TOTAL LOSS CLAIMS ON PIRATICAL CAPTURE

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EDWARD COLE

Maritime piracy is a real contemporary peril. Somali piracy alone costs the shipping industry between $7-11bn annually[1]*. Between 2007 and 2011, average ransoms paid to Somali pirates rose from $600,000 to $4.7m per vessel. Ransoms paid in 2011 to Somali pirates totalled $135m*[2]*. Piracy is not confined to the Gulf of Aden, but has recently proliferated throughout Indonesia, is increasing off the coasts of Guinea and Nigeria, and isolated incidents occur worldwide. An extensive, growing literature on the international criminal law of piracy questions where pirates might be prosecuted. Contrastingly, the insurance law concerning piracy attracts little academic attention.*

A 2011 English Court of Appeal judgment ('Masefield') found that an insured could not recover for a total loss under its policy immediately following a capture. It was deemed not to have lost its property while it remained probable that the pirates intended to seek and accept a ransom payment, then release the property. Ship and cargo owners received little comfort, for the judgment effectively requires them to wait an uncertain time after capture before they might recover under a policy, and meanwhile support ransom negotiations. Insurers might welcome the relief from making prompt payments, and from having to deal themselves with the consequences of a capture.

This judgment was not a foregone conclusion; English law historically allowed the insured to abandon instantly and recover for a total loss, despite a hope of recovery. This thesis outlines how English insurance law concerning capture developed, from the earliest reported authorities to Masefield. It questions whether Masefield followed established authorities, and argues that a presumption of total loss arises on a capture.

12 July 2013

[1] House of Commons Foreign Affairs Committee, *'Piracy off the coast of Somalia; Tenth Report of Session 2010–12'* , p 15.
[2] *Ibid.* pp 3, 55.

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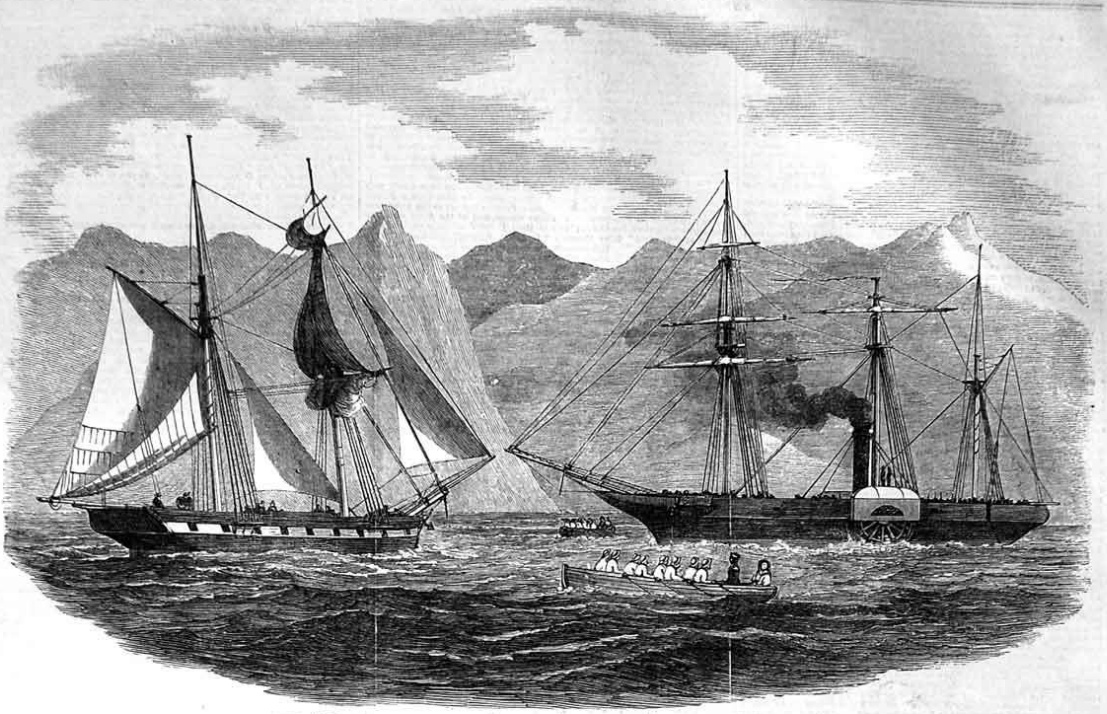


H.M.S. "VIRAGO" TAKING THE PIRATES' SCHOONER "ELIZA CORNISH," IN THE STRAITS OF MAGELLAN.

been shown to our assistant-surgeon as the Governor did not in any way answer the description of the real Governor, Munios, who was one of the best officers in their navy, and had been brought up in our own service. They also discovered that the letters we had brought up had forged signatures attached to them; and, on describing the dress of the pretended Major, who, it appears, was the head man in this murderous scheme, it was found that he was wearing Munios' epaulettes, but was only one of the junior lieutenants, and who had before borne a bad character. The men who had been represented to us as runaway prisoners must have been some of the men who had originally fled with Munios, at the first outbreak; and so it proved; for about the same time they arrived at San Carlos Chilos, in the barque *Tres Amigos* (which, it appeared, had gone part of the way back, according to the instructions in the letter which we had taken to them), but happily fell in with these fugitives on the shore, in time to save her also from falling into the hands of these pirates.

LOS REMOS BRUNES, CAPTAIN OF THE PIRATICAL SCHOONER "ELIZA CORNISH."

On the day after the arrival of this news, there came a request from the Chilian Government to Admiral Moresby to send a steamer down to the Straits of Magellan, as they had some disposable; and, on the Tuesday morning, we (the *Virago*) were to have gone out to the Admiral to carry this request, had he not suddenly appeared off the port on Monday night. Next morning we went out and towed the *Portland* in; after which we coaled, and on the 15th started for the Straits of Magellan.

We entered the Gulf of Penas on the morning of Sunday, 25th January, and proceeded through Messier, Sarmiento, and Smith's channels, arriving at the Straits on the 27th. We commenced our search for the pirates by going to Mercy Harbour, where we anchored for the evening. Next morning we got under weight, and proceeded eastward; and, about ten o'clock, when approaching Plaza Parda, all hands were astonished and delighted at the cry of "A sail right ahead." She was soon made out to be the *Eliza Cornish* schooner we had seen lying at Punta d'Arenas on our former visit. We soon beat to quarters, and prepared to lower and send away our two cutters armed. When we first sighted the schooner, we observed a great many persons on deck; but, as we came nearer, there were only a few; and we observed two men struggling for which should be first. When we came near, we fired one of the broadside guns at her, taking care not to hit her. She immediately hove to; we stopped and lowered our cutters, which immediately pulled alongside, and the men jumped on board. The English crew jumped into the boat, laying hold of the officers and men's hands, saying, "Thank God, sir, you've come to our rescue; we've been in prison, and in danger of our lives long enough." Those who were below then came up one by one, apparently too much taken aback to offer any resistance. The two cutters conveyed the men and their things on board the *Virago*, where they were strictly searched and made prisoners. On board the schooner were Captain Salas and Lieutenant Diez, officers of the Chilian army, who had refused to join the others; and had, consequently, been imprisoned with the Englishmen. These two officers, together with the English mate, pointed out the ringleaders, who were immediately put in irons. When all the men were brought on board from the schooner, she was lashed alongside. The *Virago* then proceeded into Plaza Parda Bay, where she anchored to finish the necessary arrangements.

The schooner, with a prize crew of a lieutenant, a master's assistant, and five men, was left at anchor at Plaza Parda; having, also, part of her own crew and all the women on board.

Next day the *Virago* proceeded in further pursuit of the pirates, having learnt from the *Eliza Cornish* that the barque *Florida* had had her name changed to *Inesperada*, and had accompanied the schooner as far as Wood's Bay: here they both anchored, and Cambiaso persuaded about sixty to land on pretence of preparing for a revel; having done this, he got under weigh in the night, and giving the schooner the slip, ran away to the eastward, with the intention, it was supposed, of going either to Europe or to join Gen. Rosas at Buenos Ayres.

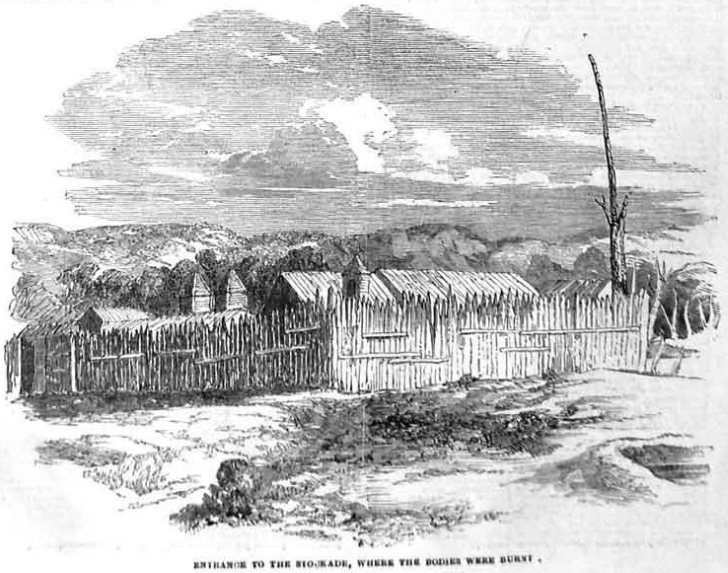
This had happened fifteen days before we fell in with the schooner; so that our hopes of catching her were small, as in fifteen days she could hardly have failed to get clear of the Straits. I may here mention that on board the *Florida* were some of the principal men—the two Generals, as they styled themselves, Cambiaso and Garcia, both of whom had been lieutenants in the Chilian service; also, they had on board the Englishman, St. Jago Dann.

On the 30th we arrived once more at Punta d'Arenas, where we met with the party we expected, except sixteen men, who had started the day before on horseback, with the intention of falling in with the Indians, and so making their way back to Chili through Patagonia. These men here willingly came on board, the more so that they did not know that they were to be prisoners. Next morning we started to the eastern end of the Straits, to make sure that the *Florida* was not still there, and to touch at Cape Gregorio, where it was supposed the fourteen men (two had returned the day before to Punta d'Arenas) must pass in their route to find the Indians. We anchored that evening at the Cape, and landed some armed men, to kindle large fires to attract and bring off, if possible, the before-mentioned men; but in this they failed. In the afternoon we again proceeded to Punta d'Arenas, to examine the remains of provisions, &c. there, and to post a notice of what had occurred, in case of any ships calling there. While here I made the accompanying Sketches of the Stockade; for we all landed to see the place where so many atrocities had been committed, and to have each individual spot pointed out to us.

We now proceeded to Fort Famine. After picking up the schooner at Plaza Parda, we proceeded with her through Smith's, Sarmiento, and Messini Channels; and, after giving her a good offing, left her to pursue her voyage to Valparaiso. We had now about 160 prisoners on board, and were desirous of reaching Valparaiso as soon as possible. A sharp watch was kept, with so many desperate fellows on board; and a certain portion of both officers and men, besides the regular sentries, carried loaded pistols in their belts.

On the morning of Sunday, the 15th, we reached St. Carlos Chilos, and to our surprise found that the *Florida* had arrived the evening before, and been given up to the Chilian Government. It appeared that, after getting clear of the Straits, finding that many of the people were disaffected, Dann, with some others, got up a counter-revolution; and, putting Cambiaso and the other ringleaders in irons, succeeded, with the Captain and crew, in bringing her round Cape Horn, and giving her up to the Chilian authorities at St. Carlos, though at the imminent peril of their own lives being sacrificed almost every night. We took Cambiaso and the other ringleaders on board the *Virago*, and then proceeded with a strict search of both the vessel and the prisoners, who were then bestowed in two Chilian men-of-war which were lying at St. Carlos; the women remaining on board the barque. An officer and some men were then sent on board her from the *Virago* to assist in taking her to Valparaiso, for which port all left together on Wednesday, 18th February.

Punta d'Arenas, the scene of the fearful tragedy, is a small penal settlement belonging to the Chilian Government. The Governor, Manios, was a Captain in the Chilian navy, brought up in the English service. A small force of soldiers, under Captain Salas, and a few settlers, originally convicts, with women and children, altogether 500 or 600 persons, were the population of the colony. Cambiaso had been placed under arrest for insubordination; but



ENTRANCE TO THE STOCKADE, WHERE THE BODIES WERE BURNT.

Dean v Hornby, as reported in *The Illustrated London News*

INTRODUCTION

Was Rix LJ right to dismiss the claimant's appeal in *Masefield AG v Amlin Corporate Member Ltd*[3] *(Masefield),* holding that no presumption of 'actual total loss' arose on piratical capture under a marine insurance policy under English law? Secondly, was Steel J right to hold[4], and Rix LJ to confirm, that piratical capture does not establish a 'constructive total loss'? What were the commercial and policy consequences of Masefield's claim failing? The growing academic and professional consensus is that *Masefield* settled the law; no presumption of 'total loss' either actual or constructive arises on capture[5]. It will be shown that although Rix LJ was right to dismiss the appeal as pleaded, his and Steel J's *rationes decidendi* are problematic and provide unsafe precedent, as the claimant's constructive total loss argument, differently pleaded, should have succeeded.

This evolution of 'total loss', from its adoption by English courts in the Eighteenth Century to *Masefield*, attracts little academic attention. This contrasts to the criminal and international law on piracy, which has prompted lively academic debate concerning whether there is a right of 'hot pursuit' by a navy into Somali waters, what criminal offences apply, and which courts might have jurisdiction. Little academic discussion exists of total loss in insurance law. Commentary in insurance practitioners' textbooks is largely direct quotation from post Marine Insurance Act 1906 cases, and it is suggested that because this academic analysis has not been done, these dicta are not understood by reference to their proper historical context, and are therefore misconstrued. There exist short 'current awareness' case commentaries by solicitors' firms, and a several were published following *Masefield,* but these merely indicate contemporary opinion, and do not help analyse the decision. The rules underlying total loss originated in early continental treatises such as Emerigon, and were discussed in a variety of textbooks pre-1906. However, there has been almost no academic analysis of this topic since 1906, despite the complexities of the caselaw. Even legal articles discussing the ethics of ransom payments do not deal with the insurance law issues[6]. Accordingly, this work is necessarily dependant on primary sources of law, as a detailed secondary academic commentary does not yet exist. Consequently an historically informed inquiry into the precise nature of capture in insurance law appears to be innovative.

[3] [2011] EWCA Civ 24, [2011] 3 All ER 554.
[4] [2010] EWHC 280 (Comm), [2010] 2 All ER 593.
[5] E.g. Robert Merkin and Kate Lewins, 'Case Note: Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua; Piracy Ransom and Marine Insurance' (2011) 35 Melb. U.L. Rev 717; Ashwin Nair, 'Masefield AG v Amlin Corporate Member Ltd [2010] 1 Lloyd's Law Reports 509' (2010) 24 Austl. & N.Z. Mar. L.J. 138.
[6] E.g. Paul Lansing and Michael Petersen, 'Ship-Owners and the Twenty-First Century Somali Pirate: The Business Ethics of Ransom Payment' (2011) Journal of Business Ethics 201 at 507-516.

0.1 JUDGMENTS IN *MASEFIELD*

0.1.1 FACTS

The *Bunga Melati Dua* was a tanker owned by a Malaysian state shipping company. The value of the vessel and the cargoes shipped was about US$80m. The claimant owned two parcels of bio-diesel shipped on board, with a declared insured value of $13m. These were insured on 'Institute Cargo Clauses (A)' ('ICC(A)'), covering, *inter alia*, theft of the cargo and piratical capture or seizure.

Somali pirates captured her on 19 August 2008, killing one crewmember. Ransom negotiations between the shipowner and pirates began on 20 August. By 15 September *Lloyd's List* reported that negotiations were going well. On 18 September the claimant served a 'notice of abandonment' alleging that it had been, or appeared to have been, irretrievably deprived of the cargo (and likewise the shipowner of its vessel) and thus its cargo had been actually or constructively totally lost. The date of that notice was, by agreement, treated as the date of the issue of proceedings.

Later, a ransom was paid. By 28 September 2008, the vessel had been released. She arrived at Rotterdam on 26 November 2008, where the cargo was discharged. The cargo had not deteriorated after capture, but had missed its market. The market for biofuel is seasonal and effectively closes after the end of September. Consequently the insured's bio-diesel had to be stored until the following year, when the parcels sold at a price substantially less than their insured values. The insured gave credit for the recovery made on sale, less expenses, and issued proceedings seeking the balance in the sum of about $7m.

The insurers adduced expert evidence from a consultant providing security advice to the international shipping community. His evidence was that the safest, most timely and effective means to secure the release of a ship's crew in such circumstances had regularly proven to be to negotiate and subsequently pay a ransom. Somali pirates were not ordinarily interested in keeping the cargoes, and there was no risk of the cargoes being discharged. As a result, there would have been a 'high expectation' that upon the vessel's release the cargoes would also be released. The vessel's detention for 41 days was close to the then average detention period of 37 days and within the then known range of 21-68 days (though the known range has increased to 2 years, 9 months[7]). The insurer observed that the cargo had been recovered, as

[7] Nick Meo, 'Longest Somali Pirate Ordeal ends for Iceberg-I Crew', in *The Telegraph*, 29 December 2012 (http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/9770677/Longest-Somali-pirate-ordeal-ends-for-Iceberg-1-crew.html).

was always likely, and argued that, effectively, the claim was not for physical loss, but for financial loss caused by delay and loss of/fall in the market, an excluded peril[8].

0.1.2 JUDGMENTS

At first instance, Steel J held that no total loss, either actual or constructive, had occurred. Additionally, he held that public policy did not oppose ransom payments, so that a ransom payment was a 'proper means' that an insured was expected to use, where appropriate, to recover property. Masefield appealed, but abandoned its appeal against his findings on constructive total loss, limiting its appeal to actual total loss. Dismissing the appeal, Rix LJ held that, notwithstanding *Dean v Hornby*[9], a presumption of actual total loss on capture did not arise. He ruled that, as in any hostage situation, the parties must 'wait-and-see' what the result of the capture actually was. In *Masefield* the property was eventually released; consequently there had never been a total loss. Additionally, he confirmed that no public policy discounts ransom payments as a 'proper means' of recovering property from pirates. As it could not establish a total loss by capture, Masefield's loss was characterised as an excluded partial loss due to delay and/or a fall in the market[10].

0.1.3 POLICY ISSUE: PARTIES' COMMERCIAL INTENTION

Arguably, the result did not reflect the parties' intention when fixing the policy. Both parties must have known, or inferred as common business sense, that for Masefield to earn a profit, the cargo had to arrive within the annual season for biofuel. Although the insured's cargo was captured and its commercial relationships with intended buyers disturbed, it was uncompensated. Masefield suffered a further loss in storing the cargo until eventual sale. Although not party to the ransom negotiations, it was effectively bound to wait to discover whether they proved successful. Conceivably, as a ransom payment was made by the ship-owners, a cargo interest becomes potentially liable for contributions to the ransom payment as general average, regardless of its wish to pay. The parties, by agreeing the ICC(A) clauses for the voyage, had expressly incorporated piracy risks in mind of the sort operative in Somalia. Other ICC policies, presumably for a lower premium, excluded piracy. All policies exclude delay: accordingly, it was not possible to purchase more comprehensive cover against piracy than the ICC(A) policy. The facts of the casualty had been predictable, conforming to known patterns of Somali piracy. *Prima facie*, the objective commercial intention of the insured - and

[8] Marine Insurance Act 1906, s 55(2)(b), codifying the rule established in *Taylor v Dunbar (the Leopard)* (1869) LR 4 CP 206 and *Pink v Fleming* (1890) 25 QBD 396 (CA); the insurer on ship or goods is not liable for loss proximately caused by delay, although the delay is caused by a peril insured against; cf. Halsbury's Laws, vol 25 (2003) at 350.
[9] (1854) 3 El &Bl 180 (1854), 118 ER 1108 (KB).
[10] *Masefield* (n 4) at [13].

other policy holders under ICC(A) clauses - was to have cover for exactly the sort of losses that occurred.

0.2 LEGAL ISSUES ARISING FROM *MASEFIELD*

Both judgments turned on the meaning of 'total loss' in a marine policy. A total loss is one on account of which the assured may recover from the underwriter the whole amount of his subscription[11], in return for 'abandoning' the subject matter (if anything survives) to the insurer. Total losses contrast to partial losses, payments to reimburse an insured for specific recoverable losses. As many standard-form policies restrict recovery for constructive total loss, Rix LJ's judgment in *Masefield* raises the question; 'when can an actual total loss on (piratical) capture occur?' Both judgments raise the issue; 'when can an insured establish a constructive total loss following (piratical) capture?'

These questions matter to policy holders. If they cannot recover for total loss, they receive little or no compensation from the insurer, regardless of their actual financial loss: the sums recoverable for a 'partial loss' are comparatively small, if not totally excluded. The authorities provide no example of a partial loss by 'piracy/capture' after capture and recapture. Losses arising from these perils, absent physical damage, fall within 'delay', an excluded peril. The authorities therefore concern whether a total loss occurred. Further, both cargo and ship-owners foreseeably remain contractually liable to third parties, in which the capture puts them in breach, and a late payment following 'wait-and-see' might be as commercially injurious as a non-payment. An insured might have to pay salvage charges, which might include ransom payments. These policy reasons are grounds for criticism of the judgments. Conversely, supporting the judgment s in *Masefield,* the authorities indicate that ransom payments have tended to be small in relation to the potential loss suffered.

The growing consensus is that *Masefield* settled the law: an insured, under English law, must 'wait-and-see' if he is 'irretrievably deprived' of the subject matter before recovering for a total loss. In summary; *'mere seizure of a vessel or cargo by pirates is insufficient to ground a claim in either actual or constructive total loss'*[12]. Some commentators erroneously go further, stating that piracy cover is excluded entirely from these policies, so that a specific

[11] Arnould, 17th ed, 28-01.
[12] E.g. Michael Underdown '*Case Notes*; *Masefield AG v Amlin Corporate Member Ltd'* (2010) 21 ILJ 62 (referring to the first instance judgment).

war/piracy risks clause must be purchased[13]. As Masefield was eventually reunited with its cargo there is considerable logic in the judgments, which apparently follow established authority[14]. However, in their proper context, these authorities are doubtful.

0.3 CAPTURE IN CONTEMPORARY LAW

The 'contemporary' law on capture is twofold: (a) the 'unlikelihood' test for constructive total loss, and (b) the 'wait-and-see' approach for actual total loss. What is the authority for these contemporary tests?

0.3.1 THE 'UNLIKELIHOOD' TEST FOR CONSTRUCTIVE TOTAL LOSS ON CAPTURE

The idea that a claimant must demonstrate that it is 'unlikely' that the property can be recovered to establish a constructive total loss originates in Storey J's dictum in the United States case of *Peele v Merchants Insurance Company* (*Peele*)[15]:

> *"…the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage[16]."*

This was widely copied in English and American textbooks. It was taken as the classic definition of a constructive total loss from Arnould's early editions, and remains in the 17th edition[17]. It was paraphrased in discussions concerning arrest or embargo, and was erroneously stated to derive from Emerigon:

> *'There is a right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo may be of long, or, at all events, of very uncertain continuance[18]'.*

Selective quotation of textbooks suggests that 'uncertainty' was the settled test of constructive total loss (then *'total loss without abandonment'*) on capture. *Polurrian v Young*[19] established

[13] E.g. Christopher Douse 'Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry' 35 Tul. Mar. L.J. 267 (2010x2011) at 279-80.
[14] *Masefield* (n 3) at [77]; The authorities principally relied on were *Polurrian v Young* [1915] 1 KB 922 (CA), (1913) 84 LJKB 1025, [1914-15] All ER Rep 116, *Marstrand Fishing Co Ltd v Beer (the Girl Pat)* [1937] 1 All ER 158 (KB), and *Kuwait Airways Corp v Kuwait Insurance Co* (*KAC v KIC*) [1996] 1 Lloyd's Rep 664 (QB) (reversed on other grounds [1999] 1 All ER (Comm) 481 (HL)).
[15] (1822) 19 Fed. Cas. 102.
[16] *Peele* at [111]-[112].
[17] 17th ed at 29-01.
[18] Arnould (1848) p.1077.

that the new statutory test was 'unlikelihood' of recovery, modifying this earlier test of 'uncertainty'. In *Masefield*, this was applied by Steel J, and endorsed by Rix LJ. It appears to be settled law (e.g. Arnould (17th ed) 29-04ff).

However, a proper reading of the authorities reveals that no test of 'unlikelihood' was applied before 1906. First, *Goss v Withers (the David and Rebeccah)('Goss')*[20], the earliest and still the leading English case on capture on a valued policy, permitted a total loss where there was a *strong* hope of recapture and restoration. The right to claim was 'not suspended', i.e. there was an instant right to abandonment on capture[21]. *Polurrian* was therefore based on an incorrect understanding of the common-law of capture. Indeed, textbooks and cases record a '*prima facie* right of abandonment' and an 'instant right of abandonment' on capture. This makes little sense where there is a settled test of 'unlikelihood' of recovery, and none where a 'wait-and-see' approach applies. Chapters 1-3 investigate the law before and in 1906. Chapter 4.2 questions how the modern law of constructive total loss has modified the pre-1906 law and argues that there was between 1756 and 1906 a presumption of total loss on capture, which should survive as the contemporary law.

0.3.2 THE 'WAIT-AND-SEE' APPROACH TO ACTUAL TOTAL LOSS AFTER CAPTURE

Where capture does not establish a constructive total loss, the courts have indicated actual total loss only occurs if property is destroyed, though severe damage might suffice. A 'wait-and-see' approach was described by Rix LJ as the 'classic response to a hostage situation'. This approach originated in *Dawson's Field* (1972)(unreported), *Kuwait Airways Corp v Kuwait Insurance Co*[22] (*KAC v KIC*)(cf. *Scott v Copenhagen Reinsurance Company (UK) Ltd*[23]), and initially applied to aircraft. It does not appear in maritime law before *Masefield.* Interestingly, 'wait-and-see' was *explicitly* rejected by Mansfield LCJ in *Goss v Withers*. Accordingly, *Masefield,* in its historical context, is an innovative case, and 'wait-and-see' is a novel approach to determining an insured's position. Indeed, 'wait-and-see' presupposes that hostage-and-ransom is an innovative peril, not covered by 'capture' or 'seizure'.

The 'wait-and-see' approach creates commercial uncertainty. It is unclear what events finally prove loss, short of later physical destruction or severe damage, which might be long delayed

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[19] *(The Polurrian)* [1915] 1 KB 922 (CA), (1913) 84 LJKB 1025, [1914-15] All ER Rep 116
[20] (1758) 96 ER 1198, (1758) 2 KENY 325, (1758) 2 BURR 683.
[21] (1758) 2 BURR 683 at 696.
[22] [1996] 1 Lloyd's Rep 664 (QB), [1999] 1 All ER (Comm) 481 (HL).
[23] [2003] EWCA Civ 688.

or never occur[24]. The ostensibly pragmatic 'wait-and-see' approach is not necessarily the most commercially desirable one; courts should help commerce, and offer more assistance to parties involved in litigation than simple observation. Chapter 4.3 explores the 'wait-and-see' doctrine and its proper application to capture situations. Many of the disadvantages of the approach to actual total loss fall away if a presumption of constructive total loss is recognised and applied.

Together, 'wait-and-see' and the exclusion for delay – if no presumption of constructive total loss applies - effectively deprive an insured of cover on the voyage or time, not simply the physical subject matter. Without wait-and-see, the insured could in principle abandon immediately and recover from the insurer the expected value of the cargo as if the voyage had not been interrupted, and the cargo had arrived in time. Wait-and-see requires the insured to delay until the situation is clarified, and precludes him from claiming any loss to compensate for any delay if there is ultimately recapture or release. Effectively, this nullifies one significant part of the insurance. Arguably, the purpose of insurance is to share the risk of an individual shipowner with shipowners as a body; here that purpose is defeated because although insurance on voyage/time is nominally taken out, it is rendered ineffective in all circumstances short of destruction, although possibly a capture lasting a year might suffice (see 4.2.5).

0.3.2 RANSOM

Finally, by refusing to discount ransom payments as a proper means of recovering property, *Masefield* requires an insured to support the process of ransoming stolen property from pirates. An insured might have good reason not to wish to negotiate ransom, either because of commercial pressures, a moral stance, or most importantly, for foreign-domiciled entities (in particular, American companies), so as not to infringe their domestic anti-terrorism laws in supporting the process of ransom. A separate issue arises concerning whether ransom should be a proper means of recovering property. This issue appears settled from earlier authorities, e.g. *Goss,* which discounted ransom at a time when it was a legal means. It appears to conflict with the instant right of abandonment which arguably remains good law. However, there is insufficient space to properly consider the issue here.

[24] Compare Rix J/LJ's comments in *KAC v KIC* (n 21) and *Masefield* (n 4) concerning whether condemnation by a prize court establishes actual total loss.

CHAPTER I ORIGINS OF THE PRESUMPTION OF TOTAL LOSS

When, in insurance law, has an insured 'lost' his property? It will be shown that in the pre-1906 law a presumption of total loss arose immediately following capture. Before 1756, it was thought that property law or prize law would determine the issue. Roman property law is briefly introduced to explain the frequent references in early cases. The presumption of total loss entered modern insurance law in three judgments of Mansfield LCJ, specifically excluding these property rules from capture claims on policies, creating a separate law of insurance. The presumption contrasts to the 'wait-and-see' approach originating in *Dawson's Field* applied to '*deprivation of possession simpliciter'*, and applied in *Masefield.* Its origin must be set out at length, as its existence has been entirely overlooked in contemporary cases. An understanding of why the law abandoned a 'wait for condemnation' approach is essential to properly analyse the decisions post 1906.

1.1 ROMAN LAW

Roman property law developed doctrines permitting the transfer of title on capture in war, but preventing legal transfer on theft/piracy. Gaius's Institutes provided '*Capture from an enemy is another title of property by natural law*[25]*'*, and later *'...what a man had captured from the enemy was held to be most distinctly his own*[26]*'.* Justinian's code confirmed a captor took legal title to enemy property captured; '*Things again which we capture from the enemy at once become ours by the law of nations*[27]'. This introduced time: the property passed *immediately*. Comparison was impliedly drawn with ownership of captive wild animals. Ownership ended the moment they appeared to make good their escape. Accordingly, an enemy took good legal title *immediately* on capture: a re-captor took good title to property by the same doctrine.

Under Roman law, piratical capture differed from enemy capture. Pirates gained neither legal 'ownership' nor legal 'possession' of captured goods or persons[28], despite taking factual possession or control. Whately cites the doctrine of postlimity; *"Ea quae piratae nobis eripuerunt, non opus habent postliminio, quia jus gentium illis non concedit ut jus dominii*

[25] *Gai Institutiones*, trans. E. Poste, 4th ed., (Oxford 1904), Book 2, s 69.
[26] *Ibid.* Book 4, s 16.
[27] The Institutes of Justinian; Bk II s. 17. (in Moyle, J. B.; The Institutes of Justinian, 5th ed., Oxford, 1913).
[28] Whatley, A.T. 'Historical Sketch of the Law of Piracy' 3 Law Mag. & Rev. Montly J. Juris. & Int'l L. Both Leg. Prof. Home & Abroad 4th ser. 618 (1874) at 622.

mutari possint[29]*." The same principle was applied to the case of people taken by pirates "a piratis capti liberi permanent"'.* It followed that where goods were re-captured, they would be restored to their rightful owners – the re-captor took nothing[30].

