Carslogie Steamship Company Limited Vs. Royal Norwegian Government Represented by the Norwegian Shipping and Trade Mission

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Court : House of Lords

Decided On : Nov-29-1951

Judge : LORD VISCOUNT JOWITT, LORD NORMAND, LORD MORTON OF HENRYTON, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE

Appeal No. : No.

Appellant : Carslogie Steamship Company Limited

Respondent : Royal Norwegian Government Represented by the Norwegian Shipping and Trade Mission

Judgement :

Viscount Jowitt

MY LORDS,

The facts which gave rise to the present case may be stated as follows: —

On the 26th November, 1941, the Motor Vessel Heimgar was lying at anchorage off Oban. She was due to join a convoy to West African ports. Whilst she was so lying at anchor the Steamship Carslogie collided with her. It was admitted that the Carslogie was solely to blame for the accident. On the 27th November the Heimgar was surveyed at her anchorage for the purpose of ascertaining the nature and extent of damage she had sustained as a result of the collision ; and this having been ascertained Lloyd's Surveyor issued a certificate of seaworthiness enabling the ship to go to a repairing port in the United Kingdom. Accordingly she proceeded to Greenock on the 28th November and arrived there on the 30th November. Owing to war restrictions all the work required could not be carried out, and temporary repairs were effected at Port Glasgow. In the meantime, and before these temporary repairs had been effected, the representative of the owners of the Heimgar had arranged with the Ministry of War Transport to send the vessel to the United States instead of to West Africa. This change of voyage was made primarily in order that she might go to a port at which permanent repairs could be effected. It was also considered by the owners desirable to take the opportunity of her being in dock to inspect her engines which had been giving some trouble. The port originally suggested was Chester, Pennsylvania, as it was hoped that a firm at Chester who were very experienced with Diesel motors might make any necessary adjustments to the engines. In fact Chester proved impossible and she was allocated to New York.

On the completion of her temporary repairs she was given a certificate of seaworthiness authorising her to be continued in her present class without fresh

record of survey subject to certain permanent repairs at the owner's convenience, and to her propeller being renewed at the owner's convenience, and she was stated to be fit to carry dry and perishable cargoes.

When the vessel sailed for New Yorkafter the completion of the temporary repairs she was in a seaworthy condition, but during her crossing of the Atlantic she experienced heavy weather and sustained considerable damage thereby which rendered her unseaworthy. It was therefore necessary for her to go into dry dock at New York to have this heavy weather damage repaired apart altogether from the desirability of effecting permanent repairs in respect of the collision damage. The heavy weather damage was not in any sense a consequence of the collision, and must be treated as a supervening event occurring in the course of a normal voyage, during which the Heimgar was on hire.

She remained in dry dock in New Yorkfrom the 2nd January to the 1st March, 1942, being thus off hire for a period of approximately 50 days. During her time in dry dock the repairs due to the collision, the engine repairs and the heavy weather repairs were all done concurrently. It was agreed that ten days out of the 50 should be allocated to the repair of the collision damage and that 30 days would have been required for the heavy weather damage.

The question for decision was whether the owners of the Carslogie were liable to pay, inaddition to the cost of the repairs occasioned by the collision, the loss of chartered hire for ten days, whilst the Heimgar was in dock, together with certain items in respect of war risk insurance and war bonus. These three items were considered as all turning on the same principle, and it was agreed that they succeeded or failed together. The Registrar allowed the sum claimed by way of damages for detention and allowed the two remaining items as a necessary consequence of allowing the first item. He considered that where a collision had taken place in consequence of which the innocent ship was on her way to the repairers when another casualty occurred which necessitated immediate repairs, the owner was entitled to recover damages for detention in respect of the collision repairs from the owners of the wrong-doing ship. Willmer J. reversed this decision, and the Court of Appeal (Bucknill L.J., Denning L.J., and Lloyd-Jacob J.), reversed this decision of the Judge and restored the decision of the Registrar. From this decision of the Court of Appeal the Appeal is brought to Your Lordships' House.For the Appellants it was contended that as a result of the heavy weather damage which was subsequent to the collision, the owners of the Heimgar had not suffered any damage by reason of her detention, since during the whole time that the collision repairs were being undertaken the ship was undergoing repairs to render her seaworthy, which repairs were necessitated by heavy weather. It was further contended that as the heavy weather damage was the only damage which rendered the vessel unseaworthy this must be regarded as the effective cause of the detention.

For the Respondents it was contended that as the owners of the Heimgar were entitled to have permanent repairs effected as a consequence of the collision and had actually and properly decided to send the ship to New York to have these repairs effected, they had become " necessary ", and it was argued that her owners were entitled to claim against the owners of the wrong-doing vessel for damages due to the detention. In support of this contention they relied upon the rule laid down in the Haversham Grange ([1905] P. p. 307).

