[HIGH COURT OF AUSTRALIA.]

JAMES PATRICK AND COMPANY LIMITED PLAINTIFF;

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . } DEFENDANT.

H. C. OF A. 1938.

MELBOURNE, *Feb.* 7-12, 14-18.

SYDNEY, *April* 8.

Dixon J.

Navigation—Shipping—Collision—One ship solely liable for collision—Action to limit amount of liability—No "actual fault or privity" on part of ship's owner—Sufficiency of watch—Sufficiency of supervision by owners—Limitation of damages not counterclaimed in collision action—Separate action brought to limit damages—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *secs.* 78 (1), 503, 504—*Merchant Shipping Act* 1906 (6 *Edw. VII. c.* 48), *sec.* 69.

Held, in an action by the owner of the s.s. *Caradale* seeking to limit its liability in respect of the loss or damage caused by the collision of that ship with the s.s. *Kakariki* in Hobson's Bay*:—

(1) A condition of a shipowner's right to limit his liability, whether in respect of loss of life or of damage to another vessel or to property, is that it shall have occurred without his actual fault or privity.

(2) The burden of excluding actual fault or privity lay on the owner of the *Caradale*, the collision having been occasioned by the fault or default of the master and crew of that ship.

(3) Unless it discharged the burden of excluding actual fault or privity on its part, the owner of the *Caradale* could not obtain a decree for the limitation of its liability; if a given fact or state of facts would stand in the way of its doing so, it was enough that its existence appeared probable or even to be a reasonable supposition, and it was not necessary that it should be positively found.

(4) The owner was not at fault in its choice of a master of the ship.

*As to which, see *Union Steamship Co. of New Zealand Ltd.* v. *The "Caradale,"* *ante*, p. 633.

(5) The fact that there was no man on the look out whose sole duty was to keep a look out, the master relying on himself and the third officer to keep a look out, did not constitute actual fault or privity on the part of the owner.

(6) The fault or privity of the owner must be fault or privity in respect of that which causes the loss or damage in question.

Paterson Steamships Ltd. v. *Robin Hood Mills Ltd.*, (1937) 58 Ll.L.Rep., at p. 39, applied.

(7) The loss or damage was not caused by the failure to tell off an additional man to discharge the duties of a look-out exclusively, and this in itself was enough to exclude actual fault or privity on the part of the owner of the *Caradale* in relation to the conditions which determined or led to each of the three helm orders constituting the fault or default of the *Caradale*.

(8) The necessity of telling off a special look-out was to be decided not as a matter of law or rigidly but as a matter of fact, having regard to the look out kept otherwise and to the general circumstances.

Anchor Line (Henderson Bros.) Ltd. v. *Trustees of Harbour of Dundee*, (1922) 38 T.L.R. 299, at p. 311, applied.

(9) It would not be culpable in an owner to acquiesce in a practice by a master of such a ship as the *Caradale* of navigating his ship by night in Hobson's Bay without a special look-out, relying upon the look out of himself and his third officer.

(10) Actual fault or privity implies some culpability on the part of the owner; it may consist in being privy to the neglect, unskilfulness or improper act or omission of a servant or agent; it may be the neglect or the imprudent or wrongful act of the shipowner himself; but the shipowner must in some way be to blame in respect of an act or omission on his own part or of his privity to the act or omission of someone else; a failure to make himself aware of what he ought to know is or may be an actual fault; to limit his liability, he must show that he himself has not in any such manner been blameworthy in respect of a cause of the loss or damage.

(11) The primary responsibility of a shipowner is for the seaworthiness of his ship, the sufficiency of her manning, the selection of her master and officers and the supply of all proper furnishings, equipment and provisions, all of which duties were fulfilled by the owner of the *Caradale*.

(12) It was not a fault on the part of the owner of the *Caradale* to omit to lay down rules or to give instructions or to institute inquiries as to the maintenance of a proper look out, having regard to the size of the organization, the number of officers employed and the shortness of the voyages.

(13) The owner's fault should be considered in relation to the mode of navigating its ships in pilotage waters like Port Phillip Bay.

(14) An obligation did not rest on it, by regulation or instruction to have prescribed rigidly that between sunset and sunrise a man should be specially told off as a look-out so that the rule would apply notwithstanding that the master was navigating under his exemption with an officer upon the bridge and a man at call.

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(15) In the circumstances of the present case the course followed by the owner was not negligent or unreasonable or blameworthy.

(16) The owner of the *Caradale* had satisfactorily shown that the collision took place without its actual fault or privity, and was accordingly entitled to a limitation decree unless the defendant was able to exclude on some special ground the operation of secs. 503 and 504 of the *Merchant Shipping Act* 1894.

(17) The failure of the owner of the *Caradale* to counterclaim for a limitation decree in the collision action in which the *Caradale* was pronounced to blame did not preclude it from afterwards seeking in an independent action the relief which was open to it by way of counterclaim ; and the owner of the *Caradale* had not waived its right to a limitation decree by taking a bond conditioned to be void if all such sums of money as might be found legally due on account of damages, costs or any other matter whatsoever to the owner of the *Kakariki* in the action then pending should be duly paid and satisfied.

(18) In ascertaining for the purpose of limitation the tonnage of a ship propelled by power the engine-room space to be added pursuant to sec. 503 (2) of the *Merchant Shipping Act* 1894 (as amended by sec. 69 of the *Merchant Shipping Act* 1906) is the engine-room space deducted from the gross tonnage pursuant to sec. 78 (1).

(19) In a limitation action the plaintiff pays the costs, except the costs of issues or questions which the defendant raised unreasonably or which are of a special and unusual nature, when the defendant has failed upon these issues.

TRIAL of action.

This was an action by James Patrick & Co. Ltd., the owner of the s.s. *Caradale*, against the Union Steamship Co. of New Zealand Ltd., the owner of the s.s. *Kararikí*, for a decree limiting its liability in respect of the damages awarded in *Union Steamship Co. of New Zealand Ltd.* v. *The "Caradale"* (1).

The facts and arguments are stated in the judgment hereunder.

Wilbur Ham K.C. and *Evans*, for the plaintiff.

Reynolds and *Burdekin*, for the defendant.

Cur. adv. vult.

April 8.

DIXON J. delivered the following written judgment:—

In this suit the owners of the s.s. *Caradale* seek a decree limiting their liability in respect of the loss or damage caused by the collision of that ship with the s.s. *Kakariki* in Hobson's Bay on the night of 29th January 1937.

(1) *Ante, p.* 633.

The owners of the *Kakariki*, who are the defendants in the present proceedings, brought a suit *in rem* against the *Caradale* for the purpose of determining the responsibility for the loss suffered in the collision. That suit I heard. I pronounced the collision to have been occasioned by the fault or default of the master and crew of the *Caradale* or some or one of them and condemned her owners in damages. The assessment of the damages was referred to the registrar, but his inquiry has not yet begun.

