cemetery are contained within the lands of the said glebe. That the minuters, the said Parish Council, desire to acquire a portion of the glebe of Alva in question for the purpose of extending the cemetery belonging to them, consisting of that portion of the said glebe extending to 1 acre, 2 roods, 7 poles, 16 yards or thereby imperial standard measure, bounded on the south-west and south-east by other portions of the said glebe, on the north-west partly by the manse garden and partly by Alva Parish Churchyard, and on the east by the existing cemetery of the said Parish Council, all as shown in red on the plan. Subject to the authority of the Court being obtained, they have arranged to purchase same at the price of £200 per acre. Reference is made to the 17th section of the Glebe Lands (Scotland) Act 1866. That the said Parish Council of the Parish of Alva are conterminous proprietors in terms of the said statute, and although they have not exercised their right of pre-emption within the statutory period, the said Rev. James Alexander Williamson, now minister of the parish of Alva, is willing that they should have the same privilege with respect to the glebe in question as they would have been entitled to if they had intimated their willingness to purchase within the said period. That the consents of the Presbytery of Stirling and of the heritors of the parish through their general committee have been obtained to this application conform to certificates by their respective clerks."

The application was heard by the Teind Court on 25th May 1923, when counsel for the minuters craved the Court after such procedure and inquiry as should seem proper to fix the price which the Parish Council should pay for the said portion of the glebe, and thereafter to pronounce decree of sale in their favour subject always to the provisions of the said section in regard to the consignation of the price. He referred to the case of *Stewart*, 1887, 25 S.L.R. 164.

On 25th May 1923 the Court remitted to the Lord Ordinary to inquire into the circumstances set forth in the minute and to report.

On 8th June 1923 the Lord Ordinary (CONSTABLE) remitted to Mr Henry Allan Newman, architect and surveyor, Alva, to report what price should be paid for the portion of the glebe proposed to be purchased. Mr Newman having stated that in his opinion £370 was a reasonable price, the Lord Ordinary on 26th October 1923 reported the case to the Court.

On 2nd November 1923 the Court, without delivering opinions, and following the course adopted in the case of *Stewart* (1887, 25 S.L.R. 164), granted the prayer of the minute, and pronounced the following interlocutor:—

"Find that the price or value of the portion of the glebe of the parish of Alva . . . authorised to be feued . . . shall be £370 sterling, and . . . in terms of the 17th section of the statute sell, dispone, adjudge, decern, and declare the said portion of said glebe . . . to pertain and belong heritably and irredeemably to the said parish of Alva and their successors at the foresaid price conform to the provisions of the statute, but supersede extract until consignation of the price shall be made in the hands of the Royal Bank of Scotland and the receipt be deposited in the hands of the Clerk of Court, and decern."

Counsel for Minuters—Jamieson. Agents—Dove, Lockhart, and Smart, S.S.C.

HOUSE OF LORDS.

Friday, November 23.

(Before the Earl of Birkenhead, Viscount Haldane, Lord Atkinson, and Lord Parmoor.)

STANDARD OIL COMPANY OF NEW YORK *v.* CLAN LINE OF STEAMERS, LIMITED (OWNERS OF S.S. "CLAN GORDON").

(In the Court of Session, December 21, 1922, 1923 S.C. 245, 60 S.L.R. 166.)

Ship — Seaworthiness — Obligation on Owners to Use Due Diligence to Make the Vessel Seaworthy—Owners' Failure to Communicate to Master Instructions as to Loading Issued by Builders—Liability of Owners—Harter Act 1893.

Ship — Bill of Lading — Exception and Exemptions — Exception of Accidents of Navigation not Resulting from Negligence of Owners — Owners' Failure to Communicate to Master Instructions as to Loading Issued by Builders—Liability of Owners.

Ship—Seaworthiness—Owners' Liability for Loss—Limitation of Liability—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 503.

The owners of a line of steamers agreed to supply a vessel for the carriage of goods from New York to China. The charter-party provided that the contract should be subject to all the exemptions contained in the Harter Act of the United States of 1893, clause 3 of which provides "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy, . . . neither the vessel, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel." The bills of lading issued in conformity with that Act provided that the following exemptions from liability should apply:—"Perils of the sea . . . or any latent defect in hull, machinery, or appurtenances . . . or other accidents of navigation of whatsoever kind (even where occa-

sioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship. . . ."

The "Clan Gordon," the vessel supplied, was a "turret" steamer, a type of vessel in regard to which the builders had, consequent on a disaster to a vessel of that class, circulated to owners of such vessels loading instructions which contained, *inter alia*, the following direction:—"This vessel is not intended to load down to her marks with a homogeneous cargo without water ballast." This information was not supplied to the master of the "Clan Gordon," who had a wide experience in the command of ships, and of "turret" ships in particular. When she left New York the "Clan Gordon," which was loaded with a homogeneous cargo, had two of her water-ballast tanks full and was down to her marks. Two days out the master, thinking his ship would trim and sail better without water ballast, ordered the tanks to be pumped out. When they were nearly empty the ship, in fine weather and in a calm sea, turned turtle on the application of the port-helm owing to the loss of stability due to the withdrawal of the water in the ballast tanks. In an action of damages by the owners of the cargo against the owners of the ship, *held* (*rev.* the judgment of the First Division, *diss.* Lord Sands) that the "Clan Gordon" was not, having regard to her structure as a turret vessel and to her loading, seaworthy without having two out of her six ballast tanks filled to the extent of containing 290 tons of water; that this fact had not been communicated to the master by the owners who were aware of it; that it was the duty of the owners to have brought to his notice the loading instructions issued by the builders regarding the necessity for water ballast, and to have informed him that the vessel was only conditionally seaworthy; that in neglecting to do so they had failed to use due diligence to make the vessel seaworthy; and that accordingly they were liable for the loss. *Held further*, that the owners were not entitled to the limitation of liability provided for by section 503 of the Merchant Shipping Act 1894, the loss not having taken place without fault or privity on their part.

Interest — Action of Damages — Appeal to House of Lords—Judgment of Lord Ordinary Awarding Damages Restored — Motion by Successful Appellants for an Award of Interest from the Date of the Lord Ordinary's Judgment — Court of Session Act 1808 (48 *Geo. III, cap.* 151), *sec.* 19.

Expenses — Appeal to House of Lords — Expenses Incurred in Court of Session—Question of Modification Reserved.

The Court of Session Act 1808 (48 Geo. III, cap. 151) enacts—Section 19—"If upon hearing the appeal it shall appear to the House of Lords to be just to decree or adjudge the payment of interest, simple or compound, by any of the parties to the cause to which such appeal relates, it shall be competent to the said House to decree or adjudge the payment thereof as the said House in its sound discretion shall think meet."

