Arnold D. McNair.

Year by year in lecturing on the law of contracts I am asked by successive generations of students whether the Polemis decision applies to the measure of damages for breach of contract. This decision is one which gives no practitioner sleepless nights, but troubles the teacher and the student a good deal. It seems therefore worth while to preserve from destruction such documentary information as may throw any light upon the case beyond what is afforded by the reports of the judgments of Sankey J. and of the Court of Appeal. Accordingly, by the courtesy of Messrs. Holman, Fenwick and Willan, the solicitors for the owners of the Thrasyvoulos, I am able to print the following documents:

1. Points of Claim.
2. Letters of April 26, 1920, from charterers' solicitors demanding particulars and of April 28, 1920, from owners' solicitors in reply.
4. Respondents' (charterers') Contentions.
5. Claimants' (owners') Contentions.
6. Award and Special Case dated December 20, 1920.
7. Further Finding by the Arbitrators dated February 11, 1921.
8. Judgment of Sankey J. dated May 5, 1921, which, though reported in 26 Commercial Cases and 37 Times Law Reports, is reprinted here from the transcript for the benefit of readers to whom these reports may not be available.
Repetition will be avoided by reproducing these documents at once and allowing them to tell their own story. To them I have appended a note on the relation, if any, of the decision to the law of contract, as it seems to me, without touching upon its position in the law of torts which has been fully dealt with by many writers. 4

IN ARBITRATION. BETWEEN C. A. POLEMIS and L. BOYAZIDES (Owners of the s.s. 'THRASYVOULOS') and FURNESS WITHY & CO., LTD.

POINTS OF CLAIM.

1. By Charter Party dated 21st February 1917 the Owners of the s.s. 'THRASYVOULOS' let the said steamship to Furness Withy & Co. Ltd. for the duration of the war with a further option for six months to be employed in such lawful trades as Charterers may direct.

2. The said charter party provided (inter alia): —

3. That the Owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew, and pay for the Insurance of the said vessel war risks excepted.

4. That the Charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, commission and all other charges whatsoever except those above stated.

5. Steamer to be re-delivered on expiry of the charter party in the Bame good order and condition as and when delivered to Charterers fair wear and tear excepted.

11. Steamer to work night and day if required by charterers and all steam winches to be at charterers' disposal during loading and discharging and steamer to provide men to work same both day and night as required. If shore watchmen are required same to be for charterers' account.

33. That the Captain although appointed by the Owners shall be under the order and direction of the charterers in all matters.

3. In the month of July 1917 in pursuance of directions received from the Charterers the 'THRASYVOULOS' loaded a cargo consisting of petroleum, benzine, cement, etc. at Lisbon for Casablanca and other ports on the Moroccan coast. The said steamer arrived at Casablanca on the 17th July and the discharge was-forthwith proceeded with by the Defendants' agents and their employees, shore winches being required. The whole of the discharging operations were undertaken by and were under the control and directions of the Defendants.

4. Shortly after midday on the 20th July [while] the discharge of cases of benzine was proceeding ex No. 1 hold the Defendants' servants negligently And improperly caused or allowed a sling of cases which was being raised from the lower hold to swing foul of a temporary platform placed across the forward section of the 'tween decks hatches with the result that a beam of timber, part of the said temporary platform, was dislodged and crashed into the lower hold with the result that flames immediately thereafter shot up through the hatchway and in spite of all efforts made to save the said steamer she was gutted by the fire and became a total loss.

5. The Charterers are not relieved of liability for the negligence of their agents and/or servants or employees under the said charter party and the Owners' claim for loss and damage occasioned to them by reason of the negligence aforesaid. Alternatively the Claimants say that the Charterers are liable in damages under Clause 5 of the said Charter Party.

Delivered this 9th day of April 1920 by HOLMAN, FENWICK & WILLAN, 1, Lloyd's Avenue, E.C., Claimants' Solicitors.

22, Great St. Helens,

London, E.C.3,

26th April 1920.
Dear Sirs,

s.s. "THRASYVOULOS"

We require the following particulars under the Points of Claim \textit{viz}.

(1) Under para. 3—
(a) of the Defendants’ Agents and employees specifying them;
(b) of the shore winchmen required;
(c) of the undertaking by the Defendants specifying how they undertook the discharging;
(d) of the control and directions specifying how the Defendants controlled and what directions they gave and what
members of the Defendants so controlled directed and undertook.

(2) Under para. 4—
(a) of the Defendants’ servants referred to specifying them.
(b) of the person or persons who placed the platform referred to.

(3) Under para. 5 of the loss and damages referred to.

Yours faithfully,

(Sgd.) DOWNING HANDCOCK MIDDLETON & CO.

Messrs. HOLMAN, FENWICK & WILLAN.

April 28th 1920.

Messrs. DOWNING HancoCK MIDDLETON & LEwIS, E.C.

Dear Sirs,

‘THRASYVOULOS’

We are to-day in receipt of your letter of the 26th inst. The particulars you require under paragraph 5 we will of course
furnish you with promptly, but the particulars called for otherwise appear to us to be quite unreasonable. Our clients have
no knowledge and no information as to the names or the identity of the agents and employees of the shore winchmen,
etc. The steamer was under time charter to your clients, the whole operation of discharge was in their hands and the ship
had nothing whatever to do with either the engagement or direction of your clients’ agents, employees or servants. As yon
are aware, under the time charter the shipowner and his representative, the Master, do not control or direct, or indeed
intervene in the course of the discharge of a vessel.

