

# An Englishman's Safe Port

F.J.J. CADWALLADER\*

## INTRODUCTION

A port is quid accrecantum, consisting of something that is natural, an access of the sea, whereby ships may conveniently come, safe situation against where they may well unload.<sup>1</sup>

Thus spake the good Lord Hale and in so doing, albeit unwittingly, provided the English shipowner with his first round of ammunition in the running fight with those charterers who will nominate ports that are neither convenient nor safe for use by the shipowner's most cherished possession.

For the shipowner a safe port is one to which his ships may come, transact their business and depart, without being exposed to physical or political dangers. To meet this natural requirement there has grown up a body of law designed to give protection in those cases where the shipowner has suffered loss as a direct result of a charterer requiring a vessel to use an unsafe port. It applies whenever by the terms of the contract the charterer is enabled, in futuro, to nominate as yet unnamed ports.

In its present form the doctrine of safe ports excludes from its consideration those charterparties where the ports to be used are agreed to by the parties and find expression within the body of the

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\* LL.M., Faculty of Laws, University College London.

1. BACON'S ABRIDGMENT, "Prerogative", B. (5).

contract. Indeed since the shipowner expressly hires his vessel for such ports it can be said that he warrants its ability to reach and use them, a factor which may explain the ready use of the reservation of "or so near thereto as she may safely get," in case optimism has blunted the keen edge of reality. Where the charterparty contains a number of named ports from which the charterer is later to make a choice, the non-application of the doctrine is less clear. Judicial murmurings show that to imply a guarantee of safety of the chosen port on the part of the charterer might be too unkind, whilst to imply nothing at all could be considered in certain circumstances to be unjust.<sup>2</sup> The position is presently bridged by compromise whereby in his nomination the charterer is required to refrain from nominating the legally ill-defined "impossible port," a feature as yet more spectral than law.<sup>3</sup>

In English law, therefore, the scope of the doctrine of safe ports is broadly confined to those charterparties where, due to the absence of a named port, the subsequent nomination of the charterer is required in order to fully activate the contract. At one time argument could be found for attempting to distinguish the nature of the obligation of the charterer depending upon whether the charterparty was one of voyage or time, the latter being the more natural home of the insistence for safe ports.<sup>4</sup> Such argument, based more on historical accident than concentrated legal thought, has now ceased to be.

In order to examine the extent and application of the doctrine in England, this work has been divided up as follows: Implied or Express Safety; The Incidents of Nomination; The Attributes of Safety; Proof and Damages.

#### IMPLIED OR EXPRESS SAFETY

It is stated by one authority that it is still open to question whether in the absence of express condition for the use of safe ports the law will imply such an undertaking.<sup>5</sup> If this is so it does not ap-

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2. *Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food*, [1962] 1 Q.B. 42, 110.

3. See *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.*, [1891] 2 Q.B. 647, 652; and *Akt. Oliveband v. Dansk Fabrik*, [1919] 2 K.B. 162.

4. For the former position see *West (Samuel) Ltd. v. Wright's (Colchester) Ltd.*, 40 Com. Cas. 186 (1935); and *The Pass of Leny*, 54 Lloyd's List L.R. 288 (1936). See now *Reardon Smith Line Ltd. v. Australian Wheat Board*, [1956] A.C. 266 (Austl.); and *Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills*, [1955] 2 Q.B. 68, 74.

5. See T. SCRUTTON, *SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING* (17th ed. 1964) 111.

pear to be for want of attempts on the part of the judiciary to supply the answer. Certainly Mr. Justice Devlin appears to have entertained no doubts as to the rectitude of implying such a term should it be absent when, in dealing with the charterer's duty to nominate ports, he stated: "There must . . . be an obligation to nominate . . . and there must be implicit in that some condition about safety to prevent the making of a derisory nomination."<sup>6</sup> This conclusion had already been arrived at by Mr. Justice Wightman in 1851 when he somewhat more tersely exclaimed: "I do not know what force can be given to the word "safe" when added to the word port,"<sup>7</sup> thereby no doubt gaining the silent plaudits of Lord Hale's certainly attendant ghost. Similarly the terms "usual ports" and "approved ports" have both been held to carry within them the implied requisite of safety.<sup>8</sup>