Circumstances in which the House of Lords (the Lord Ordinary's judgment awarding damages having been *restored*) found the successful appellants entitled to interest on the principal sum found due from the date of his Lordship's interlocutor; and *ordained* the respondents to pay to the appellants their costs in the House of Lords and in the Court of Session under a reservation of the question of modification, if any, of the expenses in the Inner House as well as before the Lord Ordinary.

The case is reported *ante ut supra.*

The pursuers, the Standard Oil Company of New York, appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In the opinion which I am about to deliver, my noble and learned friend Lord Birkenhead desires me to say that he concurs.

The mixed question of fact and law that arises in this appeal is one which necessitates close examination. Only after modifying my own view from time to time as the arguments at the bar proceeded, and after subsequently re-studying the whole of the evidence and the judgments in the Courts below, have I arrived at the conclusion that the Lord Ordinary and Lord Sands were right, and that the judgment of the majority in the First Division cannot stand.

Having regard to the concurrence of findings in what is an issue of fact, I think that we are bound to hold that it was established by the respondents that when the "Clan Gordon" left New York she was physically seaworthy. But it appears to me to be not less clearly shown that she was thus seaworthy only on the footing of having two out of six of her ballast tanks filled, to the extent of containing 290 tons of water. Without this amount of water in the tanks she was not, having regard to her loading, seaworthy, and the master in charge of her had to know this and observe the requirement through his voyage. He did not know it; he pumped out the water, and the ship heeled over, and was lost two days after her commencement of the voyage. I think that the requirement as to this ballasting was due to the construction of this steamer as a turret vessel. Only scientific calculation could show the absolute character of a requirement which, if not observed, would render the ship unseaworthy. The master had not been instructed as to its special significance in the case of a turret ship like the "Clan Gordon." He could not divine it, nor could the ordinary experience of a master not informed of the special peril due to

abnormal construction be relied on to disclose it. The master did not know the unusual risk he was called on to undertake. The fault of this absence of knowledge lay not with him but with the owners, whose duty it was to have instructed him that while the vessel was seaworthy, it was only conditionally seaworthy. The breach of the condition was therefore an occurrence for which they were personally in fault.

In the light of what has been proved, the two tanks held just enough water to give the vessel the stability indicated in the builder's instructions. But it is significant that the master was not shown to have been specially warned that the presence of the water ballast was essential to the ship as loaded if its stability was to be preserved. The instructions of the builders rendered such ballasting essential, and the master was not told about it. In his evidence Captain M'Lean says that it was the first cargo of the kind that he had actually loaded himself, and that before he sailed he had intended to sail with his ballast tanks empty. This makes it not surprising that two days later he directed that the tanks should be pumped empty. He hoped to obtain thus more freeboard for his vessel. He says that he had got no instructions from his owners that with a homogeneous cargo he was on no account to pump out the ballast tanks. All he knew was that those in charge of turret ships were to be careful of them. But he knew nothing of the Doxford instructions. Had he been informed of them he says that he would have obeyed them. But the reason of the necessity for what they prescribed was not known to him. He had been in command of the "Clan Gordon" for some time previously, and had been employed on other turret ships, and had found no difficulty. The case with which he had to deal of a ship loaded just as this one was, was, however, new to him, and he appears to have somewhat overestimated the proportion between the cargo in the lower holds and that between the decks. If he had known that there was not so much weight in the lower holds, it may be that he would not have emptied the tanks. Captain M'Lean was admittedly a competent and experienced officer, and there had been no difficulty with turret ships excepting in the case of the "Clan Ranald," when the disaster was due to the carelessness of another master. Captain M'Lean simply did not imagine that he could be running a serious risk when he began to pump out the tanks at sea, and nothing in his experience of turret ships had pointed to there being such a risk as there actually was.

No doubt the primary and immediate cause of the disaster which occurred to the "Clan Gordon" must be taken to be, not defect in the initial loading, but the pumping of the tanks out at sea just before the disaster happened. But then, if the Doxford instructions meant anything, they meant that such pumping must not take place. Whether its effect would be to destroy general stability, or to enable the free water to cause a dangerous disturbance of stability by the rush to the sides of the half empty tanks, does not matter. The instructions obviously implied not only that water must be kept in tanks that were filled, but that it must not be withdrawn.

On this point at least the instructions do not seem to me to be ambiguous, and if they had been given to Captain M'Lean, we must take it that he would have interpreted them properly and carried them out. There is no doubt that Doxfords sent them round as being suggested by their investigation of the circumstances which led to the overturning of the "Clan Ranald." It may be that ordinary ships might have proved to be subject to some analogous peril, but not, so far as we can gather the views of Messrs Doxford, to the same extent. Mr Holey, their assistant chief draughtsman, says in his evidence that the document, a copy of which was sent out for each turret ship, was meant to prescribe what was to be provided when loading. It is difficult to draw any other conclusion than that Doxfords thought there were risks in the case of turret ships, as to which special guidance for masters was required. It is true that the instructions were prepared and sent out by the builders, not only long after the ship was built, but many years before the accident, and that they are open to some criticism of the calculations on which they are founded. But the substance which underlies what they prescribe remains. They suggest to instructed persons that as in the case of a turret ship there is danger of righting force diminishing more rapidly than in the instance of a wall-sided ship, it is necessary to provide an appropriate amount of special ballast. This seems to follow from the proposition that the ship is not to be loaded down to her marks with a homogeneous cargo without water or other adequate ballast. In so far as this is scientifically true, no amount of fortunate experience in the course of which the peril happens not to have matured can properly be set against it.

Under these circumstances, and with the builders' warning in their hands, was it the duty of the owners to inform the masters of their turret ships of the special risk to which the turret form gave rise? I think that it was. On the mere experience and skill of the individual master they could not safely rely. He might never have given thought to any unusual critical point as possible in the stability of his ship, or have been in circumstances from which he could derive the necessary experience. The deduction of the critical point was, as I have said, the outcome of scientific calculation rather than of practice. But that circumstance did not render it the less important, or justify people in thinking that it was of such a nature that it could be left to be divined by those who had not been specially instructed.

