evidence, that had he introduced references to the balancing, or comparison of normal and conoidal pressures, he would have improved the clearness of his description, or made that description more useful in practice. It is important in such cases not to permit a mathematical analysis to empty a description in plain language of its practical merit. And I may further say that had the patentee entered upon that dangerous ground he would have been likely, by binding himself down to a specification in that sense, to make the way easy for the infringer, who, by variation of the particular angles, forces, or pressures specified, could maintain with much force that he was outside the exact ambit of the monopoly.

In my opinion this objection to the patent also fails. I think the judgment of the Second Division of the 9th June 1910, granting interdict against the appellants, was well founded, and that this appeal should be refused.

Their Lordships dismissed the appeal without expenses.

Counsel for the Pursuers (Respondents)—Clyde, K.C.—Sandeman, K.C.—M. A. Robertson. Agents—Webster, Will, & Company, W.S., Edinburgh—Coward & Hawksley, Sons, & Chance, London.

Counsel for the Defenders (Appellants)—Walter, K.C.—Macmillan. Agents—J. & J. Ross, W.S., Edinburgh—Percy J. Nicholls, London.

Wednesday, June 28.

(Before the Lord Chancellor (Loreburn), Lord Alverstone, Lord Shaw, and Lord Robson.)

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

(In the Court of Session, July 16, 1910, 47 S.L.R. 860, and 1910 S.C. 1072.)

Insurance—Marine Insurance—Non-disclosure of Material Circumstance—Warranty of Seaworthiness—Competency of Master—Over-insurance.

The master of a ship had not been to sea for twenty-two years, being employed on shore as a stevedore, and on the last occasion when he was at sea his ship had been lost and his certificate suspended for six months. The vessel, whose market value was about £9000, and whose freight, one-half of which had been paid before sailing, was £4790, was insured on behalf of the owners, on hull, valued at £18,500, £19,000, on freight, valued at £5500, £5500, on disbursements, P.P.I. policy, £4600, on policies effected by the manager of the ship, who took out also P.P.I. policies for £6500 on his own behalf.

The underwriters of the hull were not informed of the master's record, nor of the freight and disbursements policies or the policies on behalf of the manager.

The vessel having become a total loss, and the owners suing under the policies on the hull, *held, affirming* judgment of the First Division, (1) that as the master's competency was covered by the warranty of seaworthiness there was no duty on the owners to disclose to the underwriters his record, and (2) that *in the circumstances* the master was not proved to have been incompetent so as to put the owners in breach of the warrant of seaworthiness; but, *reversing* judgment of the First Division, (3) that there was a duty on them to disclose the other policies of insurance, these being material circumstances which would influence the mind of a prudent insurer in fixing the premium and determining whether he would take the risk, and that the policies were therefore voidable and the underwriters not liable.

This case is reported *ante ut supra.*

The defenders, the Thames and Mersey Marine Insurance Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The facts of this case have been exhaustively considered in the opinion about to be delivered by the Lord Chief-Justice, which I have had the advantage of reading, and I need not therefore recapitulate them. I agree with the First Division in thinking that there was no breach of the warranty of seaworthiness, and that there was no concealment of material facts in regard to the qualifications and career of the master.

There is, however, one further ground of defence, namely, the non-disclosure of material facts as to other insurances effected upon hull, freight, and disbursements. Upon this point I am constrained to differ from the First Division with much reluctance because of its great authority. No actual circumstance is in dispute affecting this point, but the question is what ought to be the conclusion of fact. Were the circumstances which the assured or his agent failed to disclose material in the sense described by the statute?

Now it is common ground that owners and agent between them (for I cannot discriminate) effected policies upon her hull, freight, and disbursements for £35,600, apart from master's effects valued at £200. If the insurances be split up they were as follows—Upon hull, £19,000, on freight, £5500, the freight for the voyage being about £4800, of which one-half had been paid in advance and was not at risk, on disbursements £4600, and additional on hull and disbursements (including debts of ship to her managing owners and others) against total loss, £6500.

The actual value of the hull was about £9000. No insurable interest could be shown in respect of the greater part of the

items stated to have been insured under the denomination of disbursements, and full indemnity for actual disbursements would in the event of loss be recovered by reason of the high valuation of hull. It was admitted that it would be a great deal better for the shareholders if the ship were lost. If she completed the voyage she would earn £2400 freight, and be worth herself some £9000, in all £11,000. If she were lost, her owners and agents stood to receive £35,600 less a sum of £2400 freight already paid. Their theory of insurance was to insure the original capital of the company which owned her and add to that the debts of the company.

Accordingly I ask myself in the language of the statute, would these circumstances influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk? I can answer this question only in one way. In truth the witnesses for the most part answered it in the same way.