From implying the safety of a port to implying the safety of a berth to be nominated within a safe port is but a small step; a step which the English judges have made with only the faintest semblance of misgiving.<sup>9</sup> The hesitation, if it be one, stems from the special circumstances of a particular case in which the charterparty required that the charterer "indicate" a berth. In the judgment, not overblessed in clarity, it appears that the latch point is the word "indicate" which, it was held, could not be said to contain any implications as to the safety of the object indicated.<sup>10</sup> It is doubtful whether even this much of the case survives today and to consider it as merely moribund is an undeserved kindness.

#### THE INCIDENTS OF NOMINATION

When the charterer accepts that he will nominate only safe ports he is undertaking that each port will be such that during "the relevant period of time, [the] particular ship can reach it, use it and re-

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6. *Compania Naviera Maropan S/A v. Bowarers Lloyd Pulp and Paper Mills*, [1955] 2 Q.B. 68, 72.

7. *Ogden v. Graham*, 1 B. & S. 773 at 779 (1861). See also *Axel Brostrom & Son v. Dreyfus*, 38 Com. Cas. 79, 87 (1932).

8. See *Robert Dollar & Co. v. Blood Holman & Co.*, 4 Lloyd's List L.R. 343 (1920); *Compania Naviera Maropan S/A Bowaters Lloyd Pulp and Paper Mills*, [1955] 2 Q.B. 68.

9. *Lensen Shipping Co. Ltd. v. Anglo-Soviet Shipping Co. Ltd.*, 40 Com. Cas. 320 (1935).

10. *The Pass of Leny*, 54 Lloyd's List L.R. 288 (1936).

turn from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."<sup>11</sup> To this must be added the fact that the court will consider not only the immediate environs of the particular port, but also any special peculiarities relating to the route to be followed by the vessel, particularly when one route only is available. Thus the need for a vessel to proceed up an ice-filled river,<sup>12</sup> or through waters made dangerous by the presence of enemy warships,<sup>13</sup> in order to reach the nominated port, have both been held capable of rendering the nominated port unsafe.

Once the undertaking applies, the liability of the charterer in the event of breach is absolute, his knowledge as to the port's safety or otherwise being a matter for conscience rather than law. Indeed in the majority of cases the surprise of the charterer at the subsequent discovery of a port's unsafety is probably equalled only by the surprise of the shipowner. Effectively the charterer guarantees that the port designated will be safe for the particular vessel. It is a guarantee that does not extend to the safety of the cargo, although the fate of ship and cargo may be occasionally so intertwined as to be inseparable, nor does it include any potential liability should the chosen port prove to be "inconvenient."<sup>14</sup> Ports may be old, their methods slow, their employees slower or worse; such ports may be mightily inconvenient but they are not unsafe.

#### *Safety at the time of nomination*

"The giving of an order to sail for an unsafe port is a breach of the charterparty."<sup>15</sup> Indeed nomination of an unsafe port may be stated to be no nomination at all, being outside the terms of the contract, so that the ship-owner may refuse to accept it and demand that the charterer make a proper choice within the terms of the contract. But what if the nomination is accepted—is there then some form of express or implied waiver of the charterer's breach? Two situations arise for possible consideration, depending upon whether the actual acceptance is that of the master of the vessel or of the ship-owner.

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11. Leeds Shipping Co. v. Société Français Bunge, [1958] 2 Lloyd's Rep. 127, 131.

12. Grace (G.W.) & Co., Ltd. v. General S.N. Co., [1950] 2 K.B. 383.

13. Palace Shipping Co. v. Gans. S.S. Line, [1916] 1 K.B. 138.

14. Dobell v. Green, [1900] 1 Q.B. 526; Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Food, [1962] 1 Q.B. 62. *See also* Associated Lead Manufacturers v. Ellerman & Bucknall S.S. Co., [1956] 2 Lloyd's Rep. 167 as to a "neighboring safe and convenient port".