As to the particulars under paragraph 4, we can only repeat that the conduct and regulation of the discharging operations
was in the hands of your clients’ servants and who they were is wholly unknown to our clients and their respective
officers.

The particulars of loss and damage we will furnish you with as promptly as possible.

Yours truly,

HOLMAN, FENWICK AND WILLAN.

\textbf{POINTS OF DEFENCE.}

1. The Defendants admit the Charter Party but not that it is accurately set out and will refer to the same for its terms. By
the said Charter Party loss and damage for fire on board was mutually excepted.

2. The Defendants admit that the s.s. ‘THRASYVOULOS’ loaded a cargo consisting (\textit{inter alia}) of petroleum, benzine and
cement for Casablanca and other Moroccan ports but not that such loading was in pursuance of directions received from the Charterers or at Lisbon.

3. The Defendants admit that the discharge of the said S.S. was proceeded with at Casablanca on or about the 17th July 1917 but not that such discharge was proceeded with by the Defendants' agents or employees or that shore winchmen were required or that the discharging operations or any of them were undertaken by or under the control or direction of the Defendants.

4. The Defendants deny the acts of negligence and impropriety alleged and that their servants were guilty of the same.

Alternatively the Plaintiffs' servants were guilty of contributory negligence.

**PARTICULARS.**

Certain cases of petrol were being transferred from the lower hold to the orlop deck instead of being discharged and the Plaintiffs' servants for the purpose of facilitating such transfer negligently placed the platform referred to in para. 4 of the Points of Claim without any or any proper fastening and though there were fumes of petrol in the hold and without giving any or any sufficient warning with regard to the said platform.

5. The Defendants deny that any beam of timber was dislodged or crashed into the lower hold or that flames shot up or shot a result of the fall of the said beam.

6. The Defendants deny that they are not relieved of liability for the negligence of their agents or servants or employees and deny that the loss and damages alleged and that such loss or damage occurred in any circumstances such as to make them liable.

7. Save in so far as hereinbefore admitted the Defendants deny each and every allegation contained in the Points of Claim.

S. L. PORTER.

Delivered this 29th April 1920 by DOWNING HANCOCK MIDDLETON & LEWIS of 22, Great St. Helens, E.C.3, Defendants' Solicitors.

**RESPONDENTS' CONTENTIONS.**

The Claimants' contention is that (1) the Respondents are liable because they undertook to deliver up the ship unless lost. (2) 'Unless lost' does not mean lost from any cause, but lost by excepted perils. (3) Fire is an excepted peril, but fire caused by negligence is not. (4) The ship was in fact lost by fire caused by negligence, and therefore not by an excepted peril.

The negligence suggested is that of the stevedores in letting a sling with cases of petrol tins strike a shifting board placed over the combing of the hatch, knocking it into the hold and thereby causing, it is said, a spark which set fire to the petrol vapour in the hold and destroyed the ship.

In reply the Respondents say:

(1) In fact the loss was not due to a spark caused by the fall of the shifting board.

(2) If it was so caused—

A. There was no contract express or implied by the Respondents to deliver up the ship if lost.

(i) There is no express agreement in the Charter Party by the charterers to deliver up the ship in good order and condition. By clause 3 the owners have to repair. Clause 5 merely deals with the duration of hire and provides that hire shall continue even after the termination of chartered period and until the necessary repairs are completed. ‘Unless lost’ in that clause must mean ‘unless lost by any means’ and not ‘unless lost by excepted perils,’ otherwise
the clause provides for a continuous payment of hire for ever if the ship is lost unless she is lost by excepted perils. Such a construction is contrary to clause 20.

(ii) There is no reason for implying such a term, nor can contrary to the provisions of clause (iii). 8

(iii) The charterers are under no liability as bailees of the ship. This is not a demise charter and they are not bailees. The phrase 'deliver up' means only 'will cease to have the right to have their goods carried.'

(iv) Fire in clause 21 means fire however caused.

The Respondents are therefore not liable by express or implied contract or as bailees to replace or repair the ship.

B. There was no negligence for which the Respondents are responsible.

(i) There was no negligence towards the Claimants and to be actionable the negligence must be negligence towards the Claimants. To let a shifting board fall into the hold of a ship when that hold is half full of cement and petrol tins can do no harm to the ship and therefore is no negligence towards shipowners.

(ii) The danger and/or damage is too remote, i.e. no reasonable man would have foreseen danger and/or damage of this kind result from the fall of the shifting board.

C. If there was negligence it was not the negligence of the Respondents.

(i) The negligence (If any) was that of the stevedores, who in any case were employed by the Cie. Transatlantique and not by the Respondents.

(ii) The only obligation (if any) on the Charterers was to provide the regular stevedores employed in the port and not negligently to choose persons to perform the discharge who are known or likely to be inefficient as stevedores.

(iii) The stevedores were acting for the mutual advantage of shipowner and charterer in the discharge no matter who may have mutually engaged them.

(iv) By clause 11 of the Charter Party winchmen (sail (?), including shore winchmen) were to be provided by Owners. Shore winchmen were for charterers account, but for charterers account means that shore winchmen were to be paid for by the charterers but to be the servants or employees of the shipowners.

CLAIMANTS' CONTENTIONS.

The Claimants contend that quite apart from the effect of the Charter Party as a contract between them and the Respondents the Respondents are liable to them in damages for the damage to the ship by fire, since that damage was caused by the negligence of the servants or agents of the Respondents when upon their ship.