It is very possible that some underwriters do not ask and do not expect to be told what are the insurances, and that some underwriters gamble. But I do not believe that prudent underwriters would treat as immaterial such over-insurance and such large sums placed on disbursement as were effected in this case.

I have to say that Lord Macnaghten agrees with this view.

LORD ALVERSTONE—This is an appeal in an action brought in the Scottish Court upon two policies of insurance for £1000 each effected with the appellants, the Thames and Mersey Marine Insurance Company, on behalf of the owners of the sailing ship "Gunford." The defenders, the present appellants, resisted payment of the amounts insured on three grounds—(1) That there was a breach of the warranty of seaworthiness; (2) On the ground of non-disclosure of material facts, (*a*) As to the captain of the vessel, (*b*) As to the other insurances effected in connection with the ship.

The facts material to the above-mentioned points are not in dispute. The "Gunford" Shipping Company, Limited, was managed by Francis Briggs, by whom all the business of the ship, including the employment of her officers and the effecting of insurances, was transacted.

The captain of the vessel on the voyage in question was A. W. Sember. The "Gunford" sailed from Hamburg on the 12th October 1907, with a full cargo of patent fuel, coke, and 13 tons machinery, on a voyage round Cape Horn to Santa Rosalia. In the course of this voyage, upon the incidents of which it is not necessary to dwell, she, on the 10th December 1907, went ashore near Cape San Roque and became a total loss.

All the policies, both voyage and time, contained a warranty of seaworthiness. The appellants alleged that this warranty was broken, in that the ship was not seaworthy, because Captain Sember, who, as already stated, sailed in charge of her, was not a competent master. Lord Salvesen, the Lord Ordinary before whom the case was tried in the first instance, came to the conclusion that there was no breach of the warranty of seaworthiness. He found, after considering the evidence on this question, the captain himself being a witness, and after carefully discussing all the incidents of the voyage, that the "Gunford" was not unseaworthy by reason of the captain's incompetence. Upon this part of the case your Lordships did not call upon the learned counsel for the respondents. There was, in my opinion, ample evidence on which the learned Judge could find, as he did, that the captain was not incompetent, and the appeal, so far as it is based upon that ground, fails.

Upon the second ground, namely, that there was concealment of material facts in connection with the employment of the captain, there was a great deal of evidence on both sides. The facts relied upon by the appellants were that a period of 22 years had elapsed since Captain Sember had last been at sea, he during that time having been engaged as a stevedore; it was further said that his engagement as captain was made without sufficient inquiry, and the circumstances under which he was engaged were such that it was material to the underwriter to be informed of the previous history and experience of the captain. A great many witnesses were called for the appellants, who stated that in their opinion it was material to the underwriters that they should be informed of the circumstances connected with the captain's experience above referred to. The matter formed the subject of some correspondence after the vessel had sailed and before the loss. The Lord Ordinary, in his judgment, came to the conclusion that under ordinary circumstances underwriters rely upon the information at their own disposal with regard to the competency of masters, that the name of the master is as a rule not inserted in the policy, and that it is only on very rare occasions that underwriters make any inquiry as to his name or history, and that they rely on the shipowners to engage a competent master.

There is no doubt that in this case the information at the disposal of the underwriters would not have afforded the necessary information, because Captain Sember was not appointed master of the "Gunford" until the 19th July, and the records of information as to masters, at the disposal of the underwriters at the date the policies were effected, would not have contained his name. I am, however, not prepared to differ from the Lord Ordinary and the Court of Session upon this part of the case. The fact upon which most reliance was placed was that the underwriters were not told that the master had been on shore for twenty-two years; but this fact could not well be stated by itself without further information as to other matters put before Mr Briggs as to the qualifications of Captain Sember, and looking to the well-established usage I concur in the view

taken, as appears in the judgments in the Court below, that there was no concealment of any material fact in regard to the captain.

I have now to deal with the remaining point in the case, and that is, whether or not there was concealment of material facts by reason of the non-disclosure of the insurances effected upon the ship. Before discussing this matter it is desirable to state briefly the law applicable to the case.

It is, in my opinion, quite unnecessary to do more than refer to the sections of the Marine Insurance Act 1906. Section 17 is in the following terms—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 circumstances which need not be disclosed, where an insurance is effected for an 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.