The *Kakariki* was sunk, and the lives of five members of her company were lost. Claims have arisen out of the loss of life, and accordingly, if the owners of the *Caradale* are entitled to limit their liability, the amount beyond which they would not be responsible is £15 a ton of the *Caradale's* tonnage. But a condition of a shipowner's right to limit his liability, whether in respect of loss of life or of damage to another vessel or to property, is that it shall have occurred without his actual fault or privity. On the ground that this condition is not fulfilled the defendants deny the right of the plaintiffs as owners of the *Caradale* to limit their liability.

The circumstances of the collision are stated in the reasons which I gave for the decree in the collision suit, and I shall not again set them out. The parties did not attempt at the hearing of the present suit to go again over the ground covered by the findings made in the earlier proceedings. They accepted the view not only that the decree pronouncing liability was conclusive, but also that the detailed findings contained in the reasons should be taken as establishing the facts upon which I based the conclusion that the *Caradale* was solely to blame. They, therefore, did not go into evidence to prove the circumstances of the actual collision. For those circumstances recourse must be had to my judgment in the collision suit, interpreted and explained by the pleadings and notes of evidence taken on the hearing of that suit, which in the present suit were put in evidence for that purpose and not as a means of independently proving the facts. The attempt made in that judgment to give a complete view of the courses and movements of the respective vessels for some time before they collided and to explain how they came so to be navigated made it necessary to state some steps as matters of probability rather than as definite facts affirmatively found to have occurred.

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This may be thought to involve a difficulty when what is stated in the judgment comes to be applied, as it now must, to another issue or other issues. But the difficulty is more apparent than real. For the burden of proof in the present proceedings is upon the opposite party, the owners of the *Caradale*. Unless they discharge the burden of excluding actual fault or privity on their part, they cannot obtain a decree for the limitation of their liability, and, if a given fact or state of facts would stand in the way of their doing so, it is enough that its existence appears probable or even to be a reasonable supposition. It is not necessary that it should be positively found.

The cause of the *Caradale's* striking the *Kakariki* lay in the relative movements of the two ships and the fault or default of the former, or, more strictly, of her master and crew, consisted in the manner in which she was manœuvred or controlled. Her owners say that this consideration is enough in itself to show that the collision occurred without their actual fault or privity. For, the general purpose of the provisions for the limitation of the liability of shipowners is to distinguish between their liability for the wrongful or negligent conduct of their servants and their responsibility for their own acts or defaults and to confine the former liability to a sum calculated according to the tonnage of the ship. Owners must intrust the navigation of a ship to skilled servants, and, prima facie, fault in manœuvre or control is that of the navigator. And, as appears from my previous reasons, the fault or default which I found consisted in the helm orders which the master gave and his failure to act in some other way.

The defendants, however, answer that the master would or might have acted in a different manner if it were not for one or other or both of two things which they allege; and they say that those things did not occur without the actual fault or privity of the owners of the *Caradale*.

The first allegation is that the master was at the time under the influence of intoxicating liquor and that, because of his habits, the owners knew or ought to have known that he might be unfit to navigate his ship.

This imputation upon the master led to the calling on behalf of the owners of the *Caradale* of a volume of testimony to prove, not

only that he was sober upon the night when the collision occurred, but also that he was a man of temperate habits. The evidence satisfied me affirmatively that the master, Captain Hansen, was not under the influence of drink on the night in question, that he is and has been sober in his habits and that there was no reason why his owners should think otherwise. It is not an issue upon which I think that it is useful to do more than give my conclusion, except that it seems best to add an express statement that I do not accept the evidence given by Robertson and that the matters upon which reliance was placed by the defendant's counsel as grounds for suspecting the testimony called to prove the perfect sobriety of Captain Hansen, when the ship sailed, do not appear to me to have the significance which counsel attached to them.

An issue of a different kind is raised by the second of the two things alleged by the defendants as matters affecting what the master did and did not do in navigating the *Caradale* and as involving actual fault or privity on the part of her owners. The defendants say that there was no man on the look out whose sole duty was to keep a look out and that it was not enough for the master to rely upon himself and the third officer to discharge the duty of keeping a look out.

On the part of the owners of the *Caradale*, it is denied that for want of such a man the look out kept was insufficient. In any case they disclaim responsibility in such a matter for doing more than providing a full complement of competent men and appointing a skilled and careful master to whom they intrust the general command and navigation of the ship, including the posting of such look-outs as circumstances make proper. In respect of the absence of a man told off as a special look-out, proof of either of these two positions would exclude actual fault or privity on the part of the owners. For, on the one hand, if it does not amount to fault or negligence, there is no blame to lay at the door of the owners. While, on the other hand, if it does amount to fault, but the fault is confined to the master because the responsibility of the owners has been fulfilled, then none of the blame can be laid at their door. " But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must

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be fault or privity in respect of that which causes the loss or damage in question" (*Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.* (1)). This involves a third question, namely, how far the loss or damage was caused by the failure to tell off an additional man to discharge the duties of a look-out and no other duties. It is better to deal first with this question because it concerns the circumstances of the collision itself. I, therefore, proceed to consider what, if any, effect the posting of a man with the exclusive duty of keeping a look out might have produced upon the events causing the collision.

From the time the *Caradale* rounded the Williamstown buoy until she hit the *Kakariki* there were three persons upon the navigation bridge of the *Caradale*, the master, the third officer and the helmsman. The master was navigating the ship under his pilotage exemption ; the helmsman was steering by compass ; and the duty of the third officer was to keep a look out, subject to the execution of such other orders as the master might from time to time give him. All three were aware that a ship, which proved to be the *Kakariki*, was coming up the bay. The helmsman can, of course, be disregarded. But in fact he, as well as the two officers, had seen her lights before the first of the three starboard movements of the *Caradale* occurred which, according to my previous judgment, brought about the collision ; that is, before the alteration of the *Caradale's* course to starboard which took place just before 11.6 p.m. as she was drawing abreast of the Gellibrand pile. The purpose with which she was then put to starboard was to pass the *Kakariki* red to red. I have held that this starboarding was wrong and that it created the risk of a collision. But any intelligent able seaman who was aware that the master had seen the other ship would have understood its purpose. I stated that I was inclined to think that at this time not only had the *Kakariki's* green and red lights been in view, but the red light had been lost. I also said that I was inclined to think that the starboarding of the *Caradale* was based on the notion that she held the two side lights of the *Kakariki*, the loss of the red not having been observed. Further, I expressed the opinion that for some reason the master did not see what I thought probably occurred on this starboard movement of his ship, namely,

(1) (1937) 58 Ll.L. Rep., at p. 39.