The Claimants further contend that the respondents are liable for breach of the contract in the Charter Party in that: (1) The Respondents undertook to deliver up the ship unless lost. (2) 'Unless lost' does not mean lost from any cause but lost by excepted perils (3) Fire is an excepted peril but fire caused by negligence is not. (4) The ship was in fact lost by fire caused by negligence and therefore not by an excepted peril.

The negligence suggested is that of the stevedores in letting a sling with cases of petrol tins strike a shifting board placed over the combing of the hatch, knocking it into the hold and thereby causing, it is said, a spark which set fire to the petrol vapour in the hold and destroyed the ship.

As regards Respondents' contentions the Claimants say:

(2) (A) They agree there was no demise of the ship, but submit this is immaterial. If the Respondents even as trespassers on Claimants' ship damage her by negligence they would be liable, and if as licensees on board by virtue of the charter they so damage her, they are equally liable unless there is something in the Charter Party to excuse them. So far from there being anything to excuse them, it is clear that clause 5, and other parts of the Charter, recognise the liability of Respondents in case at the end of the Chartered service (which is what is meant by delivery up) the ship has been damaged by their action or default.

(2) (A iv) That an exception does not apply if brought about by negligence of the party seeking to rely upon it, unless there
is a further express and clear exception of negligence, is settled beyond doubt by the authorities.

(B) It is a fallacy to say that a man is not liable for damages for his negligence because he could not be expected to anticipate the damage that would result. In almost every case a man is negligent because he does not, and in most cases could not reasonably be expected to, realize the damage it will cause. If he did he would be careful (cf. such a case as Grayson v. Ellerman Line, Ltd.9).

(2) (C) The stevedores were clearly the servants of the Charterers and so was the shore winchman under the clause in the Charter that he was to be for Charterers' account.

If it is sought to say that the Cie. Transatlantique employed them they did so either as agents for Respondents or for Respondents' sub-charterers and clause 24 of Charter Party applies.

IN ARBITRATION. BETWEEN C. A. POLEMIS and L. BOYAZIDES (Claimants) and FURNESS WITHY & CO. LTD. (Respondents).

AWARD AND SPECIAL CASE.

Whereas by a Charter Party dated the 21st February 1917 made between the above-named parties the Claimants (hereinafter called 1 the Owners') chartered to the Respondents (hereinafter called 'the Charterers') the Greek steamship 'THRASYVOULOS' for the period of the duration of the War and at Charterers' option up to six months afterwards at a monthly rate of hire as therein mentioned.

And whereas by Clause 22 of the said Charter Party it was provided that should any dispute arise between the Owners and the Charterers it was to be referred to three parties in London one to be appointed by each of the parties and the third by the two so chosen their decision or any two of them to be final and binding.

And whereas disputes did arise between the said parties under the circumstances hereinafter set out and the Owners duly appointed as their Arbitrator the undersigned William Clifton of 17 Leadenhall Street, E.C., Solicitor, and the Charterers appointed as their Arbitrator the undersigned Aubrey Francis Wootten of 1 Temple Gardens, E.C., Barrister-at-law, and the said two Arbitrators duly appointed the undersigned Stuart J. Bevan of 2 Plowden Buildings, Temple, E.C., one of His Majesty's Counsel as Third Arbitrator.

And whereas on the hearing of the Reference it was desired that the Award should be stated in the form of a Special Case for the opinion of the Court.

Now we the before-named Arbitrators having taken upon ourselves the burden of the said Reference and duly considered the evidence submitted to us DO HEREBY MAKE OUR AWARD in the form of a SPECIAL CASE subject to the opinion of the Court on any questions of law arising thereon : -

1. The claim of the Owners put forward on the Arbitration was to recover damages for the total loss of the said vessel by fire.

2. It was provided by the said Charter Party (Clause 2) that the Steamer was let and the Charterers agreed to hire the vessel for the period aforesaid from the day she was placed at the disposal of the Charterers ready to load as therein mentioned she being then tight, staunch, strong and every way fitted for ordinary cargo service and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage and to be employed in such lawful trades between any safe ports as Charterers might direct with certain exceptions as therein mentioned.

3. By Clause 3 of the Charter Party it was provided that the Owners should provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew for the insurance of the vessel war risks excepted and also for the engine room stores and maintain the vessel in a thoroughly efficient state in hull and machinery for ordinary cargo service.
4. By Clause 4 it was stipulated that the Charterers should provide and pay for all the coals fuel port charges pilotages agencies commissions and all other charges whatsoever except those before stated.

5. By Clause 5 it was provided that the Charterers should pay for the use of the vessel at the rate of £9,572 16s. Od. per calendar month commencing on the day of delivery as above hire to continue from the time specified for commencing the Charter until the hour of her re-delivery to Owners (unless lost) at a port in the United Kingdom or Continent in same good order and condition as when delivered to them fair wear and tear excepted.

6. By Clause 8 it was provided that the cargoes should be laden and/or discharged in any dock or at any wharf or place the Charterers might direct where the vessel could always lie safely afloat, except where steamers of similar size usually safely lie.

7. By Clause 9 the whole reach burthen and passenger accommodation of the steamer (if any including legal deck load at Charterers' or shippers' risk and not being more than she could reasonably stow and carry) was to be at the Charterers' disposal and the Captain was to prosecute his voyages with the utmost despatch and render all assistance with ship's crew and boats.

8. By Clause 10 the Owners were to provide ropes falls slings and blocks as on board necessary to handle ordinary cargo up to two tons in weight also lanterns for night work.

9. By Clause 11 the steamer was to work night and day if required by Charterers and all steam winches were to be at Charterers' disposal during loading and discharging and steamer to provide the men to work same both day and night as required Charterers agreeing to pay extra expense (if any) incurred by reason of night work at the current local rate Overtime as per articles or custom. If shore winchmen were required same to be for Charterers' account.