The two policies to which the appeal now under consideration related were dated on the 30th and 31st August 1907, but the material date for the purpose of the question under consideration, viz., the date of the initialling of the slip was on the 3rd August. The policies were effected upon the instructions of Mr Briggs. The actual amount of freight due under the charter-party was £4790, of which one half, £2395, was paid in advance at Hamburg. The disbursements and other outlay which had been incurred in order to earn the freight was stated to amount to £5280. Some portion of this amount would not have created any insurable interest having regard to the provisions of section 16, but in the view I take of this case it is unnecessary to say how much. Moreover, it was conceded that the only source from which these disbursements could be repaid was the freight earned by the ship, which freight were itself insured. The insurances which were effected on behalf of the owners amounted to £29,300, as follows:—

Hull, valued at £18,500 . .	£19,000
Freight, valued at £5500 . .	5,500
Master's effects, valued at £200.	200
Disbursements, P.P.I. policy .	4,600
	£29,300

In addition Mr Briggs took out, for his own protection, insurances to the amount of £6500 by P.P.I. honour policies, making in all £35,800. The evidence established that the actual value of the property at risk was hull £9000, and freight about £5000, but, as already stated, the underwriters accepted a policy upon which the hull was valued at £18,500. Assuming that no part of the disbursements should be taken into consideration as being included in the difference between £9000, the actual value of the hull, and £18,500, the insured value of the ship, there was still a double insurance in respect of the alleged disbursements to the extent of £4600 in addition to the £6500 insurances effected by Briggs.

If the difference between the declared £18,500 and actual £9000 value was represented by any insurable interest in disbursements, the over-insurance or over-valuation would be correspondingly increased.

It was proved in evidence that no dividends had been earned by the ship for about seven years; it was further established that the object of the insurances was to cover debts owing by the company in the event of the loss of the vessel. There was further evidence that the profits which were being earned by the ship could not stand the amount paid in respect of premiums of insurance. All the disbursement policies were valued policies—that is to say, in the event of the ship being lost the full amount would be paid, and it was admitted by Mr Briggs that it would be a great deal better for the shareholders if they lost their ship under the policies than if they had to realise their ship by sale, unless they got the Spanish Government to buy or a war took place. Even assuming the value of the ship to be taken at £18,500, the total amount at risk did not exceed £23,500 before the moiety of the freight was paid at Hamburg, and a little over £21,000 after the vessel left Hamburg. Some distinction was attempted to be made between over-valuation and over-insurance, but inasmuch as all the policies were valued policies the question becomes immaterial. There was on the evidence

over-valuation to the extent of £11,100, without taking into consideration the difference between the declared value, £18,500, and the actual value, £9000. Apart, then, from evidence in the particular case, it seems to me that the statement of the above facts is sufficient to show that, looking to the provisions of the Act of 1906, the circumstances above stated were material as being those which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk.

Before proceeding to examine the evidence bearing upon this part of the case, I think it well to consider the grounds upon which judgment has been given for the pursuers in the Court below. Lord Salvesen, in the first instance, left out of view the honour policies; he further held that the pursuers were not concerned with the policies of £6500 taken out by Briggs, because their manager entered into the contracts for his own behoof and without the authority of the pursuers; and he also held that it is not in accordance with the principles and calculations on which underwriters in practice act that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept. The Lord President adopted in terms the reasoning of Lord Salvesen, and further, in the passage at the end of his judgment, appears also to put out of view the policies which were effected by Briggs.

Lord Johnston considered that as soon as it was ascertained that the policies in question were valued policies the case was at an end.

I referred to these reasons, because, with the greatest respect for the opinions of the learned Judges, they do not seem to me to have sufficiently considered the question of concealment as it arises upon the sections of the statute to which I have called attention, and had not, so far as I can follow their judgment, considered the evidence bearing upon this part of the case.

Before I refer to that evidence I think it well to say that I cannot accept the view that the £6500 honour policies, effected it is said by Mr Briggs for his own protection, can be put out of view on the grounds suggested by the judgments. Briggs was the managing owner of the ship, the disbursements in respect of which he was purporting to insure were moneys due from the ship to him, and in considering whether there was over-valuation or over-insurance —and in this case, as I have pointed out, the terms are synonymous—which ought to have been disclosed to the underwriters, I cannot, having regard to the provisions of section 19, put out of view the £6500 policies effected by Briggs, nor does it, to my mind, make any difference in regard to the duty of disclosure that the policies covering this £6500, and the policies for the £4600, also for disbursements, were honour policies. These policies were void under section 4 of the Act, but they go to swell the sum which would be payable in the event of the ship being lost, and the total amount being upwards of £35,000, whereas the value actually at risk did not exceed £14,000, there was a very large over-valuation, which might well make a prudent underwriter hesitate as to undertaking the risk and consider the premium which he should require before doing so. I am aware of the doubt suggested by the Court of Appeal in *Roddick* v. *Indemnity Mutual*, [1895] 2 Q.B., as to whether the effecting of honour policies was a breach of a warranty not to insure, but, in my opinion, the view taken by Kennedy, J., in that case was correct, and at any rate the point does not affect the question now under consideration.