I think that the true conclusion as to this case is that expressed in a passage near the end of Lord Sands' dissenting judgment in the First Division—"The broad view of the

matter appears to me to be this—A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the 'Clan Gordon' would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the 'Clan Gordon.'" I see no sufficient answer to the reasoning either of Lord Hunter, the Lord Ordinary, or of Lord Sands. Not the less it is hardly admissible to come to this result easily without careful consideration of the judgments of the majority in the First Division, for I have rarely read judicial opinions on a technical question which impressed me more by their care in expression than those of the majority as well as of the minority in the Courts below. The Lord President holds that the builders' instructions were fallacious in that even if the cargo was so far from being homogeneous that the ratio of the density of what was between decks to what was in the lower holds was only 83 per cent., somewhere near 500 tons of water was required in the ballast tanks to give stability. This he thinks to be out of the question, inasmuch as the ship was shown to be actually stable with only 290 tons of water in the tanks. He attributes this error, he suggests, to defective calculation by Doxfords about the cargo. But he goes on to say that even if this be so it is not wholly fatal to the pursuers' case, inasmuch as the master admitted that if the owners had communicated to him Doxford's instructions he would not have pumped out the 290 tons after leaving port, whatever he might have thought about the necessity of these instructions.

I am not satisfied that all the criticisms on calculation of the cargo made by the Lord President were wholly well founded. But even if they were I think he has himself given the answer to them, for it is not in serious dispute that the vessel was defective in righting power, and therefore unseaworthy when loaded unballasted down to her marks with a homogeneous cargo. The criticism of the Lord President does not affect this proposition. It may be that the wash over of the water in the half-emptied tanks contributed to and accelerated the turning over of the vessel. But if the master had been told that she was unstable without 290 tons of water ballast he would not have begun to pump out the tanks. It is no answer to say that the "Clan Gordon" and other steamers of the same turret construction had previously made successful voyages without any water ballast. That may have been their good fortune. But it does not prove that to make such voyages without special ballast was safe. Careful scientific calculation has in my opinion demonstrated conclusively that it was not, having regard to the restriction on righting force in the case of a turret ship, and the tendency of the righting force to diminish rapidly after a point has been reached which is only reached substantially later in the case of a wall-sided vessel. The Lord President thinks that the danger to the ship was one which neither arose from a latent peril in her construction, as in the case of the "*Schwan*" ([1908] P. 356, [1909] A.C. 450), nor from anything lying beyond the scope of competent seamanlike skill. He is therefore of opinion that if there was blame for the accident it is the master and not the owners who are made responsible for it under the charter-party and the bills of lading and the Harter Act. But surely in this case specific danger had been established as being a special and exceptional one by the calculation by the builders. The owners ought to have known of this, and it is obvious that the master might well not have. Even experienced navigators seem not to have come to suspect it in the course of their voyages in these turret ships. Captain M'Lean suspected danger so little that if left to himself he tells us that he would have pumped out his tanks before leaving New York. The instructions from Doxford's office of which he knew nothing were, as Barr, the managing director of the respondents, says, a surprise to the respondents themselves, who appear not to have taken them seriously, or to have made any independent attempt at the time to see whether they were or were not well founded. And yet her righting power depends largely on the shape of a vessel, and is a matter which can only be accurately ascertained by highly technical and highly scientific study. I am therefore unable to agree with the Lord President when he says that it would be detrimental to security at sea to put on owners who have appointed a competent master a duty to give him instructions even in such special circumstances. Unless this is done the most competent master may not be aware of risks of which only exact knowledge extending beyond any which he can be assumed to possess can inform him.

The reasons just given leave open, even assuming the view which I have expressed to be true, yet another point urged on their behalf by the defenders. They argue that as the instructions from the builders were when received passed on to Mr Lyall, the defenders' engineer, now dead, this relieves them from responsibility, for Lyall was their servant and as such responsible to them for all structural matters, and for giving instructions to the masters of their ships. If this be so, they contend that their liability cannot extend to the full sum of £97,892, 17s. 7d. awarded to the pursuers by the Lord Ordinary, but is limited to £27,581, 0s. 9d., being the amount calculated on the footing of a liability of £8 for each ton of the ship's tonnage. This contention they base on section 503 of the Merchant Shipping Act 1894 (as amended by section 69 of the Merchant Shipping Act 1906), which limits the liability where the damage has been occasioned without the actual fault or privity of the owner. It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privy to

what occurred—in this case to the failure to render the ship properly seaworthy by taking care that the master was instructed about the special risk arising from its shape. Now even on the assumption that the late Mr Lyall was fully directed to instruct the master on this point, and that the failure to do so was his fault, the owners are surely not discharged from responsibility, for their personal duty was to provide a seaworthy ship, and the ship was not seaworthy if the master was not instructed on the special matter in question. That they left their duty to be discharged by Lyall, as their servant or agent, therefore does not relieve the owners of blame. Their responsibility as regards seaworthiness was an individual one of which they could not divest themselves, and when they left its discharge to Lyall they did so at their own risk. I am well aware of the magnitude and seriousness of the consequences of this conclusion to the respondents, but I am unable to see how what they did divested their breach of duty of these consequences. I therefore think that the interlocutor of the Lord Ordinary should be restored, and that the respondents must pay the costs here and in the Inner House. As to the point made by Mr Macmillan about expenses, it is true that the pursuers failed technically in the part of their case which related to physical seaworthiness in New York Harbour. But the evidence they led on this point was not easily severable from the evidence required on the broader issue on which they succeeded. Accordingly I do not think that we ought to interfere with the exercise made of his discretion by the Lord Ordinary in giving the pursuers the whole of their expenses.

The appeal was admirably argued on both sides, and I wish before sitting down again to state the broad reasons which have made me finally feel myself compelled to prefer the argument of the appellants.

These reasons are as follows:—The vessel was unseaworthy in that she could not safely undertake a voyage with a cargo of an approximately homogeneous character unless she had and retained at least 290 tons of water in her lower tanks. That this was her indisputable condition for safety is not the less true because she and vessels resembling her in shape and construction had successfully made a certain number of voyages with a full cargo and without this minimum ballast required. To be put about under a rapid action of the helm is what in the case of every vessel that undertakes a long voyage may be necessary, and in the case before us the operation is proved to have been a dangerous one for a turret ship without sufficient ballast. The inherent danger was one which a master not specially instructed might well overlook. Even a long experience might chance not to reveal it. It was a danger, however, which scientific calculation could reveal—calculation of a kind which no ordinary master, however long his experience at sea, could be reckoned on as having either made or as having been able to make. Thus it was the duty of the owners, whose business lay in making their ship seaworthy, to have the master instructed as to all defects in seaworthiness during the voyage arising from inherent causes that were not obvious, and of which his merely practical knowledge could not be relied on to inform him. This the owners in the case before us failed to do when they did not bring to the mind of the master of a turret ship the Doxford special instructions. These instructions may be open to criticism in detail, though I think that the Lord President attaches more importance than is due to the effect on their substantial validity of the points he made. But, as the Lord President himself concedes, they show that it was unsafe to get rid of the water ballast after the ship had started. Speaking broadly, Doxford's investigation had shown the reason for such unsafeness and its direct relation to the shape of the ship. The investigation was of a technical character. The master could not himself be expected to make an investigation leading to a calculated result like this, or to learn for himself what was implied merely in the course of ordinary experience. I differ at this point from what I understand the Lord President to suggest, and I draw the inference that the ship was inherently unseaworthy in certain not improbable conditions unless special precautions were taken which it was the duty of the owners to enjoin, as being required by the structure of their ship.