10. By Clause 12 the Captain although appointed by the Owners was to be under the orders and directions of the Charterers as regards employment agency or other arrangements Bills of Lading were to be signed at any rate of freight the Charterers or their agents might direct without prejudice to the Charter and the Charterers thereby indemnified the Owners from all consequences or liabilities that might arise from the Captain so doing.

11. By Clause 20 it was provided that should the steamer be lost or missing the hire was to cease from the date when she was lost or last spoken, or if not spoken then from the date when last seen any hire paid in advance and not earned was to be returned to the Charterers.

12. Clause 21 contained the following exceptions:—The Act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and restraint of Princes, Rulers and People, collision, any act neglect or default whatsoever of Pilot, Master or Crew in the management or navigation of the ship and all and every of the dangers and accidents of the seas canals and rivers and of navigation of whatever nature or kind always mutually excepted.

13. By Clause 33 it was provided that the Captain although appointed by the Owners should be under the orders and directions of the Charterers in all matters and that it was a condition of the agreement that the Owners should on the signing of the Charter cable to the Captain that his vessel had been time chartered for the period aforesaid on the Charterers and that he was at all times and under all circumstances to follow any directions that the Charterers might give him within the limits of the Charter Party.

14. The vessel by the direction of the Charterers or their Agents in or about the months of June and July 1917 loaded at Nantes a part cargo of cement and general cargo for Casa Blanca Morocco. She then proceeded to Lisbon and was loaded with further cargo consisting of cases of Benzine and /or Petrol and Iron for Casa Blanca and other ports on the Morocco Coast.

15. She arrived at Casa Blanca on the 17th July and there discharged a portion of her cargo. The cargo was discharged by Arab workmen and winchmen from the shore supplied and sent on board by the Charterers'
Agents. The Cargo in No. 1 hold included a considerable quantity of Cases of Benzine or Petrol which had suffered somewhat by handling and/or by rough weather on the voyage so that there had been some leakage from the time in the cases into the hold.

16. On the 21st July it had become necessary to shift from No. 1 lower hold a number of the cases of Benzine which were required to be taken on by the ship to San and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which when filled were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working.

17. In consequence of the breakage of the cases there was a considerable amount of Petrol vapour in the hold.

18. In the course of heaving a sling of the cases from the hold the rope by which the sling was being raised or the sling itself came in contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold and the fall was instantaneously followed by a rush of flames from the lower hold and this resulted eventually in the total destruction of the ship.

19. We make the following findings of fact: —

(a) That the ship was lost by fire.
(b) That the fire arose from a spark igniting petrol vapour in the hold.
(c) That the spark was caused by the falling board coming into contact with some substance in the hold.
(d) That the fall of the board was caused by the negligence of the Arabs (other than the winchmen) engaged in the work of discharging.
(e) That the said Arabs were employed by the Charterers or their Agents the Cie. Transatlantique.
(f) That the causing of the spark could not reasonably have been anticipated from the falling of the board though some damage to the ship might reasonably have been anticipated.
(g) There was no evidence before us that the Arabs chosen were known or likely to be negligent.
(h) That the damages sustained by the Owners through the said accident amount to the sum of £196,165 Is. lid. as shown in the second column of the Schedule hereto.

20. Subject to the opinion of the Court on any questions of law arising WE FIND AND AWARD that the Owners are entitled to recover from the Charterers the before mentioned sum and no more.

21. If the Court should be of opinion that our Award in the last preceding paragraph is correct then we direct that the Owners' costs of this Reference to be taxed shall together with our fees and expenses on the Reference and the costs of this our Award amounting to £604 14s. Od. be borne and paid by the Charterers.

22. If the Court shall be of opinion that our Award as set out in

|Page: 135|

paragraph 20 above is wrong then WE AWARD AND DIRECT that the Owners shall recover nothing from the Charterers and that the Owners shall bear and pay the Charterers' taxed costs of the Reference and our fees and the expenses of this Award.

23. A copy of the said Charter Party and of the Pleadings in the Arbitration and of the contentions formulated by the two parties are annexed hereto and may be referred to as if set out in this Award.

As witness our hands this 20th day of December 1920.


WM. CLIFTON.

AUBREY F. WOOTTTEN.
IN ARBITRATION. POLEMIS & BOYAZIDES and FURNESS WITHY & CO. LTD.

FURTHER FINDING ON JUDGE’S DECISION.

Referring to our Award herein dated 20th Dec. 1920 our finding in paragraph 19 (e) was and is that the said Arabs were employed by the Charterers or their Agents the Cie. Transatlantique on behalf of the Charterers and that the said Arabs were the servants of the Charterers.

WM. CLIFTON.

A. F. WOOTTEN.

STUART BEVAN.

IN THE HIGH COURT OF JUSTICE.
KING’S BENCH DIVISION.

(Special Paper.)

ROYAL COURTS OF JUSTICE,

Thursday, May 5, 1921.

Before MR. JUSTICE SANKEY. POLEMIS v. FURNESS, WITHY & CO. LTD.

JUDGMENT.10

SANKEY J. : This is a Special Case stated by three arbitrators who, subject to the opinion of the Court, awarded the claimants the sum of £196,165 Is. lid. as damages for the total loss by fire of their steamship ' Thrasyvoulos.'

The facts are as follows: By a charterparty dated February 21, 1917, made between the claimants and the respondents, the claimants chartered to the respondents the above-mentioned Greek steamship for the period of the duration of the war, and at charterers’ option up to six months afterwards, at a monthly rate of hire, as therein mentioned.