that the *Kakariki* had gone to port. Now, a man with the exclusive duty of keeping a look out might be placed on the forecastle head or the bridge. The traditional place for such a look-out is on a ship's forecastle head, and, except in heavy weather, it is more usual to station him there. But sometimes the bridge is found a better position. It is said that, owing to the height of a plate rising above the bulwarks of the *Caradale* at the ship's stem, her forecastle head was a less suitable or convenient place for a look-out than her bridge. If a look-out were stationed forward, the plate would obstruct his view directly ahead unless he stood on a step provided for the purpose. Of this more must be said later ; but for present purposes it is enough that the plate and step afford no justification for saying that if a man had been told off as a special look-out, he would have been stationed on the bridge. He might or might not. Wherever he was stationed it would have been his duty to report the ship when he first picked up her lights. But it is not the ordinary duty of a look-out to draw attention to the subsequent movements of a vessel the sighting of which he has already reported. Something likely to escape notice or very unusual in its nature an intelligent look-out might or would report. But that would depend on his discretion. Suppose then that, in addition to the master and the third officer, there had been an able seaman posted as a look-out with no other duties. What course would he have followed as the *Kakariki's* two lights came into view and the red light was lost and as the *Caradale* starboarded in the manner described ? I think that the preponderance of probability is that he would have done nothing. The ships were separated by a considerable distance, by about a mile and a half. The changes in the *Kakariki's* lights would be quite visible to the master who was navigating ; there was nothing remarkable about them. Even if the starboarding of the *Caradale* would strike the look-out man as unwise in view of the loss of the *Kakariki's* red light, it would not be for him to comment. The statement in the previous judgment that the *Kakariki's* going to port probably occurred on the first starboard movement of the *Caradale* is to be read with the statement that about six minutes past eleven the *Kakariki* altered her course to port because she saw the *Caradale* come to starboard. Consistently with this view the disappearance

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of the *Kakariki's* red light cannot be explained on the ground that she had already begun to port. But if the *Kakariki* ported only after her red light was shut out, the fact that she was doing so could not be gathered unless her mast-head lights broadened out. If such a look-out man had been stationed on the forecastle head, I think it almost certain that he would not have reported the loss of the *Kakariki's* red light or the alteration in her course. If he had been stationed on the bridge, I think the probabilities are against his doing so. It is true, of course, that he might by chance have become aware that the master was not following what the *Kakariki* was doing, and, in that event, it may be supposed that he would have reported the shutting out of the red light to draw his attention to it. What would have been the consequence if the master had become aware, as it occurred, that the *Kakariki's* red light was shut out or that she had ported is a matter of speculation. The previous judgment expressed the view that the *Caradale* made a still greater movement to starboard before the final order, hard-a-starboard. But it contains no explanation why from the standpoint of the master this was done, except that the purpose of passing the *Kakariki* red to red was pursued. The distance between the ships had lessened by this time, and the *Kakariki's* lights were certainly in full view of the *Caradale's* master. He must have seen them, and he was not deterred from continuing the attempt to pass port to port.

Referring to this second starboarding of the *Caradale*, the previous judgment says that when it was seen on board the *Kakariki* the latter was put hard-a-port. "The *Caradale's* red light had not then come into view." The *Kakariki* gave a sound signal. The third officer of the *Caradale* had by that time returned from her chart-room and had reported to the master what was logged as the previous course. It was in these circumstances that the mistake was made of putting the *Caradale's* helm hard-a-starboard. This was the immediate cause of the collision. The passage in which my views of the final order, hard-a-starboard, are expressed contains some statements relating to the look out. Although I have treated my former judgment as, so to speak, incorporated in the present, it is perhaps better to repeat the passage before discussing its application. "The final order, hard-a-starboard, as in effect I have already

said, turned out to be wrong. As something done in the crisis of a collision, that it turned out to be wrong would not mean fault or negligence. But I think it arose out of some failure in vigilance occurring on the navigation bridge and out of the confusion and excitement due to a sudden realization of the danger thus created. It is not possible to say whether, if a look-out had been posted on the forecastle head, he would have given a warning in time or at all. But, in the absence of a look-out there, it cannot, I think, be right for the same man to undertake the navigation of the ship and, at any rate in those waters, the duties of a look-out on the bridge. While the third officer was in the chart-house, the master occupied that position, and the realization of the state of danger into which they had got did not, in my opinion, occur until on the third officer's return the *Kakariki's* blasts called their attention to it."

The *Kakariki* had not in the interval altered her course. But she had drawn nearer, and what the failure in vigilance aboard the *Caradale* led to was a want of appreciation of the danger involved in the approach of the vessels. There was no new fact such as it would be the duty of a look-out to report. The purpose of posting a look-out is not to warn the navigating officer against the dangers of failing to keep out of the way of another vessel which that officer sees. How imminent the danger appeared before the *Kakariki* sounded her second two blasts it is not easy to say. But any man might be expected to act under an impression of danger in a way which would call attention to it. This is the relevance of the observation that it is not possible to say whether, if a look-out had been posted on the forecastle head, he would have given warning in time or at all. The probabilities are, I think, that a man so posted would not have given any warning before the *Kakariki's* blasts were sounded. But, if another man had been posted on the bridge as a look-out, it is possible that he would have made sure that the master was attentive to the mutual relations of the ships. It was suggested that, if a man had been posted exclusively as a look-out, he would or might have heard and reported the sound-signals of the *Kakariki*. There is, in my opinion, no reason to think that the first sound-signals would have been audible to him, and to report sound-signals does not appear to be a recognized part of a look-out's duties. When

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the second sound-signals were given, they were heard on the bridge of the *Caradale*, although possibly their number was questioned. A look-out could scarcely have affected the action of the master, who immediately gave the order hard-a-starboard.

The result of the foregoing discussion may, I think, be summarized as follows :—The three successive starboardings of the *Caradale* formed the improper navigation on her part causing the collision. The fault consisted in making them, however they came to be made. The main reason explaining them is the persistence of the idea that the ships were to pass red to red. Then there is a negative condition consisting in the failure of the master to notice that immediately before the first starboarding the red light of the *Kakariki* was lost and that immediately afterwards she ported. If he had done so, it might or might not have influenced him against the second starboarding. The third officer, whose duty it was to keep a look out, was taken from that duty for other purposes. The third starboarding might not or would not have been ordered but for the surprise of the master which arose from a failure to perceive the danger that had arisen. If there had been an able seaman posted as a look-out with no other duties and he had been stationed on the bridge and if he had seen that the master's attention was distracted, he might have reported the loss of the red light and later have warned the master of the danger. But, except in these conditions, a look-out would probably have made no difference. The master ought not to have relaxed his attention and he ought not to have sent the third officer from the wheel house so that he himself was left as the only person to discharge the duties of a look-out.

On these facts the question presents itself whether the fact that a seaman with no other duties was not posted as a look-out can be considered a proximate cause of the collision.

The difficulty of the question whether the absence of a man posted as a look-out was a " cause " of the collision arises from the burden of proof. If the owners of the *Kakariki* had to show that but for his absence the collision would not have occurred, it is plain that they could not do so. But it is for the owners of the *Caradale* to establish that the want of such a man did not directly contribute to the collision. Moreover, it is a negative condition. On the whole,

however, I think that the contingencies in which his presence might have operated to intercept the consequences of the other causes involve the combination of so many uncertain conditions or chances that it is too remote to be considered from the standpoint of the law a cause of the collision.