My Lords, at the outset I think it is well to bear in mind the elementary principle that it is for the plaintiff in an action of damages to prove his case to the satisfaction of the court. He has to show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant before he can recover such damages. This principle applies to maritime collisions as much as it does to collisions on land. Mr. Roscoe hi the third edition of his book dealing with the Measure of Damages in Maritime Collisions, at page 10, cites the Marpessa [1907] A.C. 241 as illustrating the proposition that the plaintiffs were only entitled to recover damages by way of demurrage in respect of such money as the court was reasonably satisfied had been lost. He points out that the same principle has been laid down in the United States:

It is equally well settled, however, that demurrage will only be allowed "when profits have actually been, or may be reasonably supposed to have "been, lost, and the amount of such profits is proven with reasonable "certainty." (The Conqueror (1896) 166 U.S. (S.C.) 110 at p. 125.) Moreover, it is well established that in considering the damages occasioned by a wrongful act all those facts which have actually happened down to the date of the trial must be taken into account. (The Kingsway (1918) P. per Scrutton L.J. at p. 362.) For this reason it is undoubted that if a collision took place which would have occasioned a time in dock for repairs and the ship is sunk before these repairs can be effected, any claim for loss of time which would have been occupied in such repairs must fail.

Scrutton L.J. inthe York([1929] P. at p. 185) puts other illustrations showing circumstances which may make it impossible to substantiate a claim for damages for loss of profitable time. A ship may be detained by ice so that she could not trade at all, or possibly by an embargo, and other illustrations can be given.

If I may use the expression of Lord Justice Bucknill, who delivered the leading judgment in the Court of Appeal, damages are payable for the detention of a ship because she is a profit-earning machine. If she ceases to be a profit-earning machine it follows that she can sustain no damage from being detained until she again becomes capable of earning profit. In other words, it is not enough to consider whether the ship was detained by the wrongful act of the Defendant. It is essential to consider whether damages were caused to the Plaintiff by reason of such detention. So considered, it will be seen that the problem is not solved by answering the questions: Was the ship detained and if so what was the cause of her " detention? " It is essential to answer the further question: " Assuming that " she was detained and assuming that she was detained by the wrongful act " of the Defendant, did the Plaintiffs sustain damages as a result of such " detention?"

In the present case the ship, having had temporary repairs, was in a seaworthy condition when she sailed across the Atlantic. It is no doubt the fact that she was sent on this particular voyage in order that permanent repairs might be carried out. At the same time it must be noted that the owners had not entered into any contract to send her for repairs and would have been free had they been so minded to send her back from New York without such repairs being effected. I am willing to assume, without deciding the question, that the collision was a cause of her detention. Still the fact remains that when she entered the dock at New York she was not a profit- earning machine by reason of the heavy weather damage which had rendered her unseaworthy. If there had been no collision she would have been detained in dock for 30 days to repair this damage. I cannot see that her owners sustained any damages in the nature of demurrage by reason of the fact that for ten days out of the 30 she was

also undergoing repairs in respect of the collision.

Willmer J. considered that the repairs to the engines would not have prejudiced the owners' claim to recover damages for loss of profitable time. He deals with this question as follows:

Although the collision repairs were not immediately necessary, the owners of the ' Heimgar ' were entitled to have them carried out, and if they did so would be entitled to take advantage of the occasion to carry out such other repairs of their own as they might think fit. The learned Registrar has found, rightly in my judgment, that the vessel was diverted to New York for the express purpose of undergoing the collision repairs, and it matters not that, as I have found, there was a subsidiary purpose of carrying out a machinery overhaul at the same time. Had there been no subsequent heavy weather damage necessitating immediate repair, it seems to me that in accordance with the principles applied by the House of Lords in the Chekiang ([1926] Appeal Cases, p. 637) the Plaintiffs would clearly have been entitled to recover damages in respect of ten days of the detention, notwithstanding the fact that they took advantage of the occasion to proceed with their machinery overhaul.

My Lords, I am in complete agreement with this view.

It is well established that if a ship goes into dock for repairs of damage occasioned by a collision brought about by the fault of another vessel, the owners of that other vessel must pay for the resulting loss of time, even although her owners take advantage of her presence in the dock to do some repairs which, though not necessary, were advisable. Thus, in the case of The Ruabon Steamship Company. Limited v. The London Assurance ([1900] A.C. p. 6), the Ruabon suffered damage on the voyage which made it necessary for her to be put into dry dock. The owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey of the vessel for renewing her classification made, though this survey was not then due. It was decided that the expenses of getting the vessel into and out of dock as well as those incurred in the use of the dockfell upon the Underwriters alone. In the Acanthus ([1902] P. p. 17), whilst the vessel was in dry dock to repair collision damage for which the defendants were liable, the owners took advantage of the opportunity to fit her with bilge keels. It was decided that, notwithstanding this fact, the wrong-doers were not entitled to any contribution towards the cost of dry docking. In the Chekiang ([1926] A.C. p. 637) H.M.S. Cairo suffered damage in a collision for which the owners of the Chekiangwere to blame. After being temporarily repaired, she proceeded to Hong Kong for permanent repairs. The Admiralty took advantage of her presence in the dock to undertake her annual refit, though this was not then necessary. It was decided that this fact did not avail the defendants and could not be prayed in aid by them in reduction of their liability. Lord Dunedin, at page 642, points out, how- ever, that if the act of the owner was of necessity, it would have been otherwise.

