as is here conceded, in the absence of a descriptive label an offence would have been committed, the label, to furnish a ground of defence, must in my view be such as to make it clear to the purchaser that the commodity is *not* butter.

The Court, in respect that the appellant did not insist on his appeal on the second charge, answered the second question of law in the affirmative, and (the Lord Justice-General dissenting) answered the first question of law in the negative.

Counsel for the Appellant—W. T. Watson, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent — Patrick. Agents—Croft-Gray & Company, S.S.C.

COURT OF SESSION.

Friday, December 21.

SECOND DIVISION.

[Lord Sands, Ordinary.

BORTHWICK *v.* BRITISH GENERAL ASSURANCE COMPANY, LIMITED.

DEMETRIADES *v.* NORTHERN ASSURANCE COMPANY, LIMITED.

CAMBITSIS *v.* NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED.

THE "SPATHARI."

Insurance — Marine — Misrepresentation and Concealment — Duty to Disclose — Facts Material to the Risk—Greek Ownership of Ship —Marine Insurance Act 1906 (6 *Edw. VII, cap.* 41), *secs.* 17 *to* 20.

A foreign ship was purchased in Britain by a Greek, and thereafter transferred to a British subject for a limited time and for a limited purpose and was registered under the British flag. When the vessel reached Greece she was to revert to the Greek purchaser and thereafter to pass into the hands of Greeks. During the voyage the vessel was to be managed by the Greek purchaser, who, however, was to act without a salary, receive the freight, and be liable for the disbursements apart from the insurance. He was, moreover, interested in the cargo. The vessel was insured by the British transferee, and the cargo by the Greek cargo owner at a time when Greek vessels were only insurable in the marine insurance world at exceptionally high premiums. The Greek interest in the vessel was not disclosed to the underwriters, and she was represented to be British owned. In an action at the instance of the insured against the insurers in respect of total loss, *held* (1) that the Greek interest in the ship was a fact material to the risk, that the state of the market at the date of the insurance with regard to the insurance of Greek ships imposed on the insured a duty of disclosing this interest, that there was nothing to put the underwriters on their guard so as to impose on them a duty to make inquiry, and therefore that the policy was voided for non-disclosure; (2) that the representation that the vessel was entitled to be registered as British owned was not in accordance with the facts of the case, and that the policy was consequently voided by active misrepresentation on the part of the insured.

Insurance—Marine—Scuttled Ship—Doubt as to Privity of Insured—Burden of Proof —Failure to Establish Real Cause of Loss.

Opinions per curiam that where in a claim under a policy of marine insurance in respect of the loss of the ship the evidence establishes that the ship was scuttled, but leaves it in doubt whether the insured were privy thereto, the insured had failed to prove their case.

La Compania Martiartu v. *Corporation of the Royal Exchange Assurance*, [1923] 1 K.B. 650, and *The "Elias Issaias,"* 1923, 15 Lloyd's List Law Reports 186, *commented on.*

Insurance — Marine — Insurable Interest — Commission — Commission not Specifically Mentioned in Policy.

Commission due under a collateral agreement is not covered by a policy on goods.

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. (5) The term 'circumstance' includes any communication made to or information received by the assured." Section 19—"Subject to the provisions of the preceding section as to cir-

cumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer (*a*) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by or to have been communicated to him; and (*b*) every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent." Section 20 (1)—"Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract. (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

Robert Forrester Borthwick, shipbroker, Glasgow, *pursuer*, brought an action against the British General Assurance Company, Limited, *defenders*, for payment of a sum of £650 alleged to be due under a policy of insurance on the ship or vessel called the "Zachris Tophelius," re-named "Spathari," executed at Glasgow on the 15th day of April 1921. Actions were also brought by H. Demetriades & Company, shipbrokers, Glasgow, against the Northern Assurance Company, Limited, and by Nicolas Cambitsis, merchant and commission agent, Glasgow, against the Norwich Union Fire Insurance Society, Limited, on policies over cargo carried on the "Spathari." The actions were heard together.

The defenders, the British General Assurance Company, Limited, pleaded, *inter alia*—"6. The pursuer having made material misrepresentations to the defenders before the contract was entered into the defenders are entitled to avoid the contract, and having so avoided it should be assoilzied. 7. The said contract having been made void by the pursuer's breach of the representation condescended on, the defenders are entitled to absolvitor. 8. The pursuer having failed to disclose to the defenders material facts and circumstances affecting the insurance risk undertaken by them they are entitled to avoid the contract, and having so avoided it the defenders should be assoilzied."

Similar pleas were stated for the defenders the Northern Assurance Company, Limited.

A proof was allowed and taken. The *facts* of the cases and the import of the evidence so far as material appear from the opinion of the Lord Ordinary (SANDS) in the principal action, who on the 31st October 1922 assoilzied the defenders in all three actions.

Opinion.—"The pursuer in this case is a shipbroker and marine surveyor who for a number of years carried on business in Glasgow and afterwards in London. He appears to have met with misfortune, for he was at one time bankrupt, and he does not seem to have satisfactorily re-established himself. He served in the war, and on its termination he returned to Glasgow and endeavoured to collect some business. He had no office of his own, but he obtained a seat at a desk in the outer room of the office of Mr Demetriades, a Greek subject, who carried on a shipbroking and general export business in Glasgow. The pursuer was without means except what he could earn.

"In the autumn of 1920 Demetriades was in correspondence with a group of Greek gentlemen in the Levant, who were interested along with Demetriades in a scheme for opening up an iron ore mine in the island of Samos, of which Demetriades was a native. In connection with this scheme it was proposed that a vessel should be purchased to carry workmen and material to the scene of operations. After some negotiations Demetriades purchased a small steamer lying at Hull, the 'Zachris Tophelius,' which apparently had formerly belonged to the Russian Government, and had been sent by some persons in Finland for sale in this country. The negotiation for the purchase was a long and intricate one. The pursuer went to Hull and inspected the ship, and then got into correspondence with the master for its purchase by himself on behalf, as he represented, of some person other than Demetriades, who at the same time was endeavouring to negotiate a purchase through an agency in London. I was not altogether satisfied with the explanation given as regards these contemporary negotiations.

"But, in any event, it is not in dispute that the vessel was eventually purchased by Demetriades at a price finally fixed at £2550, and ostensibly, at all events, for the Samos mine scheme. The correspondence is incomplete, and though the vessel was purchased for the purposes of the Levant syndicate, it is not clear that Demetriades purchased it as their agent in such a way as to restrain him from doing what he pleased with it if he changed his views.

"It was proposed that the vessel should be registered under the British flag. There may, as defenders suggest, have been sinister reasons for this, but the pursuer states reasons for it, particularly with reference to the state of war in the East, which *prima facie* are not unreasonable and have not been shown to be unreasonable. In order that the vessel should be so registered it was necessary that a British owner should be found, and that the vessel should undergo a somewhat extensive overhaul to satisfy Board of Trade requirements. Demetriades was not himself a British subject, and he does not appear to have had available the means either to pay the purchase price or to pay for the overhaul. His correspondents in Greece professed themselves indisposed to put down any money until the ship appeared in Greek waters. These difficulties were got over in this way. The ship was transferred by the sellers to the pursuer, a British subject, and the pursuer borrowed on the security of the ship from a London marine financier and a Glasgow lawyer the necessary money at rates of interest which were perhaps not unreasonable if the lenders were to have a share of profit of the venture, but which were un-

reasonable regarded as interest on ordinary loans. The practical effect of this arrangement was that the pursuer was to find the money to pay for (1) the ship; (2) the overhaul; and (3) the financial accommodation, and was to take as his reward the difference between the aggregate of these three payments and £8000. On the other hand, he was to give his name and the benefit of his advice as a marine surveyor. He was also primarily responsible for the borrowed money, but having regard to his financial position not much stress can be laid upon that. If the scheme miscarried Demetriades and his friends would have to repay the advances or lose the ship. Further, under the arrangement between the pursuer and Demetriades, whilst the price to the purchaser in Greece was to be £9000, Demetriades was to have £1000; he was also to have the management of the ship and he was to pay all the disbursements of the voyage, being entitled, on the other hand, to any freight earned. It appears that if the vessel had not been lost and the price had been forthcoming upon her arrival in Greece the pursuer would have made about £1700. It is, represented, however, that on a survey the ship turned out to be in better condition than was expected, and that the repairs for which the pursuer was primarily responsible cost less than had been anticipated. Making allowance for this the arrangement does not square very satisfactorily with the representation of Demetriades that there was no doubt or difficulty as to the provision of the £9000 by his friends in the Levant. It was proposed eventually to form a company to work the mines. But if, as is represented, the group or syndicate of promoters had ample credit and resources, it seems strange that it was necessary that not only the large payment to the pursuer but also £1500 for temporary accommodation should have been added to the price of the ship. With a credit provided in London I think that, even allowing Demetriades his £1000 upon the transaction and a reasonable consideration to the pursuer for his name as owner and his services, the ship might have been delivered in Samos for £7000 instead of £9000. This difficulty can not be got rid off by the suggestion that Demetriades was indifferent to the interests of the Levant syndicate. He himself and his brother in Samos were both interested in the matter, and there does not appear to have been any concealment in his correspondence either as regards his taking £1000 or the large payments for financial assistance. These considerations, I confess, suggest to me some doubt whether, particularly in view of the conditions which then prevailed as regards credit and currency and the possibility of carrying on any ordinary business during the war, the £9000 in London if the ship arrived safely in Samos could be regarded as by any means assured.