I am therefore of opinion that the appeal must be allowed.

LORD ATKINSON—It having been admitted that the "Clan Gordon" was not by reason of want of stability unseaworthy when she left New York Harbour, the main questions for decision in this appeal are whether the neglect of her owners to communicate to the master the contents of the document rendered him incompetent to navigate his ship laden as she was, and therefore rendered that ship unseaworthy, and whether the owners had exercised due diligence to make the ship seaworthy. The appellants filed the following pleas-in-law:—1. The defenders having failed to carry and deliver the pursuers' said cargo in terms of their contract are liable in damages. 2. The sum sued for being the loss to the pursuers caused by the said breach of contract, decree should be pronounced in terms of the conclusions of the summons. 3. The "Clan Gordon" having been sent to sea in an unseaworthy condition, and the pursuers having thereby suffered loss and damage as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons. 4. The "Clan Gordon" having been lost for a cause for which the defenders are liable under the contract condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons. 5. The defenders having failed to exercise due diligence to make the "Clan Gordon" seaworthy, and the pursuers having suffered loss and damage through this unseaworthiness as condescended on, the pursuers are entitled to decree in terms of the conclusions of the summons.

The first and second of these pleas rest upon the breach by the respondents of the contract contained in the bills of lading to deliver at the ports of Dalny or Taku Bar the goods shipped on the "Clan Gordon" under order of the appellants or their assigns. This breach of contract admittedly took place. The burden rests upon the respondents to show that they are not responsible for it.

By the charter-party it is provided, amongst other things, that the vessel, *i.e.*, the "Clan Gordon," was tight, staunch, strong, and in every way fitted for the voyage, including proper ballast and dunnage, and should receive on board for the voyage a full cargo of refined petroleum in customary low-top cases of ten American gallons each, which the charterers (*i.e.*, the appellants) were to provide and furnish. By the 21st clause of this charter-party it is expressly provided that it is subject to all the terms and provisions of, and all exemptions from liability contained in the American Statute, known as the Harter Act, and that bills of lading shall be issued in conformity with that Act. And accordingly the bills of lading provided that the shipment was subject to all the terms and provisions of, and to all the exemptions from, liability contained in the Act of Congress of the United States relating to navigation approved on 13th May 1893, *i.e.*, the Harter Act.

The relevant provisions of the Harter Act are contained in its third section, which runs thus—"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel. . . ."

In addition to the provisions thus imported into the bills of lading, each of the latter (three in number) contained a clause the relevant portions of which run as follows:—"It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters, by fire from any cause wheresoever occurring; by barratry of the master or crew, by enemies, pirates, or robbers, by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager)."

It will be observed that under the Harter Act it is the absence on the part of the owners of due diligence to make their vessel seaworthy which deprives them of protection, whereas under the clause in the bills of lading it is the omission of the owners of the ship or any of them, or of the ship's husband or manager of the like kind, to exercise due diligence which deprives the owners of the named protection.

I fancied it was suggested by Mr Macmillan in the clear, ingenious, and able argument which he addressed to the House that it was the duty of the first officer of a ship exclusively to superintend the stowage of her cargo, and that the master was altogether relieved of that duty by this officer. I do not think that that is quite so.

In *Anglo-African Company* v. *Lamzed*, L.R., 1 C.P., p. 226, Willes J., at p. 229, said —"The master (*i.e.*, the master of the ship) is by law required to be a competent stevedore himself." And in Carver on Carriage by Sea (4th ed.), it is in par. 48 laid down, on the authority of *Hayn, Roman, & Company* v. *Culliford & Clark*, L.R., 3 C.P.D., 410-416, and on appeal in L.R., 4 C.P.D. 182, that it is the *prima facie* duty of the master to stow safely the goods carried in his ship. I observe that it is stated that "At the time the 'Clan Gordon' sailed two of her ballast tanks, Nos. 1 and 2, containing 95 and 195 tons of water respectively, were full, and that she was loaded down to her marks."

It may, of course, well be that in any given case the responsibility for the proper stowage of the cargo of a vessel is by the agreement of the shipper and shipowner thrown upon some person or persons other than the master, such as stevedores. But such an arrangement even if made, though it may relieve the master from attending to or being responsible for the actual operation of stowing the cargo, it by no means follows that he is relieved from the duty of accurately ascertaining what is the result of the completed work of stowage upon the stability of his ship, such as the relative weights of the portion of the cargo stowed in the hold and that stowed atween decks.

It is set forth in the respondents' case that the "Clan Gordon" had a dead weight carrying capacity of 5675 tons, that she was a turret ship, a class of vessel differing from wall-side steamers in the configuration of their sides, that Messrs Doxford & Sons, shipbuilders, of Sunderland, had built nearly 200 of these ships, that they were good sea boats of better sea-going capacity and rolling less heavily than wall-sided ships, due to the fact that owing to their configuration less weight was carried in the upper part of the ship relatively to the lower, than in wall-sided ships. But another result of their configuration was that while up to 18 degrees of inclination or heel they possessed a greater power of righting themselves than did the wall-sided ships, yet beyond that angle of inclination they possessed much less power of righting themselves than did the others. It is not disputed that before leaving New York on the 28th July 1919 the goods mentioned in the bills of lading had, with a number of tons of bunker coal, been loaded on the "Clan Gordon," and that

the cargo so loaded was so stowed that the contents of the 'tween decks represented a density of 95 or thereabouts, as against a density of 100 represented by the contents of the lower holds and bunkers.