These cases support the view that the time occupied in the engine overhaul which, however desirable it may have been, was not then necessary, could not have been used to reduce any amount which might have been due from the owners of the wrong-doing vessel by way of damages for detention ; but they have no bearing on the effect of the heavy weather repairs which had made the Heimgar unseaworthy.

The case mainly relied upon by the Respondents as bearing upon this latter question

was the Haversham Grange ([1905] P. p. 307). In that case the Maureen had suffered two collisions, for the first of which she was held partly to blame, and for the second of which she was held free of all blame. Each collision made it necessary that she should go into dry dock. The two sets of repairs were carried out together: 22 days were taken in repairing the damage due to the first collision and six days in repairing the damage due to the second collision, these periods being concurrent and not cumulative and successive. The question arose which of the two wrong-doing vessels should pay the undoubted damages which the owners of the Maureen had suffered from the delay to their steamship, and a separate question arose as to the dock dues which had been incurred.

With regard to the demurrage, Sir Gorell Barnes P. held that as the Maureen had already been incapacitated by the first collision before the second collision took place, the repair of the damage done by the second collision did not in any way delay her, and therefore the second wrong-doer was not responsible for any part of the damages due to delay. He dealt with the dock dues upon the same basis. On appeal, the decision of the President was confirmed with regard to demurrage, but it was decided that the claim for dock dues ought to be dealt with on a different basis, and it was decided that the amount due in respect of dock dues should be divided between the two wrong-doers.

My Lords, I think that there can be no logical distinction between the claim for damages for delay and for dock dues and, believing as I do, that the decision as to damages for delay was correct, it follows in my view that the latter decision in respect of dock dues cannot be supported. I am confirmed in this view by this further consideration. The Ruabon ([1900] A.C. p. 6) was a case which was concerned solely with dock expenses. No question as to damages for delay arose in that case. The Chekiang([1926] A.C. p. 637) was a case which was concerned solely with damages for delay. No question as to dock expenses arose in that case. Yet Lord Dunedin in the latter case (at p. 641) regards the decision of the House in the Ruabon about dock expenses as concluding the question in the Chekiangabout damages for delay. This supports the view that in principle the two questions are indistinguishable.

The case from which I have derived most assistance is the Vitruvia (1925 Session Cases, House of Lords, p. 1). The Vitruvia had been in collision with the Carperby. For this collision the Carperby was alone to blame. The damage sustained by the Vitruvia did not render her unseaworthy. She continued to make voyages and it was not until several months after the collision that she came to Glasgowto have the collision damage repaired.

When the case first came to the House of Lords the Appellants put forward an argument founded upon the alleged facts that the Vitruvia, before she entered the dock to carry out the collision repairs, was in fact unseaworthy, that the defect rendering her unseaworthy could only be remedied in a dry dock and that no dry dock was available until after the collision damage had been repaired. Accordingly they sought to argue that there had been no damages for delay occasioned by the repair of the collision damage. As this matter had not been properly pleaded and the relevant facts had not been found, the House sent the case back for a further ascertainment of the facts. The further findings established that the Vitruvia was in fact unseaworthy owing to a small defect which could have been put right in a few hours ; and that it was not necessary to obtain a dry dock to remedy this defect. Upon these facts Lord Dunedin (at p. 5) was of the opinion that the Respondents had not established the

defence they sought to make. Had the facts established that the unseaworthiness of the vessel could not have been made good until after the collision repairs had been completed it is plain that he would have decided that the owners of the wrong-doing vessel would not have been liable for any damages for delay whilst the collision repairs were being carried out.

Lord Phillimore put the matter in this way: When this case was before your Lordships' House on the last occasion, a formidable point was made by the Appellants. They said, ' you must not charge us for the time 'spent in repairing the damage caused by the collision, for you lost no, 'time by it, because you had to wait for the dry dock into which you could 'put your ship in order to repair her propeller'." Lord Phillimore adds, however, that this case was not proved, for it was not necessary for the owners of the Vitruvia to wait for a dry dock; they would have been able to do the work by tipping the ship in wet dock, and accordingly he decided that the owners of the Vitruvia were entitled to be paid for the loss of profitable time during which the repairs were being effected.