The material clauses of the charter are 3, 5 and 21. Clause 3 provides : ‘ That the Owners shall provide and pay for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the Insurance of the Vessel (war risk excepted); also for all the Engine Room Stores and maintain her in a thoroughly efficient state in Hull and Machinery for the ordinary cargo service.’ Clause 5 provides: ‘ That the Charterers shall pay for the use and hire of the said vessel at the rate of £9,572 16s. Od. (Nine thousand five hundred seventy-two pounds and sixteen shillings sterling) per calendar month, commencing on the day of delivery as above with a clean and clear hold and at and after the same rate for any fractional part of a month; hire to continue from the time specified for commencing the Charter until the hour
of her re-delivery to Owners (unless lost) at a port in the United Kingdom or Continent in same good order and condition as when delivered to them fair wear and tear excepted.' Clause 21 provides: 'The Act of God, the King's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest and/or restraint of Princes, Rulers and People, collision, any act, neglect, or default whatsoever of Pilot, Master or Crew in the management or navigation of the ship, and all and every of the dangers and accidents of the seas, canals and rivers, and of navigation of whatever nature or kind always mutually excepted,' and I need not read the rest of the clause.

The vessel, by the direction of the charterers or their agents, in or about the months of June and July, 1917, loaded at Nantes a part cargo of cement and general cargo for Casa Blanca, Morocco. She then proceeded to Lisbon and was loaded with further cargo, consisting of cases of benzine and/or petrol and iron for Casa Blanca and other ports on the Morocco coast. She arrived at Casa Blanca on July 17 and there discharged a portion of her cargo. The cargo in No. 1 hold included a considerable quantity of cases of benzine or petrol, which had suffered somewhat by handling and/or by rough weather on the voyage so that there had been some leakage from the tins in the cases into the hold. On July 21 it had become necessary to shift from No. 1 lower hold a number of the cases of benzine which were required to be taken on by the ship to San, and for this purpose the native stevedores had placed heavy planks across the forward end of the hatchway in the 'tween decks, using it as a platform in the process of transferring the cases from the lower hold to the 'tween decks. There were four or five of the Arab shore labourers in the lower hold filling the slings which, when filled, were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working. In consequence of the breakage of the cases there was a considerable amount of petrol vapour in the hold. In the course of heaving a sling of the cases from the hold, the rope by which the sling was being raised, or the sling itself, came in contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold,

and the fall was instantaneously followed by a rush of flames from the lower hold, and this resulted eventually in the total destruction of the ship.

The award was remitted to the arbitrators for further findings, and their findings of fact are as follows: (See above.)

As above stated, the arbitrators found in favour of the claimants.

The respondents contend (1) that the damages are too remote, and (2) that they are excused either by clause 5, which provides that they shall pay for the use and hire of the vessel until the hour of her re-delivery to the claimants, unless lost, or by clause 21, by which fire, as they allege, was an excepted peril.

As to (1), are the damages too remote? The case relied upon by the respondents is Sharp v. Powell (reported in (1872) L. R. 7 C. P. 253), and the dictum of Pollock C.B. in the case of Greenland v. Chaplin (reported in (1850) 5 Ex. 243), where he says that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur. This dictum was approved by the Court of Appeal in the case of Cory Brothers v. France, Fenwick & Co. Ltd. [1911] 1 K. B. at p. 122.

I am of opinion that those cases are clearly distinguishable from the facts in the present case. In Sharp v. Powell the defendant's servant, in defiance of a local bye-law, washed his master's cart in the street, and the water spread over a large area and subsequently froze, with the result that the plaintiff's horse slipped and sustained injuries, when it was held that the damages were too remote. The case of Greenland v. Chaplin resulted from a collision between two steamboats, and the plaintiff was successful.

In the present case, the respondents were in possession of the claimants' vessel. The respondents' servants were engaged in the work of discharging her, and although Finding (f) of the arbitrators is that the causing of the spark which kindled the petrol vapour could not reasonably have been anticipated from the falling of the board, I do not think that that affects the legal position. As above stated, the respondents were in possession of the claimants' ship; they have been found to have been guilty of negligence, and it was that negligence which caused the destruction of the vessel. There is a negligent act and consequent damage which under the peculiar circumstances renders the respondents liable. It appears to me to be a case of mere damages by negligence of the respondents' servants.
I cannot help thinking, although I do not for a moment suggest that the case took an unreasonable time, that it is the largeness of the award which is responsible for the length of the argument.

As to the second point, I am of opinion that the words 'unless lost' in clause 5 do not excuse the respondents because they do not refer to the case of destruction of the vessel by fire caused by the respondents' negligence. The same reasoning applies to the fire referred to in the exception clause 21.

In the result, the award of the arbitrators was correct and must be upheld.

Mr. MacKinnon: The owners will have the costs of the hearing, my Lord?

SANKEY, J. : Yes.11

NOTE.

The judgment of Sankey J. was upheld by the Court of Appeal12 (Bankes, Warrington and Scrutton L.J J.), and the shipowners recovered the value13 of their ship which had been destroyed in this unexpected manner as the direct consequence of the negligence of the charterers' servants. The essence of the decision is perhaps expressed by Warrington L.J. (as he then was) as tersely as could be done in the following passages14:—

'The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act.' ... 'In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see per Lord Sumner in Weld-Blundell v. Stephens15 [1920] A. C. 983, 984.