Roman property law, following the revival of civil law in late medieval Europe, underpinned mercantile law. However, its general principles were modified by municipal laws. Frequently, these specified a proportion of the value of the property recovered as owed to the re-captors as salvage, (e.g. the English Prize Acts), or exceptionally granted the property to the re-captor if the pirate had kept it for more than 24 hours (e.g. Venetian law). The rules were later simplified[31]. Nevertheless, the classical Roman law rule that property should be restored to the original owner after piratical capture, to the total exclusion of the re-captor, endured[32]. As discussed in *Goss*, property law created uncertainty for insurance; when is property lost if an owner's entitlement to its return endures indefinitely? Mansfield LCJ excluded these problematic property laws; insurance law substituted its own presumptions[33].

1.2 PROPERTY LAW EXCLUDED

Where the subject matter is destroyed or irreparably damaged[34] identifying a total loss is straightforward. The difficulty lies where property may be simply lost to its owner. In s 57 of the 1906 Act, the words '*irretrievably deprived*' contrast to the previous two possibilities in that section; the subject matter may survive *in specie*, even undamaged. Section 60(2) concerns loss of 'possession'. But what does 'deprivation' or 'loss of possession' mean? Possession means either actual physical control or legal entitlement in property law. However, an owner's continuing legal entitlement is unhelpful; a thief or pirate has not respected it (although it might become relevant if property were adjudicated in a prize court, and it does govern whether notice of abandonment is necessary). Consequently, it was ruled in *Goss v Withers* that property law was excluded in answering the question of when an insured totally lost his property for insurance purposes. The reason why was that property law

[29] *Digest. do capt et Postl. Revers, Digest. xlix., xv. 19: 'What pirates have seized from us have no need of reassignment because the law of nations does not enable them to change rightful ownership'.*
[30] Citing *Grotius 11, xvii. 9; iii., ix. 16.*
[31] Bykershoek, p.36.
[32] Whateley, at 622ff.
[33] See Chapter II; *Goss v Withers* (n 21).
[34] The law struggled to define a shipwreck (in earlier cases, *naufragium*). Various tests were devised, such as whether it became a 'mere congeries of planks'; sunken but substantially intact ships caused difficulties in insurance law. Initially, these were actual total losses, but as salvage technology advanced, ships sunken in shallow water became constructive losses only. The language therefore evolved from 'destruction' to 'loss of possession'. This change did not alter laws on capture.

did not answer simply when an owner lost his property on capture that sufficiently satisfied commercial certainty[35].

In *Goss* the plaintiff held two policies, one covering the vessel, the other her cargo of fish, from Newfoundland to a European port. England was at war with France. The vessel was captured by a French privateer but recaptured eight days later. During the capture, the fish started to spoil, and the ship was damaged in a storm. The plaintiff heard news of her capture and recapture simultaneously, and instantly abandoned alleging a total loss. The court considered whether the plaintiff had lost his interest in the ship on the capture, whether she had never been lost at all, and whether the property had been restored. Counsel for both parties argued the case under prize and/or property law.

The insurer argued that property passed in the case of enemy capture only on condemnation by a prize court. Mansfield took on judicial notice that in prize proceedings between owner and re-captor/vendee before the Court of Admiralty, capture was never 'complete' until condemnation. Legal property never passed before condemnation; indeed, a prize court could order restoration with compensation. Settled property law provided that on recapture, even several years and/or re-sales later, the owner retained legal ownership throughout[36] and had the right to take possession subject to paying applicable salvage charges to the recaptor under municipal laws. Absent judicial condemnation, statute provided that *'the ius postliminii is perpetual'*[37] – 'postlimity' applied even to 'enemy' captures. After enemy capture, a judgment was an event that the owner could expect to determine whether he retained or lost his property. Theoretically, captures in European waters would be adjudicated quickly. The system worked well for owners, and it suited major European states to support prize law. The starting point for insurance law was prize: condemnation transferred the property from owner

[35] *The Bamburi* [1982] 1 Lloyd's Law Reports 312 at 316.

[36] Mansfield LCJ cited a prize law case in the time of King Charles II, heard before Sir Richard Floyd, restoring a ship in the possession of the enemy for fourteen weeks, because there was no condemnation, and also *The East-India Company* v. *Sands*, cited in *the Ruth* (n 131) where an owner had good title against a vendee 'after a long possession, two sales and several voyages'. In *the Ruth* it was said "*the law is clear that not the length of time, but the bringing intra praesidia into a place of safety is that which divests the property*". The rule that an owner continued to have good title was, *inter alia*, restated, *obiter* by the Privy Council in *Our Sovereign Lady The Queen v Augustus McCleverty* (1871) 17 ER 229, and seems to have been well accepted. On property on capture generally, *Our Sovereign Lady* confirmed that a pirate might lawfully have his own property. It seems that a pirate's own property could be condemned by the Admiralty Court, after which it would vest in the Crown, as per *The Marianna* (1835) 3 Hag Adm 206. Property found on board a pirate ship, and condemned as *droits* of Admiralty, could be granted to the original owners upon a memorial to the Crown. In practice, inconsistently with the rights of any prior non-piratical owner, property captured was presumed to be prize, and all prize was the absolute property of the Crown, and there was no property in it before adjudication (*per Re Banda and Kirwee Booty (1866) LR 1 A&E 109*). This serves to illustrate the potential complexity of prize litigation, which did not necessarily produce quick or easy judgments. For insurance law, if an English prize court took possession of property, it was considered to have been removed from the original owner, pending its restitution.

[37] Mansfield LCJ in *Hamilton v Mendez (The Selby)* (1761) 1 Black W 277 at 279, citing the Naval Prize Act 1743, 29 G. 2 c. 34, s. 24.

to capture. Before condemnation property did not pass. Problematically, in *Goss*, there was no condemnation. Had there been no loss?

In practice, the 'wait-for-condemnation' approach was imperfect. Enemy capture might not necessarily lead to a quick condemnation. Difficulties arose where vessels were captured on an outward voyage[38], or distant from a prize court, resulting in long delays before condemnation. The English partially resolved this by establishing colonial Vice-Admiralty courts[39], but it persisted in other jurisdictions. Consequently, prize law potentially left parties' rights suspended indefinitely after capture. Moreover, pirates would not (and masters acting piratically, i.e. beyond their state-sanctioned jurisdiction, might not), lay captures before prize courts. This undermined the 'wait-for-condemnation' approach, as the capture might never be adjudicated. If insurance law followed prize, an insured would never be able to recover under his policy without condemnation. This would cause great injustice. Cases on wagering policies resolved this through the doctrine of the loss of the voyage (see 2.5). The 'wait-for-condemnation' approach (anticipating the post-1970*s* 'wait-and-see' approach) was consequently deemed inappropriate for insurance law, and was not adopted in wagering policy cases. *Goss*, the earliest authority on a policy for interest, established that 'wait-for-condemnation' likewise did not apply to valued policies. What alternative was there to 'wait-for-condemnation following prize law?

In submissions in *Goss*, counsel and Mansfield LCJ explored Roman property law, as part of the *lex mercaturia*, seeking doctrines identifying when property transferred by capture absent condemnation. The *spes recuperandi* was central to all these, but there was no consensus in contemporary treatises on the timing. One doctrine stated property passed to enemy captors after 24 hours[40]. Another stated when no *spes recuperandi* remained[41]. A refinement was that the *spes recuperandi* ended when the prize reached an enemy port (*infra praesidia)*. Another, envisaging capture in battle, stated bringing into the enemy fleet ended the *spes* (*infra classis*)[42]. Another was that property law followed the terms of the Prize Acts: possession passed '*when the battle, and pursuit were over*'. Less specific was that *'every effective*

[38] (n 21), 3 Keny 325 at 333.
[39] Sweeney J, 'The Silver Oar and Other Maces of the Admiralty: Admiralty Jurisdiction in America and the British Empire' (2007) 38 J. Mar. L. & Com. 159.
[40] Citing Grotius.
[41] Citing Bynkershoek.
[42] Bynkershoek wrote that *intra praesidia* had a flexible meaning, either into a fleet or port as appropriate to the circumstances. The important point was that there was no *spes recuperandi* by physically recapturing the vessel. He admitted that the '24 hour rule' had been alleged, attributing its origin to an innovation of Grotius upon the Roman law. Bynkershoek argued against it being a workable rule, and admitted evidence to demonstrate that no state adhered to it as a matter of law, save once in 1624, where the judges had been *'seduced by… Grotius'*. See Bynkershoek, Cornelius, *Quaestiones Juris Publici, Bk I*, trans Du Ponceau, Peter Stephen; 'On The Law of War' American Law Journal, Vol. 3, Issue 2 (1810), pp. 1-198 at Ch IV., 3 Am. L.J. 1 (1810).

depravation of possession' changed legal ownership. Yet another was that property passed if the vessel was on-sold by the captor. Evidently neither domestic nor international mercantile law was settled on when legal title passed after capture. The parties avoided mention of the further foreseeable complication that had the capture ever been 'completed', a re-captor might have been entitled to the ownership of the property, excluding the original owner[43]. Mansfield's conclusion was that property laws did not help resolve the dispute with the insurer. After noting that the law of property was 'quite uncertain' as to the precise time that property might pass, he stated that the issue of legal property in the subject matter only mattered between owners and recaptors[44]. Rather, '*controversies between the insured materially differ from those between owners and re-captors*'. Accordingly, the issue of whether legal ownership had ended did not arise for determination in an action on a valued policy: insurance law was distinguished from property law.

In *Hamilton v Mendez* (*The Selby*)(1761), Mansfield LCJ repeated:

> *'…arbitrary notions concerning the change of property by a capture, as between the former owner and a re-captor or vendee, ought never to be the rule of decision, as between the insurer and insured upon a contract of indemnity…*[45]*'.*

This corrected advocates who misunderstood the rule in *Goss,* arguing that property *itself* passed immediately on capture. The law that, for insurance purposes, property law was immaterial has never been overruled. There is no authority for the proposition that this rule applied only to cases of imperfect capture by an enemy and not to pirates. It was repeated in this wide sense in pre-Act academic works, reflecting the settled understanding of the profession and insurance industry.

Occasionally, advocates ignored this rule excluding property law. In *the Selby*[46], the insurer argued, citing civil/property law authorities, that where the vessel had never been taken *'in loco securo'*, there was never a total loss; that a taking at sea could never be a total loss[47]. Rejecting that, Mansfield ruled, '*by this capture, while it continued, the ship was totally*

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[43] *'movable goods carried <u>intra presaedia</u> of the enemy, become clearly and fully his property, and consequently, if retaken, vest entirely in the recaptors. The same is to be said of ships, carried into the enemy's ports, and afterwards recaptured, so that no property or right to them remains in the former owner…*' Bynkershoek, (n 42). It followed that, where the capture had not been 'completed', following property law, the owner would be entitled to restoration without salvage (Ch XVII); the obligation in English law to pay salvage arose from Prize Acts, not the *lex mercatoria*.

[44] The typical dispute was whether the owner had to pay salvage, Bynkershoek (n 42), p.133.

[45] (1761) 1 Black W 277, 2 BURR 1198, (1761) 97 ER 787; 2 BURR 1198 at 1209.

[46] Ibid.

[47] *Ibid. at* 1201, citing especially *Roccius's Notabilia*, p 50, para 204, Magens, *Essay on Insurances*, vol 2, p. 174ff.

lost'[48]. In *Parsons v Scott (the Little Mary)*(1810)[49], counsel argued for a possible transfer of property on capture. These submissions were unsuccessful, and were not the *ratio* of any decision until after the Act[50]. Accordingly, whilst isolated *dicta* can be found seeking to refer to the insured's continuing ownership, especially in submissions in earlier cases, they remain unpersuasive. Property law discussions on capture do appear in textbooks, but restricted to a prize law context. Consequently after *Goss*, total loss in insurance law became a separate branch of law to property and prize law. This distinction remains essential for insurance law to operate sensibly in cases of theft or piratical capture.

Mansfield's rule excluding property law was long the settled opinion of the courts. The House of Lords confirmed it in *Anderson v Marten*. The Earl of Halsbury stated, '*in the present case, as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed…*'[51]. The rule is the foundation for the insured's 'instant right of abandonment' immediately on hearing of the capture. If the court must wait for the adjudication of property law, it would deny the insured this immediate right of abandonment. The courts never, until *Masefield,* suspended an insured's right on the basis of his continuing legal entitlement: property law and the *spes recuperandi* were irrelevant (although it crept back in gradually, e.g. the High Court in *The Romulus* (see 2.1.1), *Panamanian Oriental Steamship Corporation v Wright* (1970)[52] (see 4.3.3). Steel J reintroduced property law considerations into *Masefield,* which provides grounds for doubting his ruling on constructive total loss (5.2). If property law was irrelevant, how did the courts test whether cases of capture were cases of total loss? The answer was by a presumption of total loss.

[48] *Ibid. at* 1209.
[49] (1810) 2 Taunt. 363, (1810) 127 ER 1118.
[50] E.g., the exchange in defendant's submissions in *Lozano v Janson* (n 146): counsel submitted, *'[the loss] might have been total, had The "Newport" been captured as a prize, in which case the property in the goods would have been changed by the capture: but she was not taken as a prize. Moreover, the goods were taken merely ex necessitate, because they were in the ship; nor did the judgment of the Court at St. Helena change the property in them*'. Crompton J. replied; *'If the owner is ultimately deprived of the goods, it is quite immaterial whether or not the property in them was changed by the seizure.'* at [172].
[51] Although the judgment at first instance, and apparently submissions before the Court of Appeal, did rely on property law, by the suggestion that a condemnation 'related back' to the time of capture, so that property passed, for insurance purposes, from the moment of capture. While not disagreeing with this, the Court of appeal and House of Lords distanced themselves from this property law speculation, and gave judgment on insurance law grounds.
[52] (1970) 2 Lloyd's Rep 365, [1971] 2 All ER 1028

1.3 PRESUMPTION OF TOTAL LOSS ON CAPTURE ESTABLISHED

Mansfield LCJ was the first judge to articulate the doctrine of total loss applicable to policies for interest. In *Goss v Withers*[53] the ship was captured in the English Channel, where 'English cruisers sailed daily in the hope of (re)capturing vessels'. Counsel for the insurer submitted that there had been a *strong* hope of recovery after capture, and attempted to distinguish capture in the Channel from capture upon the open seas, where the *spes recuperandi* was remote. The insured did not contradict that the *spes* was strong; it is reasonable to conclude that the insured conceded this. Mansfield LCJ accepted the strong *spes*. Had it been in issue, there might have been no total loss, or a 'wait-and-see'. Accordingly, as it did not feature, it is reasonable to conclude *ex silentio* that the *spes recuperandi* was irrelevant, being part of a property not insurance law test[54]. Had it been in issue, Mansfield LCJ could not have stated that the ship was, while in the possession of the enemy, a total loss. Instead, having held that the question of property law was irrelevant to whether there was a total loss, Lord Mansfield CJ ruled:

> *'By the capture the insurers became liable, though never carried into port; and though there may happen a recapture afterwards, that will not vary the case, nor make any difference, as to the contract by which the insurer agrees to run the risk and indemnify the assured; and though the ship be never condemned, the contract is equally binding, ex. gr. A ship may be taken by a commission from a foreign State, between whom and us there is no war, solemn or otherwise, and in that case there can be no condemnation; so in the case of pirates. Yet a capture, in either of these cases, is, as between the insurer and insured, the same as a taking by an enemy at open war, &c.'*[55]

So Mansfield LCJ found that the insurers were liable for a total loss on capture, ignoring the property law rules. There was a total loss on piratical capture. There was a total loss even where a ship was taken by a non-enemy state, where the end result would probably be judicial restoration to the owner. He continued;

> '*Certainly here was a total loss at the time of the capture, and for eight days after; and it is as certain, that at that time the assured had a right to come upon the insurers as for a total loss, and if any thing should thereafter be recovered by re-capture, &c. to abandon to the insurers*'[56].

Clearly, the *spes recuperandi* continued after a capture. However, that did not mean that a 'wait-and-see' approach had to be followed;

> '*…no capture is so total a loss that it is impossible any-thing can be recovered; she may be re-taken, and, be it at ever so great a distance, a right accrues to the owner,*

[53] (n 21).
[54] (n 21); at 337-338.
[55] 2 Keny 325 at 342
[56] 2 Keny 325 at 344

> *paying salvage… this possibility shall not suspend the right the assured had to recover on the contract, but he might abandon his interest in such possibility to the insurer*'[57].

So there was an 'instant right of abandonment' which was 'not suspended'. Mansfield explained that he considered a ship while captured to be equivalent to a ship totally submerged, as it had ceased to exist, from the insured's perspective[58], because it was of no commercial utility while captured. Accordingly, *Goss* established a clear rule excluding the *spes recuperandi* as an issue between insurer and insured. The *spes recuperandi* did not fall to be argued on the balance of probabilities. 'Wait-and-see' was not applied. Accordingly, the insured suffered no delay by waiting for condemnation, and did not have to argue that condemnation was unlikely or even uncertain; both arguments potentially causing delay and increased costs. This judgment cannot be distinguished by interpreting the case as a constructive total loss as a result of the damage and high cost of repair (cf. a loss within s 60(2)(i)(b) of the Act), for the judgment was written on the basis that the loss *was* and *continued* total. The loss was total while the capture subsisted, despite the strong *spes recuperandi* persisting. Further, the possibility of ransom (then both lawful and commonplace) was raised in argument, dismissed as irrelevant, and did not form part of the judgment.

Mansfield's second reported case of capture was *the Selby* (1761)[59]. The plaintiff held a policy on a ship on a voyage from Virginia to London. She was taken by a French privateer, but recaptured by the Royal Navy 17 days later. A month after the vessel was returned undamaged to England, the plaintiff abandoned to the insurer. In an interim judgment, a total loss was found. On appeal, it was found to have been converted to a partial loss by the recapture. Though dismissing the claim, Mansfield LCJ confirmed: (i) that the question of property law was irrelevant since '*the ius postliminii is perpetual'*; and (ii) that it was not controversial that '*while the ship was in the hands of the enemy, it was a total loss*[60]*'*. By asking whether the loss *ceased* to be total on recapture, he reinforced the rule that the loss *was* total while the capture subsisted.

[57] 2 Keny 325 at 344
[58] 2 Keny 345; 2 Burr 698. The test of total loss on a shipwreck changed with time. At this time, shipwreck appears to have been a simple case of 'total loss': as salvage technology improved the test became an impossibility of raising the vessel (a constructive total loss, cf s 60), or whether the vessel was destroyed as a ship or a 'mere congeries of planks' (an actual total loss). This change occurred later than this statement, and the precise timing of that change is outside the scope of this work.
[59] (n 44).
[60] *Ibid* at 279.

Mansfield's next relevant contribution was in *Milles v Fletcher (the Hope)*(1779)[61]. The ship, sailing to London, was captured by American privateers, but recaptured and taken to New York. Considering the recapture, Mansfield stated that '*it continued a total loss'*. This confirmed that he considered the vessel and cargo a total loss during the capture, in line with his previous decisions. In the circumstances the damage was so great that the cost of repairs exceeded 50% of her value, so falling within another rule established in *Goss v Withers* allowing a total loss to continue after recapture. He stated that the whole of the law on capture and recapture could be found summarised in *Goss* and *the Selby*[62].

Finally, in *Kulen Kemp v Vigne (the Emanuel)*, which was a policy on a wager, Mansfield LCJ stated that an insured on a policy for interest could abandon for a 'temporary capture'[63]. Mansfield LCJ referred to a presumption (*"by construction"*) of total loss on capture:

> *'In effect, there was only a temporary capture, and though by construction a temporary capture is such a loss, as that an assured upon interest is warranted in abandoning at the time, if he please*[64]*'.*

The Emanuel provides a further *obiter* indication for the presumption of total loss, provided that a notice of abandonment has been given. It did not suggest the presumption of total loss on capture depended on the duration of the capture promising to be long or uncertain. The case further confirmed that the 'loss of the voyage' applied to valued policies (see 2.5).

Accordingly after Mansfield LCJ, the starting point for the test on a valued policy was that a vessel was a total loss while it was in the captor's possession. Capture *simpliciter* did not apparently generate litigation on this point. It can be inferred that insurers accepted losses, and did not resist or delay claims by arguing for a hope of recovery; settled law does not usually generate litigation. The reported cases only concern situations where recapture had occurred. It was clearly stated in *Goss* that it was possible for a loss, once total, to become a partial loss, or indeed no loss at all, by the property being restored to the possession of the insured. This does not undermine the presumption on a subsisting capture, as the *spes* was irrelevant while it persisted. The court looked only to the present facts, not to the future probabilities, however strong. The *spes recuperandi* was not raised again in relation to capture cases for over 100 years. Academic authorities, English and American, repeated Mansfield's judgments in substance[65]. This presumption was settled law.

[61] (1779) 1 Doug 231, [1779] ER 151.
[62] Ibid at 232.
[63] (1786) 1 T.R. 304 at 309.
[64] Ibid at 308.
[65] E.g. Marshall (1802), p 423.

CHAPTER II THE PRESUMPTION OF TOTAL LOSS APPLIED; 1786-1906

The presumption of total loss introduced into English law by Mansfield LCJ was subsequently refined during the following century. This chapter considers judgments on and dicta from authorities on capture cases. The presumption of total loss was explained in three contexts:

i) Capture *simpliciter*, establishing total loss;

ii) Cases of recapture where the total loss continued;

iii) Cases of recapture where a total loss became partial or no loss.

The presumption interacted with three further relevant issues:

iv) When the rights of the parties were to be treated as finalised;

v) Whether the loss of the voyage continued to apply to valued policies;

vi) Whether there were circumstances in which a plaintiff was required to litigate in a prize court to recover his property.

This chapter incorporates early American jurisprudence on total loss claims following capture. The insurance laws of both states were identical on capture in the nineteenth century, save concerning when the parties' rights finalised. American judgments were widely adopted by English academic writers, and cited in English courts. Since the survey of American cases evidences a presumption of total loss in US law, it reinforces the presumption in English law. This chapter concludes by summarising the presumption of total loss as applied immediately before the 1906 Act. This thesis recognises that wherever the insured is stated in cases to have 'right to abandon', this means that an insured would recover for a total loss (explained at 2.4).

2.1 CASES OF CAPTURE *SIMPLICITER*

Capture *simpliciter* - capture without recapture or release by the date when the rights of the parties were assessed - was never litigated. This thesis suggests it was settled law accepted by insurers before the Act: a ship captured was a ship totally lost; the absence of litigation denying a total loss on the basis of a continuing *spes* strongly supports this conclusion. *Obiter dicta* and academic commentary reinforce this presumption of total loss. Arguably, these authorities included 'deprivation of possession' within 'capture' or 'seizure'.

2.1.1 IN REPORTED AUTHORITIES

Reinforcing the cases decided by Mansfield LCJ, in *Dyson v Rowcroft* (1803) concerning a cargo which had spoiled (a similar situation to *Roux v Salvador*[66]), it was observed:

> *'When the loss arises from capture, the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship*[67]*'.*

Dicta in *the Friendship* (1816)[68] strongly support that statement. In *Kaltenbach v MacKenzie* (1878), it was stated that:

> '*if he hears his ship is captured in time of war, it must be obvious to everybody, unless the ship is re-captured, it would be a total loss*'[69].

This confirms the rule (though confining it to situations 'in war', contra established authority) expressed in *Dean v Hornby* that without more, a capture by pirates was a total loss. It was not, as applied in *Masfield*, a statement which required an investigation of the chances of future restoration.

In *Dean v Hornby*[70] the ship was insured on a time policy for one year ending April 1852. On her homeward voyage in December 1851, she was captured by pirates in the Straits of Magellan, but recaptured by the Royal Navy in January 1852. In April, the owners received intelligence of her seizure and recapture at the same time, and abandoned at once. The vessel was sold by the Prize master in August on the authority of the Admiralty Court, which held the proceeds pending the dispute between the owners and insurers[71]. The action was commenced in December. Campbell LCJ held that the owners could recover for a total loss. He said that once a ship was taken by pirates:

> '*then, in fact, a total loss has occurred*.'… '*The cases* …[establish that]…*once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration*[72]*. The right to obtain it is nothing; if that were enough to prevent a total loss; there never would in this case have been a total loss at all; for pirates are the enemies of all mankind and have no right to the possession'.*

[66] (1836) 3 Bing. (N.C.) 267, 132 ER 413 (Exchequer chamber).
[67] (1803) 3 Bos. & Pul. 473 at 477, (1803) 127 ER 257 (CP).
[68] (n 109).
[69] (1878) 3 C.P.D. 467 at 474.
[70] (n 9).
[71] That sale would in any case, as in *Stringer*, have been a sufficient ground to found a claim for a total loss.
[72] Whether ransom is a 'means of obtaining restoration' that insurance law should consider is addressed further in Chapter V.

This critically important statement explained the rule in *Goss* that the *spes recuperanti* was not considered, as arising from the legal presumption that a capture would be permanent. Concurring, Coleridge J stated the simple rule, supporting the presumption of permanent total loss:

> '*There was a capture by pirates; and, if that were all, there would unquestionably be a total loss*[73]*'.*

Dean v Hornby was cited by Rix LJ in *Masefield,* although the significance of the presumption set out in the case was perhaps overlooked, and *Dean* not put in context, because the earlier supporting authorities were not cited and their significance was not developed in argument (5.2). It was not appreciated that the possibility of ransom had been discounted in *Goss*. Consequently, it was considered, erroneously, that in *Dean*, the insured had been required to demonstrate irretrievable deprivation, where in fact the court had not required this.

In *M'Iver v Henderson*[74], the ship was captured and released with a foreign crew, who barratrously defeated the subsequent voyage. Ellenborough CJ, considering the situation where there had not yet been a restoration, confirmed that the insured had then a right to abandon:

> *'It has not been disputed, nor can it with any colour of argument be contended, that on the 4th of April 1814 there was not a sufficient ground for the abandonment of the ship, which was on that day made to the underwriters. The ship had been captured, plundered of thirteen out of sixteen of her guns, and of her stores, and possession of her was not restored till afterwards, i.e. on the 11th of May 1814.*[75]

This operated as a prima facie presumption, which the insurer could disprove only by evidencing that the capture had in fact ended. In *Lozano v. Janson* (1859)[76], it was confirmed that there was a *prima facie* presumption of total loss in capture. Counsel argued: *'At all events, the seizure did not prima facie constitute a total loss'.* Crompton J replied, '*I think that it did; and that the onus of shewing the contrary rests upon the underwriters'*[77]. Similarly, in *Mullett v Shedden (the Martha)*, Bayley J's observation in argument that, '*No circumstance has happened since the seizure to make the original detention less than a total loss*' supports the presumption of a total loss on capture and seizure[78].

[73] (n9) at 192.
[74] (1816) 4M. &S.575, (1816) 105 ER 947 (KB).
[75] *Ibid.* at 583.
[76] (1859) 2 E. & E. 160.
[77] (1859) 121 ER 61 at 172.
[78] (1811) 13 East 304, (1811) 104 ER 387.

Finally, the approach where there had been no recapture was illustrated by the House of Lords in *Andersen v Marten (the Romulus)*(1908)[79]. The insured vessel was captured on 26 February by the Japanese during the Russo-Japanese war while carrying coal to Russia. She was wrecked while in the custody of the captors. The Japanese Prize Court later condemned both vessel and cargo. The insured claimed loss by perils of the sea, which were covered under the policy. The insurers defended that claim alleging that she had already became a total loss by capture, which was not a risk covered. Loreburn LC noted that legal property had not passed, as she had not yet been condemned. He also noted that there was a *spes recuperandi: 'The owner still had a chance of recovering the ship and still remained so at risk that he might in law have insured her, and being insured already his policy was not necessarily at an end, though I cannot agree that he still retained possession[80].'* He nevertheless held, on 26 February, *'There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released[81]'.*

The Earl of Halsbury took a similar approach, and stated that the idea of a total loss existing from the moment of capture had been the settled law for 150 years (since *Goss*), and that '*it would be a bold thing to argue against a judgment of the full Court of King's Bench presided over by Lord Mansfield[82]'.* He confirmed that the question of the change of property was irrelevant, and quoted from *Goss*, though it was his view that the decision of the prize court had been clearly predictable in advance. He concluded, *'I should have thought that… it would have been impossible in an English Court to deny that there was a total loss to the owner on February 26[83]'* The unfavourable *spes* supported the decision, but was not part of the test applied.

Accordingly, the House of Lords in *the Romulus*[84] confirmed the decision in *Goss* that *spes recuperandi*, which necessarily exists in relation to every captured ship, did not defeat a claim for a total loss on capture. The court did not assess the *spes* at all, neither as uncertainty nor unlikelihood. The approach was simply to ask whether the vessel remained captured. It had, and therefore it was a total loss.

The presumption of total loss on capture was found in early American law. The policy considerations were expressed in *Rhinelander v Insurance Company of Pennsylvania (the*

[79] [1908] AC 344 (HL) (affirming [1907] 2 KB 248 and [1908] 1 KB 601).
[80] *Ibid. P.339.*
[81] *Ibid* at 339.
[82] *Ibid* at 341.
[83] *Ibid* at 340-1.
[84] (n 76).

Manhattan)[85] and *Mashall v Delaware*[86], which stated that the uncertainty involved with a capture situation justified an *'immediate right of abandonment'*. Neither case required the insured to prove an improbability of recovery while the capture subsisted.

Care is needed not to be misled by dicta concerning property law in *the Romulus*. Although the House of Lords confirmed the judgments below, there *ratio* differs. Channell J decided the case on a property law basis, and ruled that the ultimate condemnation 'related back' to the time of the capture. His authority for this was, as he admitted, doubtful[87]. The Court of Appeal upheld his judgment, but distanced itself from his doctrine of 'relation back'. It held that property law was immaterial, stating: '*for the authorities, … shew that, as between the assurer and the assured, the question of the transfer of property is not, or is probably not, a material consideration*' (Cozens-Hardy MR[88]) and *'In my opinion the doctrine of relation back is not involved in our decision in this case. The question is whether or not there was a total loss to the insured by reason of the seizure, and the fact that an authoritative determination of that matter could only occur at some future time appears to me not to affect in the least the question whether the loss occurred really at the moment of and by reason of the capture'* (Fletcher Moulton LJ[89]). Accordingly, the pre-Act authorities unanimously affirm that capture *simpliciter,* subsisting at the date of the action, was a total loss justifying an instant abandonment. The *spes recuperandi* was always ignored. The simple issue was factual possession/control at the time of the abandonment, and as in *the Romulus,* the rule was clear *'The ship was a total loss from the moment she passed into the possession of the [captors]*[90]*'*. If possession or control was lost by that date, there was a total loss.