Dealing now with the evidence in the case, the whole of which I have carefully considered, though having regard to the terms of the statute and the duty of the assured, I doubt whether a great part of it was relevant or admissible. The practice of underwriters as to accepting any risks or not making inquiries on particular points cannot, in my opinion, affect the duty as defined by statute, and cannot properly be received as evidence of waiver in any particular case. I have, however, come to the conclusion that the evidence as given establishes beyond any reasonable doubt that the matters to which I have referred were material to be disclosed. Taking first the evidence of the pursuer, it is to be noted that although Mr Lockhart, one of the principal witnesses for the pursuer, stated that it is not the practice for underwriters now to be informed or to inquire as to what are the current insurances on other interests, such as freights or disbursements, the witness admitted in cross-examination that had he not known he would want a satisfactory explanation as to the large amount of the total insurances, and that without explanation he would probably not take the risk. It is to be noted that Mr Lockhart was well acquainted with all the facts of the case, and knew the reasons which had induced Messrs Briggs to insure to the extent which they had done. Mr Dixie, who was the manager to Messrs Howard Houlder & Company, had done the "Gunford's" insurance ever since 1893, and knew all the facts, and it was his firm that had effected the policies with the underwriter. Mr Boyd, also a witness for the pursuers, stated that the value of the hull was far too high; and Mr Shankland, who stated that the underwriters would not be in the least concerned by other policies for disbursements, does not appear to have given satisfactory answers to the questions put to him in cross-examination. On the other hand, the evidence of Mr Jervis, Mr Douglas, and Mr Lemon seems to me to be entitled to great weight, as well as that of Mr Swan and Mr White.

I have referred to this evidence in some detail, because I felt it right to consider how far the view which, apart from the evidence, I had formed as to the materiality of the facts not disclosed is borne out by the testimony given in Court, and, speaking for myself, I unhesitatingly come to the conclusion that, both from the point of

view of fixing the premium and determining whether he would undertake the risk, the over-valuation was a matter material to be considered by the underwriter. As regards the amount of premium, this view is confirmed by the correspondence which passed between the brokers, Howard Houlder & Company, and Francis Briggs & Company, when the insurances were being effected. I will not refer to the letters in detail, but when the brokers were being asked on the 30th July to insure £13,000 on hull, £6000 on freight, £6000 on disbursements, and £200 effects, they replied—"The market is very difficult for this outward voyage, and, as we have already mentioned to you, we see no possible chance of placing the lines you wish covered on freight and disbursements at anything like a reasonable price; indeed, we would go further and say we do not think there is a market for such amounts at any price."

Your Lordships were informed by counsel for the respondents that this correspondence was not referred to during the arguments in the Courts below. I have only mentioned it because it cannot be said in any way to displace the inference of fact which I have drawn from the evidence which I have quoted.

A distinction was drawn in argument by Mr Clyde between insurances on hull, or hull and materials, and insurances on ship. For some purposes, I agree, there may be a distinction, but it is wholly immaterial in this case, having regard to the difference between the valuation of the interests and the amount insured as contrasted with the value actually at risk. In my opinion the appeal should be allowed, and judgment given for the defenders upon the ground that the policies were void owing to concealment of material facts.

In the second appeal, which is brought by the Southern Marine Mutual Assurance Association, upon the main point the facts and arguments were the same, but it was alleged on behalf of the respondents that the defenders were not entitled to the benefit of the objection because they received payment of premium after they knew of the facts, and had with the same knowledge agreed that the ship should remain insured with the association until her arrival. I am satisfied that the appellants had not full knowledge of the facts when they received payment of the premium, and that the agreement to keep the vessel covered was made at a time when they were disputing their liability under the policies. No distinction should therefore be drawn between the two cases.

LORD SHAW—In this action the respondents, the "Gunford" Ship Company, Limited, and the liquidator thereof, seek to recover a total loss upon two policies of insurance, each for £1000, effected upon the hull of the ship "Gunford" for the voyage from Rotterdam to Hamburg and thence to Santa Rosalia. The one policy is dated 30th August, and the other 31st August 1907. The insurances were effected through the agency of one Francis Briggs, the managing owner of the "Gunford." He was also manager of the "Gunford" Ship Company, Limited, which appears to have been an ordinary one-ship company. The claim is resisted by the appellants on various grounds. Two of these alone have been the subject of argument—the first, namely, that the contract is void because the vessel was not seaworthy at the inception of the voyage; and the second, that the contract is voidable by reason of concealment by the assured and their agent of facts material to be known by the insurer.

The "Gunford" was towed from Rotterdam, and on 12th October 1907 left Hamburg with apparently a full cargo. She was wrecked on 29th November near Cape San Roque on the Brazilian coast. After various ineffective tackings for the purpose of weathering the Cape, she struck badly on a rock or reef and became a total loss. The crew of twenty-six reached the shore in safety, although ten sailors unfortunately died of a fever caught after landing. A Board of Trade inquiry was held upon the circumstances, and there seems no reason to doubt the soundness of its findings, that the stranding was caused by the default of the master. His certificate of competency was suspended for twelve months.

Having come to the conclusion, which I shall in a little mention, that the contract of insurance is, on the ground of the concealment of material facts, not enforceable, it is not necessary that I should enter upon the merits of the plea of unseaworthiness—a plea which is founded upon the alleged incapacity of Captain Sember for the responsible post of master of this sailing vessel. Sember's record was not good. He had not been to sea for twenty-two years, having been acting mostly as a stevedore during that time. When he was last at sea his conduct had been such that his certificate had been suspended for six months, his ship having been lost. The certificates which he produced, although good, should have prompted inquiry into his record. But, answering an advertisement, he was appointed as mate of a vessel named the "Belford" at £9 a month, and within a few days he was appointed master of the "Gunford" at £20 a month. The interviews at which these appointments were made lasted a few minutes. They were held with Briggs, whose relation to the vessel and to the company will be afterwards mentioned. I am not satisfied in my own mind that Sember was a competent master, and I incline strongly to the opinion that his record was such as to impose a duty upon the assured to explain to the insurers the peculiar and, as I hope, unique circumstances of the appointment. Upon either view the claims under the policy would fail. I have, however, sufficiently indicated my doubts as to this part of the case; and I do not think it necessary to dissent from your Lordships' opinion upon it, having, after much consideration, no doubt that the defenders should be assoilzied on the second head of the argument.

By the policies the insurance is "declared to be upon hull and materials valued at £18,500." The vessel was an old vessel, and from the point of view of realisation in the market, was apparently worth £9000. Had this over-valuation been tainted by fraud, the contract of insurance could not have been enforced. Where there is heavy over-valuation, fraud is, *a priori*, not very far to seek. But fraud is not here pleaded; and upon the general question it ought to be remembered that to the insurer using a ship as part of the going concern of a business, a statement of value going much beyond the amount to be realised if the concern was stopped and the asset put upon the market is intelligible and legitimate. It is not discountenanced by the Marine Insurance Act of 1906, but, on the contrary, is, apart from fraud, held under section 27, sub-section 3, of the statute, to be conclusive, of the insurable value. It was not argued that this part of the transaction was assailable in law.

Much more serious considerations, however, follow. There were insurances on freight to the extent of £5500, and insurances on disbursements to the extent of £4600. The latter policies—those on disbursements — were P.P.I. policies. They were bound to be so, because in point of fact, as was admitted in argument for the respondents, the disbursements were the very things which had been already accounted for in the freight, and when the ship became a wreck the payment on these policies was not to be a payment of indemnity, but a present to the assured of this sum of money—a present falling to be made in the event of the wreck and loss of the vessel.

The story, however, does not stop there. There were also insurances on disbursements on behalf of Briggs. These were time policies current during the voyage to an amount of no less than £6500. Briggs had made advances to the bank on behalf of the company, and he was in other ways deeply involved as a creditor. Any payments made under these insurances would, again, not be payments to indemnify Briggs for loss, but would be of the nature also of presents—presents made on the issue of a gamble upon the life of the vessel, the issue to be favourable to Briggs when the vessel was lost.

It needs no words of mine to point out that property at sea and the lives of seamen stand in the greatest peril if business of that character obtains the sanction of law. These policies are admitted to be P.P.I. policies—that is to say, "without further proof of interest than the policy itself." They are therefore, by section 4, sub-section (2), of the Act of 1906, deemed to be gaming or wagering contracts, and by sub-section (1) "Every contract of marine insurance by way of gaming or wagering is void." These sub-sections simply express the principles of the law anterior to the Act, but, to judge from the facts of the present case, the abolition of gambling, involving danger to property and life at sea, has not been much furthered by these plain words of the Legislature. Indeed the argument of the respondents—an argument which has succeeded in the Court of Session—is this, that the policies *are* policies of insurance without real insurable interest; that they *are* gambling and wagering policies; but that the shipping and insuring world is aware that such things go on; and that every insurer of ship or hull takes his risk that the scales may be weighted in favour of the destruction of the vessel by that kind of underwriting.

This argument raises, in my humble judgment, something much more serious than a mere question of the duty of disclosure; it is necessary to examine fundamentally the position of an owner who has made legitimate insurances upon ship, cargo, or freight, and also made separate gambling insurances.