The conclusion that the failure to post a seaman as a look-out having no other duties did not form one of the "causes" of the collision is, I think, in itself enough to exclude actual fault or privity on the part of the owners of the *Caradale* in relation to the conditions which determined or led to each of the three helm orders constituting the fault or default of the *Caradale*. The factors or conditions which led the master to give those orders include nothing else for the existence or occurrence of which blame can be attributed to the shipowners.

But, if the fact that the look out was not kept by a seaman having no other duties were considered to constitute a cause directly contributing to the collision, it would not follow that the occurrence took place with the actual fault or privity of the owners of the *Caradale*. The owners of the *Caradale* would negative actual fault and privity in that respect if they established either of the two positions already stated. That is to say, they would do so if they showed that, as the third officer was on the bridge, it was not for the master to navigate the ship at the time and place in question without stationing upon the bridge or in the bows a seaman and assigning to him the duty of keeping a look out and no other duty. They would also negative actual fault and privity in respect of the sufficiency of the look out if they showed that, notwithstanding that the omission to post such a man might be considered improper, yet they were not privy to the omission and no fault on their part contributed to it.

I shall now deal with the question whether the owners of the *Caradale* have satisfactorily made out these two positions or either of them.

The collision took place in clear weather and at night. The *Caradale* was in pilotage waters, but they were open for a long distance before her, and no special precaution was necessary. Conditions in which ships are navigated vary so much and the ships

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themselves differ so widely in nature, construction, size and speed that the standard of legal duty cannot well be stated with more particularity than to keep a proper look out. Perhaps a proper look out may be defined as a look out of such a nature as to insure as far as practicable that any material object large enough to be a source of danger to the ship will be seen at an adequate distance and that no craft or other thing which the ship might injure will escape notice. The practice and experience of seamen must form a guide in determining what in any given conditions constitutes a sufficient look out. In the navigation in open waters of ordinary ocean-going ships propelled by power the generally recognized practice between sunset and sunrise in clear weather is to put one man to look-out duty and nothing else. The officer of the watch is on the navigation bridge, and his duties include that of keeping a look out. But he has other duties during the performance of which he must turn his attention away. The man at the wheel steers by compass, and so for the most part must have his eyes turned towards the binnacle. The responsibility of maintaining a continuous look out is, therefore, placed at night upon a third man, usually an able seaman, who is stationed either on the forecastle head or on the bridge. In heavy weather he is brought up on the bridge, but more commonly he is stationed on the forecastle head, although some masters prefer to have him on the bridge and make a practice of placing him there.

In large passenger ships it appears to be a not uncommon practice even in fine weather to have more than one man exclusively upon look-out duty. In such ships the number of seamen to a watch is comparatively large. On the other hand, in ships of small tonnage the stationing at night of a seaman as nothing but a look-out is not a regular practice. There are three watches, and in many ships upon the coast, manned according to the manning scale in the second schedule to the *Navigation Act*, this means that a watch will comprise, besides an officer, two able seamen. While one acts as quarter-master, the other may, of course, be employed in look-out duty.

In the *Caradale* the manning scale was more than complied with, and it is not disputed that the owners fulfilled their responsibility of providing a sufficient number of competent men to work the

ship. But one of her officers and two able seamen formed a watch. The practice of Captain Hansen has been to station the man who is not at the wheel on the deck below abaft the bridge and within easy call. The duty of maintaining a look out is not discharged by him but rests upon the officer of the watch. The man below is, however, readily available and may be called up to relieve the officer of the duties of a look-out whenever that officer thinks proper. It is evident that under such a practice the continual maintenance of a look out depends on the discretion of the particular officer. For example, he might leave the wheel-house for the chart-room without regarding it as necessary to call up the man below and then be absent for much longer than he expected or realized.

Courts of admiralty have always been strict in their insistence on the maintenance of a continual and a vigilant look out, and, if at night while the duties of a look-out rested on no one but the officer of the watch as navigating officer a failure to observe some material object occurred and occasioned a casualty, I do not think that the master of a ship of the size of the *Caradale* and carrying her complement would be absolved from fault in adopting a practice of making the officer of the watch the sole look-out. But at the time of the collision the *Caradale* was in pilotage waters and the watch had not been set. A somewhat different state of affairs existed, and it is the propriety of what was done on that occasion that must be considered and not the course followed in navigating between ports.

The master had brought the third officer up to the bridge from the forward part of the ship, where he had been stationed until the river mouth was cleared. In a river or narrow waters an officer is usually placed forward both as a look-out and to be ready for emergency. In more open pilotage waters he is brought up to the bridge, where the master under his exemption navigates the ship.

Now, upon the issue of actual fault or privity of the owners, I think that what has to be considered is the sufficiency of the third officer, in addition to the master, as a look-out. The fact that the third officer was sent into the chart house may be used as an illustration of the kind of thing the occurrence of which makes it wise or prudent to have a look-out man who is not liable to be called to other duties. But that is all. The conduct of the master in sending

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him to the chart room so as to leave himself the only look-out is in itself a thing in which the owners can have no privity or fault. If a system or practice be improper, there may be an actual fault or privity of the owners in its existence, not in the personal neglect of the individual. But suppose that the owners had been aware that it was the practice for the master, the third officer and the helmsman to occupy the bridge as the ship made her way at night from the river mouth to the heads and that in clear weather no special look-out was stationed forward or with them on the bridge. Might they not reasonably have considered that the arrangement was sufficient to insure that an adequate look out was kept? Two responsible officers are there, alive to the duty. The master is actually navigating, and the third officer is under his control. It is true that the third officer must work the telegraph and that he might receive other orders. But there is a man within call, and it is only by the orders of the master himself that the third officer would be called on to undertake any task inconsistent with keeping a look out. After all, the contingency of anything arising which would make it imperative that his attention should be diverted for any substantial interval of time is remote. The fact that, in the event, the third officer was absent at a critical time and that something went amiss in the observation of the *Kakariki* as the two ships drew near should not be treated as a sufficient ground for saying that the shipowners, or for that matter the master, ought antecedently to have foreseen the likelihood of such an occurrence and to have provided against it by adding a seaman as an independent look-out. It is one thing to say that the master navigating the ship in pilotage waters at night and with an approaching ship in the vicinity ought not to be left for a substantial interval of time as the only person undertaking the duties of a look-out. It is another thing to say that a practice of entrusting the execution of the duty of maintaining a continual look out at night in pilotage waters to the exempt master and to the third officer is in itself improper or negligent. The question whether such an arrangement is sufficient to fulfil the obligation of keeping a proper look out cannot be answered in the abstract or in general terms. Its adequacy must depend upon circumstances and conditions. The size and character of the ship must be taken into

account. For, apart from the number of men available for various duties, the structure of the ship affects the range of unobstructed vision from the wheel-house, the length of the ship and its speed are considerations on which the need of a man in the bows may depend, and the likelihood of the third officer's being required for other incidental duties will be affected by the class and character of the ship. Still more important are the conditions of locality, weather and visibility. In clear fine weather on the way down Port Phillip Bay, I think that it is difficult to say that it is necessarily improper to leave the duty of maintaining a continual look out to the master and third officer. The fact is, I think, that it is just such a matter as must be left to the judgment of the master of the ship. I should think that an owner who acquiesced in a practice of following such a course in the conditions stated would not be blameworthy and so unable to exclude fault and privity if one or both of the officers failed in vigilance.