2.1.2 IN ACADEMIC WORKS

That presumption expressed in authorities was repeated in academic works. Marshall stated the presumption in substantially the same terms as in *Goss*:

> *'and the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. For a ship is lost by capture, though she be never condemned, or even carried into any port or fleet of the enemy. It can never, therefore, be a question between the insurer and the insured, whether the capture be lawful or not, or whether the property be changed by condemnation, or by being carried into an enemy's port. A capture by a pirate, or under a commission, when*

[85] (1807) 8 U.S. 29, (1807) 4 Cranch 29.
[86] (1808) 8 U.S. 4 Cranch 202.
[87] [1907] 2 K.B. 248 at 255.
[88] [1908] 1 K.B. 601 at 607.
[89] *Ibid.* at 609.
[90] *Ibid.* at 342.

> *there is no war, does not change the property; and yet, as between the insurer and the insured, it is just upon the same footing as a capture by an enemy in open and declared hostilities: for whatever rule ought to be observed in questions of this sort, as between the owner and the recpator or his vendee, it can in no way affect the case, as between the insured and the insurer*[91]*'.*

This explains the logical consequence of the rule excluding the property law test between parties to insurance policies; the right exists to claim total loss on capture regardless of the insured's continuing property entitlement, or whether it has been adjudicated. It provides the additional example of a capture under a commission when there was no war. Ordinarily, this would lead to the captured vessel's restoration by the captor's prize court, but this expectation would not defeat or suspend the insured's right to recover. Elsewhere Marshall stated:

> *'and in every case of capture the insurer is answerable to the extent of the sum insured, for the loss actually sustained. This may be either <u>total</u>, as where the ship or goods insured are not recovered again; or <u>partial</u>, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage, and any other necessary expense the insured may have been put to for the recovery of his property*[92]*.*

This extract is inconsistent with the court assessing the *spes* at the time of action brought. Either the subject matter had been recaptured, or it had not. If it had not, it was a total loss. Where captors had 'possession', because the free use and disposal had been 'suspended or rendered uncertain', the situation was construed as total deprivation[93]. This extract, which summarises the academic commentaries and the decisions in all situations where the insured's property had not been recaptured by the date of the action, states that a subsisting capture was treated as a total loss with no enquiry into the likelihood of recovery.

2.2 RECAPTURE BY DATE OF ACTION WHERE TOTAL LOSS CONTINUED

There were two types of case where a ship was recaptured but a total loss continued. The first was where 'possession', lost by the capture, was not restored. The second was where possession was restored, but the loss continued.

2.2.1 <u>WHERE 'POSSESSION' WAS NOT RESTORED DESPITE RECAPTURE</u>

Recapture by a friendly ship did not necessarily restore possession to the insured. In *Mitchell v Edie (the Lady Mansfield)*[94], the vessel, '*... was not restored to the possession of the*

[91] Marshall (1802), p 423, expanding on Mansfield LCJ (n 21) Keny 325 at 342.
[92] Marshall, 1802, p.422-423
[93] Marshall, 1802, p.484.
[94] (1787) 1 T.K.609, (1787) 99 ER 1278.

insured, even though it was returned to a friendly port, as neither insured nor insurer had agents there'. In *the Friendship* (1816)[95], the policy was on a cargo of wheat, fish and staves from Quebec to Teneriffe. The ship was captured on her return voyage, and her cargo was plundered. She was recaptured, and sent by the recaptors to Bermuda, where there was an embargo on the export of provisions due to famine. While in the possession of the recaptors, the goods spoiled. Ellenborough LCJ held that there had been a total loss by the capture. Although the goods had been recaptured, they did not exist *in specie*, as a result of their deterioration. She was afterwards retaken by another ship, in a damaged condition. It was held that there was a total loss. Lord Ellenborough said:

> *'This seems to me to be a case of total loss, and on this ground, that, by the capture, a total loss occurred in the first instance…[and the insured abandoned in time]'*

Bayley J, concurring, stated the risk concerned the voyage to Teneriffe, and it followed that the goods and cargo had effectively never been redeemed from the capture. He said:

> *'At one period, doubtless there was a total loss, by the capture of the ship; circumstances might have intervened which would have changed this loss from a total into a partial loss… [in the circumstances] the ship and cargo never were effectually redeemed from capture; and the plaintiffs are entitled to recover as for a total loss'.*

Abbot J, also concurring, said:

> *'Capture operates as a total loss, unless it be redeemed by subsequent events… I do not consider an abandonment as having the effect of converting a partial into a total loss; but here the loss was total in the first instance, and continued so ever after.'*

Finally, Holroyd J stated that he was of the same opinion, and said:

> *'This was a total loss by capture, and has never ceased to be so'.*

The language in *the Friendship* supports the idea that a capture was presumed a total loss: if the action was brought while it lasted, the *spes recuperandi* was not investigated. The situation after recapture was different. In *the Friendship* the total loss continued on a separate ground: the destruction of the cargo, which could equally have been given as ratio. However, there was no suggestion in *the Friendship* that the rights of the parties were suspended because of the *spes* – it appears that the insured might have abandoned earlier and successfully claimed a total loss. The rule was that the possession had not been restored.

In *Holdsworth and another v Wise and others* (1828), the vessel was abandoned at sea, as it appeared to be unseaworthy. She was recovered by the crew of another ship, who repaired

[95] (n 109).

her, and sent her back to England subject to claims to salvage and repairs which exceeded her value. Bayley J did not address the likelihood of recovery in relation to capture or of salvage by another crew. He reinforced the rule that the total loss existed from the moment of capture, subject to subsequent events actually happening. He stated: *'There are cases which shew, that the mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss, ... The ship must be in esse in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it.'* Crucially, the chance of restoration or recovery was not addressed.

The issue of whether recapture necessarily led to restoration arose in *Dean v Hornby*. This was not, as might appear from the discussion in *Masefield*, a case on the likelihood of recapture on capture *simpliciter*. It was likely in *Dean*, as in *Goss*, that the already recaptured property (or the proceeds of sale) would be restored; the court would not assume that a British prize court might act unlawfully. This was irrelevant: *'[w]hether the detainer was rightful or wrongful is immaterial: for the possession was taken away from the plaintiffs and never restored to them'*[96]. Rather, recapture having already occurred, the issue was whether, on the day the action was brought, the assured had possessed the means of obtaining possession from the recaptors, where the ship was physically in the possession of the recaptors' agent. The court unanimously held that it had not; the act of bringing the ship back to England was the act of the recaptor, and the vessel was out of the control of the assured throughout. The issue was therefore whether the total loss had been converted by later event of recapture into a partial loss. Concurring, Wightman J observed, '*To make that so, the circumstances ought to be such as either to restore the possession to the assured, or to afford them the means of obtaining possession.'* The phrase 'the means of obtaining possession' was evidently meant to express the rule in *Holdsworth* and similar cases, that if the insured could pay prize to the recaptor, then he had the means of obtaining possession. This should not be confused with considering ransom on property held by captors in another country.

Dean was cited by Masefield as the most helpful authority. However, arguably it is not the strongest authority. On analysis, it was a '*The Martha*'[97] situation, where the recaptured ship had already been sold by the time of the action. The judgment ought to have been on the basis that she was an 'actual total loss' because by the date of the action she had been sold. The judgment did not adequately address the real issue; namely the factual situation at the time of the action. It was not a case of abandonment before a later restitution. Arguably, Masefield had available clear expositions of the law, and stronger authority, in *Goss* and *the Romulus.*

[96] (n 9) at 191.
[97] (see n 206).

The real issue in *Masefield* was not whether possession was restored, but whether the possibility of future release on ransom payment defeated a presumption of total loss, where the capture subsisted at the date of the action. Release will inevitably have the effect of restoring possession; recapture will not necessarily do so as the property might remain in another's control, or be sold. Accordingly, the facts of *Dean* were not similar to those in *Masefield;* other cases provided more appropriate precedent. Although *Dean* was cited in *Masefield*, neither judge adequately addressed what the real issues had been, or considered the state of the contemporary law.

2.2.2 WHERE 'POSSESSION' WAS RESTORED, BUT TOTAL LOSS CONTINUED

In *Goss,* considering the situation after recapture, Mansfield LCJ discussed entirely different tests of loss to those arising on the capture *simpliciter*. It was clear that the captured property could become a partial loss if it were restored to the owner, or indeed, it could become no loss at all. Nevertheless, on the recapture in *Goss*, he held that there was a continuing total loss because: (i) the insured had lost his voyage, (ii) the cost of repairing the ship was so high as not to be worth making, and (iii) as regards the insurance on the cargo of fish, it had spoiled so as to be worthless. In *The Selby,* after recapture, the court questioned whether the total loss had been reduced to a partial loss. Finding that on the facts it had, Mansfield noted that, although a total loss during capture, the ship was undamaged, and that the voyage had not been significantly interrupted. The salvage costs were only 1/8th of the value of the vessel. Accordingly, the insured had had his property restored, and suffered a partial loss only. The rule was stated:

> *'It does not necessarily follow, that, because there is a re-capture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage; in all events, to bear that expense, though it should exceed the value or fail of success; under these and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there has been a recapture'*[98].

The treatment seemed to be this: there was a total loss on capture; on recapture the parties had to reassess whether there was still a total loss. The test on recapture and restoration of possession would become part of the statutory test of constructive total loss.

In *the Hope*[99], the cost of repairing the hull would, as in *Goss,* have been prohibitively high, and the cargo, also as in *Goss*, had been either physically destroyed or had decomposed[100]. Thus, where the ship or cargo had been returned undamaged, before proceedings issued, the

[98] 2 Burr 1199 at 1209
[99] (n 61).
[100] Although in *Peele,* Storey J interpreted the judgment as showing repair was not prohibitively expensive, the surviving report indicates that was Mansfield's conclusion.

total loss would be at an end. Where, however, it was severely damaged, but required expensive repairs or was worthless, the total loss would continue, notwithstanding that the insured had or could have regained possession. In each of those three cases, the insured had purported to abandon after the capture had ended, and after giving a notice of abandonment. The question of the *spes recuperandi* was not an issue while a vessel was captured.

After recapture and restoration of the property to the insured, the situations where a total loss could continue were primarily those where there had been damage to the property, as had been stated in *the Selby*. These situations were later codified in s 60 of the 1906 Act, and represent situations of constructive total loss. There are a great number of nineteenth century cases where a constructive total loss was found after a restoration of property. It is in the context of these other cases that the test of foreseeability, or a hope of inexpensive repair, appears to have been introduced to the test of 'total loss'. This test did not originate in capture cases; its development is considered in greater detail in Chapter 3.

2.3 RECAPTURE WHERE TOTAL LOSS WAS OVER

Several cases illustrated situations where a recapture before the date of the action brought resulted in the loss being reduced to a partial loss or even no loss. In *Parsons v Scott (the Little Mary)*(1810)[101], a vessel insured from England to Portugal and back was captured by the enemy French. It was liberated on payment by the master of ransom of $3,000, on condition of his returning English prisoners to England to be exchanged for an equal number of French. On news of the capture, but after the ship had been released, the owners abandoned the ship to the insurers. After her arrival at Portsmouth the captain refused to deliver her to the owners unless he were reimbursed the ransom money. The owners refused to pay the ransom costs, and claimed for a total loss. On appeal, the claim was dismissed. The payment of ransom to an enemy was by statute illegal[102], and accordingly was not an expense that the master could claim from the owners. Therefore the owner was entitled to take possession without making the payment, so there was no loss. Lawrence J stated:

> '*[the authorities] assert generally, that wherever the voyage insured is defeated by any of the perils insured against, there is a total loss: but I find no authority which applies to the case where the ship was, or might have been in the hands of the owner, in the country where the owners reside. The passage from the Guidon, c 7, s 1, which*

[101] (n 49).
[102] 45 Geo. 3, c 72, s 16.

was the original authority on which Lord Mansfield relied in the case of Goss v Withers, does not apply to the ship…'.

The rule, so far as it is recorded, was that as the ship was actually in safety at the time of abandonment (having been released by the French), there was no total loss. There was nothing (the insured not being required make the payment) which prevented him from taking possession once it had arrived in England. The case does not undermine the rule on capture *simpliciter* at the date of the action. There was no attempt in *the Little Mary* to investigate a speculative hope of recovery in the future. No submissions on that point were made in the case.

2.4 WHEN ARE THE RIGHTS OF THE PARTIES ASSESSED?

2.4.1 ENGLISH LAW

As some *spes* exists after any capture, the possibility usually remains of restoration. This creates tension between the requirement for certainty and swift resolution of the parties' rights, and fairness to the insurer. The obvious difficulty was restoration after payment by the insurer. In *the Selby*, Mansfield LCJ held, *'And particularly I desire, that no inference may be drawn, "that in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the money and take the ship or goods:"'* [103]. Accordingly, restoration of property following judgment did not undo the total loss already determined.

A grey area remained concerning restoration between notice of abandonment and judgment. In *Bainbridge v Neilson (the Mary)*(1808)[104], where recapture occurred between abandonment and trial, Ellenborough LCJ indicated at an early hearing that the rights of the parties would become settled at the date of the notice of abandonment. However, both he and Le Blank J later held that the parties' rights settled at the time of action. The question was whether it had in fact been recaptured by that date; the *spes* was not considered. Ellenborough applied an identical approach in *Brotherston and Another v Barber* (1816)[105]. The assured received intelligence of the vessel's capture and served notice of abandonment before recapture. After recapture, the ship arrived at Liverpool partially damaged. Subsequently, the insured issued proceedings for a total loss. Ellenborough LCJ held the parties' rights crystallised at the time

[103] (n 44).
[104] (1808) 10 East 329 at 343, (1808) 103 ER 800 (KB).
[105] (1816) 5 M. & S. 418, (1816) 105 ER 1104.

of the action, so there was only a partial loss. His judgment recognised that a *spes recuperandi* existed in a capture situation:

> *'... In cases of capture a spes recupcrandi exists: it is not as if the ship were sunk to the bottom; there must be always a greater or less degree of probability that she may ultimately be recovered; of which advantage the assured certainly ought not to be ousted. By notice of abandonment the assured made an offer which remained executory; and in this suspended state of things considering this as a contract of indemnity the assured had a right to look to intervening accidents which might chance to restore them de integro to their former situation.'*[106]

Both parties, more usually the insurer, might look for restoration in fact before the date of the action. There was no investigation into future chances from the date of action. He continued:

> *'But what has been done here to preclude either the assured or underwriter from availing themselves of intervening events?[The Mary] and other cases have determined that the assured may be remitted to his situation de integro by the recapture; and certainly unless we are to consider this as a wagering contract instead of a contract for indemnity the reason of the thing requires that it should be so: for the value of the things abandoned to the underwriter might in some instances infinitely exceed and in others fall short of the sum insured. ... plaintiffs must stand, in regard to their claim for indemnity, in the position in which subsequent events have placed them at the time when they come to demand it that is when the action is brought.'*[107]

Bailey J concurred:

> *'Now, capture is an event which may or may not terminate in a total loss: if it continue and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary and the loss partial it would be against the spirit as well as letter of the contract to hold the underwriter bound to take to the subject matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject matter insured subsists in perfect safety. ... notice of abandonment is no more than a proposal on the part of the assured; which the underwriter may accept, and then there will be a new agreement between them binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought. It is unnecessary to give any opinion as to how the case might be, if the loss continuing total at the time when the action is brought, became a partial loss only at the time of trial. It is enough here that the thing remained in safety to the assured at the time when this action was brought and the loss was only temporary*[108]*'.*

This does not introduce a requirement for the insured to plead that recovery was unlikely on capture. An insured only had to demonstrate that the peril still subsisted at the time of the action. The rule was that the parties' rights were finalised, and were to be assessed at the time

[106] at 421-422.
[107] at 422 -423.
[108] at 423-424.

of the issue of the writ. The courts did not investigate future events. A temporary capture in this extract was one which had ended, not one which looked like it might end in the future, though selective quotation from academic works suggested that. Legal certainty and fairness to both parties required that the courts did not assess the *spes*. An identical approach was followed in *Cologan and another v The Governor and Company of the London Insurance (the Friendship)*(1816)[109]. It was confirmed in *Holdsworth and another v Wise and others* (1828), although the court erroneously considered that the rights ought to have finalised at the time of abandonment[110]. Bayley J, finding the vessel was totally lost, said:

> *'capture or the necessary desertion of the ship constitutes a total loss…if at one period of time there was a total loss and an abandonment before news of the vessel's safety had been received, her subsequent return does not entitle underwriters to say that it was no longer a total loss'.*

By *Ruys v Royal Exchange Assurance Corporation* (1897)[111], it was held that it was '*settled law that the rights of the parties had to be ascertained as at the date of the action brought'.* This remains the contemporary law. The rights of the parties are assessed at the date of the action, which can be by agreement taken to be the date of the notice of abandonment, as was the case in *Masefield*. In none of the cases cited for this principle was there any suggestion that the *spes recuperandi* be assessed at any point. The question was whether, in fact, the peril had ended by the date of the action.

2.4.2 AMERICAN LAW

It is useful to note that the American courts, seeking greater certainty, took the date of the notice of abandonment as the date on which the obligations between the parties crystallised. Storey J, as he then was, expressed the reasons *in Peele v Merchants Insurance Company*[112]*:*

> ***'***
> *With us, an abandonment once rightfully made, is conclusive between the parties, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property, and make that, which was a total loss at the time of abandonment, a partial loss only. And the right of abandonment is to be decided by the actual facts at the time of the abandonment, and not merely by information of the assured; and consequently, if the facts do not then warrant it, no prior or subsequent events will give it any greater efficacy. This is the established doctrine, as I take it, of all, or at least of the principal commercial states*[113]*… and has been solemnly settled, upon the fullest deliberation, by the supreme court of the United States…*[114]*. Whether*

[109] (1816) 5 M & S 446, (1816) 105 ER 1114.
[110] (1828) 7 B & C 797 at 799
[111] [1897] 2 QB 135
[112] (1822) 19 Fed. Cas. 102.
[113] Citing *Wood v. Lincoln & K. Ins. Co., 6 Mass. 479; Adams v Delaware Ins, Co., 3 Bin. 287; Jumel v. Marine Ins. Co., 7 Johns. 412.*
[114] Citing *the Manhattan* (n 83)*; Marshall v Delaware Ins Co* (1808) 8 U.S. 4 Cranch 202.

> *this decision has given entire satisfaction to the profession, is more than I can presume to say; and whether at a future time it may be fit to undergo a revision, as has been intimated at the bar, I pretend not to determine. I can only say, that the decision already made, is conclusive upon my present judgment; and so far as I have been able to comprehend the grounds on which it rests, it appears to me founded on sound reasoning, public convenience, and the great principles of equity, which regulate the contract of insurance. The rule in the English courts is, as we all know, very different'.*

This summarises both American and the English law well and concisely.

2.5 LOSS OF THE VOYAGE

Marine insurance has a dual nature; a policy covers both the subject matter itself and the voyage[115]. The law struggles with this dual nature, especially when applied to the vessel rather than goods. Although the modern law on policies for interest effectively begins with *Goss v Withers* (1758)[116], earlier cases established the idea of the 'loss of the voyage' in addition to the physical loss or destruction of the property as a part of marine insurance.

2.5.1 WAGERING POLICIES

The earliest English insurance cases concerning capture were wagering contracts, where the assured was not required to hold an interest in the subject matter. They are typically identified by the term 'interest or no interest' or by not assigning the benefit of salvage to the insurer. Occasionally, policies intended to be for interest became wagering policies through drafting error.

In *Dapaiba v Ludlow*[117], the concise report records an action of *assumpsit* on a wager. The vessel was captured by a Swedish pirate. Nine days later she was retaken by an English ship. Proceedings were issued while she was still at sea, after which the recaptor took her into an English port. The court held the insurer liable to pay. It was said that the interruption of the voyage was enough to allow the plaintiff to recover his damage:

> *'And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted ; and the question is not whether the plaintiff had his ship and did not lose his property, but what damage he sustained…'*

[115] Arnould 17th ed, *passim.*
[116] n 21.
[117] *Dapaba v Ludlow* (1721) 1 COMTNS 361, (1721) 92 ER 1112 (CB), (n.b. incorrectly cited as (1719) Comyn Rep 360 in *Pole v FitzGerald* (n 113) H/L).

Dapaba established that, for wagering policies, a loss occurred whenever the voyage was interrupted (surprisingly, it was later cited in *Pole v Fitzgerald (the Goodfellow)*[118] for the opposite proposition). Insurance law was not concerned merely with property, but also with the voyage. Assurances protected trade, not static property, and the 'loss of the voyage' was how that commercial dimension was expressed.

In *Pond v King (the Salamander)*[119], the insurance covered a cruise of three months on a privateer. She was captured by the French, subsequently recaptured, and taken to a port in neutral Spain. Lee LCJ, in the King's Bench, contrasting English law with civil law, said:

> '*the insurance is to be understood for the voyage for three months, and in common sense it cannot be otherwise; so whenever the voyage is broken or interrupted it is at an end. Safety during the three months is what is meant, but it appears the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss to the plaintiff*'.

The owner did not pay salvage, which would have ensured the return of the vessel; the terms of the policy prevented the insured from paying it. *The Salamander* confirmed *Dapaba* that the interruption of the voyage allowed the insured to recover the value stated in the policy, i.e. a total loss.

Similarly, in *Dean v Dicker (The Dursley)*[120], the insured ship was captured by a Spanish privateer, and kept for eight days in a Spanish port before being cut out by an English vessel. Lord Lee CJ held that the plaintiff was entitled to recover on the wager for a total loss[121]. Likewise, in *Whitehead v Bance*[122], there was a wagering policy on a voyage, in the course of which the ship was taken by a French privateer and carried into port for twelve days before being recaptured by an English ship and restored to the owner, who paid the salvage and sold the ship. The plaintiff was able to establish a loss of the voyage, and recovered accordingly. Those four authorities record the rule for wagering policies that if the voyage is interrupted, there was a total loss of the insurance regardless of whether the property is restored.

That rule, specifically *The Salamander*, was contradicted by *the Goodfellow*[123]. There, the crew's barratry prevented the vessel from leaving its home port to commence the voyage. Willes LCJ in the Exchequer stated that the loss of a voyage would not enable the insured to recover as for the loss of the vessel. He held that the notion of insurance 'for a voyage' was

[118] (1750) Willes 641, (1750) 125 ER 1362 (Exchequer Chamber).
[119] (1747) 1 Wils. K.B. 191, (1747) 95 ER 567.
[120] (1745) N.P. 2 STRANGE 1250, (1745) 93 ER 1162.
[121] Marshall (1802), p 426.
[122] N.P B.R. Mich 1749, Park 77, in Marshall (1802), p426.
[123] *Pole v Fitzgerald* (1750) Willes 641, (1750) 125 ER 1362 (Exchequer Chamber); confirmed (1754) Amb. 214; (1754) 27 ER 142 (HL).

absurd. In his view, it would be a 'double insurance', and a policy to insure a voyage would be 'illegal and unreasonable'. Necessarily, he distinguished the established cases. He noted that the policy in *Pond* prevented the insured from paying the salvage necessary to recover it – although it was back in England, the insured was not capable of recovering the property without forfeiting the policy. He stated that *Depaba* was authority for the proposition that there was no insurance on the voyage, though that interpretation is incompatible with the surviving report. Overall, Willes' interpretation was that the issue was whether the 'ship' were deemed lost, not whether the 'voyage' was lost. In the House of Lords, Lord Hardwick Chancellor confirmed that the 'cruze' itself was not covered by the insurance. *The Goodfellow* was cited in 1814[124] as authority that a claim for total loss could not be established on a policy covering a ship where it was undamaged, though that later case has been doubted[125]. *The Goodfellow*, though a House of Lords authority, seems to conflict with other authorities establishing there could be a loss of voyage on a marine policy.

The law on wagering policies is distinguished from later policies on interest. Mansfield observed in *Goss* that in the wagering cases, because:

> *'the insured had no interest, so there could be no indemnity; and the only question was, whether the event had happened; and to determine this, it was necessary to set up something as making a total loss between third persons, though the ship was safe, in order to determine the question upon the wager'.*

The law banned wagering policies on the grounds of public policy[126] by statute in 1745[127]. It is apparent in *Goss* that Mansfield LCJ distinguished wagering from valued policies and reached his decision on independent grounds. Occasionally, an error of drafting could mean that a policy took effect as a wager, not a policy for interest (e.g. *The Emanuel,* see 3.2.1), so the older law of wagers cannot be ignored. As previously explained, they remain important for the contemporary law because they were the means by which the doctrine of the 'loss of the voyage' entered English law.

Decisions on wagers were divided as to whether an interruption to voyage completed before action constituted a ground for the insured to allege loss of the wager. *Dapaba, The Salamander, The Dursley and Whitehead* all support the idea that the mere interruption was a total loss of the wager. *The Goodfellow* is authority that the interruption alone is not. It was

[124] *Falkner v Ritchie,* 2 M & S 289 at 293, Ellenborough LCJ.
[125] See 2.2.7.
[126] J P M de Koning, An Hiatus in English Insurance Law (1998) 9 ILJ 187.
[127] 19 Geo. 2. cl 39; Magens, vol II p 341.

supported by *Spencer v Franco*[128], where no report survives, and dicta in *Kullen Kemp* which was ultimately decided on unrelated grounds (deviation). It is arguably too simplistic, given that both lines of authority were cited with approval in judgments on valued policies, to argue that *Pole,* being a House of Lords case, overruled the earlier decisions and settled the law[129]; it is more realistic to acknowledge that there were two conflicting lines of authority. Marshall (1802) attempted to reconcile *Dapaiba* with *Pole* by suggesting that Mansfield must have been mistaken in thinking that the policy was a wager policy, and argued that it was plain, from the judgment, that the court considered the plaintiff to have an interest in the ship[130], but this analysis appears incompatible with the surviving report. This conflict of early authority contributes to the contemporary uncertainty over whether it is possible to claim for a 'loss of a voyage' on a ship, or just on cargo, and what that means in practice[131].

2.5.2 VALUED POLICIES

Authorities on wagering policies were divided as to whether a claim could be made for the loss of voyage on a ship, where she physically survived and was recaptured. Eventually, the majority view on wagering policies prevailed, following *De Paiba v Ludlow*[132]. The earliest cases, e.g. *Goss,* and textbooks on valued policies suggest, *contra the Goodfellow* [133], that there could be a loss of voyage on a ship. Marshall noted the various dicta in *Cazalet v St Barbe*[134]:

> *'In the case of Jenkins v Mackenzie though the ship was brought into port yet the capture as between the insurer and the insured was a total loss. The true way of considering this case is that it was an insurance on the ship for the voyage and if*

[128] In *Spencer v Franco (the Prince Frederick)* (1735) before Hardwicke LJ, the property was not changed by the capture, where the ship was restored in London after capture in Vera Cruz (cited by Mansfield LCJ in *Goss,* n 21, 2 Burr 695); the loss was not total, after the return of the vessel in safety, after she had been seised and long kept to the King of Spain in time of actual war (cited by Mansfield LCJ in *The Selby* (n 44) at 1211).
[129] E.g. J P M de Koning, *An Hiatus in English Insurance Law* (1998) 9 ILJ 187, *passim*.
[130] (1802, p 414).
[131] For completeness, two further reports of wagering policies survive: (1) In *Assievedo v Cambridge (the Ruth)* (1711) 10 Mod. 77, (1711) 88 ER 634 (KB) the captured ship was in enemy possession for nine days before its restoration. It was held that the property had not changed. The insurance question the court considered was whether a wager had been lost, but that issue was adjourned and not recorded (para [80]). Interestingly, the indication given in *the Ruth* was that the insurance should march in line with property law, but this opinion did not become English law. The report in *the Ruth* records the earlier case of *East-India Company v Sands* where a ship captured and recaptured was restored to its owner *'after a long possession, two sales and several voyages'*, between 1691 and 1695, because there had been no judicial condemnation. It must be *Sands* which is the unnamed report Mansfield LCJ considered in *Goss*. (2) In *Berkley v Cullen*, Lee LCJ determined that there was a loss of a voyage, where a vessel was requisitioned by the government and turned into a hulk, where the owners never had her again before the end of the voyage (unreported, case noted in *Pole v Fitzgerald*). These cases and *Spencer* (n 128) are noted as they appear in reported decisions and occasionally in commentary, but the reports are too incomplete to record a useful *ratio* directly.
[132] (n 117).
[133] (n 118).
[134] Marshall, Samuel; Treatise on the Law of Insurance (London 1st edition 1802 Butterworth) p.503.

either the ship or the voyage be lost it will be a total loss but here neither was lost. The case of [the Selby (n 59)] is decisive[135]'.

There was no total loss in *the Little Mary* (1810)[136]. The ship-owners argued that the voyage, for a cargo of salt which had a seasonal market, had been lost. This was rejected; '*[the authorities] assert generally, that wherever the voyage insured is defeated by any of the perils insured against, there is a total loss: but I find no authority which applies to the case where the ship was, or might have been in the hands of the owner in the country where the owners reside. The passage from the Guidon, c 7, s 1, which was the original authority on which Lord Mansfield relied in the case of Goss v Withers, does not apply to the ship…'.* In *Goss v Withers*, it had been held that the voyage had been lost both on ship and cargo. It was stated that the case was 'even stronger' as for the cargo, but Mansfield also found a loss of the voyage on the ship. Nevertheless, Lawrence J in *the Little Mary*, following the arguments in *the Goodfellow*, found that there could not be loss of the voyage on the vessel.

Some early authorities considered the speed at which the goods could be brought to the destination port relevant to the loss of the voyage. In *Goss*, Mansfield LCJ noted that by the arrival, the *'lent-season for the sale of fish was over'*[137]. In *Manning v Newnham*[138] he said that an insured was not obliged to wait for a ship to carry insured cargo if the first ship was too damaged, so could claim for a total loss. Accordingly Mansfield LCJ considered insurance covered the particular voyage contemplated. Implicitly, a late arrival caused by an insured peril constituted a loss of that voyage, justifying an abandonment for a total loss. Of course, in *Goss* the fish had also rotted, but it is important that the court noted the limited season for the sale of fish at a higher value, which by then was over. So, the particular voyage was understood by Mansfield LCJ to refer to the intended market, providing a separate ground for abandonment separate from the cargo's deterioration.

Anderson v Wallis (the Confiance)(1813)[139] contradicts this. The policy covered cargo for a voyage where ship and cargo were damaged by heavy weather. The cargo was landed for the season, but the ship was repaired and completed the voyage the next year. It was argued that the loss of the voyage that season amounted to a loss of the voyage. Ellenborough LCJ held that the mere retardation of a voyage could never amount to a total loss, nor could it authorize an abandonment, saying; '*disappointment of arrival was a new head of abandonment in*

[135] (1786) 1 T. R 187, (1786) 99 ER 1044.
[136] (n 49).
[137] (n 21).
[138](1782) 3 Dougl. 130; (1782) 99 ER 575 (KB).
[139] (1813) 2 M. & S. 240, (1813) 105 ER 372.

insurance law'[140]. This restriction of the 'loss of the voyage' doctrine reflected his known view doubting *the Goodfellow*.