The case of the Vitruvia is not referred to in the judgments of the Court of Appeal, though I feel confident that had the Judges considered this case and the grounds upon which it was decided they would not in the present case have come to the conclusion to which they in fact came.

A similar question arose in the Hauk (30 Lloyds List Law Reports, p. 32). In that case the Cameronia had sustained damages in a collision for which the Hauk was to blame, but her seaworthiness was not affected, and after temporary repairs she continued her trading. Subsequently she sustained sea damage to her rudder which rendered her unseaworthy and necessitated immediate repair. The question arose whether the wrong-doing vessel was responsible for any loss of profitable time occasioned during the time the collision repairs were being carried out.

Lord Constable at p. 36 states his view in the following words:

I think it would be difficult to affirm that the collision was not a cause of the detention, though the detention was immediately brought about by the accident to the rudder. But the present question does not seem to me to depend upon whether in strictness the collision or the accident to the rudder was the true cause of the detention. Even on the assumption that the repair of the collision damage was the true cause, the pursuers must also show that the detention of the Cameronia for such repair resulted in a loss of profit, and they cannot do so when in fact the Cameronia was by reason of the accident to the rudder disabled from earning any profit before she was laid up. The loss of profit was not the direct and natural consequence of the defenders' wrongful act, nor did it represent what but for the collision the owners would have earned by the use of their ship.

Lord Justice Bucknill in his judgment differentiated this case on the ground that if the heavy weather damage was done after the collision damage the rule laid down in the Haversham Grange should apply. My Lords, both in the Hauk and in the present case the unseaworthiness was caused by an event which happened after the collision, and I see nothing in the rule laid down in the Haversham Grange which in any way conflicts with the decision in the Hauk. That rule, as I have already pointed out, rightly treats the first wrong-doer who renders the vessel unseaworthy as responsible for the consequent delay, notwithstanding the act of a second wrong-doer who also

rendered the ship unseaworthy; but the rule is addressed to causation, for it was clear in the Haversham Grange that damages had resulted from the detention.

In the present case I think that the damage brought about by the collision did not in the events which happened cause any loss of profitable time to the owners of the Heimgar because when she entered dry dock she was not a profit-earning machine.

This is in substance the ground taken by Willmer J. in his judgment when he says:

The owners of the Heimgar would have had no use of their ship and would have earned nothing by her use, for the simple reason that at the time when the collision repairs were executed the ship was completely immobilised as the result of damage received in the heavy weather encountered during the Atlantic voyage.

My Lords, I agree with this reasoning and accordingly I am in favour of allowing the appeal and restoring the judgment of Mr. Justice Willmer.

Lord Normand

MY LORDS,

When a Plaintiff claims damages from a tortfeasor for the detention of a chattel while it is undergoing repairs he undertakes to prove, not only that the repairs were rendered necessary by the tortious act or negligence and that the period of detention in respect of which he claims was necessary for the execution of the repairs, but also that by the deprivation of the use of the chattel during the detention he suffered pecuniary loss. If the action is raised and the damages have to be assessed before the repairs are executed, the Court is perforce dealing with damages which may or may not arise in the future, and it will require proof of sufficient certainty that the Plaintiff will suffer measurable damage, making allowance for the chance that by some subsequent casualty the chattel may be destroyed before the repairs are executed, or that when the chattel comes to be repaired the deprivation of its use may involve no pecuniary loss. (The Kingsway [1918] p. 344.)

In the more usual case, when the damages are assessed after the repairs have been executed, the Court has before it the facts as they have occurred. It is no longer dealing with the future but with past history, and in the assessment proof of the facts displaces estimates of probabilities. This principle has long been established and has been followed not only in many claims for collision damage but also in a wide variety of other cases in which compensation or damages have been assessed. For example, in Bwllfa and Merthyr Dare Steam Collieries [1903] A.C. 426 it was applied to a claim for statutory compensation. In Williamson v. Thorneycroft [1940] A.E.R. 61 the Court of Appeal applied it when a widow claiming under Lord Campbell's Act died before the assessment of the damages, and in a recent case this House held that it has been rightly applied by the Court of Session where the pursuer in a claim for solatium died before the solatium was assessed (Kelly v. Glasgow Corporation [1951] S.C. (h.l.) 15).

The facts of the present case, which it is unnecessary for me to narrate again in detail, show that the "Heimgar", while seaworthy and able for a trading voyage after temporary repairs rendered necessary by a collision with the "Carslogie", suffered weather damage so great that immediate repairs were necessary before she could continue trading. She entered dry dock at New York and there three sets of repairs

were carried out, the permanent repairs required to make good the collision damage, the repairs immediately necessary to make good the heavy weather damage, and repairs to her auxiliary machinery which were not immediately necessary. These repairs were carried out concurrently. The "Heimgar" was detained in dock 50 days in all, but the collision repairs alone would not have detained her for more than 10 days, whereas the repair of the heavy weather damage alone would have detained her 30 days. On these facts she was, in consequence of the heavy weather damage, a vessel incapable of gainful use during the ten days necessary to complete her collision repairs, and no claim against the "Carslogie" for deprivation of profits in respect of this detention can be established.

Every case depends on its own facts, but I find the strongest support for this conclusion in The Vitruvia 1925 S.C. [h.l.] 1. The " Vitruvia " suffered damage by collision with the " Carperby " for which the "Carperby" was alone to blame. This damage did not make her unseaworthy or prevent her from trading. After several months of profitable trading her owners brought her to Glasgowsolely for the purpose of having the collision repairs carried out. She arrived at Glasgow on 22nd August and the repairs were completed on 3rd September. Her owners claimed against the " Carperby " for loss of earnings during these 22 days. On her voyage to Glasgow it had been noticed that her propeller was making a knocking sound, and after her arrival the engineer reported that he suspected there was something wrong with the propeller. On 2nd September a dry dock became available for the first time since her arrival, and she entered it that day for examination of her propeller. It was then found that a nut on the propeller was loose and needed tightening. The repair was completed in a few hours. While this defect existed it would have been imprudent to send the ship to sea. The case came before this House on two occasions. On the first occasion the House allowed parties an opportunity to amend their pleadings so as to present in clear form the defence that the " Vitruvia " was unseaworthy during the whole period in respect of which damages were claimed and accordingly that there was no loss in respect of detention during that period, and the pursuers' reply that the propeller defect would not have prevented her from completing her next voyage because it could have been quickly repaired though no dry dock was available to her. That this House regarded the defence as relevant is clear, for it remitted the case to the Court of Session with a direction to allow the proposed amendments and a proof thereof. As a result of the proof it was found that the propeller defect could have been repaired in a few hours without dry-docking the ship.

When the case was reported to the House, Lord Dunedin said (1925 S.C. [H.L.] at p. 5): "If the defenders had been in a position to say, 'your ' vessel when it arrived on the 12th was in what is admitted to be a practically unseaworthy condition ', and if they had been able to go on to " say, ' it would not have been possible for you to get it into a seaworthy 'condition before the time when you went into dry-dock on the 2nd of " ' September', then they could have added, I think, what always can be "said by defenders, ' you were bound to use that time in executing the "' repairs'. In other words, it would not have been possible for the pursuers to say, ' we will wait until the 2nd of September when we can 'put our vessel into dry dock, and then we will do our repairs and charge 'you for demurrage during the time we are doing them'". Then his Lord-ship went on to point out that the defenders could not say that, because the propeller defect could have been remedied and the vessel made seaworthy in a very few hours without the use of a dry dock. That case would have been indistinguishable from the present if dry-docking had been necessary to make good the propeller defect. On that hypothesis the defence would have succeeded. A seaworthy ship had

been directed in each case to a repair port. In The Vitruvia the only purpose in sending the ship to Glasgow was the repair of the collision damage; in the present case the repair of the collision damage was one and the chief of three purposes in sending the ship to New York, the other two being to make a voyage onhire and to carry out repairs to the auxiliary engines. In both cases the ships suffered on the voyage damage rendering them unfit for another voyage. In both cases any period of detention necessary for the completion of the repairs to make the ship seaworthy had, if possible, to be used by her owners to execute the collision repairs, and from that detention no claim for loss of profits as part of the collision damage could arise.

The Hauk [1928] S.L.T. 71 is also a case closely resembling the present case. The " Hauk" had suffered damage in a collision with the " Cameronia " for which the " Cameronia " was held liable to the extent of two-thirds. As in the present case, some temporary repairs were carried out. Then, after a period of trading, she suffered storm damage which necessitated her being docked at once for repair. The storm damage repairs and the collision damage repairs were put in hand at the same time, but the storm damage took longer to repair than the collision damage. The pursuers claimed a sum in the name of loss of profits during detention. The Lord Ordinary, Lord Constable, disallowed the claim on the ground that though the collision damage might be a cause of the detention during their repair, the pursuers failed to show that the vessel could have earned any profit in that period. The Lord Ordinary regarded this case as governed by The Vitruvia, and his judgment is a valuable clarification of the law of damages in such cases as this.