The captain in his evidence says that the cargo actually loaded was the first of its kind he had ever loaded himself, that after the pilot left him he tried on his ship the test for stability he had frequently tried from 1917 downwards. The test consisted in this, that when going full speed (10 knots) he would have the ship's helm put hard over both ways; that if the ship should be tender she would take a list. The "Clan Gordon" showed, he says, no sign whatever of tenderness under the test. The sea was, he says, more or less calm. He then adds—"I had my 290 tons of water ballast on board. Tanks Nos. 1 and 2 were full." A not unnatural conclusion to draw from this evidence is that if those tanks had been kept full his ship would not have been lost as she was lost.

A list of voyages made by the "Clan Gordon" and by other ships with homogeneous cargoes from March 1909 to December 1915 was given in evidence, and apparently relied upon by the respondents to establish that this ship might though heavily laden have been safely navigated with empty ballast tanks. In the fifteen voyages mentioned in this list only four appear to have been made with empty tanks. Besides it is not the respondents' case that the master was acting rightly in this case in emptying his ballast tanks after leaving New York. On the contrary, in their case it is stated that it is not disputed that the immediate cause of the loss of the "Clan Gordon" was the pumping out of the water from the two ballast tanks. Neither is it disputed that the captain in giving the order to pump those tanks committed an error in the management of his vessel. There is not a particle of evidence to show that Captain M'Lean ever sailed this vessel with empty water tanks, or that he applied to his ship the test he so much relied on when all her ballast tanks were empty. He seems to have concluded that because the vessel showed no tenderness and was safe when her two ballast tanks named were full, she would also show no tenderness and be safe when they were empty. The sequel shows how fatal was his error in this, and it would appear to me to show too how much he needed instruction on this question of the stability of his ship when loaded with a homogeneous cargo, or a cargo closely approaching to a homogeneous one.

His description of what happened would appear to enforce this last conclusion. He says that after tank No. 1 had been emptied and No. 2 emptied all but 6 inches, the ship took a list of about 5 degrees to port. He was then steering on a course south west true making 10 knots; that about 4·30 he wanted to get bearings and ordered the quartermaster to port his helm; that the latter began to do so, a little at first; that nothing happened immediately; that he then ordered the quartermaster to put the helm hard aport; that then she began to list; at first she went over 14 degrees and then fell right over 60 or 70 degrees; that this happened very quickly. The ship then sank; that before she sank he saw her turn with her keel up. The sea was calm.

There is nothing to show that what actually occurred would not appear to a competent seaman properly instructed to be the thing which would most probably occur under the circumstances. The evidence, I think, establishes that the master's handling of his ship amounted to gross and flagrant mismanagement for which there was no excuse. Though this be so, the main question still remains—Did the default of the master in this respect result from want of due, *i.e.*, reasonable, diligence on the part of the owners of this ship, or any of them, or of the ship's husband or manager, in not having the advice and instruction contained in the document brought home to the mind and knowledge of Captain M'Lean before they entrusted him with the navigation of this ship on her voyage from New York to the Eastern ports named in the charter-party with the cargo mentioned?

It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage. There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy. And the owner who withholds from the master the necessary information should in all reason be as responsible for the result of the master's ignorance as if he deprived the latter of the general skill and efficiency he presumably possessed.

The vital necessity, the appellants contend, was to get the contents of this document into the heads of the captains of turret ships. The mode or method in or by which that could be effected is quite immaterial. It is the effect of the acquired knowledge on the master's management of his ship that is the matter of importance, since the master would by the instructions be warned against a somewhat undiscoverable or hidden danger which if unknown or disregarded might lead to lamentable results. It is essential to consider the history of this document. The tragedy from which it sprang, the disasters it aimed at preventing, the persons by whom it was framed, as well as those to whom it was distributed, are all important. In the year 1909 a ship named the "Clan Ranald," a sister ship of the "Clan Gordon," built by the same builders and belonging to the same owners, the respondents, while on a voyage from Australia to South Africa laden with flour and grain, overturned and sank in fine weather very much as did the "Clan Gordon." Forty men were drowned, including the master, chief engineer, second, third, and

fourth engineers, second mate, and chief steward. A public Court of Inquiry was held at Adelaide, Australia, under the Merchant Shipping Act of 1894 into the circumstances attending the loss of the ship. The report made by this Court was given in evidence. It is a very significant document. The finding of the Court as set forth in it is to the effect that the "Clan Ranald" at the time of her departure at 7 a.m. on the 31st of January laden with grain and flour had a list to starboard of 4 degrees; that on reaching the open sea this list increased to 6 degrees; that about 2 p.m. the vessel heeled to starboard, placing the side of her turret deck under water; that she never righted again, yet she continued on her course firing rockets (of distress presumably); that the helm was starboarded with a view to correct the list but without effect; that at 5 p.m. the helm was put hard a-port, but she still maintained her dangerous angle of inclination, and at 10 p.m. sank out of sight. It was also proved that her ballast tanks had been pumped dry before she left the port of Adelaide. It was further found that this ship when lost was practically a full ship, having approximately 6500 tons of cargo on board, and in addition 70 tons of coal on her turret deck, 50 on the starboard side, 20 on the port side, and about 50 on each side of the fidley deck. There was no finding that the cargo had shifted, nor was there any finding that the cargo had been badly loaded or stowed.

Well, this disaster obviously affected vitally the pecuniary interests both of the builders, who were very extensive, if not the most extensive, builders of these turret ships, but also of the respondents, who were possibly the largest owners of them. Both naturally and properly desired to prevent by all reasonable precautions the recurrence of such a misfortune, and accordingly they turned their respective attentions to the best mode and method of loading these turret ships under certain possible conditions so as to secure their stability. They accordingly determined to compile general instructions for the loading of the turret ships. Experiments and calculations were made to get material for this compilation. Mr J. T. Holey, the assistant chief draughtsman of the builders, filled in the forms ultimately adopted. He stated that the object of preparing these was the guidance of masters of these vessels. It is headed "General Instructions as to Loading Turret Ships, issued by Messrs William Doxford & Sons, Ltd., Sunderland."

Copies of this document the witness Holey says were sent to all the British owners of turret ships—a copy for each ship. In particular, he says, a copy was sent to the owners of the "Clan Gordon." He believes some of the owners asked for extra copies. He did not think that any owner ever wrote to say that he did not understand them. Mr Barr, the secretary of the respondent company, admits that the instructions were the outcome of the "Clan Ranald" disaster. He says that the builders gave certain details as to stability, that they drew them out for all the turret ships owned in this country, and passed on similar notes to all these owners. . . . [*His Lordship then examined the evidence and proceeded*]. . . .—The appellants contend, rightly in my opinion, that these instructions are not to be disregarded, though the conditions actually existing in any given case may not comply to the very letter with the terms of them. For instance, if a turret ship be not loaded actually down to her marks, but within 3 or 4 inches of them, it would be ridiculous to contend that the first paragraph of the instructions did not apply. Because the object of the instructions is to warn against the danger of possible instability, and it is impossible to measure the approach of that danger by such minute degrees. The respondents further contend apparently that their own instructions circulated for use by all masters of British turret ships were unintelligible to men of that class. If so, the transmission of these was not only an imposture, but an irritating interference with the business of owners and managers of turret ships.