15. Grace (G.W.) & Co. Ltd. v. General S.N. Co., 66 T.L.R. (Pt. 1) 147, 152 (1949).

The acceptance by the master of the charterer's order causes no difficulty at all, it being useless to seek to imply any form of waiver which may be utilized against the ship-owner. This is so even if the master knows of the port's unsafety at the time of the order, for a master has no implied authority whereby he may alter the terms of a contract entered into between charterer and ship-owner and thereby destroy his employer's right to damages.<sup>16</sup>

Where it is the ship-owner who accepts the charterer's choice of port then only in very rare circumstances, it is submitted, will such acceptance act as a waiver of the breach and so bar a future right of action should the port prove to be unsafe. Arguments advanced in favour of the shipowner's acceptance being considered as waiver proceed on the basis that at the time of the nomination the shipowner may accept or reject the port, but that in accepting he has either expressly satisfied himself of its safety or must be taken as impliedly agreeing to its safety, either case barring any right to deny this fact at a later date. The argument lacks both substance and ingenuity. The charterer's agreement that he will name only safe ports must remove from the shipowner any obligation to satisfy himself as to a port's safety; to hold otherwise would be to rob the charterer's undertaking of any genuine force whatsoever.<sup>17</sup> The measure of the charterer's undertaking is that the shipowner accepts a particular port in the light of the charterer's assurance, knowing that should it prove false he has a ready means of indemnity against loss.

### *The "abnormal occurrence"*

When the charterer has satisfied the requirement that the port be safe at the time of nomination, what then if it subsequently becomes unsafe? It is a problem which tends to titillate academics rather more than it troubles the courts, shipowners or charterers. The reason for this is simple. The continuing nature of the charterer's obligation means that literal safety at the time of the nomination is quite useless unless the port is also safe at the time of use

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16. See *Hall S.S. Co. v. Paul (R. & W.) Ltd.*, 19 Com. Cas. 384 at 386 (1914). As to the position of a master in relation to variation of a contract, see *Pearson v. Goschen*, 17 C.B. (N.S.) 352 (1864).

17. See *Reardon Smith Lines Ltd. v. Australian Wheat Board* [1956], A.C. 266, 282.

by the vessel. The only exception to this is if the later unsafety arises from "some abnormal occurrence;" a feature which rarely plays any part in cases concerned with physical unsafety but which has some relevance in cases of political unsafety. In dealing with this particular form of unsafety arising subsequent to nomination three general questions fall to be answered.

- (a) *If the unsafety of the port is discovered in time, must the charterer nominate afresh?*

At one time there was strong reason for believing that the answer to this question might be given in the affirmative, based on the facts of a tried and trusted case.<sup>18</sup> However in the fairly recent past three judges of the appellate court took time out to explain that almost everybody had drawn wrong conclusions from the case and therefore today the answer must be given as a tentative No.<sup>19</sup> The appellate court judges rested their opinions on the fact that once the charterer has fulfilled the requirement to nominate a safe port there is no room for an implied undertaking that he will nominate afresh should that port subsequently become unsafe. It would in fact seem quite reasonable to imply such a term in order to give business efficacy to what may otherwise become a frustrated contract, but for the moment the matter rests in this fashion and leads naturally to the next question.

- (b) *What is the effect of discovering the unsafety prior to reaching the port?*

The immediate difficulties of the shipowner stem from the fact that having accepted a perfectly valid nomination by the charterer he is prima facie bound to take his vessel to that port, and further that he is apparently unable to demand that the charterer nominate another port, although oddly the common law appears to require the shipowner to make the request.<sup>20</sup> The position of the parties at present may perhaps be stated as follows. The fact of "abnormal occurrence" is a feature which relieves the charterer of liability since he is not in breach; the fact of the subsequent unsafety is a feature which may relieve the shipowner from liability for not entering the port. The rightness of the refusal of the shipowner to

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18. *The Teutonia*, L.R. 4 P.C. 171 (1872).

19. *Reardon Smith Lines Ltd. v. Ministry of Agriculture, Fisheries and Food* [1962], 1 Q.B. 42, 89, 90, 116, 117, 128, 129.

20. See *Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills* [1955], 2 Q.B. 68, 78. See also *The Teutonia*, L.R. 4 P.C. 171 (1872).

enter such a port depends upon whether he is able to rely upon the occurrence as frustrating the charterparty or upon some express term of the charterparty which covers the eventuality and thus relieves from his obligation. Deprived of these the shipowner is reduced to asking the court to imply a term that in such cases he has satisfied his duties if he takes his vessel "so near thereto as she may safely get."<sup>21</sup> In the event, if the opinion of the appellate court is later sanctified, a neat form of court-induced stalemate may be seen to result. In truth it should be stated, however, that the position is to some extent open to possible circumvention by delicate application of common law subterfuge but it all seems unnecessarily tortuous in such rather simple circumstances.

(c) *Who must bear the loss in such cases?*

As neither party is responsible for what happened in general it would appear that each party must bear his own loss. To the extent that the charterparty may be frustrated, special statutory rules are applicable to time charterparties as a means of producing some form of equity between the parties in relation to monies expended.<sup>22</sup> Should the vessel suffer loss or damage within the port by virtue of the occurrence then this must fall to the shipowner's account. An example of such an event has been instanced as a nuclear explosion within the port, something which may bring a degree of irony to the maxim that the loss lies where it falls.

THE ATTRIBUTES OF SAFETY

The incidents which can lead to the declaring of a port to be unsafe for the purpose of a particular vessel may be divided into two broad categories, the physical and the political. From both of these must be subtracted obstacles or occurrences of a purely temporary nature. The finding of the port filled with port workers of a violent disposition, or stricken with an influx of unsolicited ice, are neither of them necessarily features which will support a shipowner in a defence of unsafe port should his master refuse to enter and immediately seek a port of better disposition.

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21. SCRUTTON, *supra* note 5, at 118, doubts the likelihood of this.

22. Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. 6, C. 40. The Act does not apply in the case of voyage charterparties nor to bills of lading.

The essence of the temporary danger is that it is one which, should the master decide to wait, will not involve the vessel in "inordinate delay,"<sup>23</sup> a delay whose length and breadth must be determined by the nature of the adventure and the terms of the particular contract. A master seeking guidance in such circumstances may gain some judicial succour from the statement that the temporariness or otherwise of the danger is to "be determined on the estimate of the position which would be reached at that time by a well-informed and experienced master; and a decision based on such an estimate will not be affected by the fact that, in the light of after-events, it is proved to be erroneous."<sup>24</sup>

### *Physical Dangers*

By far the most numerous of the shipowners' cries as to the unsuitability of ports come within this category; the result of ships suffering harshly from the physical phenomena of the ports to which they have been directed.

The factors which may be considered as rendering a port hazardous are many and various. Low bridges which require the lopping of masts so that a ship in ballast may escape the port she so satisfactorily entered laden,<sup>25</sup> bars which inhibit the entry or exit of the laden vessel,<sup>26</sup> insufficiency of water forcing a vessel to take ground when her build belies such ability and to do so courts disaster,<sup>27</sup> all these may well herald the outcome of unsafety. Even the inability of a vessel to enter a particular port without the use of tugs, when tugs are not provided, has been held to render that port unsafe in respect of the particular vessel.<sup>28</sup>

From time to time certain limits have been attempted upon some of the above situations. Custom has occasionally been argued as a means of showing that vessels are expected to load or off-load part of their cargo one side of a bar and complete the operation on the other side, but custom is now out of favour with the courts in such cases.<sup>29</sup> In the event of insufficiency of water it has been held that the mere fact that a vessel may have to leave her berth at particular states of the tide does not necessarily render the port unsafe if such movement does not seriously interfere with the performance of the

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23. See *Knutsford (S.S.) Co. v. Tillmans & Co.* [1908], A.C. 406.

24. *Grace (G.W.) S.S. Co. Ltd. v. General S.N. Co.* [1950], 2 K.B. 383, 392, 393.

25. *Limerick S.S. Co. v. Stott (W.H.) & Co.* [1921], 2 K.B. 613.

26. *The Alhambra*, 6 P.D. 68 (1881).

27. *Hall S.S. Co. v. Paul (R. & W.) Ltd.*, 19 Com. Cas. 384 (1914).

28. *Axel Brostrom & Son v. Dreyfus*, 38 Com. Cas. 79 (1932).

29. See *The Alhambra*, 6 P.D. 68 (1881).



contract.<sup>30</sup> If it is usual for vessels to take ground at the port then the physical make-up of the particular vessel becomes all important in determining liability for damage.<sup>31</sup>

The need for the port to suit the characteristics of the particular vessel is perhaps best illustrated in those cases where the weather, or the results of it, reveal the shortcomings of the port in question. Ice is a frequent cause for alarm, so much so that an "Ice Clause" is generally included in the relevant contracts to contain the situation. Ice-bound ports unattended by ice-breakers are distinctly unsafe, whilst ice encountered by a vessel on its way up river to a port may suffice to render a charterer liable if harm is caused to the vessel. Breezes and gales are similarly great revealers of the limitations of the charterer's choice. The fact that at the time of the nomination the entry to a port was calm, or that the winds were light or moderate when the vessel reached the port, have no relevance as a defence.<sup>32</sup> What is required is that the particular vessel is able to lie in safety when force eight gales as natural visitors are in operation, or at least that in the event of rough weather the vessel will be able to leave her berth in safety and thus stand out to sea until the rough weather subsides.<sup>33</sup> In such cases unsafety may rest on so small a point as the failure of the charterer to give the master advance notice of expected bad weather. In *The Dagmar*,<sup>34</sup> the master of a vessel ordered to Cape Chat, Quebec, expected to receive notice from the charterer if bad weather threatened so that he might put his engines in readiness and put to sea if the weather worsened. The charterer failed to inform the master that at this particular port it was best to keep a vessel's engines on immediate notice nor did he take any steps to obtain weather forecasts. A strong breeze which the berth gave no shelter created a heavy swell and as a result of this the vessel's mooring lines parted and she was driven aground. In these circumstances Cape Chat was held to be just one more in a line of unsafe ports.

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30. *Carlton S.S. Co. v. Castle Mail Co.* [1898], A.C. 486. Contrast *Smith v. Dart & Son*, 14 Q.B.D. 105 (1884).

31. See *Hall S.S. Co. v. Paul (R. & W.) Ltd.*, 19 Com. Cas. 384, 387 (1914).

32. *Johnston Bros. v. Saxon Queen S.S. Co.*, 108 L.T.R. (M.S.) 564 (1913).

33. See *Leeds Shipping Co. v. Société Francais Bunge* [1958], 2 Lloyd's Rep. 127, 131.

34. [1968] 2 Lloyd's Rep. 563.

Cases actually decided on the basis of political activity rendering the nominated port unsafe are somewhat sparse on the ground, though ports so affected are none the less unsafe for that. The probable explanation is that ports suffering from such debility at the time of nomination tend to be known to shipowners and can thus be treated as nugatory nominations, whilst where the incident does not exist at the time of nomination its subsequent manifestation will fall for consideration as an "abnormal occurrence". Perhaps constant political unrest in particular areas may one day lead the courts to accept them as potentially unsafe even if enjoying a period of comparative calm at the time when the port is nominated.

Ports unsafe within this category will include those where war, confiscation, blockades or embargoes are part of the natural order at the time of the charterer's direction. Ports providing merely a prohibition on the discharge of the cargo carried cause a slight difficulty. Some writers include this as a feature rendering the port unsafe, but since there is no actual threat to the vessel it would seem more fitting that such cases be decided on the grounds either of an implied undertaking that the charterer will not act in such a way as to prevent the shipowner earning freight, or that this is foundation material for a doctrine of "impossible ports".<sup>35</sup>

The active threat of confiscation or the actual existence of a state of war, (threatened war has been rather unsuccessful),<sup>36</sup> are the best examples of unsafety within the political arena—although even actual war may occasionally prove a little unstable if national rather than legal considerations insert themselves. Certainly a sudden burst of pride seems to have slightly coloured the judgment in *Palace Shipping v. Gans* decided in 1915<sup>37</sup> and whose facts are as follows. Under the terms of a time charterparty the charterers agreed to nominate only safe ports. In pursuance of this duty on the 13th of February 1915, when the war between Great Britain and Germany was well underway, they ordered the vessel to sail from a port in France to a port on the East coast of England. Two days before this order, on the 11th of February, the German Government had promulgated the following missive:

The waters around Great Britain and Ireland, including the entire English Channel, are hereby declared a military area. From February 18th every hostile merchant ship within these waters will

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35. *Akt. Oliveband v. Dansk Fabrik* [1919], 2 K.B. 162.

36. *Ogden v. Graham*, 1 B & S. 773 (1861). *But see The Teutonia*, L.R. 4 P.C. 171 (1872).

37. *Palace Shipping Co. v. Gans S.S. Line* [1916], 1 K.B. 138.

be destroyed even if it is not always possible to avoid dangers which thereby threaten the crew and passengers.

Whilst the shipowner protested the charterers' order the vessel nevertheless sailed for the nominated port on the 19th of February and after a considerable period arrived there in safety. Mr. Justice Sankey, whilst accepting that the nature of the voyage which the vessel had to make could form part of the circumstances to be considered, held the port to be a safe port, magnificently, if irrelevantly, declaiming: "It is impossible to regard the results achieved [in relation to the threatened sinkings] as other than insignificant, or as even appreciably affecting the strength and spirit of the British mercantile marine".<sup>38</sup>

Perhaps one of the most interesting recent suggestions for widening the scope of incidents of political unsafety is to be found in the judgment of *The White Rose*, decided in 1969.<sup>39</sup> The case, although not actively concerned with safe ports, revealed that a law in operation at the port of Duluth, Minnesota, might be considered somewhat more onerous than anything existing in England in so far as it related to a shipowner's duties in respect of, and potential liability for, the safety of longshoremen employed on his vessel. This point led Mr. Justice Donaldson to speculate upon whether or not "this law was so unusual as to constitute Duluth a legally unsafe port to which the vessel should not have been ordered."<sup>40</sup> As the imagination of counsel for the shipowner had not stirred itself this far, there the matter rested.

On the fringe of this particular category is to be found the difficulties which arise where vessels are ordered to strike-bound ports. Here the English court has steadfastly refused to recognise as present the ingredients necessary to make an unsafe port, although whisperings as to the possibility of an impossible port have occasionally been heard.<sup>41</sup> The correctness of the attitude is best left undoubted, for strikes like bad weather may affect ports at any time

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38. *Id.* at 142. On 7th May, 1915, *The Lusitania* was torpedoed and sunk with a loss of 1,198 lives.

39. *A/B Helsingfors Steamship Co. Ltd. v. Rederiaktiebolaget Rex* [1969], 2 Lloyd's Rep. 52.

40. *Id.* at 59.

41. See the judgments delivered in the Court of Appeal in *Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food* [1962], 1 Q.B. 62.

and to recognize within strikes the incidents of unsafety would probably be to render the world in respect of safety, portless.

## PROOF AND DAMAGES

### *The Burden of Proof*

The safety or unsafety of a port in respect of a particular ship is a question of fact and degree to be determined by all the circumstances applicable to each individual case.<sup>42</sup> Apart from similarity in principle, no one case is wholly helpful in determining another, a very relevant point where it is the physical characteristics of a port which are being called in question.

The burden of proof lies on the shipowner, it being for him to establish that the harm of which he complains came about as a result of the charterer failing in his undertaking to nominate a safe port. To succeed in his claims for damages it is not sufficient for the shipowner to show that the charterer nominated a port and that the vessel suffered harm at that port. What must be shown is that the "proximate cause" of the loss suffered was the charterer's order for the vessel to proceed to an unsafe port.<sup>43</sup> That the charterer's order may be seen as "a cause" is undeniable, but that is not sufficient to found legal liability. What is required is that the charterer's order to that port continues to operate up to the time when the loss occurs. Should the chain of causation be broken, then whatever form of redress the shipowner may otherwise have it will not arise from an action based on the breach by the charterer of this particular undertaking.

There may be a number of incidents capable of causing a break in the chain of causation stemming from the charterer's order but that most usually relied upon is an intervening act of the master. This defence becomes available where despite the demonstrable unsafety of the port the master is so imprudent as to nevertheless take in his vessel—an act which may render the proximate cause of the loss the negligent act of the master and thus release the charterer from liability. The position is best shown by consideration of two cases both concerned with ice damage.