None of the other cases cited conflicts with the decision of Willmer, J., in this case, or with The Vitruvia or The Hauk. The decision on demurrage in the Haversham Grange [19051 P.D. p. 309 is no exception. It is indeed another example of the general rule that the owner of a chattel who claims damage for detention from a wrong doer must show that, apart from the wrongful act of the defendant, the chattel was capable of profitable use during the period of detention. In The Haversham Grange the " Maureen " was in collision with the " Caravellas " on 25th December and with the " Haversham Grange " on 26th December. The owners of the " Caravellas " agreed to a decree of both to lame, and the owners of the " Haversham Grange"' admitted sole liability. Each collision caused damage which it was essentially necessary to repair. The owners of the " Maureen " recovered 50 per cent, of their loss including loss on account of detention from the owners of the " Caravellas ", and sought to charge the owners of the " Haversham Grange " with the remaining half share of demurrage damage. There was also a claim for dock dues, which I pass over in the meantime. One of the proved facts was that the repair of the damage done by the " Haversham Grange " had not increased the period of detention. Sir Gorell Barnes P. held that as the " Maureen" was already incapacitated by the collision with the " Caravellas " when she collided with the " Haversham Grange " the claim against the " Haversham Grange " for loss of earnings during repair failed, and that decision was affirmed by the Court of Appeal. As in that case so in this the claim fell to be disallowed because the plaintiffs failed to prove that the ship could have earned profits during the period of detention caused by the repairs rendered necessary by the defendants' tort. There has been, I think, some misunderstanding of the decision in The Haversham Grange. Thus, in his judgment in The Hauk, Lord Constable seems to over-emphasise the importance of the fact that the collision with the "Caravellas " was prior in time to the collision with the " Haversham Grange ". The emphasis should be on the existing disablement of the " Maureen " when the" Haversham Grange " collided with her.

I respectfully think that the Court of Appeal in the present case erred in thinking that the issue could be settled by determining whether there was a causal connection between the collision damage and the detention of the "Heimgar" for 10 days. This particularly appears in the judgment of Denning, L.J. On this point I am in agreement with the Lord Ordinary's judgment in The Hauk. It is, I think, difficult to say that the collision damage was not, while it was being made good, acause of the detention of the ship. But the real issue is whether in these ten days the vessel was a potential profit earning vessel or not. Bucknill, L.J., thought that the fact that the Heimgar " was re-routed to New York for the express purposeof having the collision repairs carried out and that it was when she was on this voyage that she suffered the heavy weather damage, was a material circumstance which distinguished this case from The Hauk. So, also, Lloyd-Jacob, J. thought that the decision to immobilize "the" Heimgar" for collision repairs was the determining factor. But to make that distinction a ground of judgment is inconsistent with The Vitruvia, which was unfortunately not referred to in any of the judgments. Bucknill, L.J., fell into what I humbly think is the error of supposing that The Haversham Grange is authority for a rule that liability for detention attaches to a tortfeasor merely because the damage done by his tort is prior in time to a subsequent damage, whether caused by a tort or by some other cause. For example, he says: I think it is essential to know whether the heavy weather damage was received before or after the damage by collision.

But, with respect, if the fact is that one of two casualties made the vessel unseaworthy and the other did not. the problem of liability is solved and the time sequence is irrelevant. In The Haversham Grange the time sequence was important because the damage suffered by the "Maureen" in each of the two collisions was enough to make her unseaworthy.

On the view of the case which I have taken it is not necessary to consider the bearing of the repairs to the auxiliary engines, which occupied 50 days, on the claim for damages for detention. But I may be allowed to say that I agree with all that has been said on that point by my noble and learned friend on the Woolsack.

For the reasons I have given I would allow the appeal.

My Lords, in this appeal the liability for dock dues is not in issue. We were told that they had been apportioned, and there was no appeal against that. This is in accordance with the decision of the Court of Appeal in The Haversham Grange reversing Sir Gorell Barnes. P. In my opinion the liability for dock dues is the same as the liability for the demurrage, and the decision in The Haversham Grange on this point is inconsistent with principle and with a decision of this House. The history of the matter must be shortly set out. In The Ruabon [1900] A.C. 6 a vessel was damaged by a peril insured against and was put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due at that time, but the owners took advantage of her being in dry dock to have the survey made without increasing the period of detention. It was held that the liability for the dock dues fell upon the underwriters alone. It will be observed that that was a case in which the liabilities of the parties inter se rested upon contract. But in The Acanthus [1902] P. 17, the question of liability, both for dock dues and for demurrage, between the plaintiff and a tortfeasor was decided by Sir Francis Jeune by applying the rule laid down in The Ruabon. The facts were that when the vessel was in dry dock for the repair of collision damage the owners took advantage of the opportunity to fit bilge keels without causing increased detention or increase of dock dues. It was held by Sir

Francis Jeune P. that the tortfeasor was liable for the dock dues and for the demurrage, and he had no distinction between them. The next case was The Haversham Grange [1905] P. 307, which, as I have already indicated, made a radical distinction between liability for dock dues and liability for demurrage. The last case to which I need refer is The Chekiang [1926] A.C. 637. In that case the Admiralty took the opportunity of the docking of H.M.S. " Cairo" for collision repairs to do certain refitment repairs not immediately necessary. It was held that the owners of the vessel to blame for the collision were liable in damage for the deprivation of the use of the vessel for the period of the collision repairs. Lord Dunedin in his speech said that the question was concluded by The Ruabon and he also approved of the decision in The Acanthus. Lord Phillimore took the same view of the case, and said that the decision upon dock dues in The Haversham Grange might have to be reconsidered. The Haversham Grange decision is not consistent with the ratio decidendi of The Acanthus and The Chekiang.