In *Falkner and Others v Ritchie* (1814)[141], the policy covered the ship on a voyage from Cadiz to ports in Africa and back. The crew seized her in an African port, and sailed her to South America, where they plundered the cargo. The following year, she was taken by an American ship, itself captured by a British privateer and manned by a British prize crew. The owners discovered the loss and the recapture at the same time, and issued proceedings. Ellenborough LCJ questioned '*what has the loss of the voyage to do with the loss of the ship?'* Applying *the Goodfellow,* he ruled that the owner could not recover for a total loss. His reasoning was that the vessel was a total loss while captured, but that on recapture it became a partial loss (applying *the Confiance* (n 139) and doubting *Goss*). He said:

> *'And so in Anderson v. Wallis, the loss of the voyage was as complete as in this case: that was an insurance on goods; the ship had been driven by stress of weather into Kinsale, and the goods were forced to be relanded, and the voyage was lost for the season. The question was, whether the assured could abandon; and it was held that a retardation of the voyage was not a ground of abandonment, the goods still subsisting in specie. And in Everth v. Smith*[142]*, to which I at first alluded, the Court recognized that decision, and applied it to a case of freight, and held that a loss of the voyage contemplated by the assured was not a loss of the freight, freight having been afterwards earned. As to Goss v. Withers, there may be some doubt whether it is similar to the present case; and I must say that there is a looseness and generality in the expressions which have been borrowed in argument from that and the other case, that make one inclined to pause upon them. What has a loss of the voyage to do with the loss of the ship? On this subject there is so much good sense in the judgment of C. J. Willes in [the Goodfellow] that it may be of great use to resort to it in order to purify the mind from these generalities'.*

Bayley J. *referred to the Little Mary (n 49),* but his judgment was not recorded.

Falkner v Ritchie was later doubted in *Hudson and another v Harrison* (1824), where Park J, said *"I think that some of the cases on that subject cannot be supported to their full extent. I, for one, have never been able to comprehend the case of Falkner v Ritchie, which I have the less hesitation in avowing, inasmuch as the Lord Chancellor and Lord Redesdale have expressed themselves to labour under the same difficulty."* Save for being doubted in *Hudson*, *Falkner* does not seem to have received significant treatment in later authorities. Later, in *the Friendship* (1816)[143], Ellenborough LCJ noted with regard to the loss of a vessel that the voyage had been lost while it was captured, though he did not expressly make that a ground for abandonment of the vessel. In *Holdsworth v Wise* (1828) it was held that *'...in order to*

[140] Ibid. at 247.
[141] (1814) 2 M & S 289, (1814) 105 ER 389.
[142] (1814) 2 M & S 279, (1814) 105 ER 385.
[143] (n 109).

justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss[144]*'.* Accordingly, it seems that the presumption of total loss applied equally to the loss of the voyage as to the physical loss of the property.

The separate doctrine of the voyage is difficult to apply practically. It is clearly settled that it applies to insurance on goods, but is unlikely to apply to the loss of the voyage on a vessel. It applies to a charterparty and to freight, where there is no physical subject matter for insurance to cover; loss of the voyage is the ground on which those losses are based. Further difficulties arise as to the precise definition of the 'voyage'. Is the voyage the possibility of the goods ever arriving at the named destination? Or is it them arriving within the time contemplated? *Goss* seems to indicate the latter, although there is little authority on the precise meaning (the practical consequences of the doctrine in the modern law are considered at 4.2.7).

2.6 REQUIREMENT TO LITIGATE IN A PRIZE COURT

It was observed in *Masefield* that in *Stringer* the plaintiff was involved in the litigation in the American admiralty court to recover his property, and the English court investigated the chances of his success in that litigation. Was there ever a requirement on him to be involved in such litigation, and would an English court always assess the likelihood of success of possible litigation? Marshall stated otherwise:

> *'In general, whenever a ship is taken by the enemy, the insured may abandon, and demand as for a total loss; and he is not bound to make any claim or appeal in the enemy's courts of admiralty, or to litigate there the validity of the capture*[145]*.*

The point was implicitly anticipated in *Goss*. An instant right of abandonment upon capture had no meaning if the insured was still required to involve himself in a potentially lengthy legal process on which the ultimate outcome of the insurance litigation depended. The policy of protecting the insured from that litigation uncertainty underpinned the decision to exclude property law considerations – including the *spes recuperandi* - from insurance law.

Litigation requirement arose in *Lozano v Janson* (1859)[146], where the court considered whether an insured should have provided security to a prize court holding his goods. In the circumstances, providing security was 'un-commercial', so that no reasonable merchant

[144] (7 B & C 792 at 799).
[145] Marshall (1802) p 429, citing *Goss v Withers*, and *Tyfon v Gurney* (1789) 3 Term Rep 477.
[146] (1859) 2 E. & E. 160.

would have done so. This case is unique in even considering this issue. Other authorities do not indicate that the insured ought to have become involved in prize litigation. If *Lozano* can be taken to have established the rule, overturning the law as expressed in Marshall that, so that an insured was now required to litigate in a prize court, the test of whether the security was a reasonable sum to pay was compared to the overall profit of the venture, rather than to the invoice price.

The principle hinted at in *Lozano*, that an insured was required to consider giving security, does not seem to have been followed, not even in *Stringer*[147], which influenced *Masefield*, and in which no obligation was imposed on the insured to institute prize proceedings before the American court. While the ship was first taken, when it was inevitable it would be taken before an American prize court:

> *'At this time, and upon the capture of the ship, it was competent for Walsh, the owner of the goods, if he had thought fit so to elect, to treat the case as a total loss* (Kelly CB)'[148]

The consideration of whether security should have been given by the insured only applied to the period *after* he had decided to involve himself in the legal process, thereby indicating that he wished to treat the property as his own, establishing an estoppel that prevented him from claiming for a total loss arising from the capture *simpliciter*. The court did not place an obligation on him to litigate, and the judgment is not authority that changed the established position that a notice of abandonment/claim could have been given at once. The number of cases where the consideration was not referred to, where the possibility of litigating from the captors must surely have existed, is a powerful argument that this was not a consideration which the courts ordinarily considered after a capture.

2.7 THE PRESUMPTION OF TOTAL LOSS ON CAPTURE IN 1906

There was clear authority from Mansfield LCJ in *Goss* in 1758 to *the Romulus* in 1908 providing that a presumption of total loss arose on capture. The possibility of recapture was always recognised. That possibility, on the established authority of *Goss*, was irrelevant between insured and insurer. If the ship remained captured on the date of the action, it was a total loss. The only exception, the case of *Stringer* (see 3.2.8), does not undermine a presumption of permanent total loss, if abandonment is given promptly while the capture subsisted. Furthermore, no other case of capture considered the *spes recuperandi*. Tellingly,

[147] (1870) L.R. 5 Q.B. 599.
[148] *Ibid.* at 601-2.

some of the cases were decided in situations where there was a *strong* hope of recovery, *Goss* being the leading example. It is, therefore, difficult to reconcile the capture authorities with the idea in textbooks that the deprivation of possession had either to appear to be permanent, or repossession appear unlikely. Despite the criticism of the approach in Arnould[149], and Michael Kerr QC's ruling in the Dawson's field arbitration, where he said '*it is therefore dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery*[150], it appears that the approach of the courts, including the House of Lords, prior to 1906, was exactly that. In *the Friendship,* the *ratio* was stated, '*Capture operates as a total loss, unless it be redeemed by subsequent events'*[151]. Arguably, a significant body of authority supported a presumption of total loss, and textbooks diluting or modifying this presumption erred.

In *Masefield,* Steel J said that the context of the *dicta* in *Dean v Hornby* was *Roux v Salvador*[152], a case of seawater damage to cargo. Although *Roux* is certainly important, the most apposite context for *Dean* was arguably provided by capture authorities surveyed above. The factual question that all the capture authorities addressed was whether the ship or cargo had been recovered by the date of the action. Of course it was true that if the ship or cargo were, and restored to the possession of the insured by that date, the total loss might be redeemed to a partial loss. If possession were restored different tests applied, some of which looked to future chances of economical repair or restoration. What is important are the material facts that the insured had to prove to establish total loss. Simply, an insured only had to demonstrate a subsisting capture as at the date of proceedings. An insured did not have to disprove a *spes recuperandi* existed where captors remained in control.

Isolated extracts from the cases cited above support the view that capture might not operate as a total loss. In *Goss*, it was said:

> '*no capture is so total a loss that it is impossible any-thing can be recovered…There may be a capture with little or no prejudice, and there may be circumstances that make it only an average loss; as if the master immediately ransoms her and proceeds on his voyage, here the assured may not elect to abandon'*.

However, if quoted to say that capture was not necessarily a total loss, it is only because in that extract Mansfield envisaged a situation where there had been a capture which *had already* ended, and not because he considered a situation where the capture *might end*. The possibility of a ransom payment being made was not an issue for consideration, and would

[149] 17 ed. 28-03, fn 9.
[150] *Dawson's Field* (1972)(unreported).
[151] (n 109).
[152] (n 64).

only become relevant where the payment had already been made by the time of abandonment. Further, in *Milles v Fletcher*, it was said by Mansfield LCJ:

> '*It was not contended, that a capture necessarily amounts to a total loss as between insurer and insured; nor, on the other hand, that on a capture and recapture, there may not be a total loss, though there remain some material tangible part of the ship and cargo*' might undermine the view that a capture was a total loss[153].

However, in context, the doubt about whether a capture was a total loss referred to the possibility of a recapture actually having occurred by the time notice was given, not whether it might occur. The fact that it might not necessarily remain a total loss on restoration refers to the possibility that it might be undamaged. Accordingly, while selective quotation might produce *dicta* in support of the contemporary view that the *spes recuperandi* was always to be considered on a subsisting capture, a proper consideration of the pre-1906 cases refutes the idea that a capture might be anything other than a total loss while it actually subsisted, even where a strong *spes recuperandi* existed.

Further, the idea that the *spes recuperandi* had to be considered is incompatible with the idea that an insured could abandon immediately. An instant abandonment is opposed to the 'wait and see' approach. All the academic commentary supported the idea that an abandonment could be made instantly, which further supports the rule that the *spes* was not a requirement of a plaintiffs case. For example, in 1787, a textbook endorsed by Mansfield LCJ stated:

> *'[On policies with an interest] …in cases of capture the underwriter is immediately responsible to the insured. But if the ship be recovered before a demand for indemnity the insurer is only liable for the amount of the loss actually sustained at the time of the demand or if the ship be restored at any time subsequent to the payment by the underwriter he shall then stand in the place of the insured and receive all the benefits and advantages resulting from such restitution. All these regulations certainly have their foundation in the great principles of equity and justice, an observation which must be obvious to every-one who recollects that a policy of insurance is nothing more than a contract of indemnity[154].'*

Those pre-1906 Act rules were clear. They allowed an insured to know at all times where he stood in relation to his insurance. Although Mansfield LCJ recognised that ransom would end a case of total loss by capture, tellingly, not a single subsequent case considers even the possibility of a ransom payment being offered. Arguably, that is evidence for the courts not only ignoring a physical *spes recuperandi*, such as recapture, but also a restoration by paying ransom, in capture cases. The silence on the issue in the reported cases is a powerful

[153] (n 61) at 233.
[154] James Allen, *A System of the Law of Marine Insurances with three chapters, on bottomry, on insurances on lives and on insurances against fire* (1787 T Whieldon, Fleet Street), p.87.

argument that the law, prior to the 1906 Act, never looked to ransom payments to undermine a subsisting total loss on capture. After a recapture, it was possible for an insured to pay prize to the recaptor, and that was a proper method of regaining possession. However, it is dangerous to confuse those two issues. Under the common-law rules, in *Masefield*, the claimant would have been able to claim constructive total loss: capture would be construed to be permanent, regardless of the *spes recuperandi*. That, however, is not how the pre-1906 law is recalled in more modern cases including Rix LJ in *Masefield*. The confusion in recent authorities arises: (i) from conflating statements on whether a notice of abandonment was necessary with the test of whether a loss had occurred, (ii) from errors citing the earlier law; and (iii) pleading without reference to a presumption of total loss at all.

CHAPTER III NOTICE OF ABANDONMENT AND FORESEEABILITY

Chapter II demonstrated that before 1906 the *spes recuperandi* could not undermine the insured's right to abandon and recover for a total loss where capture subsisted at the date of the action. There was a presumption of irretrievable deprivation on capture that even a strong *spes* would not displace. This chapter considers the two contexts in which the *spes recuperandi* was relevant. First, it notes *obiter* statements and academic commentary stating the *spes* was relevant in a capture context. This was by attempting to formulate a 'universal' test for total loss covering all perils. These statements had not, by 1906, disturbed the presumption on capture – the law applied a different approach to different maritime perils. Practically, the *spes* was only considered in one capture case, where, unusually, the insured had not abandoned promptly, but claimed several years after capture. Secondly, it considers in what situations a 'notice of abandonment' was required, where the *spes* was relevant. This chapter questions whether these rules undermined the presumption of total loss on a subsisting capture, and concludes that they do not. This chapter is necessary to contextualise statements which, in isolation, suggest the *spes* could undermine a total loss claim on capture. It demonstrates that these statements went no further than describing when notice was required.

3.1 FORESEEABILITY AND THE SPES RECUPERANDI

3.1.1 EARLY LAW

The earliest statements on wreck indicated that a vessel's wreck or submersion established total loss, assuming no chance of recovery existed. Submersion was treated as total destruction, and in *Goss* capture was stated as equal to a vessel's submersion. The *reason* was *'during the submersion the ship ceased to exist for any useful purpose'*. In *Anderson v Royal Exch. Assur. Co*[155], it was held that while hides were submerged, they might have been treated as a total loss. The same was stated in *The Commerce*[156]. There was no investigation into the chance of recovery in these cases. The simple issue was whether ship or cargo had in fact been raised or recovered by the date of the action. Whether the ship or cargo was submerged in deep or shallow water was irrelevant[157]. Accordingly, the early law of capture, submersion, and destruction/wreck were identical: the chance of recovery was not investigated. Naturally, the courts recognised that a *spes recuperandi* existed after capture, but this went only to whether notice of abandonment was necessary (Chapter 3.2).

[155] (1805) 7 East, 38, 42.
[156] (1812) 15 East 559, 564.
[157] An analysis supported by *the Tartar* (n 67).

3.1.2 'LOSS IN THE HIGHEST DEGREE PROBABLE'

The idea that the court investigate future chances when assessing total loss evolved gradually. Ellenborough LCJ innovatively suggested that the court assess future chances in *the Confiance* (1813)[158]; *'... there is not any case nor principle which authorises an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment'*. The words *'in the highest degree probable'* indicate that an insured might anticipate a total loss. The remark was *obiter*, and did not derive from either judicial or academic authority. It was widely copied in textbooks.

3.1.3 GENERAL TEST: 'UNCERTAINTY' AFTER STRANDING

Storey J's judgment in the New York case of *Peele (the Argonaut)*[159] was a landmark in the development of the test of total loss. It has been widely cited as defining a constructive total loss (then a *'technical total loss'*). The *Argonaut* stranded and was abandoned by her owners. Those present thought her destruction so certain that even her rigging was removed, in addition to her cargo. The chances of her disintegrating on rocks were estimated as *'9 out of 10'*, and *'certain'*. Unexpectedly, the weather eased and she was re-floated by the underwriters. They repaired her and denied total loss. Storey surveyed the English cases on capture and abandonment after stranding. Having considered the individual examples, and noted *The Argonaut* presented a novel situation, he formulated a general test of total loss applicable to novel situations.

Much of his judgment restated established English rules of total loss on capture. However, some passages indicated that Storey assessed the *spes recuperandi.* First, he restated Ellenborough's *dictum* that abandonment was justified if the loss was 'in the highest degree probable'[160], stating:

> *'I take the language of Lord Ellenborough, in Anderson v. Wallis to convey the correct notion of the law on this subject. An absolute total loss is not necessary to justify an abandonment. It is sufficient, if at the time it be in the highest degree probable, to found judgments acting upon all the facts*[161]*'.*

Next, he stated:

> *'I lay great stress on these last words, because it is manifest from the case, that they were used with reference to a technical total loss, and shew that the right of abandonment does not always depend upon the certainty, but upon the high probability of a total loss either of the property or voyage, or both. And in one of the latest cases ever decided by the same learned judge, he uses expressions indicating a*

[158] (n 139).
[159] (n 112).
[160] Citing *The Confiance, 2 Maule & S. 240, 248.*
[161] (at 110)

> *perfect coincidence with the opinion of Lord Mansfield. He there observed, "the mere restitution of the hull, if the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reduced to an average loss' [162].*

So Storey stated three tests justifying a total loss where the loss is prospective, 'the highest degree probable,' 'the high probability' that the loss will be total, and 'if the insured may' pay too much. The "uncertainty" test in respect of paying too much only applied after restoration had in fact occurred. None of these tests applied to capture *simpliciter*. So far, Storey repeated rules from English authorities. He then addressed the novel situation of stranding:

> *'What is a total loss in cases of sea damage, stranding and shipwreck? It is stated, and the position seems incontrovertible, that the mere stranding of the ship is not of itself to be deemed a total loss, so as to entitle the insured immediately to abandon.[163] The reason is obvious. It may occasion but a slight injury easily repaired, and the vessel may be gotten off with a small expense, and the retardation of the voyage be trivial and unimportant. But the stranding may be attended with circumstances which would justify an abandonment, even though the hull of the ship should not be materially damaged'.*

The peril of stranding was treated differently to that of capture. On stranding, as in sea damage, the court would not presume a total loss, but would investigate the probability of the stranded ship being wrecked or re-floated. This was a new test: stranding had not been tested before. Storey formulated a general rule intended to encompass all situations when an insured could abandon, justifying his treatment of stranding. Inadvertently, this blurred the distinction between the different specific examples of total loss he had previously summarised:

> *'We are therefore driven back upon general principles, and must extract them, as we may, from the current of authorities, to aid us in the present inquiry. The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority; where there is a present total loss of the physical possession and use of the ship, as in case of submersion; where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port, where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value. None of these cases will, I imagine, be disputed'.*

This accurately reduced the rules expressed in the English authorities. This did not introduce any test of the *spes* into a case of capture or submersion that the subject matter will not be restored. However, he continued:

[162] Citing *M'lver v. Henderson, 4 Maule & S. 576, 584; cf Bell v. Nixon* (1816) 1 Holt 423.
[163] Citing *Marsh. Ins. (Condy's Ed.) bk 1, c.13, § 1, p5s2.*

> *'If there be any general principle, that pervades and governs them, it seems to be this, that the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost...*[164] *Try the Argonaut by the test of such a rule, and it is not difficult to come to the conclusion, that the plaintiffs had a good cause of abandonment*[165] *'.*

This extract was very influential. The 1857 Arnould adopted it as the paradigm definition of constructive total loss and it remains in the 17th edition[166]. It must be remembered that Storey J stated expressly that he had not desired to change the law, merely apply existing law. Innovatively, this states a test based on uncertainty as to the time that the ship might be restored. If applied to capture, the test in *Peele* conflates the rule (an immediate right of abandonment) with the justification for the rule (the uncertainty as to restitution). It is doubtful that *Peele* constituted sufficient authority to change the settled law of capture: *Peele* was a case of stranding not capture - accordingly any observations on capture were *obiter.* If it did, it is unclear whether it would have introduced a test of 'uncertainty' as to whether restoration would occur at all, or of restoration being 'unreasonably distant' despite restoration appearing probable. While *Peele* arguably did not change the law on capture, this extract attracted significant academic attention during the nineteenth century, to the exclusion in academic works of the actual tests from capture cases.

Marshall noted that the policy considerations on abandonment following capture differed considerably from those following stranding. He noted that there was no instant right of abandonment or a presumption of total loss after stranding, but that there was following capture:

> *'Where, as in the case of capture, the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the spes recuperandi to the insurer who will have the benefit of a recapture, or of any other accident by which the thing may be recovered. But it seems, at first sight, impolitic, not to say unreasonable, that the owner of a ship which is stranded, (the captain and crew being his servants, on the spot, and in possession of the ship and cargo), should be at liberty to abandon there to a number of underwriters who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands, but to the greatest disadvantage*[167] *'.*

[164] Citing *the Manhattan* (n 83); *Marshall v Delaware Ins. Co* (n 112).
[165] (n 112), at 111-112.
[166] 17th ed at 29-01.
[167] Marshall (1802) p.481.

The consensus was apparently that, although it was obvious that there remained uncertainty as to restoration in both stranding and capture situations, the law treated the perils differently. However, the textbooks began to blur the tests applicable to separate classes of factual situation. Arnould, citing *Peele*[168], but explaining the perils of arrest and/or embargo, not stranding (although not yet capture and/or seizure) stated:

> *'There is a right of abandonment in all cases where the is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo may be of long, or, at all events, of very uncertain continuance*[169]*'.*

Evidently, academic works began to use the general test formulated by Storey J for novel situations to produce a general test covering the established situations. This thesis argues that established judicially stated rules in capture and seizure situations could not be changed by such a process in textbooks. The requirement for a court to guess how long a capture might last was never stated judicially, but was explicitly excluded from *Goss* and subsequent cases. Can an academic statement change established tests endorsed by appellate courts? Arguably, it is incorrect to so suggest.

Later, Brett LJ in *Kaltenbach v MacKenzie* adopted a similar test for the right of abandonment, which might be read as to include an assessment of the 'chance' of a loss being total:

> *'Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss; as, for instance, if he hears his ship is captured in time of war, it must be obvious to everybody, unless the ship is re-captured, it would be a total loss*[170]*'.*

However, the better reading is that this does not disturb the rule that a court would presume a total loss if the loss in fact subsisted on the date of the writ. It does not insert an assessment of that probability into the test of total loss on the date of the writ. 'The imminent danger' referred to is the chance of the loss 'continuing', i.e. that there will not be a restoration between abandonment and the date of the writ.

3.1.4 THE 'PRUDENT MAN NOT INSURED'

Roux v Salvador was the source of a *dictum* which has been held to define the difference between actual and constructive losses, and is used in the 17th edition of Arnould to define an actual total loss:

[168] (n 112).
[169] Arnould 2nd ed p.1083.
[170] (n 69) at 473-474.

> *'The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured'*[171].

However, this must be considered in the context of an earlier *dictum* in *Roux, 'if, though imperishable, they [goods] are in the hands of strangers not under the control of the assured... the loss is, in its nature, total to him who has no means of recovering his goods'*. The definition continues:

> *'But there are intermediate cases – there may be a capture, which, though prima facie a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar case,* ***if a prudent man not insured,*** *would decline any further expense in prosecuting an adventure, the termination of which will* ***probably*** *never be successfully accomplished, a party may… treat the case as one of a total loss…if he elects to do this… the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident…'*

The relevant question is whether the dicta in *Roux* were sufficient to change the approach to capture cases, by introducing an element of foreseeability as to whether the capture would end, or could be brought to an end.

The circumstances in which an insured *'would decline any further expense'* occurred *after* recapture in *Goss*, not before. It is difficult to imagine, considering that the court did not discuss ransom payments in *Goss* (despite then being permissible), what expense could arise on capture *simpliciter*. It was not suggested that there was any way of bribing a pirate to obey an owner's orders. The situations where the owner had been held to have had the means of recovering his vessel were, until *Roux*, all situations where the vessel had been in the hands of recaptors. Alternatively, one can imagine an insured occasioning extra expense 'towards prosecuting a venture', by spending money on salvage or on tugs, or any other type of assistance on stranding, or indeed after re-capture or salvage, on, for example, repairs, where the insured remains in possession/control. It is suggested that it is this meaning that is

[171] Arnould, 17th ed, 28-03.

consistent with the earlier authorities, so is inherently more likely to have been the one intended – and this does not disturb the presumption on capture.

Despite its popularity in textbooks, the extract was, strictly, *obiter*. The *ratio* in *Roux* was that after a necessary sale of cargo, where the destruction of the goods appeared to be inevitable, it was unnecessary to give a notice of abandonment to claim a total loss. *Roux* does not, therefore, quite anticipate the definitions under s 60 of the Act. If the destruction *seemed* inevitable, it would be a case of constructive loss under s 60 and a notice of abandonment would be necessary. The *ratio* was not that the sale had occurred, which would have conformed with the then contemporary authority on capture. Further, the dictum in *Roux* contradicts the then established case of *the Tartar*[172], which held that capture was akin to shipwreck and therefore physical destruction. Arguably, therefore, *Roux* could not operate to change the established rules in capture cases.

3.1.5 CIRCUMSTANCES WHICH RENDERED IT DOUBTFUL WHETHER IT WOULD EVER BE RESTORED

In *Stringer and Others v The English and Scottish Marine Insurance Company* (1870)[173], the policy covered goods shipped to America. The vessel was captured by the American navy in 1863, and was carried to New Orleans where part of the cargo was expected to be condemned. The insured did not abandon, as he hoped eventually to recover his goods through legal processes, expecting a profitable market if he could recover possession. A prize court was convened at New Orleans. The Americans argued that the goods, including the insured's, were a lawful prize as contraband of war. That suit took far longer than the insured expected. The insured could have had his goods returned at any time, had he given sufficient security to the New Orleans court – but the Exchequer Chamber, and apparently other uninsured cargo interests –considered that no sane man would have given security, given the value of the greenback at the time, against fluctuations in the value of the dollar. After 18 months, the goods were held an unlawful seizure and restitution ordered. However, the captors appealed. The American court subsequently sold the goods, and ordered the proceeds distributed according to prize law. Only then did the insured claim on his insurance policy, alleging a total loss. Three factual situations arose from the circumstances at various times: initially capture simpliciter, secondly on-going detention after no notice was given; and thirdly judicial sale:

(i) In relation to capture *simpliciter*, Blackburn J, in the Queen's Bench Division, said; *'It is clear at this time the cargo was, by one of the perils insured against, taken*

[172] (n 67) and cf *Goss*.
[173] (1870) L R 5 QB 599

entirely out of the control of the assured, under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances, the assured has a right to elect whether he will retain the property in himself and treat the loss as a partial one, or abandon it to the underwriters and claim for a total loss'. On the insured's appeal, Kelly CB agreed with that assessment of the original loss. However, the insured did not abandon then, thereby estopping himself from claiming for a total loss on the fact of the capture *simpliciter* (see 3.2).

(ii) The court also speculated, *obiter* in light of its findings that sale justified a claim without notice of abandonment, whether the continued detention, where notice of abandonment had not been given, justified a total loss claim with a late notice of abandonment. Further, it considered whether such a total loss claim would have been defeated by the insured's failure to give security. The factual situation had not changed and there was no new fact that could justify a fresh total loss, prior to the sale. By considering whether a reasonable party would have paid security, the court effectively considered the *spes recuperandi* in this context. However, *Stringer* does not in fact introduce a consideration of the *spes* after capture *simpliciter*. The consideration of whether the payment would have been likely to secure the ship related rather to the duty on the insured after it had reached the prize court. It considered the hope of recovery from an established legal process rather than forceful recapture, or ransom, but it stands in stark contrast to other authorities on capture. It might be taken, therefore, to introduce a requirement on an insured to stand surety or make a payment to a foreign prize or admiralty court in every case of capture or seizure by a state. Such a rule would have been innovative,[174] and this is not what the case establishes. Arguably, properly considered, the court's speculation in *Stringer* was insufficient to found a rule that an insured had to pay prize, or would have to pay ransom in similar situations, and that failure to do so would defeat a total loss claim.

(iii) After the judicial sale, Kelly CB held that the goods were totally lost. Concurring, Martin B stated that '*totally lost… [is an] ambiguous expression – but [by the sale the goods] were taken entirely from the owner's dominion and control, and were absolutely taken away from him'*. There was, after the sale, no chance of the goods being recovered *in specie*, which was a change of circumstances which justified a fresh claim for a total loss. The court did not make any further observations on whether the initial capture had justified a total loss. This was simply following the decisions in *Idle v Royal Exchange Assurance Company* (*the Ajax*) (1819)[175] and *the*

[174] See 2.6.
[175] (1819) 8 Taunt 755; (1819) 129 ER 577.

Martha[176], that sale justified a total loss claim without notice of abandonment (see 3.2).

Effectively, *Stringer* states that there had been a right of abandonment on the initial capture, which in fact supports the presumption of total loss on capture. It should be noted that the plaintiff in *Stringer* was not required to prove that it was unlikely that he would recover his goods, only that he was required to prove that it was not commercially sensible for him to have paid the surety, a development of the test of mercantile impossibility/the prudent insured. The *dictum* of the court notes that that payment was of course not commercially sensible, and it does not disturb the established presumption of total loss. It is not an authority that capture was not an actual total loss, but a simple example of the insured failing to give a notice of abandonment, and showing by his conduct that he wished to treat the property as his own, not the insurer's. The following situation considers where notice of abandonment was necessary.

[176] (n 78).

3.2 NOTICE OF ABANDONMENT

A notice of abandonment is an early indication to the insurer - no method of service is fixed by law or statute - that the insured intends to claim a total loss. It functioned as an alternative to a limitation period, protecting the insurer from late claims and allowing it the opportunity to attempt to preserve/recover the property.

3.2.1 GENERAL RULE: ABANDONMENT ALWAYS NECESSARY

Notice was given in all the earliest cases on policies for interest. The eighteenth century reports indicate that notice was expected. *Kulen Kemp v Vigne (The Emanuel) (1786)*[177] concerned an interruption to the voyage covered by a wagering policy. The cargo owners insured the safe arrival of the vessel, in which they had no interest. She was captured by a privateer, but restored, after which she sailed for a different destination port from that named in the policy. She was subsequently captured by the Spanish and abandoned while she was before a prize court. That court released her on appeal, and she was ultimately lost at sea. The *ratio* in the English court was that the insured could not recover because the loss was by deviation, as she was lost on the new voyage. Mansfield held that by insuring the vessel not the cargo the policy was effectively a wager and not a policy for interest: *'A necessary consequence of this being a wagering policy is, that the insured cannot abandon: but, even supposing it to be a policy on interest, it is enough to say, that in this case the parties never did abandon*[178]*'*. 'Abandon' here means 'give notice of abandonment'. Notice could not be given on a wagering policy, but had to be given on policies for interest. The necessity for a notice of abandonment distinguished policies for interest from claims on wagering policies.

In *Kaltenbach v MacKenzie*, abandonment was described as the custom of parties to insurance, only later becoming a condition precedent to recovery[179]. These authorities suggest notice of abandonment was always needed. In *Goss*, Mansfield LCJ noted that, *'in all cases the insured may chuse not to abandon*[180]*'*. Here, 'abandon' probably means 'give notice of abandonment' (mirroring his use of 'abandon' in *the Selby*). Consistently, in *the Selby* he had stated that the:

> '*insured is not obliged to abandon, in any case: he has an election. No right can vest as for a total loss, till he has made that election. He can not elect before advice is*

[177] (1786) 1 T.R. 304, (1786) 99 ER 1109.
[178] Marshall (1802) suggested that Mansfield misunderstood the case and erred in treating it as a wager. Marshall's approach was that his reasoning was appropriate to a valued policy. It is arguably safer to follow the report, which clearly shows the policy took effect as a wager.
[179] (n 69).
[180] (1758) 2 BURR 698.

received of the loss: if that advice shews the peril to be over, and the thing in safety, he cannot elect at all; because he has no right to abandon, when the thing is safe[181]*'.*

In *Goss* notice of abandonment, expressed within the insured's 'election', was required in all circumstances to claim for a total loss. In *The Lady Mansfield* (1787)[182] notice of abandonment was not served for two or three years after the capture. Buller J explained '*Where the voyage is lost, but the property is saved, the owners have an option to abandon; but that unless they do elect to abandon, it is only an average loss*'[183]. In *Tunno v Edwards*[184] the insured cargo was seized by the Dutch government and returned after the insurer had by agreement compensated the insured for 50% of his loss. The insurer issued proceedings claiming back the money it had paid, arguing that he had been overcompensated for a total loss. Lord Ellenborough CJ ruled that *'…in order to have made it a total loss, there ought to have been an abandonment, which there has not been; therefore there is no ground for the underwriter's claim'*. As there was no abandonment there was no payment for a total loss. Later, in *Davy and another v Milford*, Ellenborough LCJ stated a slightly wider rule that *'It was decided in the case of Anderson v. The Royal Exchange Assurance Company*[185]*, that in order to constitute a total loss, where the thing insured subsists in specie, there must be an abandonment in time to the underwriters'*[186]. In *Holdsworth v Wise* (1828), it was restated that *'If the subject-matter of insurance ultimately exists in specie, so as to be capable of being restored to the hands of the assured, there cannot be a total loss unless there had been an abandonment'*[187].