It appears to me that wherever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid but they infect and invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is this—The voyage is one, and the ship, its earnings, its cargo, its crew, all are involved in that one and single hazard which has been undertaken and which is by the gambling transaction improperly weighted towards loss—a loss which, falling upon the ship, would not rest there but spread to unsalved cargo and to freight, not to speak of the peril to human life which would be thus encountered. The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties, for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, and no such policy thus depending upon the same hazard is enforceable. The rule governing this is simple and familiar, viz., that the law will not countenance or enforce a transaction which is thus tainted by a conflict between duty and self-interest. The rarity and difficulty of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest and duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurances upon ship in which third parties have acquired, in ignorance of the other and over-insurances and in good faith and for valuable consideration, separate interests. The rights of such parties would require to be separately and fully considered.

The case as presented, although it touched, and could not but touch, this fundamental ground, was taken as an issue on the duty of disclosure, and I treat it accordingly on that footing. So dealing with it, I do not find

myself able to agree with the judgments of either House of the Court of Session. It follows from the nature of the argument there presented that no duty rests upon the owners or agent to disclose to the insurers of the hull facts of the character found in this case. I cannot assent or give any countenance to such a view. The learned Lord Ordinary says—"I cannot see that there is any duty whatever on the part of the assured to disclose to the underwriter on hull, who accepts the vessel at a declared value, that he is also effecting insurances upon freight and disbursements." The opinion of all your Lordships is to an opposite effect, and I humbly agree with that opinion. So far as the effecting of insurances upon freights is concerned, that is sound business, because it is grounded upon a stipulation for true indemnity; but so far as disbursements, wherever they are duplications of freight, are concerned, these, when freight has already been insured, form no part of a contract of indemnity, but the insurance upon them is merely a gamble, discountenanced by sound principle and not enforceable by law. It forms a distinct temptation of self-interest to business and to conduct which are nefarious.

In point of fact, however, these illegitimate, dangerous, and unenforceable policies are entered upon because of the knowledge that in the majority of cases, if the hazard placed against the life of the vessel be won, the stake will be paid. The competition in the underwriting world seems to be such that, with premiums paid down, no questions will be asked, and nothing will be said should loss ensue. It is this which in fact constitutes the peril to property and life, and I am not surprised that in this case witnesses like Mr Douglas, speaking apparently with the authority of large associations of underwriters, condemned the practice. "If I had known," says Mr Douglas, "that so much was on the vessel I would not have touched her with a 6 ft. pole, because I consider that such insurances are a direct incentive to loss." In another passage Mr Douglas remarks with force, "She is insured *for* loss and not *against* loss." As I have observed, the practice is continued because underwriters pay upon such policies. They go by the much abused name of "honour"; and the illegitimate "honour" policies constitute that incentive of self-interest towards the destruction of the vessel that the law holds, quite apart from proof of fraud in the specific transaction, to be enough to make the policy void. It appears to me—differing in this by a very wide diameter from the judgment of the Court below—that when insurances of that illegitimate character are also effected by the owner and insurer of the hull, the duty of disclosure of that material fact is plain. Their non-disclosure can, in my humble judgment, be pleaded as an answer to liability upon any policy effected over the hull.

I have already referred to the honour policies for £6500 taken out by Briggs as an individual. The Lord President says that he feels difficulty "in holding that a policy upon the hull, for the ship, should be held as bad, because a person who was acting as managing owner or managing director did not disclose that he as an individual had honour policies in connection with the same venture." Lord Salvesen is also of this opinion. He holds that the insurers are not concerned with the honour policies at all, and that the fact that the director "entered into contracts which are not legally enforceable for his own behoof, and without their (the owners') authority is, in the absence of fraud, as irrelevant as if an outsider had had a gamble on the fate of the 'Gunford.'" "Moreover," adds the learned Lord Ordinary, "I think it is not in accordance with the principles and calculations on which underwriters in practice act that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept."

If this be the law, it is manifest that a most dangerous situation has arisen, for, as I have already pointed out, the importation of self-interest in favour of loss is thus permitted and unchallenged by law, although it is that very thing which, in principle and by repeated authorities, stands condemned and disallowed. But I do not labour this matter of the policies and position of Briggs, nor do I cite the decisions, because it appears to me that section 19 of the Statute of 1906 puts plainly a duty of disclosure upon the agent—"The agent of the assured must disclose to the insurer (*a*) every material circumstance which is known to himself." It is admitted that the honour policies for £6500 were known to Briggs, being in fact his own insurances. The circumstances of these heavy gambling policies having been entered into were, in my opinion, most material to disclose to insurers of the hull. How such knowledge on the part of Briggs, and the duty of disclosure arising from it, should be held not to fall under the plain provisions of the statute I am somewhat at a loss to understand. These Briggs honour policies for £6500 fall to be added to the other disbursement policies of a gambling nature for £4600, and it thus appears that to the extent of £11,100 no disclosure was made, and the ship was sent to sea, the scale of self-interest in favour of her destruction being as stated.