I want only to add that I think that the distinction between liability for dock dues and liability for detention is in principle unmaintainable. The present case may be taken as an illustration. As regards detention, the question is whether the owners of the detained ship suffered a loss of earnings while she was undergoing the collision repairs. The answer is that they did not, because during the detention the ship, though not disabled from trading by the collision damage, was necessarily disabled from trading by the weather damage. As regards the dock dues, the question is whether any part of the payment of the dues for the period while the collision repairs were executed was a loss suffered as part of the collision damages. The answer is that it was not, because it was a payment incurred in order to carry out the immediately necessary weather damage repairs. The collision repairs were therefore executed in the dock when its use was franked by that necessary payment.

Lord Morton of Henryton

MY LORDS,

The "Heimgar" was detained in New Yorkfor repairs for nearly 50 days. At an early stage in the speech of counsel for the Appellants, I asked whether it was common ground between the parties that, if the collision between the "Heimgar" and the "Carslogie " had never happened, the "Heimgar" would have been detained in New York for the same period of 50 days. The answer was in the affirmative. In the " Argentino "13 P.D. p. 191 at page 201 Bowen, L.J. observed: "A ship is a thing by the "use of which money may be ordinarily earned, and the only question "in case of a collision seems to me to be, what is the use which the ship-owner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the ship-owner, but for the accident, would have earned by the use of her? " Willmer, J. asked himself that question in the present case and gave this answer: " The owners of the ' Heimgar' would have had no use of their " ship, and would have earned nothing by her use, for the simple reason "that at the time when the collision repairs were executed the ship was completely immobilized as the result of damage received in the heavy weather " encountered during the Atlantic voyage ".

My Lords, I agree with this answer, and if it is the correct answer I can see no ground upon which the Respondents can recover the damages which they claim for the detention of their ship. If the " Heimgar " had not encountered heavy weather on her

voyage across the Atlantic, I entertain no doubt that the Respondents could have recovered damages for her detention in New York for the period of 10 days which would have been required to repair the collision damage. In that event they would have lost the use of their profit-earning chattel for a period of 10 days and the negligence of the Appellants would have been the cause of that loss; but in the events which happened the Respondents have failed to prove that any loss of the use of their profit-earning chattel resulted from the negligence of the Appellants. On this short ground I would allow the appeal, but as we are differing from a unanimous judgment of the Court of Appeal, and as Mr. Carpmael submitted that a decision in favour of the Appellants would involve overruling The "Haversham Grange" [1905] P. 307 I shall first make some observations on that case and shall then explain briefly why I cannot accept the reasoning of the Court of Appeal. I shall follow the example of Bucknill, L.J. in quoting Willmer, J.'s statement of the facts in The " Haversham Grange." It is as follows: -

In The ' Haversham Grange ' ... the Plaintiffs' ship (the 'Maureen') "was involved in two collisions, both necessitating immediate repairs. "Both sets of repairs were executed simultaneously, and the repair of the " second collision damage did not in any way increase the period of detention which would in any case have been required for the repairof the first collision damage. In respect of the first collision the Plaintiffs' ship and the colliding ship were equally to blame. In respect of the second collision the owners of the colliding ship (The ' Haver-sham Grange') admitted liability. The Plaintiffs in due course recovered from the owners of the first colliding ship 50 per cent, of their claim, including 50 per cent, of the amount lost by reason of the detention of their vessel during repair. They then sought to recover from the owners of The ' Haversham Grange,' inter alia, the remaining 50 per cent, of their claim in respect of the detention of their vessel. The learned President, Sir Gorell Barnes, confirming the Report of the Registrar, disallowed the claim, holding that, as the vessel was already incapacitated by something which had previously happened before the second wrong-doing ship ran into her, the repair of the damage done by the second collision did not in any way delay her, and therefore the second wrong-doer was not responsible for any part of the delay, which he had not in fact caused. In the Court of Appeal the claim for detention was abandoned, but the learned Master of the Rolls, although the matter was no longer before the Court, expressed his concurrence with the decision in the Court below.

Thus the decision in The Haversham Grange was that the owners of the Maureen "could not recover from the owners of The "Haversham Grange" any part of the loss resulting from the detention of the " Maureen " during repairs, because no part of that loss resulted from the negligence of that particular wrong-doer. That decision seems to me to be wholly in accordance with the view which I have formed in the present case.

