upon the hull for the ship should be held as bad because a person who was acting as managing owner or managing director did not disclose that he as an individual had honour policies in connection with the same venture.

Upon the whole matter, therefore, I come to precisely the same conclusion as the Lord Ordinary, and I think the reclaiming note should be refused.

The LORD PRESIDENT intimated that LORD KINNEAR, who was not present at advising, concurred in this opinion.

LORD JOHNSTON—I have come to the same conclusion, and I would not think it necessary to add anything to what your Lordship has said but for the importance of the case, and for the very exhaustive way in which it has been dealt with by the Lord Ordinary and by counsel before this Court. On the first question, that of the unseaworthiness of the ship by reason of the inefficiency of the captain, I should, sitting alone, have had more doubt than your Lordship in the chair has expressed. I think that the selection of a captain who had been away from sea, doing shore work for twenty years, requires very substantial reasons to be given in support of it. Now in the present case what causes my hesitation is that the captain was appointed with, as it seems to me, very little inquiry and very little consideration indeed, and that the ship was lost on sighting the South American coast under circumstances which undoubtedly put in issue the question of proper navigation, and throw doubt on the master's exercise of judgment and skill. On the other hand, there is undoubtedly a good deal to say for his qualifications having been set up, so to speak, *ex post facto*. On this point, then, while I acquiesce in the judgment on which I understand your Lordships are agreed, all that I am able to say is that, treating the question as one of fact, my verdict amounts to one of not proven, which, as the *onus* is on the defenders, leads to a judgment against them.

On the second question, that of over-insurance, as soon as it was ascertained that the policies in question were valued policies, and as soon as it was admitted what the effect of such valuation was, it seemed to me that substantially the case was at an end, and that the minor points which were so keenly discussed were really not of materiality to the true issue in the case.

With these observations I concur with your Lordship that the judgment of the Lord Ordinary should be adhered to.

LORD SALVESEN, whose judgment was the subject of the reclaiming note, having since taken his seat in the Division, was present at the advising.

The Court recalled the interlocutor of the Lord Ordinary, of new repelled the defences, and granted decree in terms of the conclusion of the summons.

Counsel for the Pursuers (Respondents)—D.-F. Scott Dickson, K.C.—Spens. Agents—Webster, Will, & Company, W.S.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Murray, K.C.—Mair. Agents—J. & J. Ross, W.S.

Friday, July 15.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

AULD AND ANOTHER (RODGER'S TRUSTEES) *v.* ALLFREY AND OTHERS.

Succession—Legacy—Conditional Legacy—Election—Clause of Forfeiture—Intimation by Trustees to Beneficiaries.

By his trust-disposition and settlement J. R. gave the residue of his estate in liferent to his brothers and sisters, and after the death of the last survivor thereof he bequeathed the fee in equal proportions to such of his nephews and nieces as might then be alive *per capita*. He further provided that, as his brother A. R. was then resident in America, the provisions made in favour of him and his children should only take effect "in the event of his and their returning to Scotland within the period of three years from the date of my decease and thereafter continuing to reside permanently in Scotland. . . . But declaring always that should the said A. R. and his children, or should his said children themselves in the event of his decease, fail to return to Scotland within the said period of three years from the date of my decease, and continue to reside permanently there as aforesaid, then and in that case he and they, or such of them as may so fail to return and remain as aforesaid, shall lose and forfeit the foresaid provisions hereinbefore conceived in their favour. . . ." J. R. died in 1873. A. R. returned to Scotland within the prescribed period of three years, and enjoyed his liferent provision till he died. His two sons did not so return. In a multiplepoinding raised by J. R.'s trustees in 1909, after the death of the last liferenter, A. R.'s sons claimed the shares of the estate conditionally bequeathed to them as aforesaid. They averred that they had no knowledge of their uncle's death and of the provisions in their favour until long after three years from the date of his death, and maintained accordingly that they had not incurred the forfeiture. The trustees and other claimants maintained that the clause of forfeiture had come into operation three years after the testator's death.

Held that A. R.'s sons were entitled within three years from the testator's death to elect whether they would remain in America or return to Scotland, and that as no opportunity had been given them of making such election they had not forfeited their right to their provisions.

Per Lord Ardwall—"The practice both of the Court and of the profession has been uniformly to the effect that it is part of the duty of trustees to intimate to beneficiaries that a bequest has been made to them."

William Auld, C.A., Glasgow, and another, trustees of the deceased James Rodger, who died 11th May 1873, acting under his trust-disposition and settlement, brought an action of multiplepoinding and exoneration dealing with the share of residue conditionally bequeathed to his brother Alexander Rodger and his children. In his settlement Mr Rodger, *inter alia*, directed—"In the seventh place, I direct and appoint that the whole rest, residue, and remainder of my means, estate, and effects . . . shall be held and applied by my trustees in manner following: that is to say, they shall hold and invest two parts or shares of said residue for behoof of each of my brothers Thomas Rodger and Alexander Rodger, and one part or share thereof for behoof of each of my sisters Mrs Philippa Rodger or Young and Mrs Margaret Eliza Rodger or Young, and the said Janet Smith or Rodger, my wife, but that only in liferent for their and each of their respective liferent alimentary uses allenarly: Declaring that in the event of the death of any of the said liferenters either before or after me, the liferent interest of such deceasers or deceaser in their said respective shares of said residue shall accresce and belong to the survivors in the same proportions as those hereinbefore specified, if more than one shall be alive at the time, or to the survivor if only one shall be alive at the time, and at the death of the last survivor of the said liferenters my trustees shall hold the capital of the said residue of my means and estate in equal proportions for behoof of such of my nephews and nieces as may then be alive *per capita*, and the surviving issue of any of my nephews and nieces who may have predeceased the last surviving liferenter *per stirpes*, that is, such issue being entitled equally among them, if more than one, to the share of said residue to which their father or mother would have been entitled had he or she survived. And whereas my brother Alexander Rodger is now resident in the United States of America, therefore I do hereby provide and declare that the provisions which I have now made in favour of him and his children shall only take effect in the event of his and their returning to Scotland within the period of three years from the date of my decease, and thereafter continuing to reside permanently in Scotland: Declaring that in case he shall intimate to my trustees, or to their agent or factor on their behalf, that he and his children