The House of Lords has expressly held that no hard and fast rule should be laid down to the effect that there should be a special man on the forecastle to act as a look-out (*Anchor Line (Henderson Bros.) Ltd.* v. *Trustees of Harbour of Dundee* (1)). The facts of that case show that what their Lordships were considering was not the place where a special look-out should be put, but the necessity of having a special look-out. The ship, the *City of Naples*, a steamer of 3,700 tons, had entered the mouth of the Tay without a pilot, having sought one in vain. Two years before, a vessel had sunk in the vicinity, and a chart showed that the wreck was buoyed. The Dundee Harbour authority had within the previous few days replaced the lighted buoy which then marked the wreck with a small conical buoy. The chart showed two lighted buoys. The *City of Naples* was navigated by the master. On the bridge was an apprentice and a North Sea pilot, who was voluntarily lending his assistance. Without any special instruction, the first officer had placed himself in the forecastle head. Those on the bridge failed to see the small conical buoy; the first officer saw it about two ship's lengths off, broad on the port bow, but did not think it worth reporting. Immediately afterwards the *City of Naples* struck the

(1) (1922) 38 T.L.R. 299, at p. 311.

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submerged wreck. In these circumstances the House of Lords held, Lord *Finlay* dissenting, that she was not to blame.

I do not regard this decision as marking some less insistence on the ordinary practice of stationing a man as a look-out, but it does show that the necessity of telling off a special look-out is to be decided not as a matter of law or rigidly but as a matter of fact, having regard to the look out kept otherwise and to the general circumstances.

In the present case, a large body of evidence of practice and opinion was directed to the question of a proper look out. About general propositions there was not much difference of view, and what differences were expressed were more apparent than real. As to particular applications of practice and principle, uniformity of procedure and the rigidity and extent of its operation, divergences among the witnesses were often to be accounted for by differences in training and experience.

In examining the sequence of circumstances which are said to bring about a causal relation between the occurrence of the casualty and some act or omission on the part of the owners of the *Caradale*, I have preferred to begin at the end of the sequence and go from the collision and its immediate causes backwards. I have now dealt with the question whether, as a matter of causation, the want of a special look-out contributed to the collision, and with the question whether it would be culpable in an owner to acquiesce in a practice by a master of navigating his ship by night at the place in question without such a man, relying upon the look out of himself and his third officer. No doubt the conclusion I have reached on each of these questions would be enough to dispose of the issue of actual fault or privity. But I shall deal with the third and last part of that issue, which I have now reached, namely, the consideration of the actual conduct of the shipowners which, it is suggested, amounts to a fault on their part or renders them privy to the more direct causes of the collision.

The correctness of their own conduct was maintained by the owners of the *Caradale*, and, not unnaturally, in the presentation of their case it was placed first. But the facts and considerations upon which the issue depends cover no very wide field. The *Caradale* is owned by a limited company. The business of the

company is in fact completely controlled by the governing director, Captain Patrick, and, in his absence, by his deputy, Mr. Radford. In Captain Patrick, and, failing him, Mr. Radford, "the chief management of the business resides" and "the active and directing will" of the company must be sought (*Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.* (1)).

Upon the facts of the case, if it is satisfactorily proved that the collision took place without the actual fault or privity of Captain Patrick, then actual fault or privity on the part of the company as owners of the *Caradale* is negatived. Captain Patrick, after a considerable experience at sea, became a shipowner in 1920. The company, which was incorporated at the beginning of 1925, now owns three cargo steamships besides the *Caradale*. Two of them are of the same class as the *Caradale*, and the third appears to be smaller. Captain Patrick's son, who holds a master's certificate, is the company's marine superintendent. Captain Hansen is a tried and competent master mariner who has been in the company's service from the beginning and had commanded other ships of the company. No fault can be found with Captain Patrick for appointing him to the command of the *Caradale* when she was bought by the company in July 1936. But neither Captain Patrick nor, during his absence, Mr. Radford, at any time inquired into the manner in which Captain Hansen was accustomed to provide for the keeping of a proper look out upon the ships of which he held command.

I have described the mode in which the watch of an officer and two able seamen was ordinarily disposed or employed upon the *Caradale* at night in clear weather, and this practice had been followed by Captain Hansen in other ships. The master of another of the company's ships adopted the same practice. The practice of the master of a third ship of the company has been to place the second able seaman on the bridge to perform the duties of a look-out. I do not think that the practice followed by Captain Hansen would have received the approval of Captain Patrick. He had commanded large ships, and his opinion appears to go with that of the numerous witnesses habituated to a routine of posting a man as a special look-out. But I believe his evidence that he was unaware that in

(1) (1914) 1 K.B. 419, at p. 437; (1915) A.C. 705, at p. 713.

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clear weather Captain Hansen did not post a man at night as a special look-out.

It may be taken, I think, that the same course has been adopted, at all events at some time or another, on two of the existing ships of the company besides the *Caradale*, but not on the fourth. But the explanation lies, I think, in the tendency of different men to adopt similar courses in similar conditions. It does not represent a practice in the company's service.

It was contended or suggested that a factor conducing to the adoption of a disposition of the watch by which the second able seaman was kept near an after-hatch instead of on the forecastle head was the existence of the plate rising above the bulwarks at the stem of the vessel. Such a plate also exists in two of the other ships. In one of these a seaman is habitually told off at night as a special look-out, but he is stationed on the bridge. The purpose of the plate is to give more protection against water coming over the bows. It is called a spirketting plate. In the *Caradale* the plate rises at the stem of the vessel about two feet eight inches above the bulwarks, making a total height of about five feet eight inches above the deck at the foot of the bulwarks. The deck, of course, falls away from that point aft. The spirketting plate is not wide, and its height diminishes as it follows the bulwarks. To enable a man to stand immediately behind the spirketting plate and see over it, a piece of timber is placed about seventeen inches from the deck running athwart between the bulwarks. It forms a step for a look-out, and it appears that in narrow waters or thick weather a look-out stands there. The criticism is made that to stand on the step continuously for two hours would be a hardship, while, if a look-out moved about the forecastle head, the spirketting plate would prevent his seeing a sector of which the width would depend on his closeness to the stem. In their pleading the defendants went so far as to allege that the collision was contributed to by the defective construction of the bows which impeded the vision of a look-out man there stationed, a thing which the plaintiffs knew or ought to have known. The allegation that the spirketting plate amounted to a defective construction is altogether without foundation. The inconvenience felt by a look-out standing on the step

was not, in my opinion, a consideration which moved the master to station the second able seaman on an after-hatch and not to use him as a look out either on the bridge or on the forecastle head. Out of the spirketting plate it is impossible to obtain a link for a chain of causation by which the absence of a man performing exclusively the duties of a look-out can be connected with the owners. Indeed, when it came to the hearing of the suit, the defendants placed little reliance on the spirketting plate.