In the first case<sup>44</sup> the master of a vessel directed to Abo in Finland determined to force ice in order to gain access to that port; he did this even though the charterparty did not require him to force ice

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42. See *Leeds Shipping Co. v. Société Français Bunge* [1958], 2 Lloyd's Rep. 127.

43. *Grace (G.W.) & Co., Ltd. v. General S.N. Co.* [1950], 2 K.B. 383, 397.

44. *Limerick S.S. Co. v. Stott (W.H.) & Co.* [1921], 2 K.B. 613.

and in fact ice-breakers were available at the port. The court held that the ice damage suffered by the vessel was proximately caused by the act of the master and not from the charterer's order to proceed to Abo, which in the event was held to be a safe port.

In *Grace v. General Steam Navigation*,<sup>45</sup> a vessel was ordered to the port of Hamburg, and was therefore required to navigate up the River Elbe. When the vessel reached the Elbe it was found to contain quantities of ice. The master, assessing the possible length of delay in waiting clearance, together with the degree of danger and the likelihood of harm, decided to enter the river and proceed to Hamburg. The vessel suffered ice damage on her way both to the port and on leaving it. The court found that the master had acted prudently in his assessment of the delay, and that in view of the nature and degree of the danger the act of the master in proceeding was not such as to amount to an intervening act.

The dilemma of a master so circumstanced in having to accurately gauge the situation and assess the degree of damage which may be suffered if he proceeds as against the commercial loss which may result if he does not in order to avoid finding himself translated into a novus actus interveniens was highlighted by Mr. Justice Devlin when he said:

Suppose that the master thinks that the nominated berth is barely large enough and that he might scrape his vessel's side and damage her paintwork. If . . . it is the only berth that can be nominated, is he to throw up the voyage? A master who entered a berth which he knew to be unsafe . . . rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork.<sup>46</sup>

If the above prospects seem to render the position of the master somewhat uncomfortable let it be said that whilst the English courts accept the principle of novus actus interveniens, yet masters are most infrequent victims of its application in these circumstances, the court finding the prudence of masters legion in these cases.

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45. *Grace (G.W.) & Co., Ltd. v. General S.N. Co.* [1950], 2 K.B. 383.

46. *Compania Naviera Maropan S/A v. Bowaters Lloyd Pulp and Paper Mills* [1955], 2 Q.B. 68, 77, 78.

## *Measure of Damages*

The charterer being in breach of the charterparty, the measure of damages is governed by the ordinary principles applicable for breach of contract. This enables the shipowner to recover those losses which may be fairly and reasonably considered as arising from the breach or that may fairly and reasonably be regarded as being within the contemplation of the parties in the event of such a breach.<sup>47</sup>

The most natural damages in such cases arise either as an expense caused by delay brought about by a nuyatory nomination or expense arising from repairs and consequent loss of use of the vessel where actual damage to the vessel has resulted. Freight lost as a result of a charterer's nuyatory nomination would also be recoverable. There is duty on the shipowner to mitigate his loss where possible, but as a doctrine it is sympathetically applied.

### CONCLUSION

One praiseworthy feature of the restatement of the doctrine in the last twenty years has been the clear recognition that the charterer should not be held liable for abnormal occurrences, a feature not too apparent in some of the older cases. However, what a shipowner fails to gather under one term of the contract he may well seek to garnish under another, the temptation to cast the charterer in the role of an unwilling underwriter to an "all risks" port policy being apparent inbred.

The development of the safe port in English law has been a relatively peaceful and bloodless affair. The skirmishes of the past hundred years have yielded a clear and adaptable set of principles which seek to establish some semblance of equity between the parties. If it is a fact that the only besetting sin of many charterers in breach of their undertaking is an ignorance of their ports' infirmities this must be considered the price to be paid for a freedom of choice in determining those ports to which ships may safely come.

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47. See *Hadley v. Baxendale* (1854), 9 Exch. 341. The effect of the principles laid down in this case has been recently restated in *Czarnikow Ltd. v. Koufos* [1967], 2 Lloyd's Rep. 457.