That the measure of damages thus enunciated applies to damages in actions of tort has been generally accepted. On the question whether or not it applies to actions for damages for breach of contract there is difference of opinion.15

In Hambrook v. Stokes Brothers16 a remark by Sargant L.J. suggests that in his opinion the Polemis principle is confined to cases 4 in which there was a duty by contract between the plaintiff and the defendant' and does not apply to actions in tort. Reasons for differing from this view will be given later.

There are, moreover, two learned writers who have been visibly perturbed by the possible effect of the Polemis decision upon the rules governing the measure of damages for breach of contract, and I propose, with the deepest respect for their authority, to comment upon their views, premising however that I have every reason to suppose that they have not yet read all the documents printed above. These two writers are, first in point of time, Professor Winfield17 and, secondly, Sir Frederick Pollock.18 In both, as it seems to me, the instinctive reaction to the Polemis decision so far as concerns the law of contracts is similar. Professor Winfield, after pointing out that 'the case itself arose on a clause in a charterparty which, of course, is a contract and', after commenting upon the persistence of writers on the law of contract in ignoring the decision, says: 'It is, however, perhaps safe to infer from Weld-Blundell v. Stephens that the principle of the Polemis Case includes all contracts, subject to a qualification shortly to be stated.' The qualification referred to appears to be that 'where there are special circumstances in a contract wholly unknown to the defendant, he is not liable for damages solely due to those special circumstances, though he is liable for general damages, upon which Hadley v. Baxendale19 is cited. If that be the qualification referred to, I am at a loss to know how it can he deduced from the Polemis judgments. There the liability of the charterers is based on the directness of the consequences of their servants' negligence, not upon any knowledge of special circumstances, for the arbitrators found as a fact (that the causing of the spark could not reasonably have been anticipated from the falling of the board. . . '.

No further edition of Sir Frederick Pollock's 'Principles of the Law of Contract' has appeared since the Polemis decision was given. But in the thirteenth edition of his 'Law of Torts,' appearing in 1929, it is evident20 that he has been impressed by Professor Winfield's suggestion that, a charterparty being a contract, the Polemis decision (subject to a qualification)
covers damages for breach of contract. Sir Frederick, while inclining to accept Professor Winfield's view, concludes that 'the result, surprising as it may seem, appears to be that the judgments in Polemis' Case were delivered per incuriam as regards the nature of the cause of action, and the reasons given are only extra-judicial opinions fully open to reconsideration,

and perhaps not binding even in Courts of first instance. For the present, however, a text-writer can only proceed on the footing that an authentic rule (however different from the rule in contract) has been laid down as to the limit of consequential damages in actions of tort, and that, accordingly, the earlier authorities lose, in England, much of their authority.'

Whatever doubt Sir Frederick Pollock may have as to the effect of the decision upon the law of damages in tort, he cannot bring himself to believe (in spite of the charterparty) that the old measure of damages for breach of contract has been disturbed, for later he says:

'We have seen in an earlier chapter that according to the rule now laid down by the Court of Appeal [in the Polemis Case] the contemplation of the party liable (actual or presumed) is not the proper test of remoteness when once liability in tort is established; but it is conceived this could not be used to enlarge the damages in any case where the cause of action was decided or allowed to be substantially in contract.'

In the cases both of Professor Winfield and Sir Frederick Pollock the effect produced by the Polemis Case is similar, namely, reluctant acknowledgment of the apparent application of the decision to the measure of damages for breach of contract, followed by an instinctive shrinking from this off-handed shattering of old-established principles. That instinctive reaction appears to me to be abundantly justified.

I venture to suggest, with great respect, that a perusal of the documents printed above might alter the views of Sargant L.J. and the two learned writers previously quoted as to the nature of the cause of action in the Polemis Case and as to the effect of that decision. In short, I submit that, in the light of the foregoing documents, the Polemis decision is not an authority upon the measure of damages for breach of contract and must be confined in its effects to the law of tort; the shipowners' claim was pleaded alternatively in contract and in tort, but they obtained judgment in tort. In support of this submission I beg to make the following comments upon the case: —

(1) It is true that a charterparty is a contract and that the steamer was placed at the disposal of the charterers upon the terms of a charterparty. In a similar way a passenger's ticket explains his presence on a railway platform or in a railway carriage and governs the liability of the railway company in so far as its terms nia be relevant to that liability.

(2) But the existence of a charterparty, while it enables the charterer to plead any relevant terms of the charterparty which may protect him, does not mean that a claim made against him by the owners for damages for negligence must be a claim based on contract; it may still be in tort.22 In an action of tort either party may plead by way of protection a provision of the charterparty.

(3) Paragraph 4 of the Points of Claim states the claim as one based on negligence—' the defendants' servants negligently and improperly caused or allowed,' etc. Paragraph 5 denies by anticipation the existence of any relevant terms in the charterparty which are available to the charterers to protect them.

(4) The last sentence in paragraph 5 appears to state an alternative claim based on contract, namely, an implied term to re-deliver to the owners ' in same good order and condition as when delivered to them, fair wear and tear excepted.5 This is dealt with below (8)

(5) The Points of Defence and annexed Particulars treat the claim as one based on negligence and do not specifically refer to the alternative claim mentioned in the preceding paragraph.