The chief contention on behalf of the owners of the *Kakariki* was that the responsibility of the owners of the *Caradale* for the absence of such a man at the time of the collision arose from the failure on their part to regulate or control the manner in which the master of the *Caradale*, in common with masters of their other ships, executed his duty of maintaining a proper look out and to take adequate precautions to see that he performed that duty or to discover how he performed it. It appears that shipping companies which own any considerable number of ships commonly draw up regulations or instructions for the guidance of their masters and of other officers in their service. These are printed and supplied to the masters and officers of their ships. Examples were put in evidence of the instructions circulated by all the shipping companies who have any considerable number of ships engaged in the coast-wise trade in Australia or in the trade between New Zealand and Australia. In every example there is a regulation or instruction relating to the look out to be kept and, in spite of some variation in the requirements of different regulations, none of them could be complied with unless at night at least one man was told off as a look-out. It was proved that books of instruction of a similar nature are issued to their officers by many British shipping companies with organized services. No set of printed instructions comparable with the examples put in evidence has been supplied to the masters and officers in the service of the plaintiff company. A printed card has been given to the masters containing some general counsels of prudence from which the necessity of a vigilant look out is not omitted. But no specific instruction has been given by the plaintiff company either in print or otherwise as to the manner of discharging the duty.

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It appears, further, that the log-books provided by most shipping companies contain a column for the name of the seaman on look-out duty. Log-books are inspected by the administrative officers and, if the column must be filled in, presumably it tends to prevent a failure to assign a man to look-out duty.

The *Caradale's* log-book was regularly checked, but it had been obtained from a nautical stationer and contained no such column.

The position taken up by Captain Patrick in giving evidence was that keeping a proper look out was an ordinary duty of seamanship, forming part of the responsibility of the master, who ought not to be fettered by specific regulations and subjected, so to speak, to office control in the navigation of his ship. The masters of his four ships, whenever they arrived in Sydney, reported to the marine superintendent and also to Mr. Radford and very often to Captain Patrick himself. The intervals between Captain Hansen's visits to him were short and afforded an ample opportunity of discussing anything that might arise. There had never been any reason to question the sufficiency of the look out kept on the *Caradale*, and he had no doubt of Captain Hansen's skill and caution.

The question is whether, in adopting this attitude, Captain Patrick fell short of the standard of care which the business of shipowning demands. Actual fault or privity implies some culpability on the part of the owner. It may consist in being privy to the neglect, unskilfulness or improper act or omission of a servant or agent. It may be the neglect or the imprudent or wrongful act of the shipowner himself. But the shipowner must in some way be to blame in respect of an act or omission on his own part or of his privity to the act or omission of someone else. A failure to make himself aware of what he ought to know is or may be an actual fault. To limit his liability, he must show that he himself has not in any such manner been blameworthy in respect of a cause of the loss or damage (See *Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.* (1); *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.* (2)).

The primary responsibility of a shipowner is for the seaworthiness of his ship, the sufficiency of her manning, the selection of her master and officers and the supply of all proper furnishings, equipment and

(1) (1914) 1 K.B., at p. 432. (2) (1937) 58 Ll.L.Rep., at p. 39.

provisions. All these duties were fulfilled. The fault alleged is in not exercising a systematic supervision over the actual performance of one of the elementary duties of seamanship by the masters of the four ships, or at any rate by the master of the *Caradale*, and in not defining for them the mode of its performance. The case is not one of a large organization controlling many ships and employing a great number of officers. The ships are few and relatively small. The voyages are short. Captain Patrick is himself an experienced seaman well able to judge the wisdom and usefulness of specific instruction and shore control in matters of seamanship and navigation. He was in a position to deal with his men as individuals and to estimate for himself their capacity and efficiency as commanders. I have felt no misgiving as to the closeness of his own watch on his ships and his men. On the contrary, I have felt the need for caution in adopting the view that he was in fact unaware that it was not the normal practice at night to tell off a man specially as a look-out. But, after consideration, I have arrived at the conclusion that he did not. The truth is, I think, that the maintenance of a proper look out is such a plain necessity, the variation in the conditions determining what must be done to fulfil it is so continual and it is such a practical matter of ordinary everyday seamanship, that it did not present itself to Captain Patrick as a thing upon which there was any need for him to lay down rules, to give instructions or to institute inquiries.

Again, it must be remembered that the casualty occurred before the watch was set. Strictly, the question of Captain Patrick's fault should be considered in relation to the mode of navigating his ships in pilotage waters, like Port Phillip Bay. Ought he by regulation or instruction to have prescribed rigidly that between sunset and sunrise a man should be specially told off as a look-out so that the rule would apply notwithstanding that the master was navigating under his exemption with an officer upon the bridge and a man at call? But, even if the question is stated broadly, I do not think that Captain Patrick fell short in the discharge of his duty as an owner in leaving entirely in the master's hands without fetter or interference on his part the fulfilment of the duty of keeping a proper look out.

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It was suggested that art. 29 of the regulations for preventing collisions at sea imposes upon an owner some duty in respect of keeping a look out or recognizes the existence of such a duty. It provides that nothing in the rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper look out or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. That article is in no way concerned with the distinction which is the foundation of limitation of liability, the distinction between a shipowner's own blameworthy acts and omissions and his liability for the neglect or default of his servants and agents. It throws no light, I think, upon what amounts to an actual fault on the part of the owner disentitling him from limiting his liability.

No doubt an owner may be in actual fault because he has not taken some measure or measures to insure that his servants perform duties necessarily delegated to them, or because he does not sufficiently define what is to be done by them. But the master of a ship is no ordinary servant. Both in responsibility and in authority his position is special. Seamanship and navigation constitute a technical art the practice of which requires great skill and experience. An owner not only may, but must, place his ship under the complete control and authority while at sea of a master duly qualified to navigate and command her. But the responsibility and authority of the master is vested in him by the law and is not derivative. It is easy to understand why a shipping company with a fleet of ships and a body of highly skilled experts ashore should find it desirable to prescribe in many particulars the mode in which the members of its maritime service, including masters of ships, should carry out their duties at sea and that they should devise means of enforcing the rules prescribed. But it does not follow that it is wise or prudent for every shipowner to take into his own hands the systematic control of the performance of any of the multifarious duties of seamanship and navigation which are at sea the responsibility of the master. Still less does it follow that it is blameworthy in an owner to rely completely upon a master for the proper navigation of his ship and the due observance of the precautions for safety.

In the circumstances of the present case, I think that the course followed by Captain Patrick was not negligent or unreasonable or blameworthy.