I am of opinion that, these being the facts, the objection taken to the liability on the policies is good, and that the appeal should succeed.

Lord Robson—The first question that arises in this case is whether or not the "Gunford" was unseaworthy by reason of the incompetence of her captain. The learned Judge at the trial, Lord Salvesen, has answered that question in favour of the plaintiffs, and there is ample evidence to justify his finding. The next question is whether, notwithstanding that the captain was in fact competent, his record was so suspicious and unsatisfactory that the plaintiffs must be found guilty of con-

cealing material facts in not communicating to the insurers such knowledge as they possessed of his antecedents. It is easy to state the case against the plaintiffs on this head in a way that raises suspicion as to their conduct, but on the whole I think they were entitled to the exoneration they have received at the hands of the learned trial Judge in answer to this question.

They may fairly plead in their favour that they believed in the strong testimonials from most respectable firms with which the captain supported his application for employment. A firm of high standing wrote that they had employed him for 30 years, first as mate, then as master, and latterly as stevedore, and during the whole of that time found him an active, energetic, and competent man, adding that they recommended him to anyone requiring his services. They did not think it necessary to state that he had been on shore for the preceding 22 years. The nearest approach to that information was made by a gentleman of position in the shipping world, who, in strongly recommending the captain, said he had known him for over 20 years, first as master in a line of sailing ships, "but for most of that time he had been engaged in stevedoring and superintendence." There were other testimonials equally emphatic and equally imperfect. At the same time the inquiries, if any, made by the plaintiffs were of the most perfunctory kind. They made the appointment with a minimum of trouble, and the best that can possibly be said for them is that in the then existing circumstances it was necessarily made in a hurry.

But the most important question in the case arises in connection with the insurances. The appellants say they were excessive. So far as the excess consisted of over-valuation on the legitimate policies no complaint is open to the appellants, for the values were agreed and so bind the insurers. That part of the case is therefore put forward by them only as showing that the legitimate policies more than covered the risks and left no excuse for the making of wager or "honour" policies. Their complaint rests in substance on the non-disclosure of those wager policies.

The vessel had originally cost £20,750. At the date of the policies now in question she was 15 years old, and was worth about £9000 to sell. For the purposes of insurance of the hull and materials her value was agreed at £18,500. The underwriters, of course, were well aware that this was an over-valuation. Knowing as they did the age and type of the vessel and the rate of annual depreciation, they could tell, almost as exactly as her owners, what she was worth, and, moreover, they had, as it happened, regularly insured her for years past. Although the contract of insurance is expressed to be a contract of indemnity, and the indemnity is properly based on market value at the time of the loss, yet the law allows the insured value to be agreed between the parties, and the agreed value, though frequently, and perhaps generally, in excess of the market value, is binding in the absence of fraud. There are often legitimate business reasons for this discrepancy between the selling value and the insured value, and it should not be assumed that it necessarily creates any actual conflict between duty and interest on the part of the shipowner in regard to the safety of the thing insured. The assured naturally aims at reinstatement rather than bare indemnity, and the insurer has also his own reasons for preferring that the values should be high so long as they do not constitute a temptation to loss. In order that he may be saved the trouble of small claims, which are often of a doubtful character, he stipulates that the ship shall be warranted free from average under three per cent., and where the total agreed value is high, the insurer's protection under this clause is increased. Again, in claims for constructive total loss, the higher the value, the more difficult it is for the assured to establish that the cost of repairs will exceed the repaired value, so as to entitle him to treat the vessel as lost and leave the wreck on the insurer's hands. The insurer is therefore willing to undertake the risk of a certain amount of over-valuation, relying, no doubt, on the character of the assured and also on the interest that the managing owners or managers have in preserving the ship as a source of business profit to themselves. In addition to the hull and materials, the plaintiff insured the gross freight at £5500. This policy also involved an over-valuation, as it made no deduction for the expenses of earning the freight, but the insurance of gross instead of net freight is expressly allowed by our law, and is of great practical convenience in avoiding a troublesome, uncertain, and possibly litigious inquiry into working expenses.

By the foregoing policies the plaintiffs secured that in case of loss they would receive more than a strict indemnity based on existing values, but perhaps not quite enough to replace the article insured without some slight loss. They proceeded, however, to effect a valued policy for £4600 on "disbursements." A list of the payments comprised under this head was put in by the plaintiffs, and amounted to £5280 as against a total chartered freight of £4790. So far as these payments consisted of current working expenses necessary to earn freight, they were covered by the insurance on the gross freight, and so far as they consisted of repairs, outfit, and insurance premium on hull, they would ordinarily be included in the policy on ship and materials.

