to give up the attempt to enter Vladivostock when he did, I see no reason why he should not have renewed his attempt when the weather conditions changed, as they did on the very next day. As to the second part of the clause, I have come, after consideration, to agree with the learned Judges of the Court of Appeal in thinking that "any other cause" must be limited there to causes *ejusdem generis* as war and disturbance, and cannot apply to ice, which is specially dealt with in the first portion of the clause. But even were that not so, I think that the same considerations as to the facts which prevent the appellants from sheltering themselves under the first portion apply here also. In other words, I should hold that the condition of unsafeness must at least endure until the delivery at the alternative port has been effected. The other clause appealed to was the general enumeration in clause (2), in which, *inter alia*, figures "error in judgment of the master, &c. . . . whether in navigating the ship or otherwise." I can only say that this seems to me to have no application. The non-delivery of the goods at Vladivostock was not due to an error in judgment of the captain. The proper application of the clause is sufficiently indicated by the words "in navigation or otherwise." It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it. The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. The point is a narrow one, but I am content with the judgment of Channell, J., and I cannot think that your Lordships would regard with any favour a defence which, unless it were accompanied by an allegation that the charterers were not in a position to indemnify the owners, amounts to a mere multiplication of procedure, it being clear that the shipper could recover against the charterers either as upon a contract or in respect of warranty of authority. Nor do I think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that the condition of the argument is that it is admitted that this was a bill of lading which the master could rightly have been called on to sign. Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners.

Judgment appealed from affirmed.

Counsel for Plaintiffs and Respondents —J. A. Hamilton, K.C.—A. Adair Roche. Agents—Botterell & Roche, Solicitors.

Counsel for Defendants and Appellants— J. R. Atkin, K.C.—Lewis Noad. Agents— W. A. Crump & Son, Solicitors.

HOUSE OF LORDS.

Friday, July 3, 1908.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Ashbourne and Robertson.)

ANDERSEN *v.* MARTEN.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Marine Insurance—Time Policy—Exception of "Capture, Seizure, Detention, and the Consequences of Hostilities" — Total Loss after Capture before Condemnation.

A ship was insured against perils of the sea under a time policy for total loss only, and "warranted free from capture, seizure, detention, and the consequences of hostilities." She carried contraband of war and was seized by a belligerent cruiser. While under control of the captors she ran aground and became a total loss, partly in consequence of damage which she had sustained by perils of the sea before capture. After the ship's total loss she was condemned by the belligerent prize-court.

Held that upon the date of the capture there was a total loss by capture which the policy did not cover.

The owner of the s.s. "Romulus" sought to recover her loss from an underwriter, who was the respondent. He appealed from a judgment of the Court of Appeal (COZENS-HARDY, M.R., MOULTON and FARWELL, L.JJ.), affirming that of CHANNELL, J., in favour of the respondent. The circumstances appear sufficiently from the judgment of the Lord Chancellor pronounced after their Lordships had taken time for consideration.

LORD CHANCELLOR (LOREBURN)—In this case the owner of the steamship "Romulus" insured that vessel for twelve months, from the 12th January 1905, in a policy expressed to be on disbursements. At the trial it was agreed, no doubt with propriety, that the rights under this insurance were to be determined as though it had been on hull and machinery. The perils usual in a Lloyd's policy, including perils of the seas, men-of-war, takings at sea, arrests, restraints, and detainments, appear in the policy. But the risk insured was only against total loss. And there is the following clause:—"Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy, and barratry excepted." The "Romulus," a German vessel, sailed during the currency of this policy for Vladivostock, a naval port and basis of naval operations in the war between Russia and Japan then raging. She carried coal, which had been proclaimed contraband of war. In order to avoid Japanese cruisers, the "Romulus" took a circuitous course to the north, and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. On the 26th February 1905 she was stopped by a

Japanese cruiser in the Tsugaru Straits, some thirty or forty miles from Hakodate. A Japanese officer with seamen and marines boarded her, questioned her master, examined her papers, and announced that the ship was captured for carrying contraband of war. Judging that she could make the voyage to Yokosuka, he ordered the master to proceed thither, remaining himself in control. The "Romulus" accordingly shaped her course for Yokosuka, but made much water, and altered her course. She then went aground, and, being unable to get her off, the Japanese officer was obliged to run her farther aground at 2 a.m. on the 27th February. Ultimately she became a total loss as she lay. On the 16th May 1905, after her destruction, the Japanese Court of Prize condemned both ship and cargo on the ground that the former "was employed transporting contraband of war by fraud," finding also that her papers had been falsified. In these circumstances the plaintiff claimed as for a total loss by perils of the seas. The defence was that the owner lost his ship by capture, or seizure, or the consequences of hostilities, for which underwriters were not liable, and that subsequently the captors lost her by perils of the seas. Mr Hamilton, for the plaintiff, in the course of an argument which loses nothing of its merit by being unsuccessful, urged upon your Lordships that the owner, being a neutral, did not lose either the property in his ship or its possession by the arrest of the 26th February; that he still remained at risk on the "Romulus," and only suffered present inconvenience with a prospect of expense and a possibility of total loss if ultimately she should be condemned. He had a chance it was argued, better or worse, of recovering his ship by decree of the Court of Prize, even though the cargo might be condemned as contraband, and so still retained an insurable interest until the vessel became a total loss by perils of the seas. No decision seems expressly in point, for hostile vessels stand in some respects on a different footing from neutral vessels in regard to the laws of prize. Carriage of contraband to a belligerent port does not impart a hostile character to a neutral ship. She cannot lawfully be destroyed nor her crew treated as prisoners of war. Carriage of contraband is not unlawful, as is aiding an enemy in an expedition. It is only an adventure which the offended belligerent may, if he can, visit with the penalty of capture and condemnation by a Court of Prize. I think that it is true that in this case the property in the "Romulus" did not pass wholly from the owner on the 26th February. The owner still had a chance of recovering the ship, and still remained so at risk that he might in law have insured her, and, being insured already, his policy was not necessarily at an end, though I cannot agree that he still retained possession. All this, however, does not, in my opinion, avail the plaintiff, and indeed some part of it might apply to the vessel of a belligerent, for even an enemy merchantman may in some circumstances be released by a Prize Court. The real question is whether there was a total loss by capture, seizure, or detention, or the consequences of hostilities. I think that there was in this case a total loss by capture on the 26th February, to say nothing of the other words, viz., seizure, and so forth. That was the day on which the "Romulus" was seized, lawfully as appears by the subsequent condemnation. There was on that day a total loss, which, as things were then seen, might afterwards be reduced if in the end the vessel was released. Suppose that the "Romulus" had been insured against capture on a time policy, had been taken safe to Yokosuka and there condemned, but that the time policy had expired in the interval between the date of her seizure and the date of her condemnation. In such case, if the plaintiff's contention is sound, the very thing which the policy was designed to cover would have happened during the currency of the insurance, and yet by reason of the lapse of time in bringing her into port and obtaining a decree all recourse against underwriters would have been lost, and probably the owner could not have protected himself by further insurance, or, if he could, only by payment of a ruinous premium. A contention which in such circumstances might make the liability of underwriters depend not upon acts done at sea or their lawfulness, but upon the degree of expedition shown by a Court of Prize in adjudicating upon those acts, must surely be erroneous. If there were an appeal from the Prize Court which might not be decided for a long time, this observation would apply with increased force. I think that the reasonable and true way of regarding what actually occurred is that there was in fact a total loss by capture on the 26th February, though its lawfulness was not authoritatively determined till the 16th May following. Accordingly I agree with the order made by the Court of Appeal. And it would not be necessary to say more were it not that our attention has been directed to a decision of the German Supreme Court of Appeal, which proceeds upon an opposite view. It would not be consistent with the great respect due to that Court that I should offer any criticism upon its judgment, even if I felt myself competent, as I do not, to discuss German law. I can only say that, without in the least questioning the authority of that Court, I think that the law of England is as I have said, and I am of course bound to advise your Lordships in accordance with what I believe to be the law of England.

EARL OF HALSBURY — By agreement between the parties—I suppose to avoid a multiplicity of actions—the policy, which is actually a time policy for disbursements in respect of the ship "Romulus," is to be treated as if for hull. It is for total loss only, and is warranted free from capture, seizure, and detention, and the consequences of hostilities. These are now quite familiar words, and give rise to no ambiguity, and the law is very clear that in this, as in

other regions of insurance law, the immediate and not the remote causes of a loss are alone to be regarded. This is an English policy, and the questions raised under it are to be decided according to English jurisprudence. I should have thought that, given the facts which the Lord Chancellor has pointed out and I will not repeat, it would have been impossible in an English court to deny that there was a total loss to the owner on the 23rd February. This very question arose just 150 years ago, and was argued before Lord Mansfield, C.-J., and he observed that a large field of argument had been entered into and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws—*Goss* v. *Withers*, 2 Burr. 683. After taking time to consider, the learned Judge, delivering the judgment of the whole Court on the 23rd November 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected a change in the property, he says—"but whatever rule might be followed in favour of the owner against a recapture or vendee, it can in no way affect the case of an insurance between the insurer and insured. . . ." The ship is lost by the capture, though she be never condemned at all or carried into any port or fleet of the enemy, and the insurer must pay the value. If, after condemnation, the owner recovers or retakes her, the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is that from the nature of the contract the insurer runs the risk of the insured and undertakes to indemnify. He must therefore bear the loss actually sustained. Now, I entirely concur with what was said in *Ionides* v. *Universal Marine Insurance Company* (14 C. B. N. S. 259), that the words here, "warranted free from capture, &c.," are to be construed as if these words were used in a policy against those events, and applying Lord Mansfield's words here, it seems to me that it would be a bold thing to argue against a judgment of the full Court of King's Bench, presided over by Lord Mansfield, and 150 years after it has been accepted as the law during that period by every English tribunal. I think that it is important to insist upon the exact form of the policy here, since I do not know what was the form of the policy upon which the German adjudication was founded. I neither understand that judgment nor the reasoning by which it has been arrived at by the Court, but it is obvious that we have neither the policy on which the Court was adjudicating nor the language of the Court itself. I say this because the passage in which the Court expresses its disagreement with the English judgment (which is, I suppose, either that of Channell, J., or of the Court of Appeal) is hardly intelligible, and though in the present case, as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed, I cannot let it be supposed that I entertain any doubt that the property was changed, and I do not think that it is true to say that the earlier writers ever had any doubt that where, as in this case, the possession was taken by a hostile force and an adjudication of condemnation as prize by the proper tribunal followed on grounds recognised by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture. Here a neutral vessel was carrying, with the knowledge and consent of the owner, contraband of war (recognised as such by both belligerents), and furnished with false papers, and how any question could be raised as to the lawfulness of the capture I am myself wholly unable to understand. The ship was a total loss from the moment when she passed into the possession of the Japanese forces.

LORDS ASHBOURNE and ROBERTSON concurred.

Appeal dismissed.

Counsel for Appellant—J. A. Hamilton, K.C. — Ernest Pollock, K.C. — Balloch. Agents — Woodhouse & Davidson, Solicitors.

Counsel for Respondent—Scrutton, K.C. —Bailhache, K.C. Agents—W. A. Crump & Son, Solicitors.

PRIVY COUNCIL.

Monday, July 20, 1908.

(*Present*—The Right Hons. Lords Robertson, Atkinson, and Collins, and Sir Arthur Wilson.)

ULLMAN & COMPANY *v.* LEUBA.

(ON APPEAL FROM THE SUPREME COURT OF HONG KONG.)

Trade-Mark—Infringement—Title to Sue—Assignment without the Business.

An assignment of a trade-mark without transfer of the business thereby protected does not entitle the assignee to damages for infringement. Where the plaintiffs manufactured goods in Switzerland to the order of a single customer in Hong Kong, they were *held* to have no title to damages for infringements of trade-mark in Hong Kong in respect of the business of the customer.

The plaintiffs (respondents) were Swiss watchmakers who made large sales to Bovet in Hong Kong. They used a trade-mark which Bovet had assigned to them, but the Bovet business was not assigned. The defendants and appellants were retail watch dealers in Hong Kong who had used similar marks, thus injuring the Bovet business there. They pleaded that the respondents had no title to sue in respect