The nature of the casualty, considered with the examination of the circumstances leading up to it, sufficiently shows that no acts or omissions of the owners of the *Caradale*, except those I have discussed, could be considered to have contributed to the occurrence of the loss or damage. My conclusion is that the plaintiffs have satisfactorily shown that the collision of the *Caradale* with the *Kakariki* took place without the actual fault or privity of the plaintiffs. It follows that the plaintiffs are entitled to a limitation decree unless the defendants are able to exclude on some special ground the operation of secs. 503 and 504 of the *Merchant Shipping Act* 1894.

The defendants in fact rely upon two grounds as preventing the plaintiffs from enforcing their statutory right to limit their liability. The first ground is that in the collision action in which the *Caradale* was pronounced to blame her owners, the now plaintiffs, did not plead their right to limit liability. They might, no doubt, have counterclaimed for a limitation decree. But a failure to counterclaim does not preclude a defendant from afterwards seeking by an independent action the relief which it was open to him to seek by way of counterclaim. The statute gives no defence; at best it limits damages. But the foundation of the relief, administered first in Chancery and afterwards in admiralty, is the provision on the part of the shipowner of the fund representing his maximum liability. The court then administers the fund brought into court by the shipowner. The court ascertains the claims upon it, marshals them and distributes the fund ratably among the claimants. In principle the title to relief of such a nature is a substantive right enforceable by independent proceedings. It is more than one of the conditions affecting the amount of the loss or damage to be awarded in the collision action. A limitation decree operates upon claims that have passed into judgment as well as upon those that rest upon the original cause of action. Failure to assert the right in the collision action ought, therefore, to be no bar to its subsequent enforcement. But there are some expressions,

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e.g., in *Wahlberg* v. *Young* (1), upon which the present defendants place reliance, to the effect that since the *Judicature Act* the shipowner must set up in a collision action his right to limit liability. Probably such expressions simply mean that, unless he does so, it will not be noticed in those proceedings. But, in any case, the practice is clear. A note in *Williams and Bruce, Admiralty Practice*, 3rd ed. (1902), at p. 349, says that the procedure of pleading the right to limitation in the defence in the collision action and setting up a counterclaim is seldom resorted to in practice and the course almost invariably taken by a shipowner claiming to limit his liability is to institute a separate action of limitation of liability after the existence of his liability has been either determined in a separate action of damage or admitted out of court. (See, too, *Encyclopædia of Court Forms and Precedents in Civil Proceedings*, vol. I, p. 328, and also, as examples, *The Vigilant* (2), *The Ran and The Graygarth* (3) and *The Charlotte* (4).)

In my opinion the contention that, through not setting it up in the collision suit, the plaintiffs have lost the right to limit liability is ill founded.

The second ground upon which the defendants relied as defeating the plaintiffs' right to limit liability may be described as waiver. In order to obtain the release of the ship when it was arrested by the now defendants in the collision suit, the now plaintiffs furnished by way of security a bank cheque for £35,000, which was replaced, according to a previous arrangement, by two bonds and a guarantee. By one bond the now plaintiffs bound themselves to the now defendants in the sum of £20,000. By the other bond a financial institution bound itself to the now defendants in the sum of £15,000. A guarantee was given in respect of the plaintiffs' bond by a bank. The condition of each bond was that it should be void if all such sums of money as might be found legally due on account of damages, costs or any other matter whatsoever to the owners of the *Kakariki* in the action then pending in this court in admiralty, which was described by its title, should be duly paid and satisfied. The ship was released on the consent of the now

(1) (1876) 4 Asp. M.C. 27; 45 L.J. C.P. 783.
(2) (1921) P. 312.
(3) (1922) P. 80.
(4) (1921) 9 Ll.L.Rep. 341.

defendants, given pursuant to rule 33 of the *Admiralty Rules* of this court. The decree made in the collision suit to which the condition of the bond refers was expressed to condemn the defendants in damages and costs, and it referred the damages to the registrar to assess the amount thereof and to report the amount due.

The contention of the defendants is that the condition of the bonds cannot be satisfied unless the full amount of the damages assessed is paid and that it would, therefore, be inconsistent with the obligation of the bonds to allow the plaintiffs to limit liability.

The guarantor and the obligees are none of them bail, and on that ground I refused to include any condemnation of bail in the decree in the collision suit.

I do not think the tenor of the condition implies any intention to waive or abandon or give up the right to limit liability. Nor is it, in my opinion, inconsistent with a limitation of liability. The bonds do no more than secure fulfilment of the obligation imposed by the final decree in the collision suit. That, I think, is the force of the words "money . . . found legally due . . . in the action." A limitation decree means that a fund is to be provided in the present suit. Instead of the owners of the *Kakariki* obtaining a personal decree or order against the owners of the *Caradale* in the former suit, they will become entitled to a ratable proportion of the fund. They will be put to claim against a *res*, and they will cease to be entitled to any personal remedy *ex delicto*. Proceedings in the former suit will be stayed under the limitation decree, and there will be no further obligation in respect of any part of the claims subject to limitation for the owners of the *Caradale* to fulfil. So far as the liabilities arising under or dealt with by the decree in the collision suit are subject to the limitation decree, they will not mature in a form which would answer the description "money found to be legally due in the action," i.e., the collision action.

In my opinion the plaintiffs are entitled to a limitation decree.

Two subsidiary questions remain. The first relates to the mode of ascertaining the tonnage of the *Caradale* for the purpose of finding the figure by which to multiply the £8 and the £15 a ton in calculating the amount beyond which her owners are not liable. Sec. 503 (2) of the *Merchant Shipping Act* 1894, as amended by sec. 69 of the

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Act of 1906, omitting a proviso, reads: "The tonnage of a steamship shall be her registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage; and the tonnage of a sailing ship shall be her registered tonnage." The register of the *Caradale* shows a registered tonnage of 936.62 obtained by subtracting from a gross tonnage of 1881.45 a total of allowable deductions of 944.83. These are set out in a column headed "Deductions allowed." The first deduction is given as follows: "On account of space required for propelling power . . . 766.01" (tons). The question is whether this figure should be adopted as constituting the "engine-room space deducted for the purpose of ascertaining the registered tonnage." Secs. 77 and 78 and the second schedule prescribe how the registered tonnage is to be calculated or ascertained. Sec. 78 (1) says that in the case of any ship propelled by steam or other power requiring engine room an allowance shall be made for the space occupied by the propelling power and the amount so allowed shall be deducted from the gross tonnage. The deduction of 766.01 shown in the *Caradale's* register is the allowance made pursuant to sec. 78 (1). In the register under the "Particulars of tonnage" are two notes. The first of them is as follows: "The tonnage of the engine-room spaces below the upper deck is 366.63 tons and the tonnage of the total spaces framed in above the upper deck for propelling machinery and for light and air is 105.83 tons."