(6) In the Contentions of the two parties both the claim based on negligence and the claim based on breach of contract to deliver up the ship are dealt with and are treated as being distinct.
(The arbitrators were silent as to the cause of action upon which they based their award, but found as facts that 1 the fall of the board was caused by the negligence of the Arabs' and that 'the said Arabs were employed by the charterers or their agents, the Cie Transatlantique, on behalf of the charterers and . . . were the servants of the charterers. ')

(8) Turning to the judgment of Sankey J., the defence— equally relevant whether the claim is based on contract or on tort—which rested upon clause 5 of the charterparty is briefly dismissed by pointing out that the qualification which is placed by the words ‘ unless lost’ upon the obligation to re-deliver the ship does not operate because those words cannot include a loss resulting from the charterers’ own negligence; the same reasoning disposes of the defence based on the exception of ‘fire’ contained in clause 21. Apart from that, the learned judge treated the case purely as one of tort and applied himself to

the question of remoteness of damage. He said: 'There is a negligent act and consequent damage which under the peculiar circumstances of the case renders the respondents liable. It appears to me to be a case of mere damages by negligence of the respondents' servants.'

(9) The foregoing brief examination of the history of the case before it reached the Court of Appeal seems to me to make it easier to place the judgment of that Court in its true setting. Counsel for the charterers (appellants) appear to have abandoned the claim based upon an implied contractual obligation to deliver up the ship and make no reference to clause 5 of the charterparty. Their two points are (i) that the damages awarded by Sankey J. are too remote; and (ii) that the charterers are protected by the expression 'fire always mutually excepted ' occurring in the exceptions clause in the charterparty. The second point was easily disposed of by the respondents by invoking the requirement of an express term if it is desired by a shipowner (or in this case a charterer) to protect himself against the consequences of a peril brought into operation by the negligence of his servants.

(10) The judgments of the Court of Appeal (Bankes Warrington and Scrutton L.J J.) are familiar to all readers, and it is unnecessary to make more than two comments, (i) Throughout they treat the action as a claim for damages for negligence, that being the cause of action upon which Sankey J. gave the judgment appealed from. (ii) Nowhere do they refer to Hadley v. Baxendale, which it would have been impossible to ignore if they had been laying down a principle governing the measure of damages in tort and in breach of contract alike, and which, decided in the Court of Exchequer, has since been recognized by the Court of Appeal and is so well established that even the House of Lords would hesitate to disturb it.

(11) The principle governing the measure of damages for breach of contract is, as I understand it, that prima facie the party injured by the breach of contract should recover from the contract-breaker the whole amount of his loss, subject to the limitations imposed by Buch decisions as Hadley v. Baxendale and Horne v. Midland Ry. Co. What are these limitations?

Hadley v. Baxendale, stated shortly, lays down two rules; the first, relating to general damages, requires that such damages to be recoverable must be 'such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The second rule, relating to special damages, which is illustrated by Horne v. Midland Ry. Co., requires that 'if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily flow from a breach of contract under these special circumstances, so known and communicated.'

In the Polemis Case there was an express finding by the arbitrators 'that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated.' I submit that if the shipowners could only have sued the charterers for breach of contract, that finding of fact would have been fatal and would have prevented them from recovering the value of the ship. It could not be said either that the destruction of the ship by fire in this peculiar way arose 'naturally, i.e. according to the usual course of things' from the breach of contract, or that it was ' in the contemplation of the parties at the time they made the contract as
the probable result of the breach.' Further, there is no allegation that any 'special circumstances' were communicated to the charterers. Surely the essential factor governing the measure of damages for breach of contract is that the courts awarding compensation for the breach are limited to such compensation as may reasonably be supposed or actually be proved to have been in the minds of the contracting parties at the time of contracting as

the consequence of non-performance of the contract. 'Anticipation,' or 'contemplation,' or 'expectation,' seems to me to run through the decisions upon measure of damages for breach of contract.\(^{30}\) But in tort, or at any rate in actions based on negligence, we are now expressly told by the Court of Appeal in the Polemis Case that anticipation 'is in point of damages irrelevant.

It is this mental element of anticipation, contemplation, expectation, which, I submit, characterizes the measure of damages for breach of contract; whereas in tort (or at any rate in actions based on negligence) the test is simply causation. The contract-breaker breaks a self-imposed duty, and it is therefore intelligible that in determining the damages the question of what was or ought to have been in his mind (at the time when it assented or is deemed to have assented to the assumption of the duty) as the consequence of a breach of that duty should be the material question.\(^{31}\) The tortfeasor, on the other hand, breaks a duty imposed by law and it is intelligible that, once that breach of duty is established, the amount of damages should depend upon the purely objective test of causation.

(12) If the Polemis decision applies to damages for breach of contract, Hadley V. Baxendale, Home v. Midland Ry. Co. and many similar cases must be scrapped; for their essence is the limitation of the damages which in fact result from a breach of contract by the amount of knowledge which the contract-breaker had or ought to have had, at the time of making the contract, as to the probable consequences of his breach of contract, whereas the essence of Polemis is direct causation.

13) Some of the statements\(^{32}\) to the effect that the measure

of damages is the same in contract and in tort will, I venture to think, require further consideration and perhaps qualification. In this note I am not attempting to explore that question\(^{33}\) or any other question arising on the frontier between contract and tort. I am content to endeavour to establish the opinion that, whether or not the measure of damages is the same in contract and in tort, there is nothing in the decision in the Polemis Case which compels us to hold that the principle which it declares or enunciates as to remoteness of damage applies to actions for damages for breach of contract.