A distinguished and intelligent officer of experience, Captain Ruthven, was examined upon this and kindred points, His evidence appears to me to be *prima facie* worthy of all credit. It shows conclusively, I think, that the mockery I have indicated was not gone through. He says—"If the instructions were sent out for the purpose of giving stability and information for the working of the vessel they should be in the hands of the master. He is the only man to give effect to them unless he had trained his chief officer. I had all my officers trained." And when asked about the intelligibility and common sense of the instructions, contained in the document, he answered that they seemed to him fairly clear. He could find no fault with them and would have no diffiulty in using them. When asked if in his view the captain of the "Clan Gordon" should at New York have gone into a series of calculations to find out the centre of gravity of the total mass of his vessel, he replied in the negative and said, "No, I put the saddle on the right horse—the owners ought to give him the instruction." Neither does the master, M'Lean, say that the instructions were not intelligible to him. On the contrary, he makes his point upon them with full appreciation of the meaning of at least the first paragraph on which he is examined. He was asked what was obscure about that paragraph, and he being dissatisfied apparently by the admission of the respondents in the case that his vessel was loaded down to her marks, replied, "Now my ship was not down to her marks with a homogeneous cargo, if you call it homogeneous. She was 9 inches off her marks. Therefore why should I require water ballast? I say it is obscure." He had already sworn that if he had got instructions from his owners to do a certain thing he would have done it. He is then asked, "Do you mean to say that if you had this instruction before you you would have

pumped out your water ballast?" In reply he said, "I probably would, because my experience, and all the masters' experience, of these turret ships is entirely contrary to those instructions." If that evidence were true the natural thing would have been to withdraw these instructions, or to bring to the knowledge of the captains of these turret ships that they should disregard them. This evidence, however, has this defect—it is directly contrary to the evidence this very witness gave before the Board of Trade inquiry held in 1920. His attention is called to his answer then given and the question is put to him—"When you were asked there, 'If you had had these instructions before you, don't you think you would have refrained from pumping out those water-ballast tanks at sea' your answer was, 'Yes, I would have refrained from pumping out those two water-ballast tanks at any rate till I had worked off all my 'tween decks coals'." He then adds, "I qualified that answer the following day. That was the answer I gave." He is then asked what altered his mind, and his answer was, "I thought over it at night and I thought I had not given a true reflection of my mind about that and I had that altered the following day." I am afraid Captain M'Lean has a great belief in judicial credulity, He admits, however, that his ship turned turtle because the tanks were pumped out. He admits his cargo was more or less homogeneous. He says that from a rough calculation made from figures got from his chief officer he made it out that he had close on 400 tons more weight in the lower hold than 'tween decks. It was shown to him that in this he was entirely in error; that there was no such difference of weight between these two portions of the cargo, and he is then asked —"Would you have emptied your tanks if you had known, as we now know, that there was no such weight in the lower holds?" and his answer was, "No, I would not have thought of such a thing."

Captain Charles M'Intosh, a captain in the Royal Naval Reserve (retired), one of the assessors for the Court of Session in Scotland and for the Home Office, a Master of Trinity House, Leith, and a Master of Trinity House, London, was examined as a witness, and when shown No. 141 of process and being asked was it plain, replied—"It's as plain as a pikestaff, this first thing. It teaches me that if a ship goes down to her marks with a homogeneous cargo—that is, a cargo that fills every bit of space—it is not to be inferred by a sailor that because she is deep in the water she is able to stand a sea. This set of instructions draws the attention of the master to the important fact that he has to consider the relative density of the cargo in the lower hold and in the cargo 'tween decks. It draws his attention to it as I understand it quite clearly. It tells him, according to the various proportions of the cargo in these two holds, how to alter his water-ballast. All is quite clear to me as a sailor."

After a most careful perusal of all the evidence I have come to the conclusion that the respondents have failed to establish that the instructions were either obsolete, unintelligible, or useless. I think that, on the contrary, even to masters of turret ships of general capacity as seamen, they were very helpful towards the safe navigation of those ships under conditions which frequently exist, by directing attention to the dangers which might arise from unskilful loading, and indicating how those dangers might be avoided.

I think that the respondents by leaving the captain of the "Clan Gordon" in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty they owed to the shippers of the cargo the vessel carried, and failed to use due diligence to make their ship seaworthy. The fact, if it be a fact, that few disasters befel the fleet of the respondents in the interval between the loss of the "Clan Ranald" and that of the "Clan Gordon" is no proof that these instructions were useless, or were disregarded, or were not helpful. It is quite as rational, indeed more rational, to conclude that this fortunate immunity was due to the observance of these instructions rather than to the disregard of them. It follows from what I have said that, in my view, the loss of the "Clan Gordon" did not take place without the fault or privity of the respondents within the meaning of section 503 of the Merchant Shipping Act of 1894. On the whole I think the appeal succeeds, that the decision appealed from was erroneous and should be reversed, and that the appeal should be allowed.

LORD PARMOOR—The appellants are a company incorporated under the laws of the United States of America, carrying on business in New York and elsewhere as oil merchants. The respondents have their registered office in Glasgow, and are owners of the s.s. "Clan Gordon," a turret steamer built of steel in 1900, and of the burden of 2292·45 tons register. In July 1919 the s.s. "Clan Gordon" loaded at the port of New York a cargo of motor spirit and of refined petroleum in cases, and of refined wax in bags, to be delivered at Dalny and/or Taku Bar to the order of the appellants or their assigns. The s.s. "Clan Gordon" sailed from New York on 28th July 1919. On the 30th of July 1919 she listed to port, turned turtle in a calm sea, and was totally lost with her whole cargo.

The appellants brought an action for loss and damage, pleading in law that the respondents having failed to carry and deliver the appellants' cargo in terms of their contract were liable in damages. It was alleged that the s.s. "Clan Gordon" had been sent to sea in an unseaworthy condition, and that the defendants had failed to exercise due diligence to make the s.s. "Clan Gordon" in all respects seaworthy. At the hearing the appellants endeavoured to prove that the s.s. "Clan Gordon" was not structurally seaworthy when she left New York. Both the Lord Ordinary, Lord Hunter, and the Judges of

the First Division have found that the s.s. "Clan Gordon" was structurally seaworthy when she left New York, being tight, staunch, and strong, and well equipped for the carriage of her cargo, and in a condition to encounter whatever perils a ship of that character and burden may be fairly expected to encounter on the voyage for which she is destined. The finding of the Lord Ordinary and of the Judges of the First Division on this issue was not questioned on the hearing of the appeal before your Lordships.