"It may be convenient that at this stage I should state the opinion which I have formed in regard to the reality of the negotiations and arrangements up to this date. The defenders' case originally was that both the Samos negotiation and the agreement between the pursuer and Demetriades had no reality—that they were mere 'plants' to cover up a plot to acquire and sink the ship. As regards the Samos negotiation this view is not now seriously insisted in, and I should be quite unable to accept it if it were insisted in. The Levant people may have been too sanguine, but their correspondence was *bona fide*. This view is not conclusive in pursuer's favour. There are three possible theories, all of them consistent with an arranged scuttling —(1) That the Samos negotiation was unreal on both sides. This as I have already indicated is not now insisted in. (2) That so far as Demetriades was concerned it was of the nature of a re-insurance to cover the risk of the scuttling not coming off successfully. (3) That all having been *bona fide* up to a stage unsatisfactory financial reports came from Greece, and that the scuttling was resorted to as a short way out of any difficulty.

"The second question is as to the agreement between the pursuer and Demetriades. The defenders represent that this agreement was wholly fictitious. I am unable to accept that view. I think that it represented a real understanding. But, again, this is not conclusive for the following reasons:—(1) If the scuttling came off it was necessary to have an agreement which would not only bear the light of day, but which would regulate the rights of parties in the spoil. (2) Even if the Samos expedition was only a re-insurance, or a second string to the bow, in case the scuttling miscarried, an agreement between pursuer and Demetriades was appropriate as ancillary thereto. (3) As with the Samos negotiation so with the agreement *bona fides* at the time does not preclude the idea of the short cut having been subsequently resorted to. The conclusions to which I have come are that the Samos negotiation was not fictitious, and that the defenders have failed to prove that the agreement between the pursuer and Demetriades had no reality as expressive of any true contract between them. As I have already indicated, these considerations are insufficient by themselves for the disposal of this branch of the case. I accordingly resume the narrative.

"The ship, which had been re-named the 'Spathari,' was duly overhauled, satisfied the requirements of the Board of Trade, which were fully met, and was registered as a British ship in name of the pursuer. Upon 8th April 1921 she sailed from Leith for Greece. She did not carry a full cargo, an advertisement for general cargo having met with no response. Her cargo consisted in part of a consignment of cod fish of dubious condition and value, which is the subject-matter of another action. I refer to my judgment in that action with reference to this consignment. It is sufficient here to say that it is not proved that either the pursuer or Demetriades was interested in that consignment, although the circumstances under which it was shipped and the interest in it of an associate of Demetriades

have a certain unpleasant flavour. In the remainder of the cargo Demetriades was interested. It consisted in part of goods sent by him for sale in Greece, and in part of equipment of the mining venture in which he was a participator. The ship was insured for £9000. In my view this was more than could have been realised for her on sale in this country. It was not more, however, than would have been realised if the Samos scheme had been worked out as figured. Very much the same considerations apply to the insurance of the cargo. It was very high in relation to the cost in this country. But, on the other hand, though certainly very full, the amount of insurance was not grossly excessive to cover the return and the profits which might have been realised in the East if the plan worked out on the lines which Demetriades explains.

"Upon the 29th April 1921 the 'Spathari' sank in fine weather off the coast of Portugal. In my view it is proved beyond reasonable doubt that she was scuttled by Malley the engineer. [*His Lordship then examined the evidence as to scuttling, and continued*]—In view of what I have above set forth I have come to the conclusion that the defenders have failed to prove that in scuttling the 'Spathari' Malley acted under an arrangement either with the pursuer or Demetriades, or with the two acting in concert.

"The second branch of the case concerns the defenders' denial of liability upon the ground that facts material to the risk were not disclosed to them. The law upon this matter is now statutory under the Marine Insurance Act 1906. The provisions which appear to bear upon the question here in hand are the following—[*His Lordship here quoted sections* 17, 18, *and* 19 *of the Act quoted supra*]. It was argued upon behalf of the pursuer that as the statute purports to be a codifying one, decisions anterior to its date purporting to expound and apply the common law may still be referred to as authoritative. I accept that contention, subject to the following qualification. The cases anterior to the statute may still be referred to in so far as they can be construed as interpreting and applying the rules set forth in the statute. But a decision which cannot be construed in a manner reconcilable with a reasonable interpretation of the words of the statute has no longer any authority. I am disposed to think that the case of *Heywood* v. *Rodgers*, 4 East. 590, cited by the pursuer, falls under this latter character, for I have difficulty in seeing how, consistently with the principle of 'the utmost good faith,' it could ever be held to be 'superfluous' to disclose to the insurer a fact which if known 'would influence the judgment of a prudent insurer in fixing the premium.'

"The other authority relied upon by the pursuer—*Joel* v. *The Law Union Insurance Company*, 1908, 2 K.B. 431, 863—is subsequent to the Act. It was a case of life not of marine insurance, but the same principles were held to be applicable. In this case it was explained that a policy is not vitiated by the non-disclosure of a circumstance which though material is not one which the person insuring might reasonably be supposed to deem to be material. For example, a potato merchant in Haddington might, without the intervention of any agent familiar with insurance and shipping, have insured against perils of the sea a consignment of potatoes to a foreign port. If thereafter it had been contended that the policy was voidable by reason of non-disclosure of the circumstance, known to the merchant, that the ship by which the goods were to be conveyed was a Greek one, the merchant might have replied—'Be it that this circumstance was at the time for special reasons a material one, that was not a thing which I knew or which in the course of my ordinary business I could reasonably be expected to know.'

"The defenders found upon the non-disclosure by the pursuer of certain facts and circumstances which were material to an underwriter. In regard to some of these, such as over-insurance, the defenders' case, I think, is not satisfactorily established. It fails in particular as regards the representation that the crew was to be British, for, apart from the plot to scuttle, which I hold not to be proved, there is no evidence that this was not made in good faith. In regard to other items of non-disclosure the pursuer maintains that the defenders' record is defective. I am unable, however, to take this view as regards any of the facts which I shall now mention as founded upon by the defenders as material. When the defenders aver that the alleged agreement between the pursuer and Demetriades for the transfer of the ship in Greece ought to have been disclosed I do not think that can be held to be limited strictly to the letter of the agreement and not to include the general arrangement of which the agreement was executive. The facts, the non-disclosure of which is relied upon, are as follows:—The vessel, having been bought by a Greek in Glasgow acting in the interests of a Greek syndicate in the Levant, was by arrangement transferred directly to the pursuer, a British subject, whose interest therein was intended to be of a limited and temporary character. After her arrival in eastern waters the right of property in her was to be transferred to the Greek who originally purchased her, and she was to pass into the control of a syndicate or group of local Greek gentlemen who were to endeavour to form a company registered under British law to take her over. Meantime the Greek gentleman in Glasgow was to be manager of the vessel, he was interested in the cargo, and he was to pay the disbursements of the voyage and to be entitled to the freight. None of these statements are, I think, in dispute, accepting the pursuer's version of the transaction in all particulars. The question for me is whether they were material from the point of view of an underwriter. In my view of the weight and import of the evidence the vessel, if these facts had been disclosed, was at that time uninsurable in the ordinary market and on the ordinary terms. Accordingly I am constrained to hold that these facts were material. I must further hold

that they were facts, the materiality of which persons engaged in shipping or insurance business knew or ought to have known to be material. They were not disclosed. Accordingly in view of the terms of the statute I must hold that the policy is voidable and that the pursuer cannot recover under it. I shall accordingly sustain the eighth plea-in-law for the defenders and assoilzie them."

In the action at the instance of Demetriades & Company against The Northern Assurance Company, Limited, his Lordship gave the following opinion :—

Opinion.—"I refer to my judgment in the cognate case of *Borthwick* v. *The British General Assurance Company, Limited.* It is argued that this case is differentiated from that on the ground that this is a case of insurance of cargo, whilst *Borthwick's* case was one of insurance of the hull, and that what was material as regards the latter may not be material as regards the former. In order to judge of this argument it is necessary to examine the grounds upon which the materiality of the information which was not given to the insuring company depends. At this time it was very difficult to insure Greek ships. The reason of this was that at a time when there was a great slump in ships' prices an extraordinary number of insured Greek ships had sunk in a mysterious way. The result of these sinkings was that, rightly or wrongly, underwriters were of opinion that a peculiar risk attached the insurance of Greek ships, viz., the risk that the ship would be scuttled by the Greek owner. Now the same considerations do not apply to the insurance of cargo. If, for example, goods were shipped on a Cunarder or a P. and O. liner the nationality of the owner of the ship might not be of much moment to the underwriter. Even in the case of cargo on an ordinary tramp steamer the Greek ownership of cargo would probably not be a matter of moment when the ship was a British one. The consigner of cargo has nothing to do with the engagement of the crew or the equipment of the ship or the route of the voyage. He is not in touch with the crew and has presumably no facilities for arranging a scuttling. So far the pursuer makes good that cargo is not on the same footing as hull. But what were the circumstances of the present case? I have found in the case of the hull that circumstances were not disclosed which would have awakened just as lively suspicions as if this had been a completely Greek owned steamer. These suspicions would have centred round the pursuer as a Greek and his relation to the ship. There would have been suspicion that he, with these interests in the ship and the cargo, might mean to scuttle the ship. It does not seem to me that in such circumstances there is any difference between the case of hull and the case of cargo. I am quite unable to figure an underwriter in the position of saying—'I will not insure the hull because Demetriades, a Greek, has an interest in the ship and its cargo, and is also manager. That is too risky. But I will insure the cargo which belongs to Demetriades.' I am constrained therefore to accept, as consistent with common sense, if I am right in the other case, the evidence on behalf of the defenders that disclosure of the particulars of the Greek connections of this ship would have been regarded as material by an underwriter insuring cargo.

"I accordingly hold that the policy is voidable in respect of the non-disclosure of facts material to the risk, and I shall sustain the defenders' plea to that effect and assoilzie them."

In the remaining action, viz., that at the instance of Cambitsis against The Norwich Union Fire Insurance Society, Limited, his Lordship's opinion was as follows :—

Opinion.—"The pursuer in this action is a Greek with some maritime antecedents, who for some time carried on some small fried fish business in Glasgow, but who at the date of the proof was without occupation, and apparently without means. He was one of the men who hung about the office of Mr Demetriades as a sort of Greek rendezvous. He sues the defenders for £500 under a policy for £500, being part of the insurance of a consignment of 60 tons of dried codfish valued at £3700, and consigned to Greece on the s.s. 'Spathari,' which was scuttled off the coast of Portugal.

"The history of the consignment is very remarkable. It was consigned from Iceland to Leith on behalf of a purchaser in Glasgow, Mr Eiriksson, in the s.s. 'Noah' which arrived in Leith in December 1920. On its arrival in Leith the whole consignment of 113 tons was rejected by Mr Eiriksson on account of its quality and condition. Various efforts were made to find a purchaser for it but without success, and eventually it was sold by auction by warrant of the sheriff at 10s. per ton to Messrs Dow & Carnie, Leith. Thereafter 60 tons were sold by them to Mr Eiriksson at 19s. per ton, 30 tons were sold at about the same price for manure. The balance of 23 tons seems to have been disposed of in small quantities here and there throughout the country to retailers at prices averaging from 1s. to 14s. per hundredweight. These retailers seem to have been fairly successful in disposing of it for only one small lot was seized by the authorities as unfit for human food.

"There is some conflict of evidence as to the actual condition of the fish. The evidence is very unfavourable as to its condition in bulk, but not so unfavourable where small parcels are concerned. The fish was old. It was not of the previous season's catch. Although it came by the 'Noah' it was not antediluvian, but it had probably lain for some years in Iceland. When collected upon the quay it seemed to experts to smell badly. It was not in bulk a merchantable consignment of fish in the fish trade of this country. On the other hand, as regards at least a considerable portion, it could not be said to be wholly unfit for human consumption. But it was not in a safe condition to be sent on a voyage to a warm climate, and it would have been rash to assume that it would not be rejected

on arrival if this were done.

"According to the story told by the pursuer, who was a confused and unsatisfactory witness, and by Eiriksson there had, prior to the arrival of the 'Noah,' been communings between them in connection with a proposal that 60 tons of the cod should be forwarded to a purchaser whom the pursuer was to find in Greece at a price of £60 per ton f.o.b. Leith. After the arrival of the 'Noah,' the rejection of the fish, the sale to Dow & Carnie, and the re-purchase of 60 tons by Eiriksson at 19s. per ton, the pursuer, who as is represented, was in ignorance of all these events and thought Eiriksson was paying £56 per ton for the fish as of prime quality, completed an arrangement with Eiriksson and a correspondent in Greece for the trans-shipment to Greece of the 60 tons in question. As to the arrangement so far as regards money the pursuer and Eiriksson are in agreement. The purchaser in Greece was to pay £60 per ton for the fish and also the freight. The pursuer was to get £4 per ton nett as commission. Eiriksson was to pay the insurance and other charges. That was the arrangement so far as regards money, but the pursuer's evidence is obscure and contradictory as to whether this was truly intended as a purchase by him and a re-sale at a profit of £4 or was a sale by him as agent with a commission of £4.

"Round this question turns a mixed question of fact and law as to title and interest to sue. That question, however, was not—it may be through my own fault—argued out in a manner which was clear and satisfactory to me, and I should require further argument if I were to make the disposal of it my ground of judgment.

"Demetriades was the shipping and insuring agent for Eiriksson and the pursuer—one or other or both of them—according to the view which may be taken of their relations. The policy was effected on behalf of unnamed shippers.

"The defenders maintain that the peculiar circumstances that this fish, which was being insured for £60 per ton, had been purchased at 19s. per ton, ought to have been disclosed to them. This appears to me to be a question of some difficulty. I think that the particular circumstance was so unusual that it would probably have influenced an underwriter. On the other hand the profit that is being made upon a shipment, however large, is not of the class of matters which are usually disclosed to or usually inquired into by underwriters.

"The insurance was effected through Demetriades who knew the whole circumstances in regard to the 'Spathari' and the other parts of her cargo, and who also knew that the pursuer, a Greek, was concerned with this shipment. I have already held that the non-disclosure of the particulars as to the Greek associations of the 'Spathari' rendered the insurance of his cargo by Demetriades voidable. I am unable to distinguish the present case where facts which in my view rendered the ship and her cargo uninsurable in the ordinary market were known to and not disclosed by the agent effecting the insurance.

"I shall accordingly sustain the sixth plea-in-law for the defenders" [viz., that based on failure to disclose material facts and circumstances affecting the insurance risk] "and assoilzie them from the conclusions of the summons. As regards expenses I shall take the same course as in the other two cases."

The pursuers reclaimed, and argued—*For the pursuer Borthwick.*—1. *Esto* that scuttling by the master or crew had been proved, still in a question with the owner connivance in their act was not to be imputed to the owner — Arnould on Marine Insurance, vol. ii, sec. 849; *Hobbs* v. *Hannam* (1811) 3 Campbell's Reports 93. Any such Act was covered by the barratry clause —*The "Elias Issaias,"* 12 Lloyd's List Law Reports 395. 2. In effecting the insurance the pursuer had made no misrepresentations, and had disclosed all the facts usually disclosed in insurance contracts. The facts which the Lord Ordinary held material were, in view of the facts disclosed by the pursuer, not material. Even, however, if they were material, the circumstances under which the insurance was effected threw upon the defenders the onus of making inquiry. Having failed to make this inquiry they must be held to have waived their right to further disclosure—*Mann, Macneil, & Steeves, Limited* v. *Capital and Counties Insurance Company*, [1921] 2 K.B. 300, at pp. 306, 309; *Glasgow Assurance Corporation* v. *Symondson*, 1911, 16 Com. Cas. 109, at p. 120; *Carter* v. *Boehm*, 1766, 3 Burr. 1906; *Haywood* v. *Rodgers*, 1804, 4 East 590; *Joel* v. *Law Union Insurance Company*, [1908] 2 K.B. 431, 863; Marine Insurance Act 1906 (6 Edw. VII, cap. 41), sec. 21. Under the conditions of the policy, if the vessel were sold or transferred without the consent of the insurer the insurance ceased to apply, and as the contract was signed on 16th February 1921, and Demetriades did not become manager till 19th February, his Greek managership did not require to be disclosed — *Cory* v. *Patton*, 1873, 7 Q.B. 304. There was no difference in the duties incumbent on the different pursuers as regards insurance, unless it might be that a somewhat higher onus was on this pursuer as owner of the hull to make disclosures of facts.

Argued for the owners of the cargo — There was no obligation on a cargo owner to disclose the ownership of a vessel. If there was an innocent mistake in the registration of the vessel it could not affect a policy by a cargo owner. The cargo owners had disclosed all the facts that were in use to be disclosed, and the insurers had not drawn the attention of the insured to any special requirements as to disclosure.

Argued for the defenders — 1. Whatever might be the cause of the loss on which the pursuers founded, they must at least have *prima facie* evidence that the loss was due to that cause. The pursuers must prove their case, and to do so they must show that the loss was due to a peril of the sea or to barratry of the master or crew. If the evidence left it in doubt as to which of these causes was the cause of the loss the pursuers

had failed to prove their case. The pursuers, however, had not proved loss due to a peril of the sea, and they had neither pleaded barratry nor attempted to prove barratry. The result of the decisions was that where the loss was shown, as in the present case, to have been due to the barratry of the crew, the onus was on the insured to show that they were in no way privy to the act—*La Compania Martiartu* v. *Royal Exchange Assurance*, 1923, 1 K.B. 650; *Williams* v. *East India Company*, 1802, 3 East 192; *The "Leonora,"* 12 Lloyd's List L.R. 473; *The "Katina,"* 12 Lloyd's List L.R. 220, 266; *The "Jollanda,"* 1922, 12 Lloyd's List L.R. 356, 438; *The "Olympia,"* 1923, 16 Lloyd's List L.R. 252; *The "Onderveming,"* 1921, 38 T.L.R. 194; *The "Elias Issaias,"* 1923, 15 Lloyd's List L.R. 186, was not inconsistent therewith. Even an innocent mortgagee might be affected by the connivance of the owner in scuttling—*P. Samuel & Company, Limited* v. *Dumas* (*The "Gregorios"*), [1923] 1 K.B. 592, 38 T.L.R. 751; *Graham Joint Stock Shipping Company, Limited* v. *Merchants' Marine Insurance Company* (*The "Joanna"*), [1923] 1 K.B. 592, 38 T.L.R. 753. 2. Further, the policy had been voided by misrepresentation and concealment. As regards this, there was no difference between the pursuer Borthwick and the cargo owner Demetriades, who was manager of the vessel without a salary, and who was really the beneficial owner—*Lloyd* v. *Grace, Smith, & Company, Limited*, [1912] A.C. 716. The misrepresentation was of a fact material to the risk, viz., that the vessel was entitled to fly the British flag, and that misrepresentation vitiated the policy—*Dennistoun* v. *Lillie*, 1831, 3 Bligh 202; Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), secs. 1, 9, 71; Marine Insurance Act 1906 (6 Edw. VII, cap. 41), sec. 20. This representation meant that the ship was wholly British owned, and that there was not any beneficial interest arising under the contract, or equitably in a foreigner, in the sense of section 57 of the Merchant Shipping Act 1894. In the present case there could be no doubt that the real ownership or beneficial interest was in Demetriades, and that it had never been really transferred from him. There was, further, concealment or non-disclosure of facts material to the risk under circumstances which imposed a duty on the insured to make the disclosure. At the time that the insurance was effected Greek-owned ships were uninsurable or only insurable at exceptionally high premiums, and this fact was known to the insured. If, however, the Greek interest in the ship which was vital to the insurance was being withheld, however innocently, the contract was voided. Mere knowledge was sufficient for this, and it was not necessary to prove fraud—*Horne* v. *Poland*, [1922] 2 K.B. 364. The statement made that the vessel was trading in Greek waters was not sufficient to put the underwriters on their guard—*"Gunford" Ship Company, Limited* v. *Thames and Mersey Marine Insurance Company*, 1911 S.C. (H.L.) 84, 48 S.L.R. 796.

3. The action by Cambitsis fell to be dismissed on the additional ground that he had suffered no loss that was covered by the policy. His only right in the cargo was a right to recover commission from the seller. He had therefore no insurable interest. Further, assuming that profits and commission might be insured, they must be described as such—*Lucena* v. *Craufurd*, (1806) 2 B. & P. N.S. 269, at p. 315 *et seq.*; *Mackenzie* v. *Whitworth*, (1875) L.R., 1 Ex. Div. 36, at p. 43. That was not the case here, and this pursuer's claim therefore was not covered by the policy—Arnould, Marine Insurance, secs. 287-297.

LORD JUSTICE-CLERK (ALNESS)—These three actions arise out of the sinking of the "Spathari" on 29th April 1921 off the Portuguese coast.

In the first action Borthwick sues the British General Assurance Company for £650 as the sum due under a policy of insurance effected by him on the hull of the vessel. In the second action Demetriades & Company, and Hercules Demetriades, the sole partner of that firm, sue the Northern Assurance Company for £805 as the sum due under a policy of insurance upon 21 bales of cloth or woollen goods which formed part of the cargo on board the "Spathari." In the third action Nicolas Cambitsis sues the Norwich Union Fire Insurance Society for £500 as the sum due under a policy of insurance upon 40 tons of salt cod, which also formed part of the cargo of the "Spathari." To all three actions the defence is the same. It is, broadly speaking, that the pursuers conceived and carried out a fraudulent scheme whereby, having insured the ship and her cargo, they then cast the ship away. The Lord Ordinary, who heard evidence at great length, has held that the scheme to which I have referred is not proved. He has further held that the ship in point of fact was scuttled by the chief engineer Malley. And finally he has held that, as the pursuers failed to disclose certain facts which he regards as material, and which therefore should have been disclosed to the insurers at the time when the policies of insurance on hull and cargo were taken out, they are not entitled to recover under the policies upon which they sue. Such, in rough outline, is the state of matters in which the cases come before us upon reclaiming notes by the three pursuers against the Lord Ordinary's judgments.

I now propose to deal with the actions in more detail, avoiding however, in so far as possible, at this stage, controversial matter.

First then I inquire who are the pursuers in these actions? Mr Borthwick is a marine engineer. Prior to the war he was in business in London. After the war he came to Glasgow, and desiring a business address there, he secured it from Mr Demetriades, whom he had come to know through a mutual acquaintance. Mr Demetriades' office at 212 St Vincent Street was apparently larger than the requirements of his business demanded, and he gave permission to Mr Borthwick to use a chair in his front room. There does not *prima facie* appear to have been a relation either of partnership or employment between Borthwick

and Demetriades. Mr Demetriades would appear merely to have accorded to Mr Borthwick the office facilities which he required. I may add that Mr Borthwick, so far as I can see, had no money apart from what he earned. Mr Demetriades was a Greek, carrying on business in Glasgow as a ship broker and commission agent, under the name and style of Demetriades & Company. He had never become a naturalised British subject. He was well known in the Greek community in Glasgow, and his office appears to have been the resort of many of his fellow-countrymen, including Mr Cambitsis. The latter is designed in his action, which was raised in the Sheriff Court at Glasgow, as a merchant and commission agent. He is also, in the course of the proof referred to, somewhat grandiloquently, as a restaurateur. In point of fact, his business appears to have been that of fried fish shopkeeper. The business was carried on in humble and indeed narrow surroundings, and he lived at a somewhat mean address.

Now, though Demetriades resided in Glasgow, he kept in touch with Greece, where he had a brother and many friends—business and otherwise. It appears from the evidence that in connection with the development of a certain ore mine in his native island of Samos—a mine in which some of Demetriades' Greek friends were interested—a steamer was required, and that in 1920 certain persons in Greece put themselves in touch with Demetriades with the view of securing such a vessel. After various negotiations, Demetriades, through the agency of Borthwick, purchased at Hull, at a price of £2550, from certain Finnish owners, a vessel which was then called the "Zachris Tophelius," and which he re-christened the "Spathari." The latter was the name of Demetriades' native village in Greece. The fact of the purchase was communicated by Demetriades to a syndicate in Greece who were interested in the mine, and who desired the services of a steamer in connection with it. For reasons which were good or bad, Demetriades thought it desirable that the vessel should be registered under the British flag, and in order that this should be done, she was transferred to Borthwick as at any rate her ostensible owner, and she was registered as a British steamer. Borthwick obtained two loans over the vessel from a London and from a Glasgow lender respectively, and from these loans the purchase of the vessel was financed. She was in due course thoroughly overhauled, and satisfied the requirements of the Board of Trade. A captain and a crew were duly assembled, and a cargo consisting, *inter alia*, of bales of cloth, fish, and certain printed matter was put on board. The vessel and her cargo were insured before she sailed with the defending companies. On 8th April 1921 the "Spathari" sailed from Leith for Samos. She encountered some heavy though not unusual weather, but it improved as the voyage progressed. Notwithstanding, on 29th April 1921, she sank in moderate weather off the coast of Portugal. The pursuers thereupon sought to recover from the defending insurance companies the amount for which the vessel and her cargo had been insured. The defenders resist the claim upon the grounds which I have indicated, and we have heard an elaborate and helpful argument on the questions involved. The questions appear to be these—(1) Was the "Spathari" scuttled? (2) If so, was she scuttled at the instance or with the connivance of the pursuers? (3) Are the policies of insurance voidable (*a*) because of failure on the part of the pursuers to disclose material facts to the defenders, or (*b*) because of active misrepresentation on the part of the pursuers?—[*Having examined the evidence his Lordship held it proved* (1) *that the "Spathari" had been scuttled by Malley, and* (2) *that the pursuers had conspired to sink the ship. He then proceeded*]—But even if the evidence establishes that the ship was scuttled, as I think it clearly does, and leaves it in doubt whether or no the pursuers were parties to the plot, then their actions must fail. That I apprehend to be the result of the case of *La Compania Martiartu* v. *Corporation of the Royal Exchange Assurance* ((1923) 1 K.B. 650). I must own that I find it difficult to reconcile that judgment with the later judgment in the "*Elias Issaias*" [*Issaias* v. *Marine Insurance Company* (15 Lloyd's List Law Reports, p. 186)]. If the decisions are irreconcilable, then I prefer the former, and I am prepared to follow it. I respectfully agree with L.J. Scrutton when he says, "If there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship, . . . and an examination of all the evidence and probabilities leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case. . . . In this case I find scuttling, but I do not think it is possible to put the case for the assured higher than by saying that the matter is left in doubt, and, if that be the true view, in my opinion the assured fails." For the same reasons the actions with which we are here concerned must also fail.

3. I now pass to the last branch of the case, which relates to the insurance of the "Spathari." The defenders contend—and the Lord Ordinary has upheld their contention—that the pursuers withheld from the defenders material information regarding the risk which should have been disclosed to them. And I may add that I agree with the Lord Ordinary in his view that it is not possible in this connection to distinguish between the hull and the cargo. Now there can be no doubt that a contract of marine insurance is *uberrimæ fidei*, and that every material circumstance which is known to the assured must be disclosed to the insurers before the risk is covered. And every circumstance is material which would influence the insurer in fixing the premium, or which would enable him to determine whether he should undertake the risk at all. Such, I apprehend, to have been the common law, and it was made statutory by the Marine Insurance Act of 1906. Now, I

assent to the view of the Lord Ordinary that the defenders' case on over-insurance and on the necessity of having a British crew throughout the voyage is not made out. The undertaking to employ a British crew throughout was a representation, not a warranty, and I am of opinion that it was in substance complied with. Indeed, that is the view expressed by one of the defenders' own underwriters.

But that does not conclude the matter, What are the facts? The "Spathari" was purchased by Demetriades, who was a Greek. Thereafter, she was no doubt ostensibly transferred to Borthwick, but only for a limited time and for limited purposes. When the "Spathari" reached Greece her ownership was to revert to Demetriades, and she was thereafter to pass into the hands of Greeks. During the voyage to Greece she was to be managed by a Greek, Demetriades. He was entitled to the freight, and he was also liable for the disbursements, apart from insurance. He was moreover interested in the cargo. In short, the "Spathari" was infected with the Greek taint throughout. Her past, her present, and her future were permeated by Greek interest. Now the evidence is clear that, at the date when these insurances were effected, Greek vessels were taboo in the marine insurance world. They were sinking in alarming numbers, and underwriters fought shy of insuring them. If they insured them at all, they did so at exceptionally high premiums. I am quite satisfied, and indeed I do not think that it was disputed, that if the true facts regarding this vessel, as I have rehearsed them, had been fully disclosed to the underwriters, if what I might term her Greek interest had been laid bare, she would not have been insured at all. That these facts were material I cannot for a moment doubt. That they were not disclosed is matter of admission.

It is argued for the pursuers that they exhausted their obligation to volunteer information, that they conformed with the requirements of the ordinary rules which regulate marine insurance, and that, if further information regarding the Greek interest in the "Spathari" was required, it was the duty of the underwriters to ask for and obtain it. To that argument several answers are available. In the first place, while in normal circumstances, a duty to inquire may lie on the insurer, there may be special circumstances in which the duty lies on the assured to disclose rather than on the insurer to inquire. Indeed, in the state of the marine insurance market with regard to Greek ships at the date when this vessel was insured all ordinary rules were, in my view, inverted. Moreover, as Borthwick was *ex facie* owner of the "Spathari," there was nothing to put the insurers, so to speak, on the scent of a Greek interest, and there was therefore no duty on their part, which it can be said that they neglected to discharge, to make inquiries on that topic. They did not waive inquiry, because there was nothing to put them on their inquiry. The British nationality of the vessel was emphasised—nay, over emphasised—at every point. In these circumstances I concur with the Lord Ordinary in the view which he has expressed that the policies of insurance are voidable in respect that the pursuers failed to disclose to the defenders material facts which it was their duty to disclose, and that the pursuers therefore cannot recover the sums for which they sue. I am further of opinion that, in the circumstances which I have narrated, the insurance of the "Spathari" was procured by means which in fact were fraudulent. The line between failure to disclose and fraud is in this case so fine that I am unable to detect it.

But I am prepared to go further, and to hold that there was not only a failure by the pursuers to disclose information to the defenders which was material both to the risk and to the premium, but that active misrepresentation on the part of the pursuers leading up to the issue of the policies is proved. It is necessary in this connection, be it remembered, merely to establish that a representation was made which was untrue. Fraud and intention to deceive are alike unnecessary. Now, I am bound to admit that much of the evidence regarding the representations made by the pursuers is unsatisfactory. Had these representations been documented that would be one thing. But they largely depend on the evidence of witnesses who confess to imperfect recollection, who made no notes at the time of the conversations which took place, who were first asked about the statements in dispute months after they were made, and who in the interval had carried through many other transactions of insurance. But while that is so, there can be no doubt at all of this, that the pursuers represented to the defenders that the "Spathari" was entitled to be registered as a British vessel because she was British owned. Indeed, that is not denied. It is said that the pursuers were entitled to make the representation because it was true. That is their case. Now, at the time when that representation was made, was the "Spathari" entitled to be registered as a British-owned steamer? What is the true history of the transaction regarding her? The "Spathari" was bought not by Borthwick but by Demetriades. He became her owner. Was the dominion of the vessel ever really transferred from him to anyone else? Was Demetriades' interest in the vessel ever evacuated? Was the transaction founded on by the latter *bona fide* or was it a mere device? It is no doubt said that Demetriades' interest in the "Spathari" was transferred to Borthwick. It is true that, while the first bill of sale was made out in name of Demetriades, a second bill of sale was made out in name of Borthwick. The reason alleged for this, viz., that it was to save a repair bill is manifestly absurd. It is true that for a month or thereby Borthwick was to be her ostensible owner. But, as I have already pointed out, Demetriades remained liable for the disbursements in connection with the vessel except insurance, and he was also entitled to the freight. Moreover, Borthwick did not spend one

penny of his own money on the alleged purchase, and the entries in Demetriades' books are such as would be made had he remained the owner. In short, while the vessel was represented as British owned, I am of opinion on the evidence that she was in substance and fact Greek owned and Greek managed and that she was not entitled to be registered as a British-owned steamer. Her control remained with a Greek. A Greek was interested in her cargo. A Greek was to take her over on her arrival at Greece. A Greek syndicate was thereafter to deal with her. She was in point of fact saturated with Greek interest and yet, remarkable to state, there is no document which revealed it. The facts to which I have referred are in my view inconsistent with genuine British ownership of the vessel. And yet the representation made was that she was British owned. The representation was not true. Accordingly I am of opinion that the contract of insurance is voidable, and is voided not only by the negative considerations to which I have referred, viz., failure by the pursuers to disclose material facts, but also by active misrepresentation on their part, viz., that the vessel was entitled to be registered as British owned, whereas she was not, and that accordingly in either view the pursuers are disabled from recovering under their contracts of insurance the sums for which they sue.

It only remains to add that with regard to the action at the instance of Cambitsis while the defences are the same, and are, if I am right in what I have already said, established, there is a separate defence which in itself dooms his claim to failure. On the evidence of Cambitsis he suffered no loss in respect of which in this process he is entitled to recover. His only interest in the fish which he insured was a right to recover commission in respect of them from the seller Eiriksson. He was not the owner of these goods. That is clear, not only from his evidence, but also from the documents. Now it was admitted in argument by Cambitsis counsel that if his only right in the goods insured was a right to recover commission, that claim is not covered by the policy. His only right in my view in the goods being a right to claim commission in respect of them, Cambitsis' claim on that ground also fails.

The net result is that the defenders are entitled to decree of absolvitor in each of the three actions which have been brought against them, and that the interlocutors of the Lord Ordinary, albeit on wider grounds than those on which he has proceeded, fall to be affirmed. That is the judgment which I venture to suggest to your Lordships should be pronounced.

LORD ORMIDALE—On 8th April 1921 the s.s. "Spathari" started in a sound and seaworthy condition from Leith on a voyage to the Mediterranean and Greece. She called at South Shields and Rotterdam, leaving the latter port on 21st April. Her next port of call was to be Gibraltar, there to take in coal to enable her to complete her voyage to Greece; but on Friday morning, 29th April, the weather being fine and the sea smooth, she sank off the coast of Portugal and became a total loss.

The pursuers of the three actions with which we are at present concerned are interested, Mr Bothwick in a policy of insurance effected on the hull, and Hercules Demetriades and Nicolas Cambitsis in policies effected on portions of the cargo, and they claim the sums covered by their respective policies. The claims are resisted by the insurance companies on several grounds, the main defence in each action being that the pursuers were parties to a fraudulent scheme or conspiracy to cast away the "Spathari," and that the vessel was in fact scuttled in pursuance of their scheme.

Before considering their defence, there is a preliminary matter which should be referred to as, in some aspects of it, it has a direct relation to the merits of the present dispute. It appears that the pursuer Hercules Demetriades, about the commencement of 1920, entered into correspondence with some compatriots in Greece with reference to the development by a syndicate of Greek gentlemen of an iron ore mine in the island of Samos. In connection therewith a ship was required for the purpose, *inter alia*, of conveying workmen and stores to the scene of the mining operations, and Demetriades was instructed or undertook to look out for such a vessel. Some doubt was suggested as to the reality of the mining venture. It is unnecessary to examine the question, but I agree with the Lord Ordinary in thinking that the scheme was, at any rate at the outset, a *bona fide* one, and that the "Spathari" was purchased as a ship suitable for the purposes which the Greek syndicate had in view. It is enough to say here that delivery of the ship was only to be taken on her arrival in Greek waters, that great difficulty was experienced from first to last in raising the funds wherewith to meet the purchase price of the ship, and that Demetriades was aware of this. [*His Lordship then examined the evidence and reached the conclusion* (*a*) *that the "Spathari" had been scuttled, and* (*b*) *that the pursuers were privy to the casting away of the vessel. The opinion then proceeded*]—None of the pursuers, for obvious reasons, I think, plead that the "Spathari" was sunk by the barratry of the crew. Their contention appeared to be that it was enough if they proved that she sank by the inrush of sea water and presumably, therefore, by a peril of the sea. That may be so, no doubt, in some cases. But the term "perils of the sea" refers only to "fortuitous accidents or casualties of the seas." (Marine Insurance Act 1906, Schedule C. par. 7). If, then, it is proved that the inrush of sea water was due, not to a fortuitous accident but to the deliberate act of Malley, and if they are to recover under their policies, they must show that it was due to barratry—the only other relevant risk they are insured against. Scuttling with the connivance of the owner is, of course not barratry. That has been established by the evidence, in my

judgment, beyond doubt. There is therefore no room, in my opinion, for the application of the principle commented on in *La Campania Mariartu* v. *The Corporation of the Royal Exchange Assurance*, [1923] 1 K.B. 650, assuming that it is otherwise sound, which is at least doubtful—*Issaias* v. *Marine Insurance Company*, 15 Lloyd's List Law Reports, 186.

The defenders also plead that, as the pursuers made material misrepresentations before the contract of insurance was entered into, they are entitled to avoid the contract. I am prepared to give effect to this plea also. The Lord Ordinary thinks that the agreement between Demetriades and Borthwick was not wholly fictitious. So far as it was intended to and did, in fact, constitute Borthwick the real owner of the "Spathari," I think it was. The boat was purchased by Demetriades and the ownership vested in him on 24th November 1920. On the evidence, notwithstanding the formal transfer to Borthwick on 25th January 1921, Demetriades remained the true owner. I doubt whether he had any right to part with the boat. As I understand the letters he wrote to his friends in Greece, the vessel was bought for them, and accordingly, his agreement with Borthwick was described as nothing more than an agreement for "the delivery of the boat at Samos." The agreement is dated 19th February 1921 and purports to be a sale of the boat by Borthwick to Demetriades & Company for £9000, payment to be made in Greece; but all the disbursements (except insurance) are to be paid by Demetriades and all the freights earned are to be received by him. It is obvious on the evidence that the object of effecting a transfer to Borthwick's name was to enable the ship to he registered as a British ship, and of the agreement or re-transfer to Demetriades to furnish real evidence that the apparent value of the ship was £9000—the price to be paid by the the Greek syndicate. The interest of the pursuers to have the "Spathari" presented to the underwriters as a British-owned ship is obvious. The atmosphere of the shipping and insurance world was charged with suspicion of Greek-owned vessels. The number of those which had been and were being sunk, relatively to the shipping of other nationalities had become phenomenal. Their inability to keep afloat had not been to any extent affected by increasing the premiums for insuring them, and it was well known to those who were interested in the "Spathari" that it would be impossible to get her and her cargo insured so long as she remained under the Greek flag. Her registration under the British flag involved this, that she was British owned and that no unqualified person was entitled as owner to any legal or beneficial interest in the ship; and "beneficial interest" includes interests arising under contract and other equitable interests (Merchant Shipping Act 1894, section 1, pars. 9 (5) and 57). Accordingly, was the representation that the "Spathari" was a British-owned vessel true in fact? The evidence, in my judgment, shows that she was in no real sense a British-owned ship. Section 20 of the Marine Insurance Act is as follows;—"(1) Every material representation made by the assured or his agent during the negotiations for the contract and before the contract is concluded must be true. If it be untrue the insurer may avoid the contract. (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

Now to my mind the transfer into the name of Borthwick was a sinister device to enable her true Greek owner or owners to have the right to fly the British flag and to enjoy the advantages flowing therefrom, while the real beneficial interest in the ship was retained by Demetriades. I regard the suggestion that Mr Borthwick was at the start himself in good faith attempting to buy the ship in competition with Demetriades as unfounded in fact. The transaction had no reality. I think Mr Carmont was quite correct in describing it as double-dealing with a view to creating a market. As a matter of fact Mr Borthwick was not in a position to buy. He had not the money. A sum of £50 which he had to outlay in the first instance was repaid to him by Demetriades. The price due to the Finnish owners of the "Spathari" was raised at an enormous cost by means of a first mortgage on the vessel, and Demetriades had to guarantee the repayment of that. A second mortgage was granted and the whole of the money thereby obtained went into Demetriades' account, and the whole transactions passed through Demetriades' books. Demetriades was appointed manager but drew no salary for his services. Mr Borthwick had none of the powers of an owner. He could not sell the vessel. He had parted with his right to the freight and he had been freed from his obligation to disburse. He was in every sense a dummy. On this question of representation untrue in fact, the defenders are, in my opinion, entitled to our judgment.

On the question of failure to disclose I so entirely agree with the Lord Ordinary that I do not propose to add any observations of my own.

On the whole matter I agree with your Lordship that the defenders in all three actions fall to be assoilzied.

LORD HUNTER—[*Having found on an examination of the evidence that the "Spathari" had been scuttled, and that the scuttling had taken place with the connivance of the pursuers, his Lordship proceeded*]—On the assumption that the inference of connivance at the scuttling of the ship is correctly drawn against the pursuers, the defenders are entitled to decree of absolvitor in all the actions. A number of other points, some of them of considerable interest, were raised in the course of the debate before us, and it is advisable to examine certain of the contentions of parties founded thereon. For the defenders it was maintained that the onus was on the pursuers to establish affirmatively that the loss of the "Spathari" was due to one or