(14) In short, it is submitted that the rule as to the remoteness of damage laid down in the Polemis Case must be confined to tort and has no application to breach of contract, so that Mr. Hadley and Mr. Baxendale and many others whose money and public spirit have contributed to build up the rules governing the measure of damages for breach of contract may sleep quietly in their well-earned beds and pay no heed to any attempts to wake them up.\(^{34}\)

[Dr. McNair's article, with its admirable documentation, will be welcomed as a luminous statement of the practical effect of Re Polemis in relation to remoteness of damage in the law of tort and the law of contract. As to that practical effect, I think that there is not (and never has been) any difference of opinion between Dr. McNair and myself. Hadley v. Baxendale is still good law in spite of, or irrespective of, Re Polemis. As to the precise theoretical form in which the result of the two cases in relation to one another ought to be stated, I venture to suggest that there is still more to be said, and I am not yet entirely convinced that the statement made in Salmond & Winfield, 'Contracts,' ought to be revised. One of the difficulties is that while the C. A. appear to have decided Re Polemis on the ground of tort, every one of the learned Lords Justices cited passages from Lord Sumner's speech in Weld-Blundell v. Stephens, which related to remoteness of damage in both tort and contract; and Weld-Blundell's Case itself, be it noted, was one on contract.—P. H. WINFIELD.]

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1(1921) 26 Com. Cas. 281; 37 T. L. R. 696.
2Re Arbitration between Polemis and Another and Furness, Withy & Co., Ltd. [1921] 3 K. B. 560.
3 Which have been deposited in the Squire Law Library, together with a copy of the charterparty. It is summarized in [1921] 3 K. B. at p. 561, and clauses 3, 5, and the relevant portion of 21 are quoted in the judgment of Sankey J.


5? down as
6? occurred as
7? it be implied
8 Semble, clause 3 of the charterparty.

8a I am told by a practitioner in the Commercial Court that the validity of the basis of this plea in contract is open to serious question. For historical reasons the form of the charterparty assumes a delivery of the vessel to the charterers, but in actual fact, according to modern practice, the ship is not delivered to the charterers, so that the phrase "re-delivery to owners (unless lost) . . . in same good order and condition . . ." is probably meaningless.


9a? "from time to time from the cases. . ."

9b Not printed here.

10 See 26 Com. Cas. 281; 37 T. L. R. 696.

11 A discussion then followed as to the terms of a stay.

12 [1921] 3 K. B. 560.

13 Amounting, together with some incidental loss, to £196,000.

14 At pp. 574, 575.

15 The learned editors of the 17th edition of Anson, 'Law of Contracts' (1929) (Miles and Brierly) do not mention the Polemis Case (quite rightly, I submit). In Chitty's Law of Contracts (18th ed. 1930) (Macfarlane and Wrangham), at p. 953, the Polemis Case is treated as relevant to the measure of damages for breach of contract and as qualifying or explaining Hadley v. Baxendale. In Mayne on Damages (10th ed. 1927) (Gahan), passim, the Polemis Case is treated as relevant to tort and breach of contract alike but not as disturbing Hadley v. Baxendale. The decision of the Privy Council in Great Lakes Steamship Co, v, Maple Leaf Milling Co., Ltd. (1924) 41 T. L. R. 21, though the Polemis Case is not mentioned, deserves notice.


18 Law of Torts' (13th ed. 1929), pp. 32—41, et passim

19 (1854) 9 Exch. 341.

20 At p. 38, and see the following extract from the Preface: 'My learned friend Prof. Winfield's discovery that the doctrine laid down in Polemis' Case was, in its application to the cause of action before the Court of Appeal in that case, in conflict with the rule in Hadley v. Baxendale is noted at pp. 37—39.' I think that Professor Winfield's language is somewhat more guarded than this comment would suggest.


22 See Pollock, op. cit. at p. 560: 'But injury which would have been a tort, as breach of a duty existing at common law, if there had not been any contract, is still a tort,' citing Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co. [1895] 1 Q. B. 134, and see particularly A. L. Smith L.J. at p. 140.

23 [1921] 3 K. B. 560.

24 (1854) 9 Exch. 341.


26 See Pollock, op. cit. at p. 38.

27 Per Alderson B., at p. 354.

28 And therefore, I submit, within the contemplation of the ordinary reasonable man.

29 The expression 'naturally, i.e. according to the usual course of things' means, it is submitted, what normally happens 'in the great multitude of [similar] cases,' and probably will happen in the case under consideration (see Alderson B. loc. cit.).'Natural' here clearly cannot be used in the literal sense- see Lord Sumner in Weld-Blundell v. Stephens [1920] A. C. at p. 983 : 'Everything that happens, happens in the order of nature and is therefore "natural." If that is all that 'natural' means in Hadley v. Baxendale, it would be meaningless.

30 It may sometimes be objective, as in Cory v. Thames Ironworks Co. (1868) L. R. 3 Q. B. 181.

31 See Blackburn J. in Cory v. Thames Ironworks Co., supra, at p. 190: 'The measure of damages when a party has not fulfilled his contract is what might reasonably be expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz., that if the damage were exceptional and unnatural damage, to be liable for that would be hard upon the seller, because if he had known what the consequences would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-
fulfilment of his contract.' This passage brings out well the mental element in the measure of damages for breach of contract. 'Natural' is clearly used in the sense of 'probable,' 'normal,' 'to be expected.'


33 Which is very far from being a simple one in view of the tortious origin of the action of assumpsit which, as Sir Frederick Pollock says ('Law of Torts' (13th ed.) (1929), at p. 555) 'from a variety of action on the case . . . had become a perfect species, and in common use its origin was forgotten.'

34 I am glad to find that the learned editor (Stallybrass) of the seventh edition of Salmond's 'Law of Torts' (1928) (see p. 157, note 2) is also of the opinion that *Hadley v. Baxendale* is not overruled by *Re Polemis.*