The question to be decided on appeal is whether the respondents committed a breach of duty for which they are liable in not communicating to the captain of the s.s. "Clan Gordon" certain information which they possessed, and which related to turret vessels of the "Clan Gordon" type. The Lord Ordinary found in favour of the appellants, but his interlocutor was recalled by the Judges of the First Division. Lord Sands dissented, and was of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

A further question is raised as to the quantum of damages. The respondents claim that if there is any liability they are entitled, in terms of section 503 of the Merchant Shipping Act 1894, to have their liability limited to £8 of each ton of the ship's tonnage.

The s.s. "Clan Gordon" was built for the respondents by Messrs William Doxford & Sons, shipbuilders, Sunderland. She belonged to a class of turret steamers, of which at one time, the respondents had no less than twenty-nine in their fleet. Turret vessels up to a certain angle of inclination or list possess a greater stability and power of righting themselves than wall-sided vessels; but if this angle of inclination or list is exceeded, then, owing to the shape of a turret steamer, the centre of buoyancy is shifted, and there is a greater risk that the vessel may turn turtle. Captain M'Lean, who was master of the s.s. "Clan Gordon" on the voyage in question, was as regards skill in seamanship a competent master, but the appellants maintain that the ship was not well manned on the voyage in question, in that Captain M'Lean was not furnished with, and had not had brought to his notice, a document of general instructions as to loading of turret ships issued by the builders Messrs William Doxford & Sons of Sunderland, and headed s.s. "Clan Gordon" "General Instructions as to Loading."

The first instruction is that this vessel is not intended to load down to her marks with a homogeneous cargo without water ballast. A homogeneous cargo in this context denotes a cargo of approximately the same density throughout, and of quantity sufficient to reasonably fill the whole cargo space. I agree in the conclusion of the Lord Ordinary and Lord Sands that the cargo on the s.s. "Clan Gordon" was in substance a homogeneous cargo within the meaning of this instruction.

When the s.s. "Clan Gordon" was loaded in New York two of her ballast water tanks were filled, holding an aggregate amount of 290 tons. After leaving New York the captain determined that he would pump out the water ballast from both tanks. The actual pumping began on the 30th. At noon it was reported that one tank was empty, and the second tank was then started. At 4 o'clock it was reported that the second tank only contained 6 inches of water on the port side. At about 4·30 an order was given to put the helm hard-a-port, and the s.s. "Clan Gordon" began to list, subsequently falling right over and sinking in the open sea. The question is whether there was any duty upon the respondents in the exercise of due diligence in their business as shipowners to bring these general instructions to the notice of Captain M'Lean. By the terms of the contract of carriage it was agreed that the respondents should not be liable for "loss or damage occasioned by causes beyond their control by perils of the sea . . . collisions, stranding, or other accidents of navigation, not resulting from want of due diligence by the owners." In addition the provisions of section 3 of the Harter Act applied, "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel." In substance the same considerations arise under the clause in the bill of lading, and under the above section of the Harter Act. If therefore the loss of which the appellants complain resulted from want of due diligence on the part of the respondents as owners of the ship, the respondents are under obligations as carriers, either to deliver the goods shipped on the s.s. "Clan Gordon" or to pay damages for loss.

In considering whether under these circumstances the respondents committed a breach of duty, I think that the tests stated by Lord Gorell in the case of *Abram Lyle & Co.* v. *The Owners of Steamship "Schwan"* (1909, A.C., p. 450) are applicable although they refer to conditions of an entirely different character. In that case the "Schwan" was held not to be seaworthy owing to the defect in a three-way cock, and that the shipowners were liable as their agent had not exercised reasonable care and diligence within the meaning of the secoud clause of the bill of lading. There was no evidence that the chief engineer or any of his subordinates had been warned about the danger, or knew anything of the peculiar construction of the cock, and if the cock had been of a proper and usual character there would have been no danger in its use. Lord Gorell says in his judgment (p. 462)—"The question then seems to be, Is a vessel seaworthy which is fitted with an unusual and dangerous fitting, which will permit of

water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character or of the need for the exercise of special care, and might as engineers of the ship reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think this question should be answered in the negative." In the case under appeal I am unable to come to any other conclusion than that a vessel which requires special precautions of an unusual character to be taken in the maintenance of a sufficient water ballast to ensure conditions of stability, which would not be known to a captain of ordinary skill and experience, and which have not been brought to his notice, although they had been specifically indicated to the shipowners in instructions sent to them from the shipbuilders, is not manned so as to be seaworthy, and that there was a duty on the respondents to have brought such instructions to the notice of the captain.

The relevant considerations may be summarised in the following order:—1. The s.s. "Clan Gordon" when she sailed from New York was approximately loaded down to her marks with a homogeneous cargo, so that any competent captain to whom the general instructions issued by Messrs William Doxford & Sons had been communicated would have known that the first paragraph applied to the conditions of loading in the s.s. "Clan Gordon." 2. That the s.s. "Clan Gordon" as loaded when sailing from New York was not seaworthy without water ballast, and that it was in consequence of the pumping out of the water ballast that she failed to right herself and sank on a fair day in a calm sea. 3. That the margin of stability in a turret ship of the construction of the s.s. "Clan Gordon" is ascertainable by exact calculation, and that the respondents by means of the general instructions issued by Messrs Doxford & Sons knew that the margin of stability had been ascertained, and that the "Clan Gordon" was not seaworthy as loaded without water ballast. 4. That the information conveyed to the respondents in paragraph (1) of the general instructions had not been brought to the notice of the captain of the s.s. "Clan Gordon" at the time she sailed from New York. This information was not a matter within his knowledge, although it is admitted that he had all ordinary knowledge in seamanship which a competent skilled seaman should possess. 5. That if the information contained in paragraph (1) of the general instructions had been communicated to the captain of the s.s. "Clan Gordon" he would not have pumped out the water ballast and the vessel would not have sunk.