other of the insured causes of loss. Their case on which they joined issue in the proof was that the loss was occasioned by a peril of the sea. A *prima facie* case in their favour was established by proof that the immediate cause of the ship sinking was the irruption of sea water. Inasmuch, however, as the evidence further showed that sea water had entered, not by fortuitous accident, but by the deliberate act of one or more of the officers entrusted with the safe navigation of the ship, the *prima facie* case for the pursuers had been displaced, and there was nothing in the evidence that warranted the Court in holding that the scuttling was an act of barratry. It was pointed out that the pursuer Borthwick so far from seeking to prove a case of barratry had expressly stated in the witness box that he was satisfied that the officers of the ship had done everything that could be expected of them to save the ship. For the contentions of the defenders reliance was placed upon the expressions of opinion of the Court of Appeal in *La Campania Martiartu* v. *The Corporation of the Royal Exchange Assurance* ([1923] 1 K.B. 650). In that case Scrutton, L.J., after holding that privity to scuttling had been established against the owners, said (at p. 657)—"This view renders it unnecessary finally to discuss the burden of proof, but in my present view, if there are circumstances suggesting that another cause than a peril insured against was the dominant or effective cause of the entry of sea water into the ship . . . and an examination of all the evidence and probabilities leaves the Court doubtful what is the real cause of the loss, the assured has failed to prove his case." Lord Justice Bankes and Mr Justice Eve appear to have concurred in this opinion. The pursuers maintained that the view so expressed was inconsistent with the law as expounded by the Court of Appeal in the later case of the "*Elias Issaias*" (15 Lloyd's List Law Reports, 186). There it was held that, although scuttling had been proved, the pursuers, who were the owners of the ship, were entitled to recover as it had not been proved that the scuttling had taken place with their connivance. The Master of the Rolls (Lord Sterndale) said (at p. 189)—"It was argued for the defendants that so soon as scuttling of the ship was proved the onus of proving that it was not done with his complicity was cast upon the owner, in other words, that proof of scuttling raised a presumption that it took place with his complicity. I cannot assent to this argument, it seems to me to be contrary to the ordinary principles of evidence and also to be contrary to another presumption of English law, that is, that of innocence, which is more fully dealt with in the judgment of Lord Justice Atkin." Lord Justice Warrington and Lord Justice Atkin expressed similar opinions. If the issue be between the guilt or innocence of the owner I do not think that the soundness of the law as laid down by the Judges in this later case can be seriously challenged. That may have been the real issue in the case with which the Court was then dealing, but there may be cases where, scuttling having been proved, the evidence leaves it doubtful whether there has been connivance of the owners or whether the case has been one of barratry. Why should the owners, who have to prove their case, be entitled in such circumstances to say against the underwriters that barratry must be assumed? Such an assumption may be quite reasonable, and is perhaps natural, if there are no circumstances of suspicion pointing to probable complicity on the part of the owners. In the most recent case to which we were referred, *The* "*Olympia*" (16 Lloyd's List Law Reports, 252), Lord Justice Scrutton (at p. 257) indicated his adherence to the view which he expressed in the *Martiartu* case in the following passage—"The Judge below has given a kind of 'not proven' judgment—that is to say, he thinks the case very suspicious, but the underwriters have to prove scuttling, and if they leave him in a state of mind in which he does not know what has happened, the plaintiff succeeds. As I have said in another case, I do not agree with this view of the burden of proof." In a later part of his opinion he says (at p. 260)—"By long-established authority, if all that is known is that the ship has gone to sea and disappeared, a loss by perils of the sea is presumed. But in my view, when you know a great deal more of the circumstances of her loss, and what you know leaves it equally balanced, whether the cause of loss is incursion of sea water by a peril of the sea, or incursion of sea water by the deliberate act of the owner, which in my view is not a peril of the sea at all . . . the assured has failed to prove his case and fails." If in the present cases I had felt . . . that I was not justified in reaching the conclusion of connivance at scuttling against the pursuers I should still have held, applying the law as expounded by Lord Justice Scrutton, that in the circumstances of these cases as disclosed by the evidence, the pursuers had failed to establish loss arising from one of the insured causes.

Apart from the questions of scuttling and connivance by the owner, the defenders maintain that they are not liable on the policies because of misrepresentations made by the pursuers, and concealment by them, of facts material to the risk. Among the misrepresentations the first founded on in the argument was the statement alleged to have been made to the underwriters that the "Spathari" would carry a British crew during the whole period of the insurance. I do not think on the evidence more is proved to have been communicated to the underwriters than the fact that the vessel was sailing with a British crew on board. That statement was true, and I do not think that there was any substantial breach of the obligation imposed on the assured by the circumstance that, as I have already stated, three firemen of foreign nationality were shipped at Rotterdam to take the place of others who left at that port. It is not suggested that any warranty was given that under no circumstances would a foreign seaman be employed.

In registering the "Spathari" under the British flag and representing her to be a British ship (which would be inferred from the flag apart from independent statement to that effect) I think that the pursuers Demetriades and Borthwick were guilty of misrepresentation. According to the provisions of the Merchant Shipping Act 1894 a ship is only entitled to be put upon the British Register and fly the British flag if she is entirely owned by a British subject or subjects. For reasons which I have already stated Demetriades was either the true owner, or at least joint owner with Borthwick, of the vessel. In either view Borthwick was not entitled to register as he did. What then is the effect of such a misrepresentation upon policies of insurance? Section 20 (1) of the Marine Insurance Act 1906 (6 Edw. VII, cap. 41) provides that "Every material representation made by the assured or his agent to the insurer during the negotiations for the contract and before the contract is concluded must be true. If it be untrue the insurer may avoid the contract." Sub-section (2) of the section is in these terms—"A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

At the time when the insurance was effected over the "Spathari" there was great reluctance on the part of underwriters to insure Greek-owned vessels. This is brought out very clearly in the evidence of the principal underwriters examined. This was not surprising. Mr Harper, the editor of Lloyd's Shipping List, says—"During the period from 1st September 1920 to 30th November 1921, 14 British vessels of over 500 tons were lost, having a gross tonnage of 31,396, and during the same period 27 Greek vessels were lost with a gross tonnage of 57,526. That is to say, there were nearly double the number of Greek vessels as there were British vessels. The proportion of all the Greek tonnage to all British tonnage was—British tonnage 22,070,798, Greek tonnage 599,929." Some underwriters were refusing to have anything to do with the insurance of Greek ships. If assured at all the premium asked was much higher than in the case of British ships. The difficulty of insuring Greek ships was well known to both Demetriades and Borthwick. The device of making Borthwick nominal owner was adopted, as I think, in large measure with a view to getting over the insurance difficulty. On this part of the case it is sufficient that there should have been a misrepresentation of fact even if innocently made. Were it necessary to hold that there was fraudulent misrepresentation I should, in the light of the evidence to which I referred relative to the purchase of the ship, have been prepared so to hold.

The Lord Ordinary decided the cases against the pursuers on the ground that in effecting the policies they had failed to disclose material facts to the underwriters. The law as to disclosure is to be found in the provisions of sections 17 and 18 of the Marine Insurance Act 1906. The assured is bound to disclose material facts. As Lord Justice (then Mr Justice) Scrutton said in *Glasgow Assurance Corporation* v. *Symondson & Company*, (1911) 16 Com. Cases 109, at p. 119—"By section 18 of the Marine Insurance Act every circumstance is material which would influence the judgment of 'a prudent insurer,' who, however, is deemed to know and need not be told matters which in the ordinary course of business he ought to know, or has waived being informed of." The question as to what ought to be disclosed must largely be a question of what in practice is disclosed. In the case to which I have just referred Mr Justice Scrutton said (at p. 119)—"The material facts are as to the subject-matter, the ship, and the perils to which the ship is exposed; knowing these facts the underwriter must form his own judgment of the premium, and other people's judgment is quite immaterial. . . . Again, if true disclosure is made as to the ship and the perils affecting her, no one has ever suggested that it is necessary to disclose the name of the person interested in her who is desiring to insure or re-insure his interest." If therefore it could be assumed in the present case that Borthwick was the true owner of the 'Spathari,' and that his agreement to sell to Demetriades was a *bona fide* agreement, I am not satisfied that there would have been a duty to disclose the circumstance that Demetriades was going to become the purchaser in Greece or even that the ship's husband was to be a Greek. On the assumption that everything was straight and above suspicion I do not think that any of these things would have affected the subject-matter, the ship, or the perils to which she was to be exposed. The real case against the pursuers appears to me to consist in a misstatement as to the ship being British when Borthwick knew that she had no right to fly the British flag. It is upon this ground rather than on the ground stated by the Lord Ordinary that I prefer to base my opinion on this branch of the case.