Confusingly, 'abandon' has another meaning. Mansfield also stated in *Goss*, *'[t]he subsequent title to restitution arising from the recapture, at a great expense of the ship disabled to pursue her voyage, cannot take away a right, vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved*[188]*'*. Here 'abandon' refers to the rights that the insurer takes in whatever physically remains rather than to the 'notice'. This alternative use of 'abandon' is a source of confusion in academic commentary.

[181] (n 44) 2 Burr at 1211.
[182] (n 92).
[183] *ibid* at 615.
[184] (1810) 12 East 488.
[185] (1805) 7 EAST 38; (1805) 103 ER 16 (KB).
[186] (1812) 15 East 559; (1812) 104 ER 954 (KB).
[187] (7 B & C 792 at 799).
[188] (n 21) at 696.

3.2.2 TIME NOTICE MUST BE GIVEN:

In *The Lady Mansfield,* Buller J held that an insured had to serve notice of abandonment in order to claim for a total loss on capture *'within a reasonable time'*, that meaning, *'as soon as they were informed of events'*. Ashhurst J stated that the assured was bound to decide, and signify his election to the underwriters at the *'first opportunity*[189]*'*. If the master or recaptor continued to act for the insured's interest after the casualty, and the insured was notified of the events, then failure to abandon would be construed as the insured's adoption of the acts of the master or recaptor, effectively estopping abandonment. That was compared to the notice which was necessary to be given to the drawer of a bill of exchange, in case of non-payment, which if the holder omitted to do, he was considered as giving credit to the acceptor. The case established that the 'sue and labour clause' did not allow the insured an indefinite time to decide whether to abandon, even if that time were within a relevant limitation period: the requirement promptly to tender notice of abandonment prevailed. In *Davy v Milford* the court confirmed notice had to be given *'as soon as the insured was informed of events'*.

In *Kaltenbach v MacKenzie*[190] the court found that the insured failed to demonstrate that there had been sufficient damage to the vessel to justify the abandonment. Giving a general statement of the law, Brett LJ stated that the law gave an opportunity to investigate if the facts were not immediately clear to the insured:

> *'... immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there be some reason to the contrary, give notice of abandonment; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he has a reasonable time to acquire full information as to the state and nature of the damage done to the ship'*[191].

This extract refined the requirement; if a reasonable insured party would conclude that there was a danger of a total loss, there must be an abandonment then. Although introducing a test of foreseeability of total loss, it does not change the test of total loss on capture. This appears to remain the contemporary law. Interestingly, in the 1982 arbitration, *the Bamruri*, the learned arbitrator found that there was a valid notice of abandonment even though it was served a year after the detention[192]. There appears to be little authority for granting the insured this much more time. This is a potential trap for insureds – if 'wait-and-see' is the approach taken, then they are discouraged from abandoning early, yet are potentially vulnerable to the argument that abandonment has not been in time if they do in fact wait.

[189] (n 92).
[190] (n 69).
[191] (n 69) at pp 473-474.
[192] [1982] 1 Lloyd's Law Reports 312.

3.2.3 WHERE NOTICE OF ABANDONMENT UNNECESSARY

Exceptions allowing insured to recover without serving notice appear during the first third of the nineteenth century. These situations did not precisely correspond with those of statutory actual total losses. Interestingly, academic commentary listed more exceptions than are recorded in the reported cases.

NOTICE NECESSARY AFTER CAPTURE

The first exception to the general rule that notice was necessary was on the physical destruction of the ship: this was settled by the early nineteenth century. By drawing comparisons to shipwreck, there were three unsuccessful attempts to allege a total loss after capture without abandonment. Counsel for the insurer submitted in *Tunno*[193] *that 'The seizure and confiscation by the Dutch Government was in its nature a total loss at the time; and though there was in fact no abandonment, yet that is not necessary where the spes recuperandi is gone; as where the goods are sunk at sea'*[194]. Ellenborough CJ disagreed, oversving: *'After the seizure it remained contingent whether it would be a total loss or not; and in order to make it so, should not the assured have given notice of abandonment? There was nothing but the possibility remaining, the spes recuperandi, of getting back the goods, which could have prevented the payment of a total loss; for this was a valued policy'*. Accordingly, Ellenborough LCJ's *obiter* opinion was that a notice of abandonment was necessary after enemy capture. Importantly, he did not intend to introduce a requirement for the insured to plead that recovery was unlikely on a subsisting capture, but simply indicated that a notice should be given. In *Goldsmid v Gillies*[195] it was argued that there was no need for a notice of abandonment on a capture. Gibbs J ruled: '*I do not state that upon seizure the plaintiff might not sue for a total loss without abandonment but after the restoration no abandonment having been in the meantime that which was for a time a total loss is an average loss and then all that is restored is restored the benefit of the assured not of the underwriter.'* However, this statement is isolated, and does not seem to have been followed in other authorities. Accordingly, the law appeared settled that after a capture, a notice of abandonment had to be given. Importantly, the recognition of the *spes recuperandi* did not mean that hope had to be 'unlikely'.

[193] (n 184).
[194] *Ibid* at 490.
[195] (1813) 4 Taunt 802.

The Minerva (1812) was eventually resolved as a case of deviation[196], but in an early hearing, it was pleaded as capture[197]. Interestingly, it was submitted that as the *spes recuperandi* was irrelevant to the question of enemy capture, there was no need for a notice of abandonment: '*In case of hostile capture, notice of abandonment is not necessary: so if the thing insured goes to the bottom of the sea. But here there is no question of hostile seizure; this country was not at war with Sweden. This is the case of detention by princes, where abandonment is necessary.'* Ellenborough LCJ intervened saying *'Abandonment is only necessary to make a constructive total loss'*. Possibly Ellenborough LCJ considered the idea that hostile capture did not require a notice of abandonment. However, his judgment simply stated; *'I hope that nothing which has been said during the discussion of this day will induce any person to forego the practice of abandonment, which is very convenient. But we are clearly of opinion in this case, that there should be a new trial'.* It records that the practice of the industry was to give a notice of abandonment in all cases of loss[198]. It would remain the practice of the insurance market to give notice of abandonment in cases of what would be considered actual total loss until at least the 1850s[199].

JUSTIFIABLE SALE FOLLOWING DAMAGE OR STRANDING

The justifiable sale of the vessel by the insured following stranding or damage became another exception where notice was not required. *Idle v Royal Exchange Assurance Company* (*the Ajax*) (1819)[200] concerned a ship damaged by a storm. She grounded on rocks, and the captain, fearing she would disintegrate, sold her. No notice of abandonment was given. In argument it was said, *'[in] Hodgson v. Blackiston[201] it was held, that although the ship was sold, an abandonment was necessary. And in Martin v. Crohatt[202], Ellenborough CJ said, "Where the thing insured subsists in specie, an abandonment is necessary, if it be necessary in any case; and if, upon the happening of such a peril, which suspends the voyage and induces the necessity of repair, the owners choose to make it a total loss, they ought to give notice of abandonment".* Dallas CJ held that a notice of abandonment had not been necessary: '*… the assured are entitled to recover, unless in point of form an abandonment of freight was necessary. As to this, I shall only say, without meaning to lay down any general rule, and confining the judgment of the Court to the facts before us, that we think it was not necessary*

[196] Abandonment was not raised in the second trial (1812) 16 East, 312.
[197] (1812) 15 East 13.
[198] In *the Minden; Wangoni; and Halle* it was said that notice of abandonment had been required in *the Minerva*, but it was too late and the defendant underwriters obtained a verdict on that ground ((n 328) [1942] AC 50 at 112-3). The report does not support that observation.
[199] Arnould (1857), p.1016.
[200] (1819) 8 Taunt 755; (1819) 129 ER 577.
[201] 1 Park on Ins. 281.
[202] (1811) 14 East, 465.

in this particular case.' Accordingly, it established a justified sale as another situation where notice was not required, although it was stated not to be a general rule.

In *Cambridge v Anderton (The Commerce)*[203] the vessel grounded and was damaged. The costs of repair were deemed un-commercial, and it was doubtful that she could be repaired. She was sold. The purchaser repaired her, and she performed a voyage. Abbott CJ held that the vessel had been a wreck, and a total loss. Bayley J said: '*if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in Read v. Bonham*[204]*'.* Holroyd J went further, and said, '*Where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment'*. Accordingly, notice was unnecessary if a vessel were wrecked. Interestingly, earlier extracts stated that a ship captured was to be treated like a wreck. The early insurance law on wrecks/submersion was not suited to advances in salvage technology: and it was then possible for a 'wreck' – a total loss by physical destruction, and a ship fully submerged – to be repaired. Arguably, *the Commerce* fell within *the Ajax* exception as the sale appeared to be justified. However, the judgment was expressed in different language. It is unclear, however, whether the reason for that abandonment was unnecessary was because she was a 'wreck', or because she had been sold – in view of her repair it was arguably her sale.

Damage alone, without sale, remained a situation where notice was required. In *Fleming v Smith* (1848), the House of Lords heard argument on whether a notice of abandonment was necessary where a vessel insured on a time policy was damaged by heavy seas. It was said for the insurer:

> *'[The law] confines the right so to recover, without first giving notice of abandonment, to cases where the ship has been destroyed as a ship, and is a mere congeries of planks. The cases of [the Tartar (n 67)], Roux v. Salvador [n 64], and [the Friendship (n 109)], are all to the same effect, the reason being that where the very form of the ship is destroyed, the underwriter cannot be better or worse for the abandonment; but that shews that where it is not so destroyed, he is entitled to notice of abandonment. [the Selby]*[205]*, Martin v. Crokatt (14 East, 465), Irving v. Manning in the Court of Common Pleas (1 Com. Bench, 168), Bell v. Nixon (1 Holt, 423), Toung v. Turing (2 Man. and Gr. 593 ; 2 Scott, N. R. 752), all tend to the same point, and shew the marked distinction which exists between an actual and a constructive*

[203] (1824) 2 B & C 694; (1824) 107 ER 540.
[204] (1821) 3 Brod. & B. 147 ; (1821) 129 ER 1238, though the case does not go quite that far – the captain returned to England bringing news of the necessary sale, as repairs could not be made. Abandonment was made one day after his return, which was held to be good (Dallas LCJ, Park J).
[205] (n 57).

total loss, and that notice of abandonment is necessarily incident to the latter class of cases[206]*.'*

Charles Pepys LC, with whom Brougham LJ fully concurred, declined to rule whether a notice of abandonment had been necessary but stated ambiguously, *'If there was any necessity for a formal abandonment, and with a full knowledge of the facts they did not make that formal abandonment, but took the property instead, they could not afterwards take the benefit of the policy, as if there had been a formal abandonment. If, on the other hand, there was no necessity for a formal abandonment, still, if they chose to lie by and allow things to go on as they did, they could not afterwards upon a change of circumstances, or in consequence of a better calculation, turn round and say to the underwriters, "Now we will give you up this property, because we find we cannot turn it to the advantage which we expected"*[207]*'*. Campbell also concurred, but stated *obiter* that as the ship had not been '*submerged or destroyed'*, a notice of abandonment had been necessary. All three agreed that the notice of abandonment, given several months after information of the damage reached the owners, and after the ship had carried a cargo to England, was too late to be effective.

FOLLOWING JUDICIAL SALE

In *the Martha*[208] notice of abandonment was unnecessary. The insured cargo of saltpetre was seized in the course of the voyage and condemned. It was taken out of the ship and sold for the captors' benefit. The condemnation was reversed on appeal and the value of the property paid to the owner, subject to payment of the expenses of the captor and of the Crown in Admiralty. Ellenborough LCJ held that the assured might recover for a total loss, without notice of abandonment. In the course of the argument he had remarked, '*The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it*[209]*'*. In delivering judgment he held, '*Then, as to the point of abandonment, if instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away*.

[206] (1848) 1 H.L.C. 513, (1848) 9 ER 859 (HL) at *527.*
[207] Ibid. at 531.
[208] (n 78).
[209] 13 East, at p 309.

This case established that where the property had been sold, in this case by a prize court, no notice of abandonment was needed.

Similarly, in *Cossman v West; Cossman v British America Assurance Co (Le Cann)* (1887)[210], the Privy council held that it was not necessary that a ship should be actually annihilated or destroyed for there to be a total loss within the meaning of a policy. It might, as in the case of capture and sale on condemnation, remain in its original state and condition; it might be capable of being repaired if damaged; it might be actually repaired by the purchaser; or it might not require repair**.** The rule was, '*if it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been annihilated. In such a case no distinction can be drawn between a sale upon capture and a sale under the decree of a Court of Admiralty for the expenses of salvage services, and there is no need for notice of abandonment'.*

These cases re-introduced property law considerations, which had been excluded in *Goss*, but in a limited context going only to whether a notice of abandonment was necessary. It did not change the circumstances in which abandonment could be properly served on the insurer. Was there a difference between situations of capture where no formal condemnation had occurred, such as piracy, and situations where it had, such as enemy capture? If there were a conceptual difference there is apparently no pre-Act judicial authority discussing it.

R*oux v Salvador* (1836)[211] was described as the leading common-law authority on the distinction between actual and constructive total losses by the draftsmen of the 1906 Act, and in successive editions of Arnould. The definitions at ss 57 and 60 of the Act were drafted to codify the definitions expressed in that case. It has been cited frequently as authority for the proposition that there need be no notice of abandonment if there is an actual total loss, but that there must to claim a constructive total loss. That definition was given in Arnould in 1857, and remains current. *Roux* concerned a cargo of hides. A leak in the ship soaked the cargo. It was decided that by the time of their arrival in France the hides would have putrefied, and the master elected to sell them *en route*. Later, the owners claimed for a total loss. The Court of Common Pleas held that there had been a partial constructive total loss only and that notice of abandonment had been necessary. Lord Abinger CB, in the Exchequer, held that there had been a total loss. The *ratio* was that, because by the time the hides would have arrived at the destination port they would have rotted and been destroyed there was a total loss for which no notice of abandonment was necessary. One passage that has attracted

[210] (1887) 13 AC 160, [1886-90] All ER Rep 957.
[211] (n 64).

attention is that '*when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment'*. That confirmed the earlier statement in *Holdsworth and another v Wise and another*.

Abinger's decision is problematic. At the time the cargo was sold it did exist *in specie*: the hides were sold as hides and not as waste. They were sold as damaged goods, not goods that would inevitably decay: the purchaser, taking control of the hides quickly, could dry and restore them. If the case is put in the language of the 1906 Act their destruction seemed to be inevitable (within s 60(1)), so that the loss would have been a constructive total loss only, and notice would have been required. Nevertheless, the court decided that there was no need for the insured to give a notice of abandonment, by saying that the need for a notice of abandonment had been removed by the sale of the goods, that sale being justified, by reference to the deterioration of the cargo such that the insured voyage had appeared impossible – the hides could not have physically survived the complete journey. Justified sale, as well as judicial sale, became a situation where no notice was necessary. In commentary it is often incorrectly suggested that the hides were destroyed.

ACADEMIC COMMENTARY ON WHETHER NOTICE OF ABANDONMENT NECESSARY

Early nineteenth century authorities record submissions that no notice was required where the *spes recuperandi* was gone, as in *Tunno*. Those submissions apparently derive from then contemporary academic commentary, unsupported by judicial statements. Some textbooks followed the law accurately as it appeared in the reports. In Smith's Compendium of Mercantile Law it was said: *'Total loss is of two sorts: it is either total per se, or that which may be rendered so by abandonment*[212]*',* and further:

> '*Hughes on Insurance says the same thing. A total loss occurs either when the property insured is totally lost to the owner, or when, though not in fact wholly lost, the damage sustained is of such a nature that the owner is entitled to recover to the amount of the insurance, on making an abandonment. The use of an abandonment, in such cases, is to enable the underwriters to take measures for the preservation of the property, and to exclude any inference that the insured still intend to adhere to it as their own." Tunno v. Edwards*[213] *laid down the doctrine distinctly, that wherever the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. And wherever this doctrine has been held, no distinction has been made between the case of capture and sea damage'*[214].

[212] Smith's Compendium of Mercantile Law, p. 348.
[213] 12 East, 488.
[214] Smith's, p 381.

Other textbooks went further than the reported authorities. The 2nd edition of Arnould stated: *'If the privation exists as at the time the action is brought, the assured may recover for an actual total loss, even though he has given no notice of abandonment*[215]*'.* The case cited as authority for that rule, *M'Iver v Henderson*[216], does not support that proposition. In that case the ship had been captured, damaged, eventually brought to a port in England and proceedings were instituted before a prize court. The plaintiff had, in fact, served a notice of abandonment, which was held to be made in time.

3.2.4 CONCLUSION: WHEN ABANDONMENT UNNECESSARY

By 1906 notice of abandonment was necessary after capture, unless insured property were sold by a court or actually physically destroyed. In capture, without more, there was a need for a notice of abandonment. The state of the law was not uniform. Isolated extracts from textbooks such as Arnould gave the opinion that a notice was unnecessary on capture. These were presumably were the foundation for the submissions in *Goldsmid*[217]. It is essential to note that a procedural requirement to give a notice of abandonment did not disturb the presumption of irretrievable loss on capture. Although that seems obvious the result of a notice of abandonment being seen to be necessary, and the fact that the *spes recuperandi* was mentioned in this context, possibly led to confusion of the two separate issues.

[215] Arnould (1850 2nd ed).
[216] (n 74).
[217] (n 195).

CHAPTER IV LAW FOLLOWING CODIFICATION

The 1906 Act marked an abrupt departure from the prior law on capture. The draftsmen did not intend this. It was a codifying statute. Section 91(2) provides:

> *'[t]he rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance'.*

The correct approach to capture, suggested in *the Polurrian*[218], was therefore first to identify applicable common-law rules, and then to question whether they survived. The first issue is whether the statutory definitions of total loss are 'complete', or 'incomplete' so as to admit a common-law rule to supplement them (4.1 below). Arguably, the presumption survives in the modern law by s 91(2) of the Act because: (i) the presumption is compatible with the test in s 60(1); and (ii) the common law presumption of total loss has been applied the House of Lords subsequent to the Act[219] (not cited in *Masefield*). Secondly, the 'contemporary' law, the 'unlikelihood' test of constructive total loss originating in *Polurrian*, is doubted, as it derives from two errors of law. Consequently, it arguably ought not to be followed (4.2 below). Finally, certain factual situations following capture which will be actual total losses within s 57 are considered and the 'wait-and-see' approach is discussed. (4.3 below).

4.1 THE STATUTE

4.1.1 ACTUAL TOTAL LOSS

Section 57 of the 1906 Act provides an actual total loss occurs:

> '(1) *Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof*'[220].

As s 57 lists destruction and damage as the first two possibilities, the latter clause - *expressio unus exclusio alterius est* - must include situations where the subject matter survives *in specie*, possibly even undamaged, as commonly in capture. Section 57 further provides that *'(2) In the case of an actual total loss no notice of abandonment need be given'.* However, a policy may require notice (e.g. ICC policies) to claim actual total loss. *Masefield* indicates that even a sale of a vessel by a prize court might establish a constructive total loss only. Arguably, for 'irretrievably deprived' in s 57 to retain any meaning in a capture context, on-

[218] (n 330)(facts at 4.2.1).
[219] Principally *the Minden; Wangoni; and Halle* (n 328).
[220] 1906 CHAPTER 41 6 Edw 7, http://www.legislatio\n.gov.uk/ukpga/Edw7/6/41, as at December 2011.

sale following capture must fall within this section, alongside where it is not technically possible to rescue a stranded ship or raise a wreck (outside the scope of this thesis).

4.1.3 CONSTRUCTIVE TOTAL LOSS

Section 60 of the 1906 Act defines a constructive total loss, so far as material:

> '(1) *where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*
>
> (2) *In particular, there is a constructive total loss: (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, … , or (b) the cost of recovering the ship or goods, … , would exceed their value when recovered;'*

Where the insured claims under s 60, s 61 of the Act gives the insured a choice;

> *'Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss'.*

Notice of abandonment is treated by s 62:

> *'(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss. (2)Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer…. (7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him'.*

The *Court Line Co Ltd v R (the Lavington Court)*[221] indicates that 'abandonment' has a different meaning in s 60 to its use in ss 61, 62 and 63. This was adopted by Steel J in *Masefield*, but this suggestion is doubted (see below).

4.1.4 COMPARISON BETWEEN S 57 AND S 60

The two main distinctions between actual and constructive total losses are (i) the test of whether a loss has occurred; and (ii) whether the procedural requirement to give a notice of abandonment is necessary. The test of 'irretrievable deprivation' under s 57 appears a higher bar than 'unlikelihood of recovery' under 60(2)(i)(a). To fall within s 57 the loss must have

[221] (1945) 78 Ll. L Rep 390; [1945] 2 All ER 357.

already occurred, whereas a claim under s 60 can be made where a loss appears unavoidable or likely.

The draftsmen's guidance notes explained that the sections enshrined the definitions of actual and constructive total loss made in *Roux v Salvador*[222]:

> *'In the majority of cases, the distinction between actual total loss and constructive total loss corresponds with the distinction which has been drawn between physical impossibility and mercantile impossibility. A merchant trades for profit, not for pleasure, and the law will not compel him to carry on business at a loss. A commercial operation is regarded as impracticable, from the mercantile point of view, when the cost of performing it is prohibitive.'*

That guidance indicates physical impossibility of restoration to the insured as the main type of actual total loss. It does not explain the meaning of irretrievable deprivation in s 57, or elaborate on the test in s 60(1) or (2)(i). Clearly this guidance was not intended to assist on situations of capture or related perils but referred primarily to constructive total loss arising from sea-damage.

4.1.5 CASES DISCUSSING THE TESTS FOR CONSTRUCTIVE TOTAL LOSS

RELATIONSHIP BETWEEN THE TESTS IN S 60(1) AND 60(2)

Section 60 appears to contain two separate tests; s 60(1) is a general test, s 60(2) contains specific examples. Which must the insured satisfy to establish a total loss following capture? Arguably, an insured is not limited to s 60(2) but can rely on the general wording in s 60(1). In *Robertson v Petros M. Nomikos Ltd* (*Robertson*) (1939)[223], concerning a policy on freight, Wright LJ observed:

> *'…Some difficulty has been found in interpreting that section because it consists of two parts. Sub-s. 2 is purely objective; it gives the two cases of constructive total loss of ship, the first being deprivation of possession, the second the cost of repairs. This is completely consistent with s. 61. But s. 60, sub-s. 1, is said to be inconsistent, because it makes the constructive total loss depend on the condition that the subject-matter is reasonably abandoned for either of the reasons stated. This, I think, does not qualify the definition in sub-s. 2. The two sub-sections contain two separate definitions, applicable to different conditions of circumstances…'*[224]

[222] Chalmers M.D.E.S. and Owen, D; *Digest of the Law of Marine Insurance* (1901 William Clowes & Sons Ltd, London) and also Chalmers, M.D.E.S; *The Marine Insurance Act 1906* (1st edn 1907 William Clowes & Sons Ltd, London).
[223] [1939] A.C. 371.
[224] [1939] A.C. 371.

This was echoed in Rickards v Forestal Land, Timber and Railways Co Ltd (the Minden); Robertson v Middows Ltd (the Wangoni); Kann v W W Howard Brothers & Co Ltd (the Halle)[225] The Minden; Wangoni; and Halle (Wright LJ):

> *'It has been observed that this section raises great difficulties of construction. That is perhaps inevitable, and it is certainly excusable when it is sought in a brief section, supplemented though it is by ss. 61 to 63, to embody the complicated problems of law and fact which experience has shown to arise in the case of a constructive total loss. Some aspects of the section have been recently discussed in this House in [Robertson]. In particular, the difficulty of fitting together the two sub-sections of s. 60, and reading them together with s. 61 was there considered. I think the view which this House arrived at was that the two sub-sections contain two separate definitions which may be applied to different conditions of fact. Thus an assured can base his claim on the terms of sub-s. 2, which give an objective criterion in each case, ship, goods or freight, not only more precise but substantially different from that in sub-s. 1. Sub-sect. 2, as compared with sub-s. 1 is thus cumulative, not merely illustrative[226]'.*

Accordingly, the law appeared settled that an insured can claim by various different routes under s 60. The cases are permissive: the insured can claim under s 60(2) if unable to claim under s 60(1). Importantly, there is no statement, except Steel J's judgment in *Masefield*, restricting an insured from claiming under s 60(1)(which is doubted, see Conclusions). Therefore, it is probable that there is no reason why an insured must, on capture, claim under s 60(2) rather than s 60 (1).

WHETHER THE TEST IN S 60 IS EXHAUSTIVE

A second issue with the interpretation of s 60 considered in *Robertson* was whether the tests in s 60 were exhaustive or whether prior established common-law rules supplemented them. Two earlier cases touched on the issue. In *the Polurrian*[227] the test under s 60(2)(i) had been embellished to by the inclusion of the words 'within a reasonable time' to the test of deprivation of possession (see 4.2.1ff). Contrastingly, in *Hall v Hayman* (1912)[228], Bray J held that a common law rule was excluded by the new wording. Porter LJ in *Robertson* addressed the issue of the completeness of s 60 directly, saying:

> *'That s. 60 is intended to be a complete and not a partial definition appears to follow from the wording of s. 56 when it says: "Any loss other than a total loss, as* hereinafter defined, *is a partial loss." But it does not follow that the first sub-section lays down the general rule, whereas the second gives certain particular instances already covered by the general rule. Indeed, whatever may be the case with regard to*

[225] [1942] AC 50 (HL), [1941] 3 All ER 62; affirming [1941] 1 KB 225 (CA); [1940] 4 All ER 395, reversing [1940] 4 All ER 96.
[226] (n 328).
[227] (n 18).
[228] [1912] 2 K.B. 5.

sub-s. 2 (i.), sub-sub-ss. (ii.) and (iii.) do not appear to be covered in terms by the definition in sub-s. 1.

But in any case, unless there is some reason to the contrary, a definition must be held to include the whole of its wording, and if particular instances are given which include matters which are outside the more general definition, that is no reason for supposing that their application is limited by the more general words. They do not merely illustrate - they add to the terms of the definition. Sect. 60 does not confine constructive total loss to cases where the subject-matter of insurance has been abandoned, though in some instances there may be no constructive total loss unless abandonment has taken place.'[229]

This indicates that s 60 was a fairly complete test, making it difficult to supplement with common-law rules. In *Irvine v Hine* (1949)[230], the insured trawler was damaged during the Second World War, and not repaired because government permission was required before scarce resources could be obtained. The owner claimed a constructive total loss, on the basis that at all material times he was unlikely to have obtained a licence to repair the vessel within a reasonable time. It was conceded that the claim was not tenable under any of the heads specified in the Marine Insurance Act 1906, s 60. However, it was contended that the claim was justified at common law, was not inconsistent with s 60, and accordingly was valid by virtue of s 91(2)[231]. Devlin J addressed whether s 60 could be qualified by adding the extra test. He said:

'Section 56(1) provides:

"... Any loss other than a total loss, as hereinafter defined, is a partial loss."

That seems, as Lord Porter pointed out in Robertson v Nomikos ... to mean that the definition of constructive total loss in s 60 must be complete. If any loss outside s 57 (which defines actual total loss) and s 60 were to be held to be a total loss, it could not be a partial loss, as that would be inconsistent with the express provision of s 56.'

Accordingly, he ruled that the common-law rule was excluded. However, Devlin J had to deal with the precedent of *the Polurrian*, which added the requirement of 'within a reasonable time' to s 60:

'I have arrived at my conclusion without relying on the authority of the dictum by Lord Porter to that effect in Robertson v Nomikos, to which I have referred. I have approached the matter in this way because counsel for the plaintiff may be right in saying that it is obiter dictum. The conclusion I have reached is greatly strengthened by the high persuasive authority of such a dictum. This appears to be the only place in the authorities in which the point has been considered. Counsel for the plaintiff claimed that in 1913 Pickford J in Polurrian Steamship Co v Young had, in effect, treated s 60 as incomplete by adding the qualification "within a reasonable time" to

[229] [1939] A.C. 371.
[230] [1950] 1 K.B. 555, [1949] 2 All ER 1089.
[231] Ibid. at 1091.

> *the provision about recovery of the ship or goods in sub-s (2)(i). It seems to be clear from the passage referred to that Pickford J was doing no more than to give the provision what he thought was its right construction. The sub-section is silent as to whether the deprivation of possession has to be perpetual or not, and so is open to either construction. Even if the right construction of the language, taken by itself, is that the deprivation of possession is to be perpetual, it is clear that the Act does not textually cover the point, and accordingly there would be a lacuna which the common law could fill without inconsistency with any express provision. I hold, therefore, that the claim for constructive total loss based on this ground is bad in law*[232]*'.*

Accordingly, he held that in *Polurrian* the court had been able to supplement the words of the statute in relation to s 60(2)(i), but that he was not able to repeat the exercise to the much greater extent of adding a wholly separate ground of abandonment. The difference between the two cases is significant. In *Irvin*, the plaintiff effectively argued for another ground to be added to s 60. Chapter II demonstrates a common-law presumption of total loss on capture. Arguably, this falls within the rule in s 60(1) as the loss *appears* to be permanent, and therefore it does not fall foul of *Hall v Heyman* or *Irvin v Hine.*

4.1.5.3 *Whether 'abandonment' has the same meaning in s 60(1) and 60(2)*

The issue of whether 'abandonment' had identical meaning in s 60(1) as in s 60(2) arose in *Robertson*. Wright J stated:

> *'…I do not find any inconsistency between s. 60, sub-s.1. and s. 61. Sect. 60, sub-s. 1, deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual abandonment of the subject-matter insured. But if there is any inconsistency between s. 61 and s. 60, sub-s. 1, there is, in my opinion, no inconsistency at all between s. 61 and s. 60, sub-s. 2, which latter is the definition material in the present case*[233]*'.*

This is relevant to the discussion of *Court Line Co Ltd v R (the Lavington Court)*[234] in Steel J's judgment in *Masefield* (see 4.4.1 below). *The Lavington Court*, in so far as it relates to whether 'abandonment' in s 60(1) can be an act of the insurer, rather than the master, is silent on the point; any discussion would in the circumstances have been *obiter*. Nothing in the guidance notes indicated that the draftsmen had that intention; rather they intended abandonment to be understood throughout as the act of ceding the interest to the insurer (rather than either notice of abandonment or physical abandonment)(see 4.1.8).

[232] (n 218).
[233] [1939] A.C. 371.
[234] (n 218).

4.1.6 PRESUMPTIONS OF TOTAL LOSS

The Act includes one situation where an actual total loss can be presumed, without any physical destruction being proved. Section 58 of the Act provides *'Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed'*. That section codified the rule on missing ships, established at least by 1816[235], and supports the proposition that a presumption, rather than a proven fact, can found a claim for an actual, and by extension, constructive total loss.

4.1.7 DRAFTSMEN'S GUIDANCE NOTES ON CAPTURE

Neither the Act nor the draftsman's guidance notes to ss 57 or 60 state whether capture *simpliciter* is an actual or constructive loss. However, the guidance notes on s 61 provide that where a ship is captured, the insured will have to give a notice of abandonment[236]. That indicates that the draftsmen recognised that the authorities generally required the insured to give a notice of abandonment. It was the opinion of the courts after the 1906 Act that the capture cases were cases of constructive total loss where the issue of likelihood of recovery was relevant. This retrospective reading of the statutory provision into earlier cases was an instance of the logical fallacy of the undistributed middle. Was the presumption of total loss in the contemplation of the draftsmen? In *Le Cann*, cited in the guidance notes to s 57, Sir Barnes Peacock stated:

> *'In De Mattos v Saunders… it was held that a partial loss of cargo caused by perils of the sea was not converted into a total loss by a sale under a decree of a Court of Admiralty, in a suit instituted by salvors against the ship and cargo for the recovery of sums claimed for salvage services. The case was decided upon the ground that the acts and proceedings in the Admiralty Court were not, under the circumstances in that case, the natural consequence of a peril insured against. WILLES, J, in delivering the judgment of the court, observed (LR 7 CP at p 579):*
>
> > *"The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors, and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequence of a peril insured against. … it is not a proximate consequence of sea damage in general that there should be proceedings in a Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss, which would be absurd. There was no natural connection between the sea damage here and the sale under the decree of the Court of Admiralty. The cases cited of hostile seizure and condemnation by a prize court have no application. In such a case, the*

[235] E.g. *Houstman v Thornton* (1816) Holt NP 242

[236] P89-80, to the effect that if an abandonment is given after restoration, it is out of time, citing *the Mary* (n 104) and *Dean v Hornby* (n 9) at 190, if it is given before restoration, it is in time, citing *Ruys v Royal Exchange* (1897) 2 QB 135.

> *original seizure is prima facie a total loss; all that follows is only the necessary consequence of the seizure"'* [237].

The indication was that hostile seizure (so also capture) established a *prima facie* total loss. Does this indicate that it is a potential constructive total loss before the sale? In the guidance notes to the Act on s 60, it was stated:

> *'Insurance on goods from Bombay to London with liberty to send them through France. On arrival in Paris they are detained in consequence of the siege, and it is uncertain what will become of them. The assured may treat this as a constructive total loss*[238].

First, this demonstrates the draftsmen's intention to leave the test under s 60(2)(i) as 'uncertainty'. However, the courts in *Polurrian* referred to test being changed to 'unlikelihood', and imposed a stricter test. If *Polurrian* was right a clear error in the statutory drafting occurred. It is settled that only if the statute is unclear can reference be made to supporting materials. However, it is striking that the draftsmen published, in leading practitioner works on insurance law, a clear statement of the law opposed to the construction in *Polurrian*. Where there was evidently uncertainty as to the meaning of the words, it is puzzling that no submission was made in *Polurrian* referring to the draftsmen's intention clearly expressed in the guidance notes and textbook.

Secondly, the guidance notes clarified the draftsmen's intended meaning of 'abandonment' in the ss 60 to 62. It was not to mean 'notice of abandonment', but rather *'it denotes the voluntary cession by the insured to the insurer of whatever remains of the subject matter insured'.* Where the court had difficulty understanding the meaning of 'abandonment', again, it is unclear why no reference was made to the draftsmen's guidance. The draftsmen's notes and textbook undermines Steel J's gloss on the meaning of 'abandonment' in s 60(1) as derived from *the Lavington Court*[239].

It is therefore submitted that the guidance notes establish: (i) that the test under s 60 was intended to remain as 'uncertainty', not 'unlikelihood' as applied in *The Polurrian*; and (ii) that the meaning of 'abandonment' was not an act of the master as Steel J concluded, but meant instead the actual abandonment of property saved to the insurer.

[237] (n 210) at 967.
[238] Chalmers & Owen, *The Marine Insurance Act 1906*, p.84, citing *Rodonacci v Elliott.*
[239] (n 234).

4.1.8 DEFINITION OF CONSTRUCTIVE TOTAL LOSS MODIFIED BY MODERN POLICIES

The statutory definition of a constructive total loss may be modified by the terms of the policy itself; specific terms override the statutory definitions.

STATUTORY DEFINITION RESTRICTED BY TERMS OF POLICY

Section 56(3) of the 1906 Act provides that, unless expressly stated, a policy will cover actual and constructive total losses. In *Masefield*, Rix LJ stated that the exclusion of constructive total loss in the policy was a 'special term'. The exclusion of liability for a constructive total loss, however, has been a standard term since at least the Revised Institute Cargo Clauses 1982, and has been commonplace since. The Institute Cargo Clauses (A)[240], cl 13 provides that:

> *'no claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival'.*

That term excludes the additional category of constructive total loss provided for by s 60(2)(i) of the 1906 Act, relating to deprivation of the assured's possession in circumstances where it was *'unlikely'* they could recover the subject matter, and ensures that the s 60(1) test is applied[241].

Consequently, Masefield, or claimants in similar circumstances insured on a policy containing a similar clause, could only recover for a total loss in three ways: (i) if the cost of recovering was very high (within s 60(2)(i)(b)), or (ii) if an actual total loss appeared unavoidable (within s 60(1)), or (iii) the insured had been irretrievably deprived (an actual total loss under s 57). In Masefield, it was not sustainable on the facts that the cost of recovering was very high, i.e. more than its value on arrival. The Court of Appeal in *Masefield* addressed whether the test in s 57 was satisfied. Surprisingly, it arguably would have been successful, the s 60(1) claim was dropped on appeal.

Finally, it is worth noting that despite the terms of the 1906 Act providing that no notice of abandonment has to be given for an actual total loss, the ICC state:

[240] Clauses B and C exclude piracy claims under cl 6 – War Risks Clause.
[241] Cf *Polurrian* (n 18)(C/A) where the s 60 (2) test was applied in default in the absence of that clause.

> *‘ It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation’.*
>
> .

On the ICC form, notice of abandonment was necessary in any event, regardless of the default position under the Act. The giving by the insured of a notice of abandonment was not, therefore, in itself an indication that it had to be a constructive total loss – it was consistent with the terms of the policy that notice had to be given to recover even for an actual total loss. However, arguably, the underlying law is that capture creates a presumption of constructive total loss only. Therefore the requirement for a notice of abandonment for actual total loss claims ought not to allow a claim for actual total loss to succeed, applying the presumption, where the claim was in fact for a constructive loss.

CONSTRUCTIVE TOTAL LOSS BY DEPRIVATION SPECIFICALLY DEFINED IN SOME POLICIES

Other policies contain relevant terms which define a loss by depravation of possession with more precision than the statute. The Institute War and Strike Clause (Hulls-Time) of 1 October 1983 contains a clause on detainment. It reads:

> *‘In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 6 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession without any likelihood of recovery.’*

While that sort of clause provides some certainty in a total loss claim, it is not incorporated into every policy. It requires the insured to wait a period of 6 months, which is a significant delay in the context of modern commerce. Further, it reveals confusion about the definition of actual or constructive total loss. It is apparent that where that clause applies, the presumption of irretrievable deprivation it establishes would be sufficient to claim an actual loss of the vessel under s 57, and goes well beyond what is required to allege a constructive total loss. Yet the clause is drafted to establish a constructive total loss: a *belt-and-braces* approach, or drafting a clause in an area of uncertainty as to how the courts will interpret capture cases?

“FRUSTRATION CLAUSES” EXCLUDING ‘LOSS OF THE VOYAGE’ CLAIMS

A policy of marine insurance is not only on the physical subject matter, but on that subject matter for either a voyage, or, more unusually, for a time. Some policies post 1918 contained ‘frustration clauses’, which limit recovery for the loss of the voyage, as opposed to the loss of the property, such as this policy from 1939:

> *'... warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power.'*[242]

The ICC policy in *Masefield* did not exclude claims based on the loss of the voyage. This term does not appear to be commonly found in contemporary policies. Where such a clause is included, it only operates to exclude claims based on lost or interrupted voyages where the casualty was caused by the actions of a sovereign people: the clause does not cover actions of pirates. It was drafted with the interruptions to commerce caused by the Spanish Civil War, and mindful of the possibilities of a general European war. The actions of 'non-state' parties do not fall within the exclusion. Had it been in *Masefield's* policy, it would not have taken effect.

[242] *The Minden, the Wangoni, the Halle* (n 328), at 66.

4.2 CAPTURE AND CONSTRUCTIVE TOTAL LOSS

Capture cases decided post-1906 usually treated captures as potential constructive, not actual total losses. The court addressed '*... the less severe test of the right to treat a capture as constituting a constructive total loss*'[243] first, and if that test was not satisfied, the court did not then consider actual total loss. Judges construed the statute with little reference to the established cases, and following *Polurrian* found that the Act imposed a new test.

4.2.1 *POLURRIAN V YOUNG*

The reasoning underpinning the construction of s 60 of the Act in *Polurrian* establishing a new statutory test contained errors of law. In *Polurrian*, the policy covered a ship carrying coal. She was seised in 1912 by the Greek Navy, then at war with Turkey. The Greeks appropriated the coal to supply their fleet, and stated that the vessel would be put before a prize court. The owners abandoned on 26 October, which was taken as the date of issue of the writ, following then accepted industry practice. She was released on 8 December. The owners claimed for total loss. They argued she was constructively lost, citing *Goss v Withers* and *The Romulus*. At first instance and on appeal, it was held that the likelihood of recovery was a relevant consideration. Kennedy LJ held that, before the 1906 Act, she would have been found to be a constructive total loss:

> *'According to the law as it stood before ... that Act, the seizure or arrest or detention of a vessel for that which was either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by Arnould on Marine Insurance, 9th ed., vol ii s.1108, from Emerigon, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which might be permanent, and was, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss*[244]*'.*

This contains two serious errors of law:

First, the extract repeats an error in Arnould. The case cited by Arnould from Emerigon was not authority for the rule that an apparently temporary capture gives no ground of abandonment. Emerigon's outline of the case was:

> *'Thus where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and after taking out*

[243] *The Polurrian* (n 18), first instance and appeal.
[244] at 936.

> *and paying for the corn let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment to the assured on ship'*[245].

Clearly, detention was over by the date of the action; this was a factual situation akin to *the Little Mary* (see 2.3) distinguishable from *Polurrian.* Accordingly, the Genoese case was cited for a rule it did not support. Further, Emerigon elsewhere states the English law to be the opposite of that stated in Arnould and in *Polurrian*. Having stated the French law that an insured must wait six months following a capture to claim a total loss, Emerigon wrote:

> *'In England, the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to total deprivation; it is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo*[246]*'.*

Emerigon, therefore, documented the 'instant right of abandonment' in English law, i.e. the presumption of total loss. He does not record any investigation into the *spes.* Emerigon is in similar terms to Marshall in that capture gives an 'instant right to abandon'. It is vital to separate the rule from its justification. Capture justified the instant right of abandonment *because* of the uncertainty, but that reason does not suggest that there is an investigation of the *spes*. In *Pollulrian* the case from Emerigon was applied, where it should have been distinguished, and the spurious conclusion in Arnould copied. This was a clear error of law.

As Emerigon was cited in Arnould and in *Polurrian* as the ultimate authority for the current law, it is worth noting Emerigon's only other material statement on piracy, supporting the presumption: '*Piracy is presumed to be fatal. The insurer is liable for it*[247]*'.* This concludes a long discussion on the property law relating to piratical not enemy capture, concerning where the owner could recover from a recaptor without paying salvage. Equally, this does not support either a consideration of the *spes* or a 'wait-and-see' approach. It is consistent with a right of instant abandonment. Further, Emerigon stated:

> *'The insurer is responsible for captures made by friends or by enemies not declared, just as they are for open and declared enemies; for whoever commits depredation upon another is a pirate and becomes an enemy'*[248].

Incidentally, nothing in his extensive discussion on whether ransom agreed by the master to a pirate was part of general average indicates that a master was ever required to seek to

[245] Roccus no 60, 1 Emerigon c XII s 30.
[246] Marshall, Law of Marine Insurance p. 403 (4th ed 1861), cf. Chapter 1.3.
[247] Ch XII, s 28.
[248] Emerigon ch XII s XVIII.

negotiate for or agree to pay ransom[249]. Emerigon, therefore, supports the immediate right of abandonment or presumption of total loss. This treatise, despite its early date, remains a direct source for the contemporary law[250]. An error citing it creates an error in the modern law.

Secondly, Kennedy LJ conflated dicta from 'arrest' and 'detention' cases, which were distinct maritime perils treated separately in academic texts (a full analysis is outside this MJur Thesis) from capture. A court might investigate the likely length of detention or arrest, but not seizure or capture, since the *spes recuperandi* was not assessed in pre-act capture/seizure cases in any way. The wording '*might be permanent…uncertain continuence*' was taken from Marshall, copied in other academic authorities, but was not any judicial statement in a case of capture. The words related to the *justification* for the presumption of total loss stated in Marshall were not part of the rule itself, and should not have been cited as the rule. Ultimately, they derived from Storey J's judgment in *Peele*, which itself did not change the law on capture. There was no judicial authority for that proposition that the peril of capture must appear temporary, despite its appearance as a general rule in textbooks. So the Kennedy LJ quoted academic speculation, not the actual authorities, in stating the law.

Consequently, the paragraph from Arnould cited by the Court of Appeal was unsound law. The extract from *Polurrian* is almost an exact paraphrase of the contemporary Arnould[251], so it arguably reflects the opinion of the profession. However, as it ostensibly derives its authority from Emerigon, who instead had confirmed a rule providing for an instant abandonment under English law, Arnould contains a serious error of law. Arguably, any statement relying on this error in Arnould, even by the Court of Appeal in an authority which has come to be the standard test for the post-Act law, was and remains *per incuriam.*

Having considered the prior law, Kennedy LJ addressed whether the seizure fell within s 60 of the Act. Here, the errors stating the earlier law matter resulted in his finding that the s 60 test had changed:

> *'I think that the statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition, but I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things - the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover*

[249] Emerigon ch XII s XLI, ss9.
[250] Arnould (1848) wrote that Emerigon was the most important of the treatise writers, and was a direct authority for contemporary law (Vol I, p viii-ix).
[251] 9th ed, s 1108.

> *for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases and have been unable to find it used judicially in any of them. But there it stands in the section of the Act of Parliament; its meaning is quite clear'.*

He made no reference to the presumption of total loss, or instant right to abandonment, which was the actual prior law. The reports contained no case of capture besides *Stringer* where the test was whether it was *'doubtful whether it would ever be restored, or if restored, at what period,'* and *Stringer* was not a case of capture simpliciter with prompt abandonment. The *spes recuperandi* was not assessed in capture cases, either as 'uncertainty' or 'unlikelihood' of recovery. It was precisely Mansfield LCJ's desire to prevent investigations into that *spes* which underpinned the *ratio* in *Goss*. In capture cases, therefore, there was no test of 'unlikelihood' to be modified by s 60. Kennedy LJ would have found discussions of the likelihood of the recovery of 'possession' in stranding cases, and the likelihood of recovery in detention and embargo cases, in which possession was not interrupted. The Act's guidance notes clearly indicated the draftsmen's intention that the insured be able to claim for constructive total loss in capture situations where there was 'uncertainty'. This must have been possible only by a presumption of total loss. The Act allowed for the survival of this presumption, and the draftsmen had evidently envisaged that it would survive. This was clearly illustrated in the examples within their guidance notes. Nonetheless, Kennedy LJ stated that if he found that in plain and unambiguous language the 1906 Act had altered pre-existing law, his duty was to decide in accordance with the change:

> *'... and therefore in the present case, to enable the plaintiffs to succeed, they must establish fully (1.) that at the date of the commencement of this action they were deprived of the possession of the Polurrian; and (2.) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so.*
>
> *..the crucial date, because the date of the commencement of the plaintiffs' action - the recovery of the* Polurrian *by her owners was quite uncertain, I do not feel myself justified in holding that the balance of probabilities has been proved to me so clearly against her recovery that I can say that such recovery was "unlikely." This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed.*

Accordingly, *Polurrian,* the first case after the Act, which set the framework for all subsequent cases, was decided essentially on the natural wording of the statute. In doing so the Court ignored 150 years of established cases establishing a presumption of a total loss on a capture. These were not distinguished or even considered. Kennedy's decision was based on a new rule, introduced via an obvious error in Arnould, that the court would consider the length that any detention or capture would last. Arguably, therefore, *Polurrian* was *per incuriam.*

Was the court bound to apply the test of 'actual unlikelihood'? It is strongly arguable that it was not, and did so in error. The established common-law then applied a legal presumption that following capture, deprivation was *deemed* irretrievable. The *reason* was that as the ultimate result was uncertain, but unlikehood of recovery need not be proved. Accordingly, the facts in *Polurrian* fell within the ordinary meaning of the words of s 60(1) as a loss which 'appeared to be unavoidable'. The court was arguably bound to consider all the different constructions of s 60(i), and in light of s 92, to come to the one which preserved the common law. In focusing on the word 'irretrievable' in s 60(1), Kennedy LJ ignored the word 'appeared' and did not consider whether this section could be construed to support the legal presumption of irretrievable deprivation, rather than a fact-sensitive test of unlikelihood. It is suggested that his exposition of the law was unsound, and undermined by his omission to consider the established authorities. Although it has been followed in subsequent cases, and approved by the learned authors of Arnould, *Polurrian* should not be seen as correct merely because it has become a 'classic' judgment. Arguably, the test in *Polurrian* should be doubted, in light of the errors stating the pre-Act law, the clear intention of the draftsmen, and the omission to deal with the possibility of a presumption of or an actual loss within s 60(1).

4.2.2 TEST IN POLURRIAN APPLIED

In *Roura & Forgas v Townend and Other (the Igotz Mendi*)[252] the policy covered a charterparty for goods sold under contracts containing cancellation clauses if the goods were not delivered by January 1918. It covered vessel's loss. The vessel was uninsured. She was captured by the Germans in 1917 in the Indian Ocean, disguised and grounded off the coast of Denmark while under control of the prize crew, who deserted her. Her Spanish crew raised the Spanish flag then abandoned her. She was salvaged in March 1918. The insured subsequently claimed on the policy. Roche J said: '*[h]ere I have decided that the Igotz Mendi was not merely delayed but was captured and lost, although she was afterwards found and recovered*[253]*,*' In doing so, Roche J applied the test in *Polurrian*, and found that the recovery had been unlikely. He said:

> *'In Polurrian Steamship Co. v. Young the Court of Appeal decided that this provision imposed a more onerous proof upon the assured than the case law on the subject had imposed, and that the test of "unlikelihood of recovery" had now been substituted for "uncertainty of recovery." I, of course, act upon that decision. It was conceded that in this case the ship was out of the owners' possession for 3½ months, but it was contended that it was never securely in the possession of the Germans. It was asserted, I hope and believe with truth, that the squadrons and patrols of the navies of Great Britain, her allies and associates, were numerous and vigilant, and that recapture was probable or not unlikely. On the other hand, it is to be remembered*

[252] (n 336).
[253] Although Roche J applied the test of unlikelihood from *Polurrian*, which approach is doubted.

> *that the seas are wide and the nights were dark and long during the critical stages of this voyage, and apart from any knowledge which may be permitted to a Court with regard to German practice in the destruction of merchant shipping, the evidence as to the sinking of all other prizes by the Wolf and as to the placing of bombs on board of the Igotz Mendi convinces me that the Igotz Mendi would not, save by some unexpected accident, have survived to be recaptured. I regard her actual recovery as due to a somewhat surprising combination of circumstances, and I find that the test laid down by Kennedy L.J. in Polurrian Steamship Co. v. Young is satisfied; and I hold that it was not merely uncertain whether her owners would recover her in a reasonable time, but that the balance of probability was that they would never recover her at all*[254]*'.*

Further, the insured was able to make a claim on the policy where there had been no notice of abandonment. The vessel owner was uninsured, so could not make such declaration. It was held that, nonetheless, there was still a constructive total loss of the charters. The ship had been restored before the action had been commenced by the insured. It was held that the restoration had not defeated the claim:

> *'I have already held that there was a constructive total loss of the Igotz Mendi by her capture, and before the ship was restored to the owners such capture resulted in a total loss to the plaintiffs of their rights and profit under the charter. In short, the event agreed upon as necessary to give a right to indemnity had happened, and had irrevocably caused the loss of the subject-matter of the insurance.*'[255]

The judgment adequately reflects the nature of insurance of a charterparty, rather than ship or cargo. It was specifically held that the loss was not caused by a delay, but by the capture. While the capture subsisted, itself causing a constructive total loss of the vessel and cargo, the charter came to an end. This decision has attracted relatively little attention, probably because the majority of policies cover physical subject matter, rather than a charter. It should be noted that the language used, that of 'irrevocable' loss, is closer to the language of s 57 or s 60(1), than of s 60(2)(i). Naturally, the judgment would have been different had the subject matter been the ship/cargo. It is suggested that a better approach was to have held that the vessel was a constructive total loss during the capture, and Roche J's language supports this, but was potentially restored after its salvage. In the circumstances, the abandonment of the vessel by the prize crew would probably not have amounted to a 'restoration of possession', without more.

4.2.3 BAR OF 'UNLIKELIHOOD' RAISED:

In *Marstrand Fishing Co Ltd v Beer (the Girl Pat)*[256] the policy covered a fishing vessel. Her owner intended her to fish in the North Sea near her home port in March 1936. The captain had other ideas. When proceedings were issued, the fishing ship had been last sighted at

[254] (n 336) at 193.
[255] (n 336) at 196.
[256] [1937] 1 All ER 158 (KB).

Dover, and missing for over a month. The claim was initially for a missing ship rather than a total loss by barratry. Subsequently it emerged that she was in Spain, the captain having forged her log. She had been disguised - repainted and rigging altered. She reached Dakar in West Africa, but the authorities let her escape, when the captain was permitted to test her engines. She was ultimately recovered in June, having reached British Guiana. Porter J dismissed the owners' claim, applying the test in *Polurrian*.

It is difficult to imagine a more concerted attempt to steal a ship. It is implausible that a small Scottish fishing vessel could be stolen, disguised, and sailed to South America via Africa, yet still be 'more likely than not' to be recovered. Arguably, the test for constructive total loss was set too high. If the judge was correct that there was no constructive total loss on those facts, it is difficult to conceive any claim ever succeeding for deprivation of possession, short of an actual sale (unless a policy contained an express 'frustration clause'). Arguably, *the Girl Pat* deprives the Act of its intended force, since circumstances short of ultimate sale or destruction would not suffice for a successful claim for constructive total loss on capture. Since those circumstances would be actual total loss, it is difficult to see, if *the Girl Pat* was correctly decided, that s 60 retained any application to capture cases.

4.2.4 WARTIME CASES: MORE LENIENT TEST APPLIED; WHETHER PRESUMPTION OF TOTAL LOSS RESTATED BY HOUSE OF LORDS

Two cases during the Second World War apparently mitigated the stringent test of a constructive total loss as stated in *the Girl Pat*, although these have been cited less frequently subsequently than Porter J's earlier judgment.

The Minden; Wangoni; and Halle[257] concerned three joined appeals by British cargo-owners whose goods were loaded on German flagged vessels at the start of the War. German captains had orders to put into a neutral port, then return to Germany. If caught by the British blockade of Germany, they were to scuttle their vessels. Two ships were scuttled. The third reached a German port. In each case, the policy contained a frustration clause, which excluded claims for loss of the voyage. In the Court of Appeal and the House of Lords, it was held that the loss of the voyage was independent to the loss of the subject matter. Where the subject matter was physically destroyed, the frustration clause would not operate to defeat the claim for a total loss. When did a total loss occur?

[257] (n 328).

In the Court of Appeal, Scott LJ held that:

> *'When each ship sailed from its port of refuge for Germany, in my opinion, there was at that moment such 'deprivation of the goods without likelihood of recovery' as to constitute a constructive total loss within s 60. Whether it amounted to an 'irretrievable deprivation' so as to constitute an actual total loss within s 57, it is unnecessary to decide, or even consider.'*[258]

So the general approach in *Polurrian* was followed in considering constructive losses before actual losses. In relation to whether the loss was actual or constructive, he said:

> *'It can hardly be doubted that a constructive total loss of the goods themselves may arise when they are taken wholly out of the possession of the assured and his bailee – for example, pirates, rovers or thieves. If there can be an actual total loss in such cases through 'irretrievable deprivation' under s 57, I can see no reason why the law should not recognise a constructive total loss under s 60(1)…'*[259]

Accordingly, he stated that it was possible for a capture to be an actual total loss pursuant to s 57, although under his approach, it was sufficient to address the lesser question of s 60(1). In the circumstances, he considered:

> *'… if those orders compelled the masters at any time finally to abandon the commercial voyages, it is, I think, a necessary inference from the facts that the German government then ipso facto took absolute, and not conditional, possession of the goods, and thereafter deprived the appellants of their possession continuously until, in two cases, they went to the bottom, and, in the third, the cargo reached the hands of the German government in Hamburg.'*[260]

That statement of the rule in the case was that there was at least a constructive, if not an actual, total loss from an early moment, namely the moment the proper commercial voyage was abandoned. Mackinnon LJ gave a slightly different rule, and held instead that there was a constructive total loss when the German captain determined to obey the instructions of his government, hold the goods as the subject and servant of that government (thereby ceasing to hold them as the bailee of the assured) and carry them, if he could, to a German port. That rule also presumed the loss to exist from an early moment.

The House of Lords affirmed the judgment of the Court of Appeal. Viscount Simon LC noted that where the ships were scuttled the losses became actual total losses by the scuttling. He said, *'…the owners were unlikely to recover the goods after the time when the orders of the German government were acted on and that the goods then became constructive total losses and might have been reasonably abandoned'.* Wright LJ further stated that *'…the master,*

[258] [1940] 4 All ER 395 at 400.
[259] *Ibid* at 402.
[260] (at 403).

being in possession of the goods as a carrier for the assured, seized them in the same that he ceased to hold them as carrier and changed the character of his possession by taking and controlling them as agent for the German government… In doing so he deprived the assured of them[261]*'.* He noted that:

> *'Prima facie, when once it is accepted that there has been a seizure or capture of the goods, there is 'the right of abandoning immediately' and this right subsists so long as the property is detained by the captors or by their government, whether in port or at sea'*[262].

This 'right of abandoning immediately' must be the presumption of irretrievable deprivation: the insured can abandon immediately, which will be taken as the date of issue of the writ, if the peril then subsisted, and he will succeed on his claim. It is suggested that the rule in this case was the correct law and that this extract conforms to the pre-Act authorities (chapters II-III). Arguably, this statement by the House of Lords should have been binding upon Steel J and Rix LJ, and the fact that they did not consider this case in their judgments supports the contention of this thesis that their decisions on constructive total loss were *per incuriam*. However, Wright J then went on to say that the test had become one of unlikelihood of recovery, following the test in *Polurrian*. That approach is, strictly, incompatible with the instant right of abandonment. Either there is an instant right of abandonment or there is an investigation into the parties' rights, which potentially invites a 'wait-and-see' approach.

In the second wartime case *C Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd; Leslie & Anderson Ltd v Java Sea and Fire Insurance Co Ltd (The Oder; the Lichtenfels)*[263] the first plaintiffs were interested as buyers in a cargo of copra (a perishable cargo if detained in a hot climate for any length of time) loaded on a German ship which, just before the outbreak of war, put into Massawa, Italy. The second plaintiffs held a cargo of oilcake expeller, which was also a perishable cargo, with a storage-life of about 12 months in a hot climate. Early in October 1939, negotiations were made to obtain the release and transhipment of the cargo, but both the captain of the vessel, acting apparently upon the instruction of the German owners, and the port authorities, who, although Italy was officially neutral, were not disposed to help English interests, opposed them, stating that transshipment was only allowed where the destination was neutral. It was proved that on 11 October the German captain was claiming to hold the cargo as prize, but that by 16 October instructions had been issued by the German Foreign Office that the interests of the cargo were to be protected and that delivery or

[261] at 80-81.
[262] (at 84), citing Phillips op cit vol ii p 319.
[263] [1941] 3 all ER 256

transshipment could not be refused. However, no conditions for release or transshipment were ever agreed. In 1941, the ship left Massawa and was captured by the Royal Navy. On 16 October 1939, when the cargo had deteriorated, the plaintiffs gave notice of abandonment. The defendants declined notice and on 30 October the plaintiffs claimed a total loss. Further efforts were made after the issue of the writ for release of the cargoes, but, although these seemed to be progressing, they ultimately failed. Apparently, from 25 August 1939, German shipping was under the control of the German Government and, if, after the ship had taken refuge in a neutral port, she had attempted to leave, she would probably have been intercepted by English warships. It was found that the captain was bound to remain at Massawa until he received fresh instructions from the German Government: Viscount Caldercote LCJ asked,

> *'…whether the circumstances were such as to justify the conclusion that there was a constructive total loss. The Marine Insurance Act 1906, s 60, declares that there is a constructive total loss where the subject-matter (in this case, the goods) is reasonably abandoned on account of its total loss appearing to be unavoidable. …The proper approach to the question of fact which arises as the result of the last words quoted from sub-s (2) has been laid down in two cases. According the Polurrian SS Co Ltd v Young the assured must show that the balance of probability is that they cannot recover their goods within a reasonable time. In other words, they must show that it is more likely than unlikely. Kennedy LJ, in his judgment, which was taken as the judgment of the court, also stated as indisputable the proposition that matters must be considered as they stood at the date of the commencement of the action. The second case is [the Girl Pat], where Porter J, who, following [the Polurrian], took the material date to be that of the issue of the writ, said that the facts to be considered were the true facts as existing on that date, and not merely the facts as then known. I propose to apply these decisions in considering the question I have to decide. As far as the definition in sub-s (1) is concerned, I should again adopt the view held by Porter J that it is the true facts which have to be considered in deciding whether the subject-matter was reasonably abandoned on account of its actual total loss appearing to be inevitable. However, the view I have formed in applying the definition in sub-s (2) disposes of the question. The question is one which, as Kennedy LJ said in [the Polurrian], necessarily involves conjecture and speculation, and it is not altogether easy.*

In this extract, it is easy to discern the two well established common-law rules, first, that the true facts had to assessed as of the date of the writ, and secondly, that the true facts at that date, rather than only those known to the assured, had to be assessed. However, it is masked by the gloss, decided (arguably *per incuriam*) in *Pollurrian* that the test had been modified so that the *spes* had to be considered on the balance of probabilities. The difficulties of that approach, in considering 'conjecture and speculation' had been anticipated in *Goss.*

Caldercote LCJ found both cargoes had been constructively totally lost. This finding was despite assurances given that the state authorities would respect the neutrality of the owners, engaging the well-established rule that the English courts do not assume foreign courts will breach their own laws (which a taking of that property would have required). Although *The*

Oder; the Lichtenfels[264] did not refer to the presumption of total loss, both it and *the Minden; Wangoni; and Halle* show the test for constructive total loss applied at a much lower level than in *the Girl Pat*, and as later applied in *Masefield.* Importantly, Viscount Simon LC articulated the common law presumption of a prima facie total loss on capture (the *'immediate right of abandonment'*). Arguably, this should have bound the courts in *Masefield,* which erred in not following this statement, incorporating the pre-Act law into a modern context.

4.2.5 CONSTRUCTIVE TOTAL LOSS ON THE PERIL OF DETENTION/RESTRAINT OF PRINCES

In *the Bamburi*, the arbitrator awarded the claimant shipowners damages for a constructive total loss by restraint of princes. In September 1980, the ship was detained in Shatt-al-Arab during the war between Iraq and Iran. State authorities ordered that the vessel not be moved. The claimant served a notice of abandonment a year later and issued arbitral proceedings seeking damages for a total loss. Strictly, the arbitral award does not provide binding authority[265], but unusually the decision was published as it raised issues common to about 70 other vessels similarly detained.

In *The Bamburi* the arbitrator first found that the loss fell within the peril of 'restraint of princes or peoples' clause and that it was not a loss by detention or any other peril. The next issue was whether there was a total loss by that peril within the meaning of the 1906 Act. The test of unlikelihood of recovery was applied. 'Possession' was not lost, as in a case of capture. Accordingly, it should not be considered an authority on 'capture', despite its consideration of total loss[266]. The relevant part of the judgment concerned whether there could be a loss by a 'restraint of princes' within s 60 of the Act. The arbitrator held that there could be a 'loss of possession' within the meaning of the Act where there was a 'loss of free use and disposal[267]'.

When considering the likelihood of recovery, there was some discussion as to whether the time ran from the moment of the casualty, or from the issue of the notice of abandonment[268]. Expressing no conclusive view, the arbitrator held that the time to be considered was after the notice of abandonment – yet this view appears to be without authority. It was held that 'within a reasonable time' meant 12 months, not counting time that had run before the notice. Again, it is unclear what authority that relied upon, other than 'bidding' between the counsel. In the circumstances, it was held unlikely that the vessel would be recovered.

[264] (n 263).
[265] [1982] 1 Lloyd's Law Reports 312 at 314.
[266] p.318.
[267] p.320.
[268] p. 321.

4.2.6 INVESTIGATION OF SITUATION AFTER WRIT

The pre-Act cases did not consider events after the writ. Assessing the chance of recovery on a subsisting capture involves speculation on future events. As stated in 1954:

> *'Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided'*[269].

This general approach was followed by the arbitrator's assessment of delay in *The Bamburi*. There is a tension between the law's desire for certainty and its desire to use all the information to inform a decision. Where vessel is captured and the insured abandons and claims on the policy in time, but the vessel is released before trial, the court knows what the ultimate consequence of the capture has been: the property has been returned. Applying the strict doctrine of that the rights are to be assessed at the date of the writ, and the presumption of irretrievable deprivation, might be seen to produce an unfairness on the insurer, who will have to pay for a total loss where the loss has ended. A similar tension was noted in the context of anticipatory breach of contract in *The Golden Victory*[270]. There, the court did use knowledge gained between the date at which the parties' rights were finalised and the start of the trial in considering their judgment, and in so doing, the House of Lords overruled a former doctrine of anticipatory breach of contract which had excluded such discussion. Although interesting comparisons can be drawn, it is not suggested that there should be consistency between that part of contract law and insurance law.

4.2.7 CONSTRUCTIVE TOTAL LOSS OF VOYAGE

The previous chapters have primarily addressed whether the physical subject matter of the insurance has been lost. However, since the wagering policies (see 2.5), marine insurance has had a dual nature, and is also an insurance on the voyage (or for the time in a time policy). This section considers claims based on the 'loss of the voyage' subsequent to the Act.

The loss of the voyage was rarely discussed in capture cases. Consequently, this section considers cases where there was found or alleged to be a total loss where the owner had not been dispossessed (by a capture or seizure), but nonetheless his free use and disposal over his

[269] *Atlantic Maritime Co Inc v Gibbon* [1953] 2 All ER 1086 at 1107 (Jenkins LJ, citing *Bank Line Ltd v Arthur Capel & Co* [1919] AC 454).
[270] Mustill, '*The Golden Victory; Some Considerations*'.

property had been interfered with. More frequently, loss of the voyage arose following the unrelated situations of blockade, or siege, which interrupt the voyage, amounting to 'restraint of princes', 'detention' or 'embargo' (where there is no intention to take the property). Although these are not perils of capture or seizure, several authorities were considered by Rix LJ in *Masefield*. Do these authorities modify the law on capture or seizure?

4.2.7.1 LOSS OF VOYAGE FORMERLY COVERED BOTH VESSEL AND CARGO

Early statements doubted the insurance on the voyage at all, e.g.: *'The notion of an insurance on a voyage is absurd… in the first place it would be a double insurance, both on the ship and the voyage; for if the ship were lost before the end of the four months to be sure the voyage is lost; and if the voyage be lost, according to the plaintiff's construction, though the ship… be in good safety at the end of the four months, yet the insurance must be forfeited* (Willes LCJ CB) [271]'. However, the wagering policies clearly introduced the notion of the loss of the voyage into all policies. In *Goss*, Mansfield LCJ applied the doctrine to both ship and cargo. Subsequently, it was accepted that the 'loss of the voyage' applied equally to vessel and cargo.

4.2.7.2 'LOSS OF VOYAGE' NO LONGER APPLIES TO VESSEL

The question of whether the loss of the voyage applied equally to the vessel and to the cargo was disputed. However, in 1942 it was held that the law had probably ceased to apply the doctrine of the loss of the voyage to a vessel:

> *'The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. Lord Mansfield insisted on applying the same rule to an insurance on the ship, but his view was rejected and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure. Freight is regarded in ordinary practice as a separate interest capable of being separately insured in addition. As to goods, it is indeed true that profits can be separately insured by an appropriate policy, and also that the insurable value on goods under an open policy is their value, plus charges on shipment, not their arrived value; s. 16, sub-s. 3, of the Marine Insurance Act, 1906. But it has long been recognized that in a valued policy on goods it is permissible and indeed usual to value the goods so as to exceed their value on shipment'.*[272]

In *The Bamburi*, where it was found that 1 year's continued deprivation was a constructive total loss, this distinction between ship and cargo was noted. *The Minden; Wangoni; and*

[271] In *Pole v Fitzgerald* (1750) Willes 640 at 647.
[272] *The Minden, the Wangoni, the Halle* (n 222) at 91.

Halle was quoted: *'in the case of a policy on goods in normal form the owner can claim either for loss of goods or loss of adventure, while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure (Viscount Maugham)'*[273]. *The Bamburi* questioned whether the distinction was in fact logically sensible; why is a ship less of a loss than the cargo? However, the arbitrator concluded that the distinction was too entrenched to change: '*In any case, if loss of the adventure did still give rise to a claim under a voyage policy on ship, it would remain doubtful whether it gave rise to a claim on a time policy*[274]*'.* The law on hulls is ostensibly that there is no possibility of loss of voyage claims for total loss on a time policy. However, it remains a moot point whether it would be successful on a voyage policy – there is no recent authority on this point. A dispute on time or voyage policy would fall to be argued on the authorities pre 1830 (see 2.6 above), against an apparently entrenched opinion in the profession (but not fully supported on the authorities) that the law had changed on one and possibly both type of policy. The outcome of a dispute on this point appears unclear.

Nonetheless, it is clear that in theory a constructive total loss on the voyage can be made on a policy covering goods. In *Sanaday*, it was said:

> *'...then if the loss of the voyage, the loss of the chance of arriving at the port of destination, and the consequent loss of the market appear to be unavoidable, there would be a constructive total loss of the subject-matter. I am, therefore, of opinion that, in the insurance of goods, the law as it stood before the Act of 1906, in reference to the subject of constructive total loss, remains unchanged*[275].

The draftsmen's guidance notes to s 60 specifically indicate that the doctrine of the loss of the voyage on goods survives into the post-Act law; *'It is well established…that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, to a destruction of the contemplated adventure*[276]*'.* What practical consequences follow from this in the contemporary law are unclear. In *Masefield*, this aspect of the insurance on cargo was not considered, and not apparently argued. Arguably, the claimant could have relied on earlier dicta in support of its case:

LOSS OF VOYAGE CLAIMS IN PRACTICE

What are the practical consequences of that dictum in *Sanaday*, in the context of a voyage of three months? Three viable interpretations of the meaning of 'loss of the market' exist; (i) the

[273] (n 328) at 318.
[274] (n 261).
[275] [1916] 1 A.C. 650, 664.
[276] P.86, citing Bramwell LJ in *Rodonacci v Elliot* (1874) LR 9 CP 518 at 522.

possibility of the goods *ever* arriving at the destination port; and (ii) the possibility of the goods arriving within the timescale of the contemplated voyage; or (iii) more flexibly, within a reasonable time.

i) Support for the idea that test is whether goods can never arrive can be derived from cases on the peril of 'restraint' and 'detention'. This is a strong argument for a similar test being applied on perils of capture and seizure. However, if this test is applied, then the 'loss of the voyage' will exactly duplicate the test of a physical loss of the property. This construction is undermined by *Manning v Newnham*[277], *(the Confiance)*(1813)[278] (discussed at Chapter 2.5), which both provide that an arrival of goods the following season (where the probability of their eventual arrival existed) amounted to loss of the voyage. The later authorities on 'restraint' and 'detention' do not adequately distinguish these authorities on capture.

ii) Support for the idea that if capture prevents goods arriving within the timescale of the contemplated voyage there is a total loss derives from *Goss,* which referred to the lent-season for the sale of fish. This is supported by *Manning v Newnham, the Confiance,* and the guidance notes to the Act. It appears the most logical construction of the phrase 'loss of the voyage', and is particularly appropriate for a voyage policy. Arguably, this construction conflicts with the delay clause, excluding losses flowing from delay, but if the delay clause, expressing established common-law rules which co-existed with the loss-of-the-voyage doctrine, is allowed to defeat the claim, it deprives the element of insurance on the voyage of meaning. This construction is, however, incompatible with the restraint and detention cases, defining this as a 6-month period, if a consistent meaning to 'loss of the voyage' is to apply across the different perils.

iii) There is some support for the idea that the court would imply a 'reasonable' meaning. The test for a constructive total loss following a seizure is whether the subject matter is likely to be returned within a reasonable time, and for this purpose market practice accepts that the relevant period is 12 months from the date of seizure, assessed at the date when legal proceedings are commenced[279]. However, it appears from *the Bamburi* that a 6-month delay amounts to a loss of the physical property.

[277](1782) 3 Dougl. 130; (1782) 99 ER 575 (KB).
[278] (1813) 2 M. & S. 240, (1813) 105 ER 372.
[279] Merkin (2011), p722.

What construction should be preferred? Given that a six-month delay amounts to a deemed loss of the physical property, arguably, for the loss of the voyage to retain meaning, it cannot be for a longer time than for the loss of the physical subject matter. The most natural meaning is the second option above. However, there is no authority clarifying how a loss of the voyage claim would actually operate in the modern law. *Masefield* did not address the doctrine of the loss of the voyage in any way.

4.2.8 CONCLUSION ON CONSTRUCTIVE TOTAL LOSS

Polurrian established that the Act established a new test of 'unlikelihood' of recovery for total loss claims on capture, where there was no actual total loss. The bar for recovery under s 60 has been set very high indeed. Arguably, *Polurrian* was decided in error. The 'uncertainty' test, presumed to have been modified by the Act had never been applied in capture cases. *Polurrian* ignored the settled presumption of total loss, which must have been in the contemplation of the draftsmen of the Act. *The Minden; Wangoni; Halle*, a House of Lords case, applied the presumption post-Act by applying the 'instant right of abandonment'. Accordingly, it is arguable that the presumption should continue to apply: there was no reason to depart from the common-law presumption; and it has been applied by the House of Lords in 1942. Arguably, it remains the contemporary law.

4.3 CAPTURE AND ACTUAL TOTAL LOSS

After *Polurrian*[280] the primary test applied by the courts in capture cases was that under s 60, so that the test under s 57 was seldom considered. Consequently, fewer statements exist concerning actual total loss following capture. One might reasonably assume that the law would treat common-law situations justifying total loss without abandonment as s 57 actual total losses. The law has not developed as simply.

Commentators suggest that capture might establish an actual total loss under the modern law:

> *'It is far from unknown for a court to adjudge that a vessel was a CTL even though, by the time of trial, the vessel had been repaired and was again trading… Indeed, in seizure cases this may apply also to an ATL. See Scott v Copenhagen Reinsurance Co (UK) Ltd*[281]*, where aircraft seized by Iraq on the invasion of Kuwait were held to have been lost on the date of seizure even though by the time of trial some of them had been safely retrieved from custody in Iran'*[282].

The situations in contemporary cases concern the sale following capture, and the application of 'wait-and-see' to actual total losses. This chapter aims to place ideas these in context.

4.3.1 WHETHER SALE AFTER CAPTURE CONSTITUTES *NOVUS ACTUS INTERVENIENS*

Sale following capture or seizure justified a total loss claim without abandonment pre-1906. The draftsmen's guidance notes stated that judicial sale following a vessel's desertion on a sinking condition was an actual total loss, despite subsequent salvage, citing *Le Cann* (1887)[283]. Interestingly, the Privy Council stated therein:

> *'… after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof. To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser; or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated'*[284].

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[280] (n 334).
[281] [2003] 2 All ER (Comm) 190.
[282] Merkin (2011) p728; fn89.
[283] (n 210); Chalmers and Owen, *The Marine Insurance Act, 1906* (1st ed 1907, William Clowes & Sons Ltd London), pp79-80.
[284] [1886-90] All ER Rep 957 at 961-2

Accordingly, it was directly in the contemplation of the draftsmen that a judicially ordered sale following capture was an actual total loss. At common-law, sale would have justified a total loss without abandonment (see 3.2.3). This contrasts with *dicta* in *Masefield*, where this proposition is doubted. Arguably, judicial sale after capture or seizure remains an actual total loss. A sale following the perils 'restraint' or 'detention' may not justify actual total loss. In *Fookes v Smith, (the Stambul)* (1924)[285], the court held that where restraint of princes was followed by sale, the sale was a *novus actus interveniens*. So, the test of actual total loss does not appear identical across the different perils, since *The Stambul* conflicts with *the Romulus* on the issue of whether a later sale breaks the chain of causation. Instead, *the Stanbul* illustrates that the different perils fall to be treated differently for the tests of total loss in a wider sense. A uniform test will not lead to logical results, and the courts have not applied a consistent approach over these different perils. Accordingly, authorities on the perils 'detention' and 'embargo' are not persuasive guides on situations on capture.

4.3.2 CAPTURE BY AN ENEMY WITH INTENT TO DEPRIVE

It might be thought, from *Masefield*, and given the extensive authorities in chapter II, that a capture, made with an intention to permanently deprive, would be a loss within s 57, following *Dean v Hornby*. In *the Girl Pat*, Porter J assumed that the courts had always considered the two types of loss separately. He followed the error in *Polurrian* in thinking that a test of 'unlikelihood' was applied:

> *'First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was an actual total loss, but that was because the vessel had been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone I do not think was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think it is certain, even then, that that result would follow. Normally, I think capture is a constructive total loss, and the confusion which has arisen, with regard to whether it is an actual or a constructive total loss, arose merely because, in the earlier cases, the distinction between those two classes of loss was not kept clear. In the same way, damage may amount to a constructive total loss, but I think will not amount to an actual total loss, though it may amount to an actual total loss if it has been followed by a sale so as to make the position one in which the vessel was lost to her owners by the proper sale after sufficient damage to justify it. The class of case I am referring to is Dean v Hornby and Stringer v English & Scottish Marine Insurance Co. However, that may be, whether under the old law capture was or was*

[285] [1924] 2 KB 508.

> *not an actual or constructive total loss, the case is now governed by the Marine Insurance Act 1906, ss 56 to 60. That Act provides in s 57, amongst its definitions of 'actual total loss', 'if the vessel be irretrievably lost'. In my view, no one could here say that the vessel was irretrievably lost to her owners."*

As a summary of the common-law, this was flawed. First, it wrongly assumed that the courts ever investigated the *spes recuperandi*. Secondly, the treatment of prize law is confused. A valid judicial condemnation would not be reversed if a war later ended; his summary for the presumption which he assumed existed is therefore demonstrably unsafe.

Properly viewed in context, however, Porter J recognised that capture may be a constructive total loss. It ignores the situation where an enemy did not formally condemn property, but where the presumption applied nevertheless applied, and a constructive total loss allowed. His statement was made without reference to *Goss,* which would have demonstrated, in any event, that it was incorrect to rely on property law considerations when deciding whether a total loss occurred. The *spes* only determined whether notice of abandonment was necessary. However, it was said in *the Minden; the Wangoni; the Halle* that capture without condemnation with an intent to deprive could be an actual total loss: *'It can hardly be doubted that a constructive total loss of the goods themselves may arise when they are taken wholly out of the possession of the assured and his bailee – for example, pirates, rovers or thieves. If there can be an actual total loss in such cases through 'irretrievable deprivation' under s 57, I can see no reason why the law should not recognise a constructive total loss under s 60(1)…'* Arguably, however, this overstates the case. Ordinarily, a notice of abandonment would be required at common-law, so the loss would be constructive. Significantly, the words used set the stage for the courts considering 'deprivation of possession' as a separate peril.

4.3.3 WHETHER CAPTURE FOLLOWED BY CONDEMNATION ACTUAL TOTAL LOSS

In *Forestal Land*, in the House of Lords, it was said:

> *'in the present case, in my opinion, it was unlikely that the goods would be recovered. …. If she had been captured it was, no doubt, likely that the assured would have regained possession of their goods, but the orders of the German government had provided against that contingency by requiring the master to scuttle the ship…if, on the other hand, she ran the blockade and reached a German port, the assured would presumably be irretrievably deprived of his goods, which is an actual total loss*'[286].

This *obiter* statement reintroduces the sort of consideration based on the Roman law of capture that Mansfield was keen to distinguish in *Goss.* Effectively, this stated was that the bringing *infra praesidia* that effectively transferred the property. Apparently, *Goss* was not

[286] (n 222*) at* 89.

remembered in this respect. This is directly opposed to the stated rules, and the spirit, of the established nineteenth century authorities. If the doctrine of constructive total loss operated to allow an instant right of abandonment, there is no injustice; this rule only applies where there has been condemnation, which allows a total loss without abandonment, if abandonment had not been given between capture and condemnation.

However, subsequently, capture followed by condemnation was held not to be an actual total loss. In *Panamanian Oriental Steamship Corporation v Wright* (1970)[287], Mocatta J held that a vessel detained by Vietnamese customs officials, and subsequently confiscated by a military tribunal convened outside the ordinary judicial system, was not an actual total loss. In an extract quoted by Rix LJ in *Masefield*, Mocatta J said:

> *"[The] claim for an actual total loss on the basis that the plaintiffs were irretrievably deprived of the Anita is somewhat academic. The question has to be answered as at the date of the writ. It may be true that the order of confiscation divested the plaintiffs of the legal ownership as is the case of a ship by a Prize Court. But the test of irretrievable deprivation is clearly far more severe than the test of unlikelihood of recovery of possession, and despite the gloomy prospects for the future as of Aug 29, 1967, I feel unable to find that the plaintiffs were at the date irretrievably deprived of their vessel'*[288].

This passage betrays a disregard for the prior authorities on capture throughout the previous two centuries of English and international law. The termination of legal entitlement to recover property was the basis of earlier decisions that no notice of abandonment need be given. An order for confiscation by a prize court ought arguably to be an actual total loss, in that pre-Act there was never a requirement to plead that there was no hope of recovery, and no notice of abandonment need be given. That the court would impose a more stringent test on a plaintiff is problematic; short of total physical destruction of the property, what could satisfy the test for irretrievable deprivation? It is impossible to devise a stronger form of deprivation of ownership than an order for confiscation under a prize court (usually leading to its on-sale). If this statement is followed literally it is impossible to understand what the test under s 57 could cover other than physical destruction. It would remove all additional meaning from the section. It cannot have been the intention of the draftsmen that s 57 only covered physical destruction. Therefore, it is argued that Mocatta J over-stated the stringency of the test. However, as he found a constructive total loss, his remarks on actual total loss are *obiter*.

[287] (1970) 2 Lloyd's Rep 365, [1971] 2 All ER 1028.
[288] Ibid, at 383.

4.3.4 WHETHER HOSTAGE AND RANSOM FOLLOWED BY DESTRUCTION IS ACTUAL TOTAL LOSS

In the *Dawson's Field* arbitration, aircraft were hijacked in 1970 by the Popular Front for the Liberation of Palestine and were later destroyed – one in Cairo and the other three in Jordan at a later date. The issue was whether the loss of all four aircraft arose out of 'one event'. It was held that the planes were not lost when hijacked but when destroyed, since 'wait and see' was an essential ingredient in a ransom situation[289]. Dawson's Field distinguished *Dean v Hornby* and the other capture cases because:

> *'... the persons who deprived the owners of possession clearly intended there and then to deprive him of possession and ownership forever, if they could. "Deprivation of possession" as such was not an insured peril... It is therefore dangerous to treat deprivation of possession simpliciter as a cause of total loss subject only to being turned into a partial loss by subsequent recovery....'*

Dawson's Field imported a test of the captor's intention into the law. Effectively, it held that there had not been a 'capture' or 'seizure', but a depravation of possession only. In this situation, there was a factual situation to which a 'wait-and-see' approach was appropriate.

In *KAC v KIC*, aircraft captured when Iraq invaded Kuwait in 1990 were later destroyed. Rix J (as he then was) noted that:

> *'In Rodocanachi v Elliott[290], (p 670) Brett J described capture as 'the hostile seizure of goods with intent to deprive the owner of them. In case of capture, because the intent is from the first to take dominion over a ship, there is an actual total loss straightaway, even though there later be a recovery: see Dean v Hornby (n 9) (a case of piratical seizure), and* [*the Romulus* (n 79)] *'[291].*

In that case Rix J, relying on observations in *Dean v Hornby*, and the definition of capture given in *Rodocanachi*[292], stated that there was an actual total loss where there was a capture with an intent to permanently deprive the owner of possession. Although *Dean* was in fact a situation of judicial sale before the action, not capture *simpliciter*, see 2.1, Rix LJ appeared in *KAC v KIC* to observe that the *spes recuperandi* had not been tested on capture *simpliciter*. However, he followed the new, innovative test proposed by Kerr in *Dawson's Field*, which was that a ransom situation was a case of 'wait and see', which was not to be considered as capture in the true sense.

'Wait-and-see' is a further, innovative, permutation of the test for actual total losses. If it is to be taken as the test to be applied, it conflicts with *Panamanian Oriental Steamship*[293], since,

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[289] Steel J at 49; KAC v KIC (n 21) at 685.
[290] (1874) LR 9 CP 518, [1874-80] All ER Rep 618.
[291] (n 21) at 687.
[292] (n 21).
[293] (n 287).

on any view, a tribunal ruling that divests the owners of legal ownership is plain evidence of a capture with an intention to permanently deprive the owner of possession. Arguably, *KAC v KIC* suggests the correct approach, conforming to the older authorities, that legal dispossession will be an actual total loss.

Rix J did not address one obvious difficulty with the 'wait-and-see' test, in that a test of the captor's intention had been absent from all earlier cases of maritime capture. It is unclear from where Rix J derived that test into the captor's intention, since the definition in *Rodocanachi*[294] was much later than established authorities for capture, in which an insured was never required to prove the intention of the captors. The test based on the captor's intention creates difficulties in practice. In *Johnston & co v Hogg and others* (*the Cypriot)*[295], the ship was captured by "natives" in the Brass River. These intended to plunder the ship's cargo. Although they intended to abandon the ship, they certainly did not intend to return it to its owner. Was there a deprivation of possession? Certainly, the case would not have allowed a total loss had 'wait-and-see' been applied as set out by Rix J. The court simply held that the events fell within the terms of the policy, so the case provides little clarification of the law. It does illustrate the difficulties that a test based on the postulated intention of pirates or captors might produce. The law was more efficient and certain where intention was not investigated.

In *Scott v Copenhagen*, arising from the same facts as *KAC v KIC*[296], the aircraft was eventually destroyed by allied bombing where it had been parked. Rix J reverted to the 'wait-and-see' analysis proposed by Kerr J in the *Dawson's Field* arbitration. Accordingly, the 'wait and see' test has been introduced into the law comparatively recently, albeit by the considerable authority of Rix LJ.

4.3.4 CONCLUSION ON ACTUAL TOTAL LOSS

Effectively, 'wait-and-see' is not part of the long law of capture in English law. It is an attempt to define a new peril, 'deprivation of possession'. Its origin is in non-maritime cases. However, is hostage and ransom a new factual situation requiring a new 'wait-and-see' approach, or is it rather a well-known factual permutation of capture and seizure? Arguably, as hostage-and-ransom has always been a part of piracy, and ransom was long an accepted practice in prize law, it is a mistake to say that deprivation of possession is a wholly new

[294] (n 287).
[295] (1883) 10 QBD 432.
[296] (n 21).

peril, justifying a new approach. There are comparatively few statements clarifying actual total losses after capture in post 1906 cases. Capture *simpliciter* was akin to actual total loss in that the *spes recuperandi* was never investigated. However, the procedural requirement for the insured to give a notice of abandonment makes capture *simpliciter* sit more comfortably within the definition of constructive loss. However, a judicial sale, or later destruction, is arguably an actual total loss, because then there is no requirement to give notice (argument developed out at 3.2).

CHAPTER V CONCLUSIONS: THE JUDGMENTS IN MASEFIELD

5.1 PER STEEL J

Steel J's judgment contains two difficulties. The first is that he relied on definitions of total loss from textbooks which ultimately derived from stranding and damage cases. Consequently he did not refer to the tests of total loss expressed in capture cases, so did not appreciate the presumption of total loss on capture. This approach raises issues concerning the status of academic commentary in relation to older judicial authorities (3.1.3-3.1.4). The second difficulty is that he reintroduced property law considerations into the test of total loss by his 'fact sensitive' approach, without reference to the 150 years of binding authority that explicitly excluded property law. Innovatively, he ruled that captures are 'fact sensitive' cases, which understanding is arguably inconsistent with the established prior law.

First, when addressing the issue of actual total loss, he held that *'an assured is not irretrievably deprived of property if it is legally and physically possible to recover it (and even if such recovery can only be achieved by disproportionate effort and expense)*[297]*'.*

That correctly stated the test of actual total loss, but arguably cases of capture *simpliciter* were never considered actual total losses. As authority, Steel J cited three cases. Two were of stranding. In *George Cohen, Sons & Co v Standard Marine Insurance Co (1925)*[298], an obsolete warship under tow that grounded on the Dutch coast was held not to be an actual total loss as it could physically be removed, although at un-commercially great expense. In *Fraser Shipping Ltd v Colton* (1997)[299] a vessel under tow stranded on a Chinese island. Again, it could physically be salved, but only at great expense. The third case was *Panamanian Oriental Steamship Corporation v Wright*[300] (see 4.3.3), where Mocatta J held that the order of confiscation by the irregular Vietnamese military court did not establish actual total loss. Arguably, Mocatta J's statement was doubtful authority, as it was *obiter*, conflicted directly with the pre-Act law which was clear that a notice of abandonment was not necessary in such situations, and was not supported by any authority.

Steel J's finding that to establish 'irretrievable deprivation', an insured had to establish that the recovery was impossible ([31], [35]) was arguably an oversimplification. The law provides presumptions of impossibility, one of which is an order of a court divesting the

[297] (at 31).
[298] (1921) 21 Ll L Rep 30.
[299] [1997] 1 Lloyd's Rep 586.
[300] (n 287).

property, another, a court order for sale. These presumptions were so well-established that a notice of abandonment was deemed unnecessary and arguably both situations should be interpreted as situations of actual total loss. Additionally, on capture, the law pre-1906 did not require an investigation into the *spes*. However, the presumption established was not so strong as to remove the requirement of a notice of abandonment. Contrastingly, on stranding, or after damage, the insured always had to show physical impossibility of the subject matter being recovered, or that it is capable of surviving to the destination port. The situations were factually distinct and arguably are not governed by a single legal test. In stranding or damage, the owner retains control over the property. In capture, he does not have either physical possession or control. Steel J confused the law by blurring the two parallel strands of legal authority into a single test. The statement of actual total loss means that the presumption of constructive total loss was ignored. .

Steel J's reliance of authorities on damage or stranding, rather than authorities on capture, is illustrated by his reliance on *Roux v Salvador*[301]. Relying on that case, he stated that:

> *'[t]he need to draw a distinction between a claim for an ATL where property is beyond recovery and a claim for a CTL with an associated requirement for notice of abandonment where recovery is uncertain was well established in the early 19th century*[302]*'.*

This distorts the law. *Roux* was a case of sea-damage to cargo, and any observations on capture cases were *obiter*. Capture cases contemporary to *Roux* do require the insured to give a notice of abandonment, but there is no suggestion that this procedural requirement ever implied that the insured had to prove an unfavourable *spes* in relation to a subsisting capture (see chapters 1-2). Simply, just because a notice of abandonment was required, it did not mean that the test had become one of 'unlikelihood', overturning the presumption. The error was that, seeing that capture did not fall within actual total loss, he distorted the established test of constructive total loss with a presumption.

The second difficulty with Steel J's judgement is that his finding that the legal consequences of a capture is very fact sensitive is based on property law considerations, contra *Goss* and *The Romulus*. He said:

> *'(i) Where a vessel is seized as a prize and condemned in a prize court, property is transferred and on any view the former owner is irretrievably deprived of the vessel. Mere seizure by pirates without more has no impact on the proprietary interests in the vessel. The suggestion in regard to the present case that in demanding a ransom the pirates were requiring the owners to repurchase the vessel and cargo is a felicitous but inaccurate summary of the situation. What has been transferred is*

[301] (n 64).
[302] (n 4) at 41.

possession and not title and the question thus arises, in my judgment, as to whether recovery of possession is legally or physically impossible.

(ii) of course, where possession is lost, recovery will often be unlikely… whereby the threshold requirement for a CTL claim may be established though in these circumstances the assured must elect to treat it as such by service of a notice of abandonment, a step not applicable in cases of ATL.[303] *'*

The first error in this is the consideration of property law which is a clear error of law in light of *Goss v Withers,* and *the Romulus*. Material earlier cases (chapters 1-2) were not challenged or even cited. Furthermore, the extract conflicts with his citation taken from *Panamanian Oriental Steamship Corporation v Wright (supra)*[304], where the court did not treat judicial condemnation as irretrievable deprivation. However, five paragraphs after citing *Panamanian Oriental*, Steel J concludes that it would be actual total loss, on the same hypothetical facts (neither Steel J nor Mocatta J referred to earlier reported authorities on capture). This serious inconsistency in the modern law undermines the authority of the rule from *Panamanian*. If neither judge was clear of the position on actual total loss after condemnation, their conclusions on constructive total loss, relying on that understanding, are open to doubt.

The second part extract at (ii) also blurs the issue of the notice of abandonment. Despite the terms of the Act, the policy takes priority: on the ICC clauses, a notice of abandonment would still be required for an actual total loss, a procedural point which appears to have been overlooked.

As a result of his importing a distinction between actual and constructive total losses which did not exist at the time, Steel J's interpretation of *Dean v Hornby* was flawed. His interpretation was that as a result of the notice of abandonment being served, it must have been put as a constructive total loss, and a test of 'unlikelihood' implied into it, and satisfied on those facts. Chapter II demonstrated that was not the way capture claims operated, *Dean* included. Chapter III demonstrated that not only was notice considered good practice, but that, following the sale by the prize master, it was not strictly necessary. Steel J missed, therefore, that the court in *Dean* ought properly to have held that the loss was a total loss where abandonment was unnecessary, in a similar situation to *the Martha* and *Le Cann* (see 3.1.3), or even *Stringer*. It was wrong to simply look at the fact that notice was given, and then conclude that a test of 'unlikelihood' had been imported into that case.

[303] At [39].
[304] (n 284).

Steel J considered the constructive total loss claim under the contemporary law very briefly. He noted that the property had to be abandoned on account of an actual total loss appearing unavoidable. He held that s 60(1)'abandonment' meant not 'notice of abandonment', but rather abandonment of any *spes recuperandi*[305]. As authority for that proposition he cited *the Lavington Court*[306], which he held was authority that the phrase '*abandoned on account of its actual total loss appearing to be unavoidable*' meant the same as abandoned by a master so leaving it to be derelict – i.e. the physical desertion of the vessel by the crew and not the service of a notice of abandonment. He observed that such abandonment by the crew never occurred[307].

This interpretation was erroneous. The natural meaning of the words, considering the prior authorities, is that a 'notice of abandonment' was meant in s 60[308]. There was no suggestion of the distinction made in *the Lavington Court* either in the draftsmen's guide to the Act[309] or in the 6th edition of Arnould, cited as source for the drafting of s 60[310]. Instead, the references throughout these are to the actual giving of notice of abandonment. Further, *the Lavington Court* does not go so far as to say that abandonment under s 60 *has* to have that meaning, only that the decision to abandon pursuant to s 60:

> *'may and very often must be by the master in exercise of his authority express or implied, but usually pursuant to his general powers of agency for his owner*[311].

These extracts must be understood in the context of the Crown's submissions in that case. It had submitted that abandonment under s 60 could only ever be made by the insured, and never by the master. That was rejected. The *ratio* was *permissive* of the master being able to physically abandon a vessel with the accompanying legal consequence of abandoning the vessel to the insurer, but the case does not go so far as to *exclude* the insurer from exercising that same function. The master is merely the insured's agent, and it is trite law that whatever an agent can do, their power to act derives from the master. Accordingly it is suggested that Steel J misinterpreted *the Lavington Court.* Further, in *Masefield,* it was physically impossible for the master and crew to desert the vessel upon the capture with the legal effect in s 60, even if they had wanted to do so, and there is a rule of law that leaving a vessel under

[305] At [54].
[306] (n 234).
[307] At [55].
[308] (the phrase 'appears to be unavoidable' looks like a codification of the elusive presumption of deprivation. It could cover situations like *Roux v Salvador* (n 64), where the cargo was abandoned as its degeneration as a result of damage made the loss appear to be unavoidable, as much as it covered a loss by capture, which equally appears unavoidable).
[309] Chalmers., M.D. & Owen, D; *The Marine Insurance Act 1906* (1907 William Clowes & Sons, Fleet St.), p.81
[310] Arnould 6th ed, p951-3.
[311] [1945] 2 All ER 357 at 364.

compulsion or violence cannot have that effect[312]. However, the position of the master and crew should not prevent the insured from deciding to abandon the vessel. Furthermore, reported cases show insureds recovering for total losses where the insured had given notice under s 60, where the point is not controverted[313]. Additionally, the judgment of Viscount Simon LC in *the Minden; Wangoni; and Halle* permits the insured to abandon the vessel, within the language of s60(1). Finally, the claimant in *Masefield*, as a cargo interest, did not have an agent on the vessel to physically abandon the parcels of biofuel. Accordingly, *the Lavington Court* does not support Steel J's interpretation that 'abandonment' within s 60(1) must be the act of the master, and thus the rule that he stated was incorrect.

Finally, Steel J held that his findings that an actual total loss had not been unavoidable applied equally to the constructive total loss claims[314]. While clearly the *spes* remained, once again, Steel J did not deal with the presumption. Accordingly, Steel J's judgment on constructive total loss is arguably open to doubt.

5.2 PER RIX LJ

On appeal, Rix LJ did not revisit Steel J's findings on constructive total loss. He simply concluded that, under the terms of the policy, '*deprivation of possession was only covered in the case of an ATL, ie in the case of irretrievable deprivation*[315]'. It is suggested that that statement incorporates the error identified in Steel J's approach to *the Lavington Court*, and this author suggests that the policy also covered deprivation of possession within s60(1) of the Act (appearing to be unavoidable).

Rix LJ's remaining findings addressed actual total loss. He repeated in substance Steel J's assessment of Mocatta J's *obiter* statement in *Panamanian Oriental*[316], although he did concede that the statement was not necessary very helpful to the insured, as the *'facts were obscure and the matter was treated lightly'*[317].

Guided by Masefield's counsel, Rix LJ relied primarily on *Dean v Hornby* as the most relevant authority. He stated that no reported authority found a total loss where the insured

[312] See *the Lavington Court* (n 332) and *Bradley and others v Newsum, Sons & Co, Ltd* [1919] AC 16.
[313] E.g. *Irvin v Hine* (n 230).
[314] At [57].
[315] (n 3) at [18].
[316] *Ibid.* at [21].
[317] *Ibid.* at [22].

could have paid ransom[318], and distinguished the cases on that ground. The reference to the possibility of ransom payments in submissions in *Goss v Withers* was ignored – even though by their exclusion from the judgment where ransom payments were lawful and common-place, Mansfield LCJ had dismissed that consideration. Rix LJ held that *Dean v Hornby* was inconclusive[319], and referred to several cases concerning capture. The first case he referred to was, however, not a capture case, but *Roux v Salvador*, a sea-damage case. The general test he cited from *Roux* has been examined above (see 3.1.4). This thesis argues that this test, formulated later than the test in capture cases, could not have changed the established rules for capture cases. Consequently, it is *per incuriam* in suggesting that there was in capture cases an investigation of the *spes.*

Next, Rix LJ considered *Stringer*[320]. He did not fully articulate the significance of the insured's choice not to abandon. If the plaintiff had chosen to abandon at first, then the loss would unquestionably have been total. The paragraphs that he cites refer to the situation where the insured had chosen to hang onto the *spes* in the property for very many months. (Further, he noted that the sale by the Prize Court in *Stringer* was a situation of actual total loss [at 37] – so undermined the authority of Mocatta's *dicta* in *Panamanian Oriental*[321]). However, Rix LJ did not himself state the fact that the plaintiff in *Stringer* could have successfully abandoned and claimed for a constructive total loss with a reasonable time of the capture.

A further distinction between *Stringer* and *Masefield* was that the claimant in *Masefield* was essentially passive. Cargo interests do not play a part in the negotiation process, which is almost always conducted by the hull owner. Consequently, the insured was only as well informed of the negotiations as the general public, and had no say in or control over the ransom process. The position of the shipowner, however, would have been quite different. The shipowner had decided, after the capture, to instigate the process of negotiation, after the pirates had identified themselves. After that process had started, therefore, the shipowner had put himself in a position very much like the plaintiff in *Stringer*, who involved himself in the litigation in the American prize court. However, *Masefield* concerned a cargo interest, whose interests were different to the ship-owner, and whose place in the ransom negotiations was utterly dissimilar.

[318] *Ibid.* At 26.
[319] Ibid at 32-33.
[320] See 3.1.5 ;Masefield 2011 at 36.
[321] (n 287).

He noted that in *Cory & Sons v Burr* (1883)[322] the test for a total loss was whether the assured 'but for their own fault' might get the property back. The issue arising from this - whether the insured would be at fault in not making a ransom payment - is addressed in the next chapter. He noted a statement of the law in *Arnould* 17th ed – in which the capture results in most circumstances in an constructive total loss. Having surveyed the dicta from the authorities cited, in particular *Dean v Hornby*, *the Romulus*, and *the Girl Pat*, Rix LJ concluded, on the issue of a total loss:

> *'In the light of all this material, I conclude that, subject to … the public policy of paying a ransom, piratical seizure in the circumstances of this case, where there was not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure recovery of both, was not an actual total loss. It was not an irretrievable deprivation of property. It was a typical "wait and see" situation. The facts would not even have supported a claim for a CTL, for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery. That is itself recognised by the insured's dropping of its CTL claim. There is no rule of law that capture or seizure is an ATL. The subject-matter is not amenable to a rule of law at all: it is all ultimately a question of fact. The prize, is not an ATL, although it may mature into one. Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance of recapture remains even such a seizure will not give rise to an immediate ATL, and in any event that is very far from this case. In the circumstances, Dean v Hornby, is best explained as a case concerning CTL, which in any event reference there to the assured's notice of abandonment strongly suggests. Similarly, [the Romulus], where there was on any view an ATL, is probably best explained as suggested above, i.e. as a case on proximate cause (and possibly where the ATL of condemnation relates back to the time of capture). Although Mr Kerr appears to have left the point open in Dawson's Field, I think I was therefore wrong to suggest, in KAC v KIC[323], that those cases showed that the mere intention to exercise dominion over seized property constitutes an ATL.'*

Rix LJ concluded that there was no actual total loss, because, in the circumstances, there was a hope of recovery. The result in *Masefield* is thus directly at odds with *Goss v Withers*, the first case on a policy for interest. In *Masefield* the claimant failed because of the investigation into the hope of recovery. In *Goss* the plaintiff succeeded for a total loss claim despite there being a strong hope of recovery. The *dicta* by which Rix LJ held the law to have changed have been fully set out in this and the preceding chapter.

Consequently, Rix LJ reached the right result on the appeal for an actual total loss, as even under the pre-Act law the insured would have been required to serve a notice of abandonment and it is difficult to class a simple subsisting capture under the pre-Act law as an 'actual total

[322] (1883) 8 App Cas 393.
[323] (n 21).

loss'. However, it is suggested that the investigation into the hope of recovery, as in all post 1906 Act cases, has been contrary to the rules established in *Goss v Withers*, and *the Romulus*. As the former case was decided by Mansfield LCJ, and was settled law for over 150 years, and was confirmed by the House of Lords in the latter case, it is suggested that this authority ought to have been especially persuasive, and so considered in the case, and binding, on the Court of Appeal, and that both cases ought to have been binding on Steel J at first instance. The post-Act authorities, especially *Polurrian*, have failed to address adequately the prior cases, so that it is difficult to say that the court had consciously overruled the 'old' law in favour of a completely new test. In particular, it was nowhere considered whether the old law was consistent with a claim under s 60(1), and this failure means that the court's approach, in making a 'new' test, is inconsistent with s 90(1) of the Act which preserved the common law.

The argument that there should have been found a total loss under s 60(1) is supported by the observation of the House of Lords in *the Minden; Wangoni; and Halle*:

> *'If there can be an actual total loss in such cases through 'irretrievable deprivation' under s 57, I can see no reason why the law should not recognise a constructive total loss under s 60(1)…'*[324]

This extract ought to have been considered by Steel J, when he ruled that there could not be such a loss, as 'abandonment' in s 60(1) had to be an act by the master. This House of Lords *dictum* overrules his judgment, and makes it *per incuriam*. It was in fact perfectly possible for the loss to have been pleaded under s 60(1).

The finding that there ought to have been a constructive total loss would be subject to a finding not made in the case, namely whether the insured's notice of abandonment had been in time. This is a question of fact. It is observed that it falls within the range of notices accepted at common law, as set out the table in Appendix B. It would further be subject to a court adopting a slightly different stance on the public policy as to ransom payments, in which a ransom payment should not be considered as undermining the presumption of total loss.

[324] (n 222).

5.3 CONCLUSION ON JUDGMENTS IN MASEFIELD

LAW

Many authorities material to constructive total loss were not cited in *Masefield*. Masefield relied primarily on *Dean v Hornby (the Eliza Cornish)*[325], which was not the most persuasive authority. Arguably, *Goss v Withers (the David and Rebeccah)*[326], and the line of derivative authority culminating in *Andersen v Marten (the Romulus)*[327] and *Rickards v Forestal Land, Timber and Railways Co Ltd; Robertson v Middows Ltd; Kann v W W Howard Brothers & Co Ltd (the Minden; Wangoni; Halle)*[328] was both more appropriate and persuasive. A legal presumption[329] of total loss was applied in these cases, and all but one pre-1906 case of capture or seizure, and appears in all pre-Act insurance textbooks. A test of 'uncertainty', as erroneously stated in *Polurrian v Young* (*the Polurrian*)[330], was never applied. Though *Polurrian* is considered a leading case, it adopted a material error in Arnould, which incorrectly paraphrased and misunderstood Emerigon, an important renaissance treatise on mercantile law[331], which remains the ultimate authority for contemporary law. Arguably, therefore, the authorities cited by both Steel J and Rix LJ, deriving from *Polurrian* are *per incuriam.* It will be shown that Masefield's claim for constructive total loss would have succeeded under the pre-1906 common law, applying the then settled presumption of total loss.

Steel J's construction of s 60 of the Marine Insurance Act 1906 (the Act) governing the test for constructive total loss is problematic. Arguably, his treatment of *Court Line Co Ltd v R (the Lavington Court)*[332] caused him to misconstrue s 60(1) of the Act, so that he did not consider a presumption of constructive total loss, but erroneously adopted the 'uncertainty/unlikelihood' test incorrectly applied in *the Polurrian*. Arguably, the Act has not abolished the common-law presumption of total loss. Consequently, Masefield ought to have recovered for a constructive total loss, subject only to Steel J finding that 'notice of abandonment' was given in good time[333]. While, arguably, the Act abolished the common-law presumption, as stated in *the Polurrian* and subsequent authorities, it is possible the legal presumption of constructive total loss survives as it: (i) was founded on and supported by

[325] (1854) 3 EL &BL 179.
[326] (1758) 2 KENY 325 (1758) 2 BURR. 683(1758), 96 ER 1198 (KB).
[327] [1907] 2 KB 248, affirmed [1908] 1 KB 601, affirmed [1908] AC 344 (HL).
[328] [1942] AC 50 (HL), [1941] 3 All ER 62; affirming [1941] 1 KB 225 (CA); [1940] 4 All ER 395, reversing [1940] 4 All ER 96.
[329] i.e. governing what facts were material, not a rebuttable evidential presumption (Chapters II-III).
[330] *The Polurrian* [1915] 1 KB 922 (CA), (1913) 84 LJKB 1025, [1914-15] All ER Rep 116.
[331] Emerigon, in Arnould 8th-9th edns, see 4.2.1.
[332] [1945] 2 All ER 357 (1945) 78 Ll L Rep 390.
[333] Which finding may have been doubtful on Steel J's findings (see *Masefield* (n 3), at [28], [55], but note *the Bamburi*; Table of Capture Cases at Appendix II).

higher authority than subsequent contrary decisions[334], (ii) is fully consistent with the statutory language, (iii) is a common-law rule preserved by s 91(2) of the Act, which (iv) remains more appropriate to the facts of capture than more recent approaches ignoring the presumption. Consequently, it is suggested that *Masefield* provides dangerous authority for future cases of piracy.

The common-law, the presumption of total loss justifying an immediate right of abandonment on capture was preserved by the House of Lords in *the Minden; Wangoni; and Halle*. The statutory test in s 60(2)(i) has been interpreted by *Polurrian* in a way that is inconsistent with the draftsmen's intention for s 60 as a whole in relation to cases of capture. The cases deciding that 'abandonment' means that an insured cannot claim under s 60(1) for a loss following a capture are doubted, and appear contrary to the draftsmen's express intentions. The post-Act authorities have not addressed whether a claim for total loss on capture could succeed under s 60(1), preserving the common-law presumption. That omission means the test in *Polurrian* is *per incuriam*. Arguably, the presumption should have survived the passage of the Act. Arguably, too, the presumption should apply to piratical capture; that conclusion being subject to the idea that a ransom payment is not a proper means which an insured must use if the option is available to him, although the law now permits him to do so.

POLICY

What was the real cause of the loss in *Masefield* delay or capture*?* In assessing the justice of the result, it is relevant that insurance covers more than the physical goods at shipment. On valued policies, it is usual to value goods so as to exceed their value on shipment. Goods are generally sent to a profitable market. Consequently, the valued policy on goods is, in part, insurance against loss of the market. However, the advantage gained by the insured from the voyage might be some other purpose than immediate on-sale, for instance where a manufacturer transports materials to its own factory or into storage. Clearly, however, the insurance on goods covers more than the physical interest; it includes an element of insurance on the expected benefit from their arrival[335]. If the loss suffered by the insured in *Masefield* was properly classified as loss by delay, it could be said that *Masefield* was right to protect the insurer from that part of the insurance which was against loss of the market. That policy certainly has a long standing in English law.

[334] The presumption was applied most recently by the House of Lords in *Andersen v Marten* (see 2.2.3, n 79), and *the Minden; Wangoni; Halle*. Contrastingly, the principal authority undermining the presumption is only Court of Appeal, in *the Polurrian.*

[335] *The Minden, the Wangoni, the Halle* (n 222) at 91.

However, from the insured's perspective, its insurance was ineffective. In fixing the policy under the ICC(A) clauses, they had specifically sought piracy cover; there was a major loss consequent on the piracy, and they were not compensated because 'delay' was excluded. The background to Somali piracy was well known. If the loss was indeed by 'delay', they were unable to obtain cover for the sort of loss they knew to be predictable, and sought cover against.

Arguably, the loss was more properly characterised as a loss by 'pirates' (not 'delay'), leading to a loss by either 'capture' or 'seizure', which was, at one point in English law, sufficient to establish a 'total loss'. It is argued that the laws establishing this loss have not been changed by the passage of the 1906 Act. This seems to be consistent with the common sense analysis of the situation – if at any time the insured had been asked the cause of their loss, the answer, it can be surmised, would be a loss by piratical attack, not delay to the voyage. Just as in *Roura & Forgas v Townend and Others (the Igotz Mendi)*[336]: '*[h]ere I have decided that the Igotz Mendi was not merely delayed but was captured and lost, although she was afterwards found and recovered* (Roche J)[337],' it is arguable that in *Masefield*, the cargo was captured and lost (and while lost, abandoned), but afterwards ransomed and recovered. Alternatively, if it should not have been deemed a physical loss, which is the primary argument of this thesis, it remains arguable that there was a loss of the intended voyage.

When questing the commercial consequences of the result in *Masefield*, it is helpful to compare to the length of detention in capture cases (Appendix II). In the earliest cases, where voyage durations were slower, dependent on the wind and altogether less predictable, total loss claims were allowed after captures lasting days only. In *Masefield*, the interruption of almost two months did not allow justify a total loss claim. If the *Bamburi* is followed, it would suggest a year's deprivation would be required to claim constructive total loss, and actual total loss might never occur. On a common-sense evaluation, this change in the law encourages uncertainty, does not meet the reasonable expectations of insureds, and supports the conclusion that the law has erred.

[336] [1919] 1 KB 189 (Comm List), [1918-19] All ER Rep 341.
[337] Although Roche J applied the test of unlikelihood from *Polurrian* (n 13), which is doubted, this doubt does not undermine that aspect of the decision.

5.4 RECOMMENDATION

Consequently, it is suggested that works on insurance contain a modest amendment in the following or similar terms:

"It was recognised in English common-law from at least 1758, when policies for interest superseded wagers in the English market, that '*A capture by a pirate, or under a commission, when there is no war, does not change the property; and yet, as between the insurer and the insured, it is just upon the same footing as a capture by an enemy in open and declared hostilities' (Goss v Withers,* (1758) 2 Keny 325 at 342 *(Mansfield LCJ); Marshall (1802)): '…no capture is so total a loss that it is impossible any-thing can be recovered; she may be re-taken, and, be it at ever so great a distance, a right accrues to the owner, paying salvage… this possibility shall not suspend the right the assured had to recover on the contract, but he might abandon his interest in such possibility to the insurer' (Goss; applied e.g. Dean v Hornby).* There was a presumption of total loss on capture. It was assumed that when the property was taken out of the control of the insured or his agents, that amounted to a total loss. This justified an instant right of abandonment (Emerigon; Marshall; early Arnould; *The Minden; Wangoni; Halle*). The parties' rights settled on the date of issue of the writ, and it was possible that return by that date reduced the presumed total loss into a partial loss (where there was damage), or no loss at all (if undamaged, there being no compensation for any delay). Other perils, such as stranding or seizure, prompted an investigation into the chances of the property's recovery. There was never such investigation in a case of capture that subsisted on the date of the issue of the writ. Cases of embargo, where there was no loss of possession, were treated as stranding. To claim for a total loss on capture, notice of abandonment was required, unless there had been subsequent destruction or on-sale, via-judicial condemnation or otherwise. The draftsmen intended to preserve this in the 1906 Act. The leading post-Act authority on constructive total loss after capture (*Polurrian*) was *per incuriam*. First, the prior law was misstated; the court assumed a test of unlikelihood was previously applied in capture when in fact it applied only after stranding or damage. Secondly, *Polurrian,* quoting an error in contemporary Arnould, stated that Emerigon provided that a capture avowedly for a temporary purpose gave no ground for abandonment; in fact the authority referenced was on different facts, where possession had already been restored, and Emerigon actually clearly recorded the presumption of total loss in English law. The presumption was subsequently applied in one House of Lords case in 1942 (*the Minden; Wangoni; Halle). Masefield* relied on considering cases of embargo, as well as *Polurrian.* Additionally, Steel J's discussion of constructive total loss showed a misunderstanding of the meaning of 'abandonment' in the context of the cases cited. This mistake misled him as to its

meaning in s 60 of the Act, and accordingly to discount the constructive total loss argument without considering the presumption of total loss. Therefore, *Masefield* is a dangerous authority for the idea that a constructive total loss does not arise on capture. The argument that hostage-and-ransom is a new type of peril, falling without 'capture' or 'seizure' (*Dawson's Field; KAC v KIC; Scott v Copenhagen*) is doubted. Hostage and ransom has always accompanied piracy; two centuries of precedent suggest that capture, even absent an intent to permanently deprive, justifies instant abandonment. *KAC v KIC* and *Scott v Copenhagen* further were not marine insurance authorities. The better view must be that capture or seizure, which includes hostage-and-ransom, justifies an instant claim for constructive total loss, and that the common-law presumption of constructive total loss on capture survives."

56 Partial and total loss.

(1)A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2)A total loss may be either an actual total loss, or a constructive total loss.

(3)Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4)Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5)Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57 Actual total loss.

(1)Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2)In the case of an actual total loss no notice of abandonment need be given.

58 Missing ship.

Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

60 Constructive total loss defined.

(1)Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2)In particular, there is a constructive total loss—

(i)Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii)In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii)In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61 Effect of constructive total loss.

Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62 Notice of abandonment.

(1)Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2)Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3)Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4)Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5)The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6)Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7)Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8)Notice of abandonment may be waived by the insurer.

(9)Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63 Effect of abandonment.

(1)Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2)Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

91 Savings.

(2)The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

APPENDIX II CHRONOLOGICAL TABLE OF CAPTURE CASES

Noting time in captivity, time before abandonment, and the court's judgment on the issue of total loss.

CASE	PERIL	SUBSEQUENT EVENT	TIME OF ABANDONMENT	TIME IN CAPTIVITY	RESULT
Wagering Policies/ early policies:					
East-India Company v. *Sands*	enemy capture	Sold, resold, recapture, Restoration to original owner	Unrecorded	4 years (1691-1695)	No change of property
Assievedo v Cambridge (the Ruth)	Enemy capture	recapture	unrecorded	9 days	No change of property (no decision on the wagering policy)
Berkley v Cullen	Requisition by government	none	unrecorded	Until after end of voyage	Voyage lost (total loss on a wager)
Dapaba v Ludlow	Piratical Capture	recapture	unrecorded	9 days	Voyage lost; (total loss on a wager)
Pond v King (the Salamander)	Piratical capture	Recapture before taken into enemy port	Unrecorded	1 day	Voyage (of 3 months) interrupted; total loss established.
Whitehead v Bance	Enemy capture (French Privateer)	recapture	unrecorded	12 days (and carried into port)	Voyage interrupted – total loss of the voyage established.
Dean v Dicker (the Dursley)	Enemy capture (Spanish Privateer)	recapture	unrecorded	8 days	Voyage lost – total loss.
Pole v Fitzgerald (the Goodfellow)					No loss of the voyage – loss of voyage not applicable to vessel
Valued Policies (Policies for interest)					
Goss v Withers (the David and Rebeccah	Enemy Capture (French vessel) on 23 December 1756	Recapture on 31 December 1756, returned to England 18 January 1757	Abandoned 18 January	8 days	No change in property. Total loss of vessel Total loss of cargo (& Total loss of voyage)
Hamilton v Mendes (The Selby)	Enemy Capture	Recapture	Abandoned 1 month after return to England	17 days	Partial loss only – abandonment out of time.
Milles v Fletcher (the Hope)	Capture American Privateers on 23 May (1778?)	Recaptured. Taken to New York by 23 June. Voyage to London intended to be by July. Embargo at New York until December. Captain sold vessel. Insured informed in February following year.	Insured abandoned in February.	unclear	Total loss. Primarily, decided on ground of loss of the voyage. (also, damage to ship extensive).
Mitchell and Others v Edie (the Lady Mansfield)	Insurance on goods. Capture by American Privateer, early 1782	Stores, rigging and part crew removed. Vessel set at liberty. Impossible to complete intended voyage, deviation to nearer port. Insured goods sold by part-owner of vessel, who later became insolvent.	Abandoned after 3 years	A few days	Not a total loss. Abandonment out of time.
Bainbridge v Neilson (the Mary)	Enemy capture 21 September 1807.	Recapture 25 September. Insured informed of capture on 30 September. Informed of recapture on 6 October.	Abandoned on 1 October.	4 days	Partial loss. Ship recaptured at time of abandonment.

Parsons v Scott (the Little Mary)	Insurance on ship. Enemy Capture 29 March 1809.	Master made contract to sail as a cartel ship, and paid ransom for its liberation. Released on 19 April. Arrived on 13 May in England. Insured voyage (deliver a cargo salt within fishing season, not possible that year)	Abandoned on 1 May. Insured refused to reimburse master the ransom.		Owner entitled to retake ship, already safe in English port. No loss of the voyage on the ship. (obiter – may be loss of voyage on cargo?)
McIver v Henderson	Capture	recapture	Restoration after abandonment but before action		Total loss – possibility that repairs might be prohibitively expensive sufficient for constructive total loss.
Mullett v Sheddon (the Martha)	Insured cargo captured.	Condemned by prize court and sold.	unrecorded	months	Total loss. Abandonment unnecessary following sale.
Brotherston and Another v Barber (the Fanny)	Capture American Privateer 19 April 1814	Recapture by Royal Navy on 12 May 1814. Reached destination port on 26 September.	Abandoned 25 April 1814. Proceedings issued in Michaelmas 1814	24 days	No total loss. Restoration before issue of proceedings.
Falkner and others v Ritchie	Insured ship victim of barratry of crew.	Recaptured by Royal Navy the following year.	Owner hear d of loss and recapture at same time. Abandoned.	months	No total loss. Loss of the voyage does not apply to ship.
Cologan and another v London Insurance (the Friendship)	Insured cargo on vessel captured by American Privateer 22 October 1812	Recaptured by Royal Navy on 6 November 1812. Taken to Bermuda, where damaged part of cargo destroyed, and remainder held under embargo.	Abandoned on hearing news of part destruction and embargo.	16 days	Total loss. Cargo not restored at time proceedings brought.
Dean v Hornby	Insured vessel captured by Pirates in December 1851	Recapture by Royal Navy in January 1852. Taken back to load port. Afterwards, Vessel sold by Prize master in August.	Owner abandoned in April, on hearing of capture and recapture at same time. Action commenced in December for total loss.	c. 1 month	Total loss. Total loss while captured. Total loss on sale.
Andersen v Marten (the Romulus)	Insured neutral German vessel captured by Japanese – intending to condemn contraband cargo (and vessel by alleging forged papers)	Wrecked while in control of captors. Japanese prize court condemned vessel and cargo.	Abandonment after condemnation	Not in issue	Total loss arises immediately on capture. (capture not covered by policy, so owner could not recover).
Post-Act Decisions					
Polurrian v Young (the Polurrian)	Insured ship seised by Greek navy on 25 October 1912, intending to requisition cargo and possibly seize ship also.	Ship released on 8 December.	Owners abandoned on 26 October (taken as date of issue of writ).		No total loss. Could not show unlikelihood of recovery on balance of probabilities. Actual total loss not considered.
Roura and Forgas v Townend (the Igotz Mendi)	Cargo interest insured charterparty on vessel captured in autumn 1917 by German ship.	Ship sailed to Denmark where it grounded. German crew abandoned her. Salvaged in March 1918.	Claim made on 14 March after vessel salvaged. Parties agreed that insured need not serve notice of abandonment.	3 ½ months.	Total Loss. Test on balance of probability as stated in *Polurrian* satisfied.
Marstrand Fishing Co Ltd v Beer (the Girl Pat)	Barratry of master in March 1936, taking vessel on local cruise in North Sea.	Sailed to Dover, Spain, Dakar, and reached British Guiana, where arrested on 19 June.	Proceedings issued when missing for a month,	3 months.	No total loss. Balance of probabilities unclear, so case for constructive total loss not made out.
Rickards v Forestal Land, Timber and Railways Co Ltd (the Minden); Robertson v Middows Ltd (the	Insured goods laden on three German vessels in 1939. Masters received orders on 3 September to put into neutral port and	Two ships scuttled. Third reached German port.	Requirement to give notice of abandonment waived by insurers. Frustration clause prevented loss of	Various.	Constructive total loss as of 3 September.

Wangoni); Kann v W W Howard Brothers & Co Ltd (the Halle)	head back to Germany. If intercepted by Royal Navy, had orders to scuttle.		voyage claims.		
C Czarnikow Ltd v Java Sea and Fire Insurance Co Ltd; Leslie & Anderson Ltd v Java Sea and Fire Insurance Co Ltd (The Oder; the Lichtenfels)	Perishable goods on German ships in Italian ports in August 1939.	One ship captured by British in 1941. Other vessel remained in Italian port.	October 1939	3 months	Constructive total loss on outbreak of war, abandonment in time.
Panamanian Oriental Steamship Corporation v Wright (1970)	Ship condemned following infringement of Vietnamese customs regulations.				No total loss (obiter?)
Masefield v Amlin Corporate Member	Vessel captured by Somali Pirates 19 August.	Released after ransom negotiations on 28 September	18 September	41 days	No total loss.

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