My Lords, I have noticed references in the judgments under appeal and in other cases to "the rule laid down in The 'Haversham Grange'." I confess that I can discover no rule which is laid down in that case. It seems to me merely an illustration of the elementary principle, already stated by my noble and learned friend on the Woolsack, that a plaintiff must show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant, before he can recover "such damages . I add that, in agreement with the Opinions which have just been delivered, I can see no logical reason for the distinction which was drawn in The "Haversham Grange" between the claim for damages for detention and the claim for dock dues.

I think that the reason why I differ from the Court of Appeal can best be explained if I quote three sentences from the judgment of Bucknill, L.J. whose wide knowledge of these matters leads me to differ from him with great hesitation. The learned Lord Justice said: —

"When the owners, quite properly, arranged to have their ship sent to the United States of America in order that the collision repairs " might be done, I think that the owners of the wrong-doing ship became " liable to pay, not only for the prospective cost of the repairs, but " also for the loss of time thereby incurred. It is true that if the " 'Heimgar' had been sunk on her way to the United States, the owners " of the wrong-doing ship would not have been liable to pay for detention during the repairs. But the reason for that, as explained in the 'Glenfinlas' (1918 P. p. 363) is that the ship having been lost she ceased to be a potential money-making machine, and therefore her owners did not lose something which did not exist."

With the first of these three sentences I entirely agree, but I would add that in my view no loss of time was "thereby incurred," because in the events which happened, the repairs were carried out at a time when the ship was incapacitated for other reasons. As to the third sentence, I would respectfully point out that in the present case the ship ceased to be a potential money-making machine when she became unseaworthy owing to heavy weather, having been seaworthy when she sailed—see the Lloyd's surveyor's certificate of seaworthiness dated 4th December, 1941. In these circumstances I find it difficult to distinguish between the present case and the position if the " Heimgar " had been sunk on her way to the United States. In both cases no loss of time would result from the earlier collision.

I agree that this appeal should be allowed with costs.

Lord Tucker

MY LORDS,

As I have arrived at a conclusion different from that of the Court of Appeal I will state very shortly why I have found myself compelled to disagree with their decision. The gist of Lord Justice Bucknill's judgment is to be found at page 54 of the Appendix between letters C and F. He here states that the fundamental difference between the present case and the "Hauk" (30 Lloyds List Law Reports, 32) is that in the latter case the ship was compelled to repair her rudder and was therefore not a profit earning machine until that repair had been effected. In that condition the collision repairs were also done and therefore it is right to say that she would have earned nothing whilst those collision repairs were being done. Whereas in the present case the " Heimgar " was proceeding to New York for the express purpose of having collision damage repaired when she suffered the heavy weather damage, and it would be contrary to the decision in the " Haversham Grange " to hold that she could not in any event have earned a profit during the period of detention by reason of the heavy weather damage.

But, My Lords, both the "Hauk" and the "Heimgar" were rendered unseaworthy by events which happened after the collision in each case. So far as the claim for demurrage was concerned in the " Haversham Grange", it was rejected not because the collision between the "Maureen" and the “Haversham Grange" was subsequent to the collision with the " Caravellas ", but because it turned out that the " Maureen "

must have been and in point of fact was detained the whole time in dock for the repairs which had to be executed in consequence of the damage done by the " Caravellas " which had rendered her unseaworthy. It was immaterial that the damage done by the "Haversham Grange" would also by itself have made the "Maureen" unseaworthy or that it occurred after the first collision.

It seems to me, therefore, with respect, that the decision of Willmer J. in the present case was consistent not only with that part of the decision in the " Haversham Grange " which dealt with the claim for demurrage but with the other authorities, including in particular the "Vitruvia" (1925) S.C.I and the " Hauk " (30 Lloyds List Law Reports 32). I agree, however, with your Lordships in thinking that the other part of the decision of the Court of Appeal in the " Haversham Grange ", viz., with regard to dock dues (which is quite immaterial for present purposes) cannot be reconciled with their decision as to demurrage and should be overruled. Lord Justice Denning approached the case from the point of view of the Common Law, but I venture to think that the error underlying his judgment, if I may respectfully say so, is that he regards the cause of the detention as equivalent to the cause of the loss of profit. The distinction is to be found clearly expressed in the judgment of Lord Constable in the " Hauk " in the passage which has already been quoted. I am prepared to assume in the present case that the collision was a cause of the detention, but none the less the detention for such repair did not result in any loss of profit. It does not represent what but for the collision the owners would have earned by the use of their ship.

Mr. Justice Lloyd-Jacob treated the time of the decision to immobilise as the decisive factor, and this also entered into the reasoning of Lord Justice Bucknill. I do not, however, think that this is consistent with the authorities in which the unseaworthiness of the vessel at the material time has always been regarded as decisive.

For these reasons and for those which have been stated by Your Lordships I agree that this appeal should be allowed.

LORD TUCKER: My noble and learned friend, Lord Asquith of Bishopstone, who is unable to be present, has asked me to say that he agrees with the Motion proposed from the Woolsack.