There may be a question as to how far Cambitsis is affected by a misrepresentation made by Demetriades or Borthwick. The evidence connecting him with the misrepresentation is in the main the evidence connecting him with the conspiracy to scuttle the ship. If he could be treated as the genuine purchaser of the cod-fish with a good insurable interest in that part of the cargo I am not satisfied that he would be affected by the misrepresentation made. The insurance was made by Battilana, a clerk in the employment of Demetriades, and on the evidence I do not think that any special representation was made as to this part of the cargo. It was insured as cargo consigned to Greece on board the "Spathari." Unless knowledge is to be assumed on his part as to the true ownership of the vessel and as to the misrepresentation Cambitsis would probably be entitled to recover. It was, however, admitted by counsel on his behalf that if his only insurable interest was his £4 a ton commission he could not succeed in his action against the underwriters. For the reasons which I have

already stated I do not think he was ever the true purchaser of the cargo. The person interested was Eiriksson and not Cambitsis. The transaction as alleged was not genuine. The documentary evidence probably sufficiently establishes this, but if confirmation were required it is to be found in the remarkable evidence given by Cambitsis himself in the witness-box. He was examined through an interpreter, and it cannot therefore be suggested that his answers are given because of an imperfect appreciation of the meaning of the questions put to him. His examination-in-chief reads like a piece of cross-examination, and it is only with great difficulty that his counsel extracts an answer from him to the effect that he is personally interested in the recovery of the money. He had already said that the insurance had been effected on behalf of Mr Eiriksson, and that he stood for Mr Eiriksson to get the money and give it to him. So far as I can see he lost nothing except his commission when the cargo was lost. What can one make of such answers as these?—"Mr Eiriksson tells me that I am responsible for it and I must stay here and try and get the money from the Insurance. I wished to go away last October but Mr Eiriksson's lawyer will not let me go. . . . I have the right to ask the money from the Insurance because I want to get my commission of £240. They do not give me the commission because they do not get the money." This evidence appears to me quite inconsistent with a genuine purchase by him from Eiriksson.

On the whole matter I think all the three reclaiming notes should be refused.

LORD ANDERSON—I propose to state my views as to all three cases in one opinion, which I shall deliver in the action *Borthwick* v. *British General Assurance Company*. In each of the three actions the general averment is made that the loss suffered was one which had been covered by the policies of assurance issued by the defenders. There is no specification by way of averment as to which of the particular risks insured against was responsible for the loss. The case made in evidence, however, by the pursuers was that the ship sank by reason of the influx of sea water. There is no doubt that the cause of the sinking of the ship was an inflow of sea water, and if the defenders had led no evidence to explain how that inflow might have been occasioned the pursuers would have been entitled to decree. They would in that case have proved the proximate cause of the sinking, and they would have been entitled to found on the presumption that the unascertained peril which occasioned the inflow of water was a peril covered by the policy. If, however, the evidence led by the defenders is of such potency as to create a doubt which the Court is unable to solve as to the cause of the influx of water, the presumption which favours the pursuers is displaced. In this event the case of *La Campania Martiartu* ([1923] 1 K.B. 650) decides that the pursuers cannot succeed as they have failed to prove their case. That case is not easily reconcilable with a later decision of the Court of Appeal—*The "Elias Issaias,"* 15 Lloyd's Law List Reports 186. If these two decisions are inconsistent with one another I prefer the law laid down in the former case, as it seems to me to rest upon the fundamental rule of proof which denies a pursuer success unless he proves his case. I do not, however, propose to make this law a ground of decision in these cases, as I am of opinion that the result of the evidence is that the outstanding facts are not left in doubt.

The main ground of defence relied on by the defenders is that the three pursuers conspired to scuttle the ship for the purpose of defrauding the insurers, and that this scuttling was effected by Malley on 28th April 1921, the vessel in consequence going to the bottom on the morning of 29th April. This general contention of the defenders involves these separate inquiries—(1) Was the ship scuttled by Malley? and (2) Was this done with the connivance of the pursuers?

[*After an examination of the evidence his Lordship proceeded*]—I make it my ground of judgment in favour of the defenders that the evidence shows that the three pursuers have been proved guilty of conspiracy to scuttle the ship, and that the ship was scuttled in furtherance of this conspiracy. This being my ground of judgment it is unnecessary for me to do more than examine cursorily other grounds of judgment which the defenders suggested.

An alternative defence proponed was that the pursuers had been proved guilty of fraudulent misrepresentation and concealment for the purpose of defrauding the insurers. The alleged misrepresentation was that the ship was British, the truth being that she was Greek. The alleged concealment was of what may be described compendiously as "the Greek connection" of the "Spathari." I shall at a later stage deal with the questions of whether or not the "Spathari" was a British ship, and whether there was a duty to disclose "the Greek connection." Assuming that there was such duty of disclosure, and that the representation that the ship was British was erroneous, I should have no difficulty on the proved facts in holding that the misrepresentation was made and the concealment effected with the fraudulent design alleged. The misrepresentation was actually made by Borthwick alone, but the other pursuers (and certainly Demetriades) were art and part in what Borthwick did. If "the Greek connection" ought to have been disclosed, the duty of doing so lay on each of the pursuers in the circumstances in which the respective insurances were being effected.

Another ground of judgment was suggested by the defenders on the assumption that the pursuers were not actuated by fraud. Personally I have difficulty in making that assumption. On this footing, however, the defenders urged that the pursuers had made two representations which were not in accordance with fact—(1) that the ship was British, the truth being that she was Greek;

(2) that she would carry a British crew, the truth being that after leaving Rotterdam part of the crew was foreign. On this line of defence it is enough to void the contract of insurance to prove that the representation made was untrue—Marine Insurance Act 1906, sec. 20 (1). The representation that the ship was British was admittedly made. This representation involved that the ship was British owned in the sense of the Merchant Shipping Act 1894, secs. 1, 9, 57, 71. By these provisions it is enacted that a ship is not a British ship unless both the legal and beneficial owners are British subjects. Borthwick may have been the legal or titular owner, but was he the beneficial owner? Has it not rather been clearly proved that Demetriades was the beneficial owner? The ship was bought by Demetriades on 19th November 1920, and on 20th November he wrote that the "registered owner of the vessel will be Hercules Demetriades." The formal agreement of sale in favour of Demetriades was not signed till 14th January 1921, and the price was ultimately fixed at £2650. The formal bill of sale was in favour of the pursuer Borthwick, and was dated 25th January 1921. By this time I think it is plain that Demetriades and Borthwick had matured their designs which the agreement between them of 19th February 1921 was meant to further. This agreement did not represent a real transaction. The ship was not sold to Borthwick; he had no right to transfer it; he was to get no income from its use. Demetriades depones that he entered into the agreement of 19th February in order to avoid responsibility for the cost of repairing the ship. But at almost every stage he interposed his personal credit to support Borthwick. He guaranteed repayment of the amount of the first mortgage. The whole of this mortgage and also the amount of the second were handed over to Demetriades. All payments in connection with the ship were made by him. Borthwick under the agreement was only bound to pay the premiums of insurance. If the underwriters were to be deceived it was essential that these premiums should be paid by Borthwick, the ostensible British owner. Demetriades was appointed manager by the said agreement, but—a most unusual arrangement—he had no remuneration as manager. He was to be entitled to recover and retain all freight earned by the ship. From beginning to end Borthwick did not spend a penny of his own money on the vessel. The agreement of 19th February was entered into for a twofold purpose—(1) to make out that the value of the ship was £9000, and (2) to secure registry as a British ship and so obtain insurance by British underwriters. Borthwick was put up by Demetriades as owner in order to "clear" the British flag, as it had been proposed to use Kourtessi to "clear" the Greek flag.

I therefore am of opinion that the representation that the ship was British was not true in fact.

As regards the representation that the ship would carry a British crew, the conclusion I have reached is that there was reasonable compliance with what was undertaken to be done, and that the defenders' contention on this point is not well founded.

The defenders also supported the ground of judgment on which the Lord Ordinary has proceeded, to wit, non-disclosure (innocent) by the insured of facts material to the risk. I am of opinion that because of the special circumstances of the time and of the unusual character of the whole transaction the insured ought to have disclosed "the Greek connection." In the insurance and shipping world at the time, at all events in Great Britain, Greeks were suspects as marine insurers. The insured knew that there was an agreement whereby a Greek had every right in the ship except that of formal ownership, and every obligation except to pay insurance premiums. This agreement showed that this Greek was also manager without salary, and that at the end of the voyage the ship was to be sold to a Greek syndicate. These facts, in my opinion, should have been disclosed. Had they been disclosed, it is almost certain that there would have been no insurance. The pursuers' suggestion of waiver on the part of the insurers is not well founded. There could not be waiver unless such disclosure was made as put the insurers on their inquiry. In the present case nothing was disclosed from which the insurers ought to have surmised that there were material facts to be ascertained.

I have only to add that in the case in which Cambitsis is pursuer it appears from his own evidence that he was merely the agent of Eiriksson in connection with the fish which Cambitsis had insured. Cambitsis had no insurable interest in said fish beyond payment of his commission, and this not having been specifically mentioned in the policy has not been insured. There is no right of recovery under the policy sued on for sums due under a collateral agreement—(Arnould, Marine Insurance, sections 297, 851; *Lucena*, 1806, 2 Bos. & P. 269, at pp. 313 *et sequitur*; *Mackenzie*, 1 Ex. Div. 36, at p. 43).

This is an additional ground of judgment for the defenders in the case in which Cambitsis is pursuer.

On the whole matter I am of opinion that in each action the defenders are entitled to absolvitor.

The Court adhered.

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