The captain in giving evidence at the inquiry before the Board of Trade in 1920 was asked—"If you had these instructions before you, don't you think you would have refrained from pumping out those two water-ballast tanks at sea?" He answered —"Yes, I would have refrained from pumping out those two water-ballast tanks, at anyrate until I had worked all my coal off 'tween decks." It is true that he qualified this answer on the following day on the ground that he would not have taken much notice of these instructions, because they are entirely contrary to other experience of those turret ships, but it is difficult to appreciate how such experience could have been gained when the result of an experiment would necessarily be disastrous. The captain was further asked—"Why did the s.s. 'Clan Gordon' turn turtle?" and answered —"I presume she turned turtle because the tanks were pumped out."

The above considerations are in my opinion amply sufficient to establish a *prima facie* case that there was a duty on the respondents to communicate the instructions to the captain of the s.s. "Clan Gordon." The question therefore arises whether sufficient explanation has been given by the respondents to justify them in their negative action. Mr Barr, who had been registered manager for the respondents since the s.s. "Clan Gordon" was built in June 1900, expresses quite frankly the reasons which influenced the respondents in not communicating the instructions to their captains, including the captain of the s.s. "Clan Gordon." He states that when the respondents get vessels they consider that they get their vessels sufficiently stable to carry homogeneous cargo without water ballast. This general statement may be accepted, but it emphasises the duty to communicate a special instruction which indicated that a vessel of the "Clan Gordon" type was not sufficiently stable to carry homogeneous cargo without water ballast. He further states that an instruction of this kind is so utterly against all experience of the steamers which the respondents had that it would certainly not appeal to them as a document which would be of any use to them, or as a serious document—a document they need take serious notice of. No doubt this explanation must be taken in reference to the special circumstances, but I think it was an additional reason for giving weight to the instructions that they were of such a special nature as to be entirely against all former experience.

Mr Macmillan in his able argument on behalf of the respondents supported the judgment of the First Division on the following grounds:—He said that the case presented facts of an unprecedented character, and that there was no instance in the books of the owner of a ship being held liable for not bringing the instructions of the builders relating to the stability of the ship to the notice of the captain. This may be admitted, but the question nevertheless arises whether the facts as disclosed in the present appeal do not disclose a danger of an unusual character known to the respondents, which it was their duty to bring to the notice of the captain of the s.s. "Clan Gordon." For reasons already stated, I think that it was the duty of the respondents to bring the instructions to the notice of the captain.

Mr Macmillan further argued that the conditions of stability in a turret vessel could not be regarded as constituting an unusual danger, in that such a vessel was one of a substantial class of vessels of which the merits and demerits were known, and of which the respondents had had a prolonged experience both before and after the loss of the s.s. "Clan Ranald," a ship of similar construction which had turned turtle and sunk in 1910. Among other passages he referred to the evidence of Captain Ruthven, who was called at the trial on behalf of the appellants. He was asked — "Would you, if you had been in command of this ship when she was two days out from New York, have emptied Nos. 1 and 2 tanks?" His answer is—"I certainly would not have done that; if I had had those instructions I should have filled another one. If I had been long enough on the ship I might have found out for myself what I found out from the builders." It was said that as the captain of the s.s. "Clan Gordon" had been in charge of the vessel for more than a year he might have found out for himself the information contained in the instructions, and that it was more safe to rely on the experience of the captain than to fetter him by issuing special instructions. The fact that the captain of a vessel may find out for himself after a certain period of time a source of unusual danger which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence if such a loss has been incurred. Evidence of a similar character was given by Thomas Barr, who had been the registered manager of the respondents since the s.s. "Clan Gordon" was built in June 1900. He states as follows:—"Well, the builders have not an actual experience of the vessel, and how their figures are arrived at we do not know. We do know that our masters and ourselves have the practical experience of the conditions under which these vessels are sailing, and we are rather inclined to take it that the experience which we have of these types puts us in a position of being better able to judge whether the ships could carry these cargoes or not." It is not possible to accept evidence of this character as an answer to the allegation that instructions based on exact calculations of the stability of the vessel and the accuracy of which is not questioned had not been brought to the notice of the captain.

It was further suggested that the instructions were in themselves ambiguous, and more likely to cause difficulty than to give information which would assist the captain. Mr Camps, a maritime expert, says that he did not have any difficulty in understanding the instructions, and that if you take each paragraph by itself he thinks that the first paragraph is perfectly clear. Evidence of a similar character is given by Captain Ruthven and Captain M'Intosh, and the three experts called for the respondents—Mr Wall, Professor Welch, and Dr Douglas—do not suggest that there is any difficulty in understanding the first paragraph of the instructions. In my opinion the respondents have failed to establish that the instructions were in themselves of an ambiguous character, so that it was prudent not to embarrass their captains by bringing to their notice the information which they contained.

In the result I agree with the conclusions of the Lord Ordinary and Lord Sands that there was a duty on the respondents to bring the instructions to the notice of the captain of the s.s. "Clan Gordon," and that the respondents have failed to prove that they used due diligence. There is no doubt that if there was a duty on the respondents to bring the instructions to the notice of the captain the vessel was not seaworthy, and that the loss resulted from her unseaworthiness.

It was further argued on behalf of the respondents that they were entitled to have their liability limited in accordance with section 503 of the Merchant Shipping Act of 1894, but in my opinion they have failed to show that the said loss occurred without their actual fault or privity.

The appeal should be allowed with costs here and in the Court of Session and the judgment of the Lord Ordinary should be restored.

Their Lordships ordered that the interlocutor appealed from be reversed; that the interlocutor of the Lord Ordinary be restored, and the cause remitted back to the Court of Session with directions to enter decree for the appellants for the sum of £97,892, 17s. 8d., with interest at the rate of 5 per centum per annum from the 13th day of January 1922; and that the respondents do pay to the appellants their costs in this House and in the Court of Session under a reservation of the question of modification, if any, of the expenses in the Inner House as well as before the Lord Ordinary until the lodging of the Auditor's report.

Counsel for Appellants—Dean of Faculty (Condie Sandeman, K.C.) — Normand. Agents—J. & J. Ross, W.S., Edinburgh—W. A. Crump & Son, London.

Counsel for Respondents — Macmillan, K.C. — Mackinnon, K.C. — Douglas Jamieson. Agents—Webster, Will, & Company, W.S., Edinburgh — Coward & Hawksley, Sons, & Chance, London.

Monday, November 26.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh,)

BLACK *v.* JOHN WILLIAMS & COMPANY.

(In the Court of Session, February 22, 1923, S.C. 510, 60 S.L.R. 330.)

Arbitration — Award — Reduction — Irregularity of Procedure — Alleged Failure of Arbiter to Apply his Mind to Question Submitted — Examination of Witnesses Outwith the Presence of Parties.