The owners of the *Caradale*, to whose interest it is that as little as possible should be added back to the net tonnage shown, contend that the "engine-room space" is not the whole 766.01 tons, but the 336.63 tons shown as the engine-room space below the upper deck, or a number of tons ascertained by evidence to be the actual space really occupied by engine room properly so called. Of course the 336.63 tons is contained in the 766.01 tons. A similar contention was overruled by *Street* C.J. in *The Millimumul* (1) and by *Maclean* J. in *Eastern Steamship Co. Ltd.* v. *Canada Atlantic Transit Co.* (2). I agree in these decisions and in the reasons the learned judges give. The question seems never to have been raised in England,

(1) (1930) 30 S.R. (N.S.W.) 461; 47 W.N. (N.S.W.) 170.
(2) (1929) Ex. C.R. (Can.) 103.

but the inveterate practice is, I gather, in accordance with this view.

In my opinion the figure to be added to the net registered tonnage of 936.62 is 766.01. The tonnage for the purpose of limitation is, therefore, 1702.63.

The second subsidiary question concerns the potential liability of the owners of the *Kakariki* under sec. 13 of the *Marine Act* 1928 of Victoria to defray the net expenses of the removal of the wreck of that ship. The wreck has not yet been removed. The owners of the *Kakariki* contend that the owners of the *Caradale* are liable over to them by way of damages for any amount which they may be so called upon to pay, but that it constitutes a head of damage not subject to limitation. I think that the question is premature and that the hearing of the suit is not the stage at which it should be raised or decided. I realize that the defendants may experience a procedural difficulty because if they include this head of damage in their claim upon the fund it will be conceded only too readily, while, if they do not, the amount of their ratable dividend will be diminished and their contention that the head of damage is not subject to limitation may afterwards fail. The decree will include a general stay of the proceedings in the collision suit; but, as a means of overcoming the difficulty I have mentioned, I shall reserve to the now defendants liberty to apply as and when they may be advised in respect of any liability or damage not subject to the limitation decreed for a removal of the stay or for such other order as may be just.

The plaintiffs allege in par. 9 of the statement of claim that actions against them are pending in the Supreme Court of New South Wales in respect of loss of life. Though the paragraph was not admitted in the defence, admissions were afterwards made and put in evidence by which it is substantially proved. The allegation may be material under sec. 504. I think the actions to which the paragraph refers ought to be allowed to proceed to verdict, if the claimants bringing them prefer to have a jury's assessment of the amount of damages.

In a limitation action the plaintiff pays the costs, except the costs of issues or questions which the defendant raised unreasonably or are of a special and unusual nature, when the defendant has

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failed upon these issues. The defendants failed to adduce any trustworthy evidence of the allegation that the master of the *Caradale* was unfit to undertake the navigation of the vessel owing to liquor, or any evidence of the allegation that such a thing was or ought to have been known to the plaintiffs. I do not think that what justification the defendants had for raising the issue was sufficient, and I think that not only was the issue special and unusual, but also that to raise it cannot be held to be reasonable under the rule of practice. I think the defendants should pay the plaintiffs' costs of the issues raised by par. 6 of the defence. Costs of a summons relating to pleadings under that paragraph were reserved. They should be paid by the defendants. Costs of a summons relating to interrogatories were also reserved. I think the parties should abide their own costs of that summons.

The decree will not be drawn up until the parties have had an opportunity of considering its form and making any application to add to or vary the minutes. But, unless a contrary direction is given in consequence of such an application, the decree will be considered to be pronounced now and will be dated accordingly.

The following are the minutes :—Pronounce that in respect of loss of life, personal injury and loss or damage to ships, goods, merchandise and other things caused by reason of the improper navigation of the steamship *Caradale* on the occasion of the collision between that vessel and the steamship *Kakariki* on 29th January 1937 the owners of the s.s.*Caradale* are entitled to limit their liability according to the provisions of the Merchant Shipping Acts.

Pronounce that the said owners are answerable in damages to an amount not exceeding the sum of £25,545, such sum being at the rate of £15 for each ton of the registered tonnage of the s.s. *Caradale* with the addition of engine-room space deducted for the purpose of ascertaining that tonnage and that in respect of claims for loss of life or personal injury the owners of the s.s. *Caradale* are answerable in damages to an amount not exceeding the sum of £11,921, such sum being at the rate of £7 a ton of the said tonnage with such addition and in respect of the residue of such claims if that sum be insufficient to satisfy the same and of claims for loss or damage to ship, goods, merchandise or other things alone, they

are answerable in damages to an amount not exceeding the sum of £13,624, such sum being at the rate of £8 a ton of the said tonnage with such addition as aforesaid.

Order that upon payment into court of the sum of £13,624 together with interest thereon at the rate of four per cent per annum from 29th January 1937 until payment into court and upon bail being given in the further sum of £11,921 together with interest thereon as aforesaid from 29th January 1937 until such bail is given and also upon or subject to payment of the costs incurred by the plaintiff in suit No. 17 in admiralty all proceedings in such suit be stayed except for the purposes of taxation of costs and except as may be ordered under the reservation following.

Reserve to the defendants liberty to apply as and when they may be advised in respect of any liability or damage not subject to the limitation hereinbefore decreed for a removal of such stay or for such other order as may appear just.

Let three advertisements be inserted in each of the following newspapers at intervals in the case of each respective newspaper of not less than a week between the successive advertisements, viz., the Melbourne *Age* and *Argus* and the *Sydney Morning Herald* and *Daily Telegraph*, intimating to all persons having any claim in respect of loss of life, personal injury or loss or damage caused by such collision that if they do not before a day to be fixed by the registrar and stated in the advertisements not less than three months after the intended appearance of the last of such advertisements enter their claims in a registry of this court they will be excluded from sharing in such amounts.

Let the plaintiffs be at liberty to apply for an order restraining the bringing or further proceeding with an action in respect of any such claim or for a stay of such action.

Refer to the principal registrar to assess the amount of all claims brought in, including any claim by the defendants the Union Steamship Co. of New Zealand Ltd. in respect of all or any of the damages claimed in suit No. 17 aforesaid.

Condemn the plaintiff in the costs of this suit except the costs of or incidental to or occasioned by the issues raised by par. 6 of the defence and the particulars delivered thereunder.

H. C. OF A. 1938.

JAMES PATRICK & CO. LTD. v. UNION STEAMSHIP CO. OF NEW ZEALAND LTD.

Dixon J.

Order that the defendants the Union Steamship Co. of New Zealand Ltd. pay the costs of the plaintiffs of and incidental to and occasioned by such issues, including the costs of the summons, dated 27th January 1938, for further particulars reserved by the order dated 28th January 1938.

Order that the parties abide their own costs of the summons, dated 25th January 1938, relating to interrogatories reserved by an order dated 28th January 1938.

Order that the costs of the shorthand writer and of the transcript of the evidence and the costs of the summons to take evidence before the trial be included in the costs the subject of the aforesaid orders.

Adjourn further consideration.

Liberty to apply.

Order as contained in the minutes above set out.

Solicitors for the plaintiff, *Moule, Hamilton & Derham.*

Solicitors for the respondent, *Malleson, Stewart, Stawell & Nankivell.*

H. D. W.

[An appeal from the above decision to the Full Court of the High Court was brought but not proceeded with and on 11th November 1938 was dismissed.—*Ed.*]