This policy was therefore an over-insurance by double insurance. The plaintiffs could not legally avail themselves of it to enforce recovery of any sum in excess of the indemnity allowed by law, but this was a "P.P.I." or honour policy, *i.e.*, it was made "without further proof of interest than the policy itself." In other words, it was a wager, and it is well known that the sums insured under such policies are, under ordinary circumstances, paid

with the same regularity as if they were legally due.

A further policy of the same character for £6500 was taken out on his own account by Mr Briggs, the plaintiffs' manager, who had the conduct of the whole transaction, and is, by section 19 of the Marine Insurance Act 1906, made responsible for disclosure of every material circumstance within his knowledge. The question to be determined by your Lordships is, whether it was material to the insurers of the hull and freight to be informed of these honour policies, and that depends on whether they were among the circumstances which would "influence the judgment of a prudent insurer in fixing the premium or in determining whether he will take the risk." This is a question of fact, and there was evidence both ways about it in the form of underwriters' opinions on the point. Without depreciating the value of those opinions, I think a jury, or a court of law acting as a jury, when once made acquainted with general conditions of marine insurance, can easily decide for themselves how far any particular circumstance would influence the judgment of a prudent insurer. The proposition laid down by Lord Blackburn in the case of *Ionides* v. *Pember* (L.R., 9 Q.B.) that excessive and speculative insurance has "a direct tendency to make the assured less careful in selecting the captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss" can scarcely be contested, and, however willing individual insurers may be to take the risk of such insurance, their opinion cannot bind others of more prudent temperament.

So long as the parties to a policy are dealing only with agreed values on ship or freight, high as those values may be, the ordinary course of insurance business provides substantial safeguards, both to the legitimate insurers and the seamen, against the dangers referred to by Lord Blackburn, but those safeguards are materially diminished when the owners or managers take to wager policies with other underwriters. The insurers can ordinarily make sure that the agreed value shall fall short of what is necessary for complete reinstatement. Even when the agreed value is high enough to give a profit to the shareholders, the insurers can estimate the heavy loss of business and management profits which the destruction of the ship may impose on the managers, and it is to the managers they look for vigilance and care in securing her safety. But when, as in the present case, the wager policies increase the amount recoverable by the owners on a total loss to a figure far in excess of what is needed for reinstatement, and, worse still, when the managers themselves stand to make a large profit under such policies in case of loss, the incentive to care over the safety of the ship begins to be substantially affected, and the insurers are entitled to form their own opinion as to how far they will trust the assured under such circumstances.

I think, therefore, that the existence and amounts of the wager policies were circumstances material to be disclosed, and that this appeal should be allowed.

Their Lordships reversed the order appealed from, and entered judgment for the defenders.

Counsel for the Pursuers (Respondents) — Clyde, K.C. — C. D. Murray, K.C. — Raeburn. Agents—Wright, Johnston, & Mackenzie, Writers, Glasgow — Webster, Will, & Company, W.S., Edinburgh—W. A. Crump & Son, London.

Counsel for the Defenders (Appellants)—Leslie Scott, K.C.—Mackinnon. Agents—J. & J. Ross, W.S., Edinburgh—Waltons & Company, London.

HIGH COURT OF JUSTICIARY.

Monday to Saturday, May 29 to June 3.

(Before the Lord Justice-General.)

H.M. ADVOCATE *v.* CAMERONS.

Justiciary Cases—Proof—Crime—Attempted Fraud on Underwriters—Claim for Payment not Proved—Preparation and Perpetration.

Two persons were charged on indictment with an attempt to defraud certain underwriters who had insured an article which the accused now represented to have been stolen from them. At the trial the Crown failed to prove by competent evidence that a claim had actually been made by the accused against the underwriters for the value of the stolen article.

Held (*per* the Lord Justice-General), notwithstanding the omission to prove the claim, that the jury were entitled to convict the accused provided they were satisfied on evidence that the actings of the accused had advanced to a stage beyond mere preparation for committing a fraud.

Justiciary Cases—Indictment—Charge of Attempted Fraud against Two Persons "Acting in Concert"—Conviction of One Accused—Competency.

Where in an indictment two persons were charged with attempted fraud, "acting in concert," *held* (*per* the Lord Justice-General) that it was competent for the jury to return a verdict of guilty against one of the accused, while at the same time acquitting the other.

Observations as to the evidence necessary to establish "concert" between the accused.

Cecil Aylmer Cameron and Ruby Cameron, his wife, were, on 29th May 1911, charged in the High Court in Edinburgh, on an indictment in the following terms—"Cecil Aylmer Cameron and Ruby Cameron . . . you are indicted at the instance of the Right Honourable Alexander Ure, His Majesty's