Constructive Total Losses and Abandonment

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The rights of the parties in constructive total loss cases, after the service of the notice of abandonment, under Marine Insurance Law

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Chapter 1

Introduction and Definitions

The present thesis deals exclusively with matters under marine insurance law and, specifically, cases of constructive total loss. Given the intricate plexus of such types of losses it is of paramount importance that clarifications and solutions are provided with support by case law, the marine insurance law theory and the applicable statutes, of which the most important is the Marine Insurance Act 1906. The issues discussed relate to both ships and cargos, save where there is explicit distinction of the rules applying thereto.

In the few chapters following, the main questions posed refer to the mechanisms of abandonment inclusive of the necessary notice of abandonment. For a better understanding and as an introductory means of what ensues, some basic definitions of the most important terms are provided. An intricate analysis will take place at each relevant chapter.

1.1 *Definitions*[1]

1.1.1 *Actual Total loss*

An actual total loss is an instance where the subject matter insured is completely destroyed, or where it has been reduced to what has ceased to be the thing of the kind insured, namely it does not remain *in specie*, or where the assured has been irretrievably deprived thereof.[2]

[1] See, *inter alia*: *Roux v Salvador* (1836) 3 Bing. N.C. 266; *Kastor Navigation Co Ltd v AFG MAT (The Kastor Too)* [2004] 2 Lloyd's Rep. 119; *Dornoch v Westminster (The FD Fairway) (No.2)* [2009] EWHC 889 (Admlty); and *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24.

[2] See: MIA 1906, ss.56 and 57.

1.1.2 *Constructive Total Loss*

An actual is to be distinguished from a constructive total loss. A constructive total loss is one where the subject matter insured is almost lost to the point where it is commercially not worth spending any amount on reparation, retrieval or otherwise restoration thereof.

The difference between the two types of losses is purely a matter of objectivity and calculation. If there is complete loss, or deprivation, then it is an actual total loss, whereas, if it is an issue of a bad monetary investment in reinstatement, then it is a constructive total loss; the key words here are: cost, and money.

The Marine Insurance Act 1906, s.60, makes a clear reference to what may qualify as a constructive total loss, with the most important factor being the cost of recovery or repair exceeding the value of the subject matter insured at the time of its retrieval.

1.1.3 *Notice of abandonment*

A notice of abandonment is a communication of the loss from the assured to the insurer, which informs the latter of the former's loss and of the fact that the right to abandonment is being exercised.[3]

Without this formality, the loss may only be treated as partial.[4] There is only one officially recognised exception: When, at the time of the insurer's reception of the relevant information, the tender of the notice would not offer any benefit to the insurer; e.g. in cases of actual total losses.

1.1.4 *Abandonment*

This term is the most troublesome, since it generally engulfs many meanings, such as abandonment to the world at large, abandonment to the underwriters, physical

[3] See: MIA 1906, s.62.
[4] See: MIA 1906, ss.61 and 62.

abandonment causing the subject matter to become derelict, or even abandonment in the colloquial sense (i.e. no more searching for an object).

The primary meaning under marine insurance law is: cession of the subject matter insured to the underwriters. The term analysed in full represents: the assured's right to offer the subject matter's complete transfer, namely the passing of all rights and liabilities, in exchange for an indemnification as per a total loss.

1.2 *The matters discussed*

The way that a constructive total loss, a notice of abandonment and abandonment itself work are thought to be quite complex. Thusly, plenty of topics of great interest have arisen therefrom. The current research, though, will focus only on the major issues, with the purpose of defeating any obscurities and offering clear solutions.

The first topic of importance is the service and acceptance of the notice of abandonment. This is because silence and conduct can be louder and more concrete than an express reply by the insurer. Many an insurer have found themselves bound to pay for a constructive total loss and take over the subject matter abandoned merely due to the fact that they accepted the notice inadvertently through their conduct.

Secondly, it is revealed how abandonment truly works in an effort to bring balance and security in the marine insurance market. The insurers' illogical reaction to abandonment and their unreasonable *modus operandi* are explained, rationalised and solved, especially in connection with the market's assumption of the automatic obligation to take over after the notice's acceptance.

Thirdly, there is an extensive and innovative approach to the securities provided and the position of the parties in terms of rights and liabilities from the time of the notice's service and abandonment, up to and after payment for the loss. In cases where the insurers have chosen to take over the abandoned property, they are always anxious of what may happen to it until they become full and complete owners. Equally concerned are the assureds, when there are rights to be exercised on the

insured property and severe liabilities that may be incurred. The workings of the common, contract and equity law are explained.

Finally, the major issue of *res nullius* (no-one's) properties through abandonment is resolved. This is a matter connected both with abandonment as defined above, under marine insurance law, and in the juristic sense of the term, under the common law, that is to say abandonment in the sense of throwing something away. This bears great theoretical and practical importance, given the fact that myriads of ships are left to their own fate in or near ports and other navigable waters posing a threat to the safe navigation of other vessels. A hypothesis is actually formed proposing that this conduct by the assureds may have a perfect legal standing.

All the parts below take into consideration the relevant case law tracing back to approximately the mid. 18th century. Hence, the history behind each rule and each legal and practical phenomenon is revealed, which, in turn, assists with the understanding of each issue and with the resolution thereof. In addition, as the main statutory tool used, it is of no surprise that it is the Marine Insurance Act 1906. The final means utilised is the marine insurance law theory, as extracted from the authoritative books of the learned academics of the field.

Enjoy.

Chapter 2

What amounts to an acceptance of the notice of abandonment?

In order to proceed to the ramifications of the acceptance of a notice of abandonment by an insurer, we must first examine what constitutes such an acceptance. Under s.62(5) of the Act, acceptance may either be express or implied from conduct and mere silence is not to be considered as acceptance.[5]

As there is no specific form in which to expressly accept the notice of abandonment, the matter is distilled to a question of fact, which also applies to all cases where acceptance is inferred by the mere conduct of the insurer. As a result, an insurer may inadvertently accept the notice of abandonment, if his actions show that the true intention is to take over the insured asset, thus overpowering his silence on the matter.[6]

2.1 *Case law*

2.1.1 *The general case law*

Lord Penzance in the House of Lords, in *Shepherd v Henderson*[7], was adamant in support of conduct superseding silence. In that specific case, though, the underwriters were not considered to have accepted the abandonment. They took possession of the insured vessel, floated her one month later, took her to Bombay

[5] MIA 1906, s.62(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 acceptance". Also, see: Privy Council following *Peele v Merchant's Ins Co,* 3 Mason 27 (1822), cited 2 Phillips, s.1691; *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224, at 237; and *Hudson v Harrison* (1821) 3 Brod. & Bing. 97, per Burrough J.: "Most of the cases connected with the subject of insurance depend on their own particular facts".
Additionally, the effects produced to the rights of both parties, through either form of acceptance, are utterly the same; see *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224 ("There is no distinction in principle between an express and a constructive acceptance of an abandonment").

[6] See *Hudson v Harrison* (1821) 3 Brod. & Bing. 97, where it was held that silence can be construed as acceptance of the notice of abandonment (provided, of course, that acceptance is proven by alternate means, such as the insurer's conduct).

[7] (1881) 7 App. Cas. 49, at 64.

where she was docked and executed certain repairs. In the meantime, though, they made it clear that they only operated as salvors, that the repairs were only in the interest of the safety of the vessel, that the assured was duly informed of the insurers' actions and that the ship was at Bombay at its own risk.

An analogous degree of caution was met in the House of Lords case *Smith v Robertson* [8] , where certain underwriters tried to avoid invoking any hints of acceptance of the served notice of abandonment by taking over the vessel for a short time under a "without prejudice" reservation. Parenthetically, it is offered that the insurers were eventually held to have acquiesced in the abandonment as for a total loss, even if the assured had no right to abandon, but merely a right to give notice of abandonment.

On the other hand, in the case of *Peele v Suffolk*[9], the Supreme Court of Massachusetts held that, though the underwriters had a right to keep possession of the ship for a reasonable time and exact repairs on it, they did not retain the right to continue keeping it for an unreasonable time. If they did, it would conclusively constitute a constructive acceptance of the assured's abandonment of the subject matter insured, notwithstanding the fact that they did not expressly accept.

The same conclusion was reached in the decision of *Robertson v Royal Exchange*[10]. There, it was held that the unilateral termination of attempts to salve the property on the part of underwriters can amount to an acceptance of abandonment. The insurance policy contained a clause that "no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment". The clause was considered eventually by the court to only apply to acts undertaken in continuance of the interests of both parties to the contract. Accordingly, the insurers were held to have impliedly accepted the notice of abandonment, or otherwise barred from denying its acceptance (and accordingly were bound to indemnify the insured on the basis of total loss), by commencing through their agents a course of action prejudicial to the assured and consistent only with the ownership of the vessel being in themselves.

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[8] (1814) 3 E.R. 936.

[9] *Peele v The Suffolk Insurance Company* 7 Pickering's (Mass.) Reports, 254, Phillips on Insurance, vol. ii. 5th Ed. p. 375.

[10] *Robertson v Royal Exchange Assurance Corp* (1924) 20 Ll. L. Rep 17.

2.1.2 *Strict application*

The most strict application of the rule is found in *Cincinnati v Bakewell*[11], where the court reached the verdict that, if the underwriters simply take possession of a vessel after an abandonment has been proposed and proceed to repair it without giving any notice of their objection thereto, then these actions are evidence of the insurers' acceptance of the abandonment.

Accordingly, in *Provincial v Leduc*[12], the court followed the above principle.[13] Although mere silence was held to not result in an indirect acceptance, the insurer's conduct lead to the conclusion that, in this case, the notice of abandonment was to be considered as accepted through a constructive acceptance. The insurers took possession of the ship through their agent, repaired it and retained it in their possession until she was sold as claim for salvage, without at any point repudiating the notice or providing any information to the assured of their intents or the nature of their acts.

In the same case we can also see the importance of third parties' actions and the significance of whether they operate in the interest of the assured or the insurer and function with or without the appropriate authority.[14] It is trite law that an agent acting within the scope of his authority binds his principal. But what one may observe in certain cases is the principal claiming to have given lesser freedom than that shown, while the party instructed may, and the opposing party definitely will, claim it acted within its power limits. In the *Provincial v Leduc*[15] case the counsellors of the insurers argued that the agent had only power to look after the interests of the insurance company, which, in turn, was acting merely as a salvor. The fact, though, remained that the agent, and, therefore the insurers through him, had taken possession of the ship. So, the agent's acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, bound the company in indirectly accepting the assured's notice of abandonment.

[11] *Cincinnati Insurance Company v Bakewell* 4 B. Monroe's Reports (Kentucky), 541.
[12] *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224.
[13] Per Sir Barnes Peacock: "whether the abandonment has been constructively accepted is a mixed question of law and fact".
[14] Also see: *Robertson v Royal Exchange Assurance Corp* (1924) 20 Ll. L. Rep 17.
[15] (1874) L.R. 6 P.C. 224.

Similar facts were also encountered in the US case *Peele v Merchants*[16]. There, the vessel was cast upon the rocks, lost and bilged. The assured was told by the underwriters, after a notice of abandonment had been served, to not let their agent intervene in the matter. Nonetheless, the underwriters' agents took possession of the vessel. The court, through Mr. Justice Story, held, as was expected, that any act by the insurers, including their agents, which can only be justified under a right derived from abandonment, is decisive evidence of the abandonment's acceptance, even if it was all done with the intention of surrendering the vessel back to the assured. So, if the underwriter had done an act which could only be justified on the supposition that he had accepted the abandonment, then that is decisive evidence that he had indeed accepted the abandonment.

Within the same frame of reference and in relation to the parties' conduct, so far as it touches upon the correspondence between them, Colman J., in *The Catariba*[17], extensively analysed the matter as an issue of fact and focused specifically on the wording of the letters exchanged between the parties and its proper construction. In that case, the assured asked for clarifications of the current status of his insurance cover and of the insurers' intents in terms of treating the ship as constructively lost, thereby indicating his will to implicitly serve a notice of abandonment. In his part, the judge did not find that the wording used constituted a clear offer to cede and that, therefore, no acceptance was possible to take place at that stage. The insurers replied that they recognised the ship as a constructive total loss and that they would proceed with taking over, so long as the assured agreed thereto and provided them with extra information regarding the vessel's equipment. The final verdict was that the insurers actually made an offer or, alternatively, made a counter-offer awaiting the assured's approval, which did not eventually come. As a result the insurers showed through their conduct that they had not, yet at least, clearly, finally and unequivocally accepted the abandonment of the subject matter insured.

[16] *Peele v The Merchants' Insurance Company* 3 Mason's Reports, 27; Phillips on Insurance, vol. ii. 5th Ed. p. 375.
[17] *Kusel v Arkin (The Catariba)* [1997] 2 Lloyd's Rep 749.

2.1.3 *Natural or neutral behaviour*

At this point, it is fairly logical to state that natural or neutral behaviour will not amount to acceptance. In *Thellussin v Fletcher*[18], for example, the underwriters suggested that the assured did his best with the remainder of his property. This was clearly no indication of acceptance as no intention of possessory interjection, or otherwise any will of active involvement, was formulated.

As we can clearly see, the rule concerning the conduct of the insurer is in essence that he will be held to have accepted the notice of abandonment so long as he, or an agent of his, has acted in such a manner as to demonstrate a derivation of a right from that notice and the accompanying abandonment, without any kind of clear objection thereto.[19] There is a parallel approach that bears exactly the same effects: When the conduct of the insurer is such, as to indicate that he is actually accepting the notice of abandonment, and thus acting as if the subject matter is certainly to be ceded to him, then the doctrine of equitable estoppel comes into effect as a defence for the assured, thereby preventing the insurer from successfully denying acceptance of the abandonment in the future.[20] Of course, all of the estoppel's requirements still need to be met, i.e. a communicated representation, relied upon by the assured and producing inequitable results if the insurer is to go back on it.

As per most, if not all, rules, this one, too, has exceptions. One such exception is the incorporation of waiver clauses in the insurance contract. Cl.13.3 of the Institute Time Clauses-Hulls 1983 tries to retain the status of the parties in the state previous to the service of the notice of abandonment. This prevents the parties' rights from being prejudiced by actions, whose purpose is purely the protection or sustenance of the subject matter insured.[21]

In contrast to such efforts, the courts have kept a defensive stance towards this kind of relieving clauses. Consequently, they are reluctant in granting them full effect,

[18] (1793) 1 Esp. N.P. 72.
[19] See: American constructive total loss case *Peele v Merchant's Ins Co,* 3 Manson 27 (1822), per Story J.; *Cincinati Ins Co v Bakewell,* 4 B. Munroe, R.(Ken) 541 (1844); cf. *Soelberg v Western Ass Co of Toronto,* 119 Fed.R. 23 (1902), above.
[20] See above *Robertson v Royal Exchange Assurance Corp* (1924) 20 Ll. L. Rep 17.
[21] Exact wording: "Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party".

particularly if the underwriters have undoubtedly acted outside the protection and outer limits granted by these clauses. This is naturally subject to the assured proving that an acceptance of his notice of abandonment did in fact take place, directly or otherwise.

In *Stringer v English*[22], the court was in favour of examining the true nature of the acts of each party. As a result, the relevant clause characterising these acts as neutral, or as non-triggers, was held to be ineffective, where the facts prove in the end contrary to it.

The above view is absolutely consistent with the general approach the courts adopt towards contractual terms. This is seen especially when the contractual provisions contrast the true intentions or the acts of the parties involved. Moreover, in contracts one sees very often alterations made to the original agreement, e.g. in the form of variations, or one-time exceptions, or even clauses that prevent nullification of the agreement in case of exceptional behaviour, which is a clear indication of the will of the parties to prevent their agreement's neutralisation.[23] In terms of case law, the courts have also been very flexible. Specifically, they are reluctant in applying the exact wording of a certain document, as, for example, in cases where the harmed party did not draft it[24].

The authoritative case, in accordance with the contractual terms' construction and non-acceptance of the wording of a clause as final, is the House of Lords case *Investors Compensation Scheme v West Bromwich*[25]. The court held that, when construing contractual documents, the actual goal was to find the meaning that a reasonable person would receive should he read it. That person was considered as having all the background knowledge reasonably available to the parties up to and including anything which could have affected the way that man would have understood it, but excluding any previous negotiations and possible declarations of

[22] *Stringer v English & Scottish Mar Ins Co* (1869) L.R. 4 Q.B. 676, at 686, per Lord Blackburn: "the provision itself does not … prevent such acts from having the effect properly due to them as evidence that the parties have made their choice"; Also see *Smith v Robertson* (1814) 2 Dow. 474; *Hudson v Harrison* (1821) 3 Brod. & Bing. 97.

[23] E.g. Held-cover clauses, such as cl.3 Institute Time Clauses-Hulls 1983.

[24] See contra preferentem rule; also used below in *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314.

[25] *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 W.L.R. 897.

subjective intent. The House of Lords continued to state that it was not obliged to ascribe to the parties an intention which plainly they could not have had.

Within the marine insurance case law, the same principles have been followed. An example of this practice is the Court of Appeal case *Pratt v Aigaion*[26]. A warranty incorporated in the policy required the owner or a skipper to be on board and in charge at all times, which was not met in this case. The court held that the natural inference from the wording of the warranty and according to its primary and underlying purpose, when read as a whole, was not to have a person in charge during every hour of the day. Through that train of thought, the court did not apply the clause as it was written, but instead deduced its true meaning and the true intentions of the parties. Two particularly interesting points in that case were that any clause in a contract should always be construed *contra proferentem*, i.e. that in case of ambiguity the party in benefit is the one which did not participate in the drafting[27], and that the context within the contract, which has to be always set in its surrounding circumstances or factual matrix, must be given importance.

Other more recent cases provide for the definite rule in the marine insurance policies' construction. While deciding upon the incorporation of Hague Visby Rules in a bill of lading, Mr Justice Smith, in the *Sideridraulic Systems v BBC Chartering*[28], took into consideration the reasonable man's view, as presented above, and the factual background concerning the case, such as the parties' previous dealings. In the *Rainy Sky*[29], a 2011 shipbuilding case, the Supreme Court was clear in ascertaining what a reasonable person would have understood the parties have meant, with regard to all relevant surrounding circumstances. Should there be two possible constructions, then the court would be entitled to prefer the construction most consistent with the business common sense. This rule was followed in the 2012 case *The Bonnie Smithwick*[30], where Mr. Justice Eder had to decide upon the construction of a certain charterparty clause referring to bunker costs and disregarded the appellant's submissions as unbusinesslike.

[26] *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314.
[27] Which is not followed strictly today.
[28] *Sideridraulic Systems SpA and Anor v BBC Chartering and Logistic* [2011] EWHC 3106.
[29] *Rainy Sky v Kookmin Bank* [2011] UKSC 50; and [2012] 1 Lloyd's Rep 34 ; see para.30.
[30] *Eitzen Bulk A/S v TTMI Sarl (The Bonnie Smithwick)* [2012] EWHC 202.

2.1.4 *Third parties' actions and the underwriters' differentiated responses*

In a combination of all involved parties contributing to the insurers' acts' perception by others and the construction of policy terms by the courts, there are two cases that can be of interest. For the first part, it should be mentioned that it is also agents of the parties that can alter the outcome, when examining the acceptance of a notice of abandonment. It has been observed, as a common occurrence, that insurers under a policy for the same subject matter will delegate conduct to the leading underwriter. Mance J., as he was at the time, observed in *Roar Marine v Bimeh*[31], that, although this practice engulfs an abundance of commercially prudent advantages, such as saving time and costs, or making co-insurance more marketable, there is a very important disadvantage. Namely, insurers will not always agree on their respective response towards the conduct of the assured. In the *P.T. Buana v Marine Mutual*[32] the leading underwriter was willing to fully indemnify the assured on a total loss basis, but the represented underwriters disagreed and objected on the assured's behaviour releasing them from the obligation to indemnify him.[33] The judge, Teare J., looked at the contractual provision between the insurers and noticed that it was agreed for the rest of the underwriters to unconditionally follow the leader "in respect of all decisions, surveys and settlements regarding claims within the terms of the policy". He then continued to state that the clause should be given the meaning which it would be reasonably understood to have. In deciding what that meaning is, it was held necessary to bear in mind the commercial purpose of "follow clauses" in marine insurance policies. Eventually, the judge decided that other circumstances regarding the assured's behaviour did not affect the scope of the "follow clause" and that, therefore, the other two underwriters were bound by the decisions of the leading underwriter.

The second example comes from the unique case *Dornoch v Westminster (The FD Fairway)*[34], where the underwriters alleged that they had impliedly elected to take over the subject matter insured. The assured, who did not want the insurers to get a

[31] *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Law Reports 423.
[32] *P.T. Buana Samudra Pratama v Marine Mutual Insurance Association (NZ) Ltd* [2011] EWHC 2413.
[33] The argument of the rest of the underwriters was that, although the leading underwriter was supposed to bind them in terms of his treatment of any claims the assured may have, the assured had breached a warranty contained in the policy and so the underwriters had no obligation whatsoever to pay any amount to him by automatic operation of the law.
[34] [2009] EWHC 1782 (Admlty).

hold of the vessel, argued the opposite. He claimed that an endorsement made by the excess policy slip leader to not take over the subject matter insured, after the notice of abandonment had been rejected, bound the rest of the underwriters as well. Tomlinson J. examined the policies' terms and took into consideration, *inter alia*, two important clauses. These stated that all claims are to be agreed by the slip leader and are to be binding on the rest of the underwriters, but also that the underwriters are not bound to follow any claim settlement agreement without prior consultation and approval by the two leading underwriters. The judge also placed the endorsement in its proper factual matrix, i.e. read it in context along with any preceding communications, knowledge of the value of the vessel, the lack of confidence between the involved parties etc, and came to the conclusion that the rest of the underwriters were not to be bound by the leading underwriter's statement to not exercise his, and consequently their, right to take over the vessel.

2.2 *Comprehension of the rule and Conclusion*

So far, we encountered the evaluation of hard, cold facts as they were delivered through the case law. But, as in most cases, there are some delicate issues which bring a certain level of complexity into the legal equation and that are almost always overlooked. One such issue, which should be brought up, is the fact that, after a casualty and the service of the notice of abandonment have taken place, so long as the latter remains active and has not been withdrawn, the insurer can accept it and take over the asset. Even later than that, an insurer may fully indemnify the assured and then elect to be ceded with the vessel or cargo insured. From that point onwards, the subject matter abandoned will be retrospectively, as of the time of abandonment, vested in him. What these rights add is a care that the insurer will want to procure in order for him to minimise his loss and any potential risks and claims in case the subject matter falls into his hands at a later point. For that reason, he will try to assist with, if not completely take into his control, the execution of salvage, repairs, towage or similar actions. It is as of this point that the above procedures become dangerous in relation to them becoming confused with indirect acceptance of the notice of abandonment (where, of course, no express rejection has been made).

A very reasonable, and completely compatible with the law, answer could be that, per other aspects of marine insurance law, where explicit and clear acts are needed in order for the wanted results to be brought to bear, so, here too, the insurers should be clear in their intentions and announce their will accordingly.[35] After all, it could be said that, as the assured is required to act in constructive total loss cases in such a manner so as to not produce uncertainty to the insurer at any stage from the service of the notice of abandonment right up to the point of indemnification and the completion of other proprietary transactions, if applicable, then, in a similar fashion, the latter must proceed within this frame of reference on the basis of reciprocity.[36] It is, after all, only just to request certainty in one's actions' consequences. This request becomes all the more important when coupled with the fact that this kind of dealings are often counted in the thousands, if not millions, of dollars and so the effect of each party's decisions bears significant gravity therewith.[37]

Aside from the obvious reasons of theoretical clarification and analysis, the above examination is important for an additional reason. Namely, it will help us in the understanding of what kind of measures and behaviour may constitute an act of management contrary to the rights retained by the assured after a notice of abandonment has been given and before official transfer of title takes place. This is also so in relation to the assured's conduct, which may oppose the act of the service of a notice of abandonment and a continuing will to abandon, where the notice has not been accepted, as will be seen below.[38]

[35] E.g. on the explicit and clear acts: if abandonment is to be effected and a partial loss to be treated as total, then the assured must clearly service a notice of abandonment with a true and constant will to abandon. Another example may be given from the field of marine insurance warranties, where the wording must be very clear and unambiguous, as must also be the behaviour of the assured in order for him not to violate them (and suffer their severe consequences).

[36] For example, the assured is required to facilitate the transfer of the right to registration in terms of the shares on a ship.

[37] E.g: *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, where the cargo claim was for US$7,608,845.30.

[38] See 2.1.1.2 and 2.2.1.1.

Chapter 3

Is the transfer of rights automatic as of the time of acceptance of the notice of abandonment? The meaning of s.62(6) and the significance of s.63(1).

3.1 *Introduction*

3.1.1 *Introducing the issue*

One of the most basic provisions of the MIA 1906 is s.62 and especially sub-para.6, which deals with the notice of abandonment and reads: "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" [my emphasis]. This has led to the current belief and understanding of the law that, through the acceptance of the notice of abandonment, the insurer will inevitably be vested in the property and all rights (and burdens) incidental thereto. It is only a minority which holds that the insurer, though still obligated to indemnify the assured, is not necessarily also compelled to take over the asset abandoned to him. This view, unfortunately, has yet to find full and in depth justification.[39] Therefrom stems a significant practical issue, whereby the insurers almost never accept the notice of abandonment, although they will usually state that they will fully indemnify the assured and accept to treat the situation as if a writ had been issued at the date of the service of the notice. The cause of this practice is the underwriters' unwillingness to risk being in possession of a vessel, or of a cargo, that may very well be a liability, or as it is called a *damnosa hereditas*, where costs, damages and procedural difficulties will most probably not be worth the property's remaining value.[40]

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[39] E.g. Susan Hodges, *Law of Marine Insurance*, Cavendish Publishing, 1996, p.10.

[40] Examples of damage for which the owner of the vessel may be liable include wreck removal, salvage claims, towage claims, pollution (e.g. through spilt bunkers), maritime or statutory liens and port expenses; see *River Wear Comrs v Anderson* (1877) 2 App Cas 743; *The Mostyn* [1928] AC 57; *Arrow Shipping Co v Tyne Improvement Comrs* [1894] AC 508; *Sharp v Gladstone* (1805) 7 East 24; *Barclay v Stirling* (1816) 5 M. & S. 6; *Sea Ins Co v Hadden* (1884) 13 Q.B.D. 706; *Eglinton v Norman* (1877) 46 L.J.Ex. 557, per Lord Coleridge C.J. and Brett L.J; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672 , per Scruton LJ, at 688; also see: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras.30-06 and 30-35.

The result of this tactic is the lack of certainty and predictability over the steps, which the two involved parties may take afterwards. The rejection of the notice of abandonment does not prevent the assured from fully managing the asset, including the power to dispose of it in whatever way he sees fit. On the other hand, the insurers, by virtue of s.79(1), may elect to take over the subject matter, or whatever may remain of it should they fully indemnify the assured.[41] It follows that without certainty, problems may occur, when, for example, the assured manages his asset in a way inconsistent with the service of the notice of abandonment owing to an inability to wait for a possible change of the will of the insurer.[42] In that case the assured will be legally completely deprived of the possibility of a full indemnification; unless the underwriters waive such actions and decide to remunerate him notwithstanding the assured's actions.[43] This seems to be a serious predicament from the viewpoint of the assured. Similarly, in case the underwriters eventually wish to take over the subject matter insured after full indemnification, but also after the asset has been sold, then, if the proceeds of the sale are significantly lower than what could be achieved, the insurer would be forced to a disadvantageous position.

The voices opposing the practice of rejecting the notice of abandonment as a default reaction focus on MIA 1906, s.63(1), which provides that "where there is a valid abandonment the insurer is *entitled* to take over the interest of the assured" [my emphasis]. According to them, the significance of the word "entitled" is such that it radically changes the meaning of s.62(6) as well as the parties' rights sourcing

[41] The proprietary rights received by abandonment include freight [See: *Case v Davidson* (1816) 5 M. & S. 79; affirmed by Exchequer Chamber: *Davidson v Case* (1820) 2 Brod. & B. 379. Exception: if the freight is earned by a substitute ship: *Hicjie v Rodocanachi* (1859) 28 L.J.Ex. 273; if the policy prohibits the underwriter from claiming freight, where it is then salvage to the underwriter of the freight if he pays for the CTL: *Coker v Bolton* [1912] 3 K.B. 315; if the freight is earned before the journey or earned for the journey's part before the casualty: *The Red Sea* [1896] P. 20 at 26, although freight earned as damages for the trip after the casualty is receivable by the assured, not the abandonees of the ship: *Sea Insurance Co v Hadden* (1884) 13 Q.B.D. 706 CA; approved by *Glen Line v Attorney-General* (1930) 36 Comm. Cas. 1.] as well as proceeds of the sale of ships captured by way of reprisals [See: *Randal Cockran* (1748) 1 Ves. Sen. 98; *Blaauwpot v Da Costa* (1758) 1 Eden 130; *Burnand v Rodocanachi* (1882) 7 App. Cas. 333; and *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55, where the court held that the insurers are allowed to keep all the proceeds of the sale, even if this entails a profit for them].

[42] In this way the assured disposes of the cover that s.62(4) grants him.

[43] This is so for the notice of abandonment already served; he retains the right to serve additional notices to which the insurer will have to give a new responses. Moreover and as mentioned, the insurer may still decide to indemnify the assured retaining the s.79(1) right to take over whatever remains of the subject matter insured. It must be noted, though, that the former hypothetical situation is a more of a rarity that the norm in the current marine insurance market.

therefrom. Finally, by this approach, there is an additional effect. Insurers often present the argument of lacking the means to avoid encumbrance by a, *prima facie*, unwanted asset. By granting the freedom of entitlement, as above, this argument can only be characterised as illusory and shall, therefore, be rejected.

The issues created by the current approach are not fictional or purely theoretical at all. In the rare, but most illustrative, case *Dornoch v Westminster*[44], the assured served a notice of abandonment and claimed for a constructive total loss. He wished not for their unique vessel to be sold on the free market and, thus, tried to evade a takeover by the insurers and the following sale by transferring the ship to a subsidiary company and presenting to the insurers a trivial amount of €1.000 as the proceeds of the sale and as true worth of the wreck. The insurers, having realised her true value, tried to reverse that sale, which led to court proceedings.

In the following analysis we will search into each hypothesis on the process of abandonment and try to reach a conclusion on the most beneficial solution to both the assured and the insurer, in an effort to defuse and end this conundrum.

3.1.2 *Today's Position in Law and its Roots*

The view currently applied by the courts is that, effectively, upon the acceptance of the notice of abandonment, the agreement on the transfer of all the assured's proprietary interests is irreversibly decided. This transfer concludes itself upon satisfaction of the claim for a total loss with a retrospective effect as of the time of the casualty.[45] For reasons we will explain below, s.63(1), which entitles the insurer to choose to take over the subject matter insured even after his acceptance of the notice of abandonment, seems to be regarded today as being a presage of s.79(1). Although the insurer is being recognised as not vested with the property upon acceptance of the notice and as retaining the right to elect whether to take over the property or not, his freedom of election is instantaneously confined to and by the act of acceptance or rejection of the notice.

[44] [2009] EWHC 889 (Admlty).
[45] See *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para. 30-09.

Next, we shall move our attention from the point of acceptance to the part of the settlement of the claim on a total loss basis according to s.79(1). This section of the Act grants a right of election to take over the property through the means of subrogation. In other words, the section states that, if the insurer wills so, he may take over the subject matter insured after he has paid for its loss. What we notice, according to today's standpoint, is an antithesis to the above. Similarly to the issue with s.63(1), the freedom of election is prejudiced by the irrevocability of the acceptance of the notice of abandonment (s.62(6)) and, so, the insurer has no option but to pay as for a total loss and be ceded the property after payment retrospectively as of the time of the casualty.[46] The purpose proposed for this type of structure is the need for a specific party to bear the burden of responsibility for the abandoned property, as well as to have the rights thereto.[47]

The reasons leading to that kind of evaluation of the Act's sections must be received as a residue of the pre-MIA 1906 case law. In *Dornoch v Westminster*[48] Tomlinson J conceded to this explanation. He specifically mentioned that it is a variant of the pre-Act rules, where abandoned property changed ownership by the mere act of abandonment, without the need for acceptance of the relative notice. Lord Atkin, likewise, in *Attorney General v Glen Line Ltd*[49], had noticed the confusion between the rights conferred to the parties by ss.63(1) and 79(1) and the different phrases used therein.[50]

On the other hand, Rix LJ, in *The Kastor Too*[51], held the view that the MIA 1906 perfectly justified the continuation of the legal concept of an *ab initio* conclusive decision. He indicated that the word "abandonment" is not included in the wording of s.63. Therefore, the right of election mentioned there is not suggestive of the act of

[46] See: Arnould, supra, para.30-06; also see: *Stewart v Greenock Mar Ins Co* (1848) 2 H.L. Cas. 159; *Sea Ins Co v Hadden* (1884) 13 Q.B.D., at 711; *The Red Sea* [1896] P. 20. Exception is noted in the cases of prize courts, where the insurer is unable to achieve a return of the property through his retrospective right on it, see: *The Gothland* [1916] P. 239n; and *The Zaanland* [1918] P. 303, per Sir Samuel Evans P.
[47] See: Arnould, supra, para. 30-28.
[48] [2009] EWHC 889 (Admlty).
[49] (1930) 37 Ll L Rep 55.
[50] "All rights incidental thereto", on a valid abandonment, and "all rights and remedies of the assured in respect of the subject-matter", on payment, respectively.
[51] [2004] EWCA Civ 277, p.136, para.76.

abandonment, but rather of the more general legal concept of cession.[52] This cession, he continued, in both the case of an actual, as well as in the case of a constructive total loss, would take place only on payment and only if the insurer showed his willingness to accept the property.[53] It was pointed out that, even in an actual total loss situation, where the abandonment functions as a matter of law, s.79(1) would still give the right to elect to take over.[54] But in cases of constructive total loss, as there is the need for a notice of abandonment, its acceptance is the conclusion to the right of election of s.79(1) for the reason that it precludes the insurer from denying payment to the assured. In essence, what Rix LJ said was that, at first instance, there is no automatic agreement on the ceding of the property upon acceptance and that there is a choice in terms of taking over the assured's rights inherent in ss.63(1) and 79(1); but once the insurer has accepted the notice of abandonment, he has indicated his willingness to be ceded with all proprietary rights and so the transfer will be made upon payment with an *ex tunc* (time of the casualty) effect.[55] It must be noted that in Rix LJ's preface of his analysis an early indication of his above view on the matter was stated.[56] While presenting the legal structure of the MIA 1906, the mentioning of an election to take over was made only in reference to s.79(1) and not in connection with ss.61 and 63. This is in direct contrast to the fact that s.63(1) explicitly includes the word "election".

3.2 *The rules in pre-MIA1906 times*

[52] See: dictum of Martin B in *Rankin v Potter*.
[53] See: *Kaltenbavch v Mackenzie* (1878) 3 CPD 467.
[54] See: *Allgemeine Versicherungs-Gesellshaft Helvetia v Administrator of German Property* [1931] 1 KB 672, at 687-688, per Scrutton LJ.
[55] This seems to be an analogical application of the principles of subrogation as seen in s.79(1). See *Dornoch v Westminster* [2009] EWHC 889 (Admlty), per Tomlinson J, para.39.
[56] See para.27.

In order to agree, or not, with either of the two approaches above, we must travel several aeons back. Before the MIA 1906 and as early as the 18th century (circa 1745 onwards[57]), abandonment and the accompanying cession of the assured's proprietary interest in his vessel or cargo was treated by many cases as automatic upon the service of the notice of abandonment and claiming of a total loss. As time passed, the law of marine insurance evolved and, so, later cases supplemented the condition of a notice's service with other requirements, such as payment for the loss, or, not unlike today, its acceptance by the underwriter.[58] The case law did not prove to be absolutely consistent with the one preceding it and, therefore, abnormalities were not unseen. What was also very interesting to observe was that the insurer's acceptance of the notice received different treatment throughout the above timeline. In some cases it was considered to be the turning point of the judgment, while in others it was disregarded and overlooked completely. It seems, at that time, the prohibition of any profit on behalf of the assured through the insurance policy, as it is expressed by the indemnity principle, was considered as paramount, to the extent that the underwriters received the insured property, irrespective of their wish to do so, on the grounds of avoiding any double gain for the assured. Through a different approach, it could be that the obligations on the insurer to pay and the assured to cede were contractual, under the insurance policy, and therefore absolutely binding. Additionally, in terms of the nature of the transfer of rights and property, this was considered to be a benefit from salvage.[59] Both of these issues will be discussed at length in the next chapters.

Below, we shall see the path that the case law followed, in order to reach the turning point of the MIA 1906. Though the Act supposedly recapitulated the rules of

[57] E.g. see: *Da Costa v Firth* (1766) 4 Burr 1966. In combination with *Smith* v *Robertson* (1814) 2 Dow 474, these were considered to be the basis of the MIA 1906, s.62(6). Also see: Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010, on sub-section 62(6).

[58] See *Stewart v Greenock Mar Ins Co* (1848) 2 HLC 159, 183, per Lord Cottenham LC; *Vacuum Oil Co v Union Ins Soc of Canton Ltd* (1926) 32 Com Cas 53, 55, per Atkin LJ referring to the agent's authority to accept the notice of abandonment in order for the property to pass to his principals. Other cases follow the rule that transfer is automatic upon payment; see *Simpson v Thompson* (1877) 3 App Cas 279 (HL(Sc)), 292. Per Lord Blackburn. Also see F.D. Rose, *Marine Insurance: Law and Practice*, 1st ed., LLP, 2004, para.24.42.

[59] See: *Allgemeine Versicherungs-Gesellshaft Helvetia v Administrator of German Property* [1931] 1 KB 672, per Scrutton LJ at 687; this is a citing, as in his *ratio decidendi* the judge recognizes the entitlement conferred by s.63(1); and *Ann Stewart and Others v The Greenock Marine Insurance Company, and the Directors of that Company* (1848) 9 E.R. 1052, per Lord Campbell at 172.

marine insurance up to that point in time, it still had differences and alterations from the previous case law, which, in turn, was then thought to have been established.

The cases from the 18th century up to and including the middle of the 19th century shared uniformity in regard to the time when the rights and property were transferred to the insurer. In spite of minute differences in their respective point of view, as well as in the judgments' core, all judges followed the rule that the mere service of abandonment was sufficient for the assured to be indemnified for the casualty and for the insurer to be vested with the subject matter insured.[60]

3.2.1 *The basic rule of the Bainbridge v Nelson case*

One of the first major cases that helped in the establishment of the above rule was the case *Bainbridge v Nelson*[61], which would later be cited numerous times, and especially on issues of freight. In that case, a ship was insured for an adventure from Jamaica to Liverpool. On her journey she was captured, re-captured and, finally, returned to Liverpool. The assured served a notice of abandonment and insisted on a full indemnification as for a total loss. At the time he was ignorant of the re-capture and of the vessel's state.

Lord Ellenborough, dealing with the case, heard the argument that once both parties have agreed to treat the loss as total, and the underwriters have indemnified the assured, then it is binding on both.[62] But his lordship did not accept that approach. He stated that, upon facts granting the right to abandon, the assured can "cast a desperate risk on the underwriter". But this right was still subject to later events, which would either preserve the right and the status of the property, or reverse the factual basis of the claim and, so, diminish the former and reinstate the latter. This would force the

[60] In terms of exception to the rule see: *Cammell* v *Sewell* (1858) 3 H & N 617; and *Houstman* v *Thornton* (1816) Holt NP 242, where the insurers were considered to receive a right to the subject matter insured after acceptance of the abandonment.
[61] (1808) 10 East 329.
[62] Per Holroyd for the plaintiffs, at 338. This argument was based on the case of *Da Costa* v *Firth* (1766) 4 Burr. 1966.

abandonment to fail.[63] The Lord's view was retained as a general principle to be followed in subsequent cases. In short, and leaving the issue of the later changes of facts, Lord Ellenborough expressed the opinion that, once the assured has abandoned, the "risk", that is to say the property and the rights upon it, pass to the insurer, without any further requirements.

Lord Ellenborough, in *Bainbridge v Nelson*[64], followed the case *M'Carthy v Abel*[65] *and* Lord Mansfield's judgment in *Hamilton* v *Mendez*[66]. *In M'Carthy* v *Abel* an embargo forced the assured to abandon his vessel, but later events deprived him of a full indemnification as he, eventually, had no loss. What is important and relative to the subject discussed are two statements: firstly, that abandonment to the underwriter vested in him the property with all consequences sourcing out of it and, secondly, that the benefit of salvage engulfed everything which remained of the ship at the time of the abandonment.[67] In *Hamilton v Mendez,* similarly to the *Bainbridge* case, the vessel was captured and re-captured unscathed. Lord Mansfield was of the opinion that the abandonment's results were automatic and that abandonment was sufficient to cede the property as of the time of the claim, although the right to full indemnification would be subject to future events denying such a right.

The case of *Smith v Robertson*[68] held the same stance in the matter of the property transfer, even though it did not absolutely follow in the footsteps of the *Bainbridge*[69] case, or the case law therein. The facts were similar, with the *Ruby* being insured for a voyage from Halifax to Plymouth, during which she was captured and re-captured. The owner, upon receiving the relevant intelligence, immediately abandoned her to the underwriters and claimed for a total loss. The latter took some steps to settle the loss, but, after the news of re-capture reached them, they stayed the process and denied settlement, except for a partial loss. Proceedings against them were instituted by the owners in the Scottish Admiralty Court and, upon judgment in favour of the owners, the underwriters carried the matter by suspension before the Court of Session. The Scottish Admiralty Court and Court of Session made three

[63] At 341-343.
[64] (1808) 10 East 329.
[65] (1804) 5 East 388.
[66] (1761) 1 Wm. Bl. 276.
[67] at 394 and 396.
[68] (1814) 2 Dow. 474.
[69] Supra.

major points. They held that the moment when the assured received intelligence of the capture was the time when the right to abandon vested in him. Secondly, that, after the assured having exercised his right to abandon, justified by the intelligence in his possession and on a bona fide basis, the transaction was finally closed and, therefore, it was not subject to disturbance by any event appearing thereafter. Finally, the court held that, irrespective of the previous *ratio*, since the underwriters had accepted or at least acquiesced in the abandonment, they were disallowed from refusing full indemnification.[70] This approach was a differentiation from the principle on which the Court of King's Bench had decided the case of *Bainbridge*[71], but, nonetheless, still demonstrates the immediate effects that abandonment brought on its own. This was also a judgment that offered importance to the fact that the insurers accepted the notice, which bound them to indemnify the assured and gave them the assured's rights on the subject matter insured.[72] The judgment was affirmed in the House of Lords, but was mostly founded on the last point, namely that the abandonment had been accepted by the underwriters and so the matter had been closed.

In conjunction, the judgments of the Scottish Admiralty Court, the Court of Session and the House of Lords demonstrate what is later mentioned in the latter half of s.62(6) of the MIA 1906. This is also a clue pointing at the current confusion between the two sentences of the Act's section, as, at the time the above cases were decided, the law did not distinguish between the concept of abandonment's irrevocability, admittance of the underwriter's liability and election of the taking over of the property; they were all merged in one legal notion.

Lord Ellenborough, in uniformity with his previous judgments illustrated the legal viewpoint of the automatic effects of abandonment in *Cologan v London*

[70] At 476.

[71] There is also a reference to the case *Faulkner v Ritchie*, which apparently followed the same principle as did the *Bainbridge* case, but there seems to be no available citation. For further information on the case and its connection with the *Bainbridge* and *Smith v Robertson* cases see: P. Dow, Esq. of Lincoln's Inn, *Reports of Cases upon Appeals and Writs of Error in the House of Lords*, during the fifth parliament of the United Kingdom, W.Clarke and Sons, 1814, pp.477, 480-481.

[72] The significance of this last remark can be seen in connection with the construction of the relevant law today. That is because according to the latter, the acceptance of the notice will crystallise the rights of the parties.

Assurance[73]. He did seem, though, to have changed his view on the retrospective effect that events after the claim for a total loss might have on the right to abandon. In this case, insurance was taken on a cargo from Quebec to Tenerife, free from average. The ship was captured, recaptured and sent to Bermuda, where, due to scarcity of products, an embargo was laid on exports. The cargo was landed and its damaged parts were disposed or sold along with the ship, while the undamaged part was transferred to Madeira after the lifting of the embargo. The assured had abandoned directly upon receiving intelligence of the circumstances, which was previous to the permission to proceed to Madeira. The court held that he was entitled to recover as for a total loss on the whole of the goods insured.

What is important to note is that Lord Ellenborough recognised the subject matter insured as being totally lost as of the time of the initial capture. The judge also excused the assured for insisting on the abandonment given his ignorance on the later alteration in circumstances that changed the nature of his loss (from total to partial) and supplemented that last point by stating the irrelevance of these later facts in that they did not affect the actual right to abandon and the abandonment itself.[74] We can see that the judge's opinion was based on the fact that abandonment was effected automatically. At this instance, the significance of the notice of abandonment was not considered for any other reason than to find the latest point at which the property would be considered as transferred to the underwriters.[75] This meant that it did cause some effect, although it cannot be said with certainty if Lord Ellenborough would be in agreement with the *Smith v Robertson* ratio on the gravity of that act (namely if the acceptance is the concluding factor for the transaction between the parties).

In *Davidson v Case*[76] Lord Ellenborough was also sitting as a judge. The facts are similar to the above, but include an issue on earning freight, wherefrom, here too, the same principle on abandonment was followed. The *Fanny* sailed from Rio de Janeiro to Liverpool. On her voyage she was captured by an American privateer and, so, the owners gave notice of abandonment to the underwriters, who accepted it. Later

[73] (1816) 5 M. & S. 447.
[74] In the Lord's opinion, the court should look at the situation of things before action is brought, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment.
[75] At 454.
[76] (1816) 5 M. & S. 79.

the vessel was recaptured by a British warship and brought to London, where she was reinstated to her owners and earned her freight. After a full remuneration of the assured by the ship and freight underwriters, the legal matter proceeded on a dispute between the latter two parties on whether it was also the freight earned which was abandoned. His Lordship found the matter to be axiomatically a typical, as it was never dealt before in court, but all the while considered it mature and effortlessly settled.[77]

In the important to our examination parts, Lord Ellenborough said that abandonment to the underwriters of ship divested the owner of all his rights in favour of the party to whom he abandoned.[78] The underwriter was considered to not become, by virtue of the abandonment, privy to agreements made between the owner and third parties beforehand, such as a charter-party, or a contract of affreightment. But, on the other hand, through such abandonment, the underwriters were recognised as entitled to the acquisition of the insured property's possession, which included not only the hull, but also the use of the ship and any advantages (and burdens) resulting therefrom. These rights to freight were considered to accompany the abandonment to the underwriter of the ship notwithstanding any parallel policy on freight, thus depriving the freight underwriters of their relative rights. This deprivation was considered to be a necessity, since the vessel's underwriter was entitled to look solitarily to his own contract, thus accordingly excluding reference to other contracts between the assured and other parties, and to also look to the consequences resulting from the act of abandonment.[79]

What can be seen here is that the abandonment itself was powerful enough to cede all of the proprietary rights in connection with the subject matter insured, even to the point of bypassing the rights of any other insurers. Most importantly to the present research, it was found that the underwriter was vested in the assured's rights only because the right of abandonment was exercised; which seems to be in consistency with the principles of abandonment at that time.

[77] Held that freight follows, as an incident, the property in the ship and, therefore, as between the underwriters on ship and freight, an abandonment of the ship carries the freight along with it.
[78] Origins were pointed out to be found in cases stemming from the Russian embargo.
[79] At 82.

A very commonly cited case on the subject discussed has been *Roux v Salvador*[80]. There, a cargo of hides was severely damaged, because of a leak in the ship. The cargo was subjected to a sale, as a means of preserving as much of its value as possible before arriving at the final destination. The assured had not abandoned, but claimed for a total loss, which he was eventually held to be able to successfully do. In that case, Lord Abinger examining the working system of abandonment said that the contract of insurance is one of indemnity.[81] Upon that principle it was founded that, if an underwriter is insuring an asset and that asset is so damaged as to be able to be treated as a total loss and was in fact treated as such by the assured, then the former is obliged to fully indemnify the latter, unless other circumstances alter the state of the subject matter insured.[82] Moreover, so long as the thing insured, or a portion of it, still exists, the assured is obliged to transfer all of these remains and all rights that may adhere thereto to the underwriter according to the principle of indemnity.[83] In accordance with the earlier cases, the judge seems to be an advocate of the immediate effects of abandonment with the cession of property and rights being made directly thereafter. More importantly, abandonment was perceived as independent from other factors in connection with the parties involved, such as acceptance of the notice or payment for the total loss in order for the rights to vest.[84]

[80] (1836) 3 Bingham New Cases 266.
[81] At 285-286.
[82] Here the Lord mentioned the case of a vessel's re-capture, although the mere capture would constitute a *prima facie* total loss, as in the cases of forcible sale, which end the policy abruptly.
[83] It should be noted that this passage was cited in the case *Knight v Faith* (1850) 15 Queen's Bench Reports 649, by Lord Campbell CJ, at 660; also cited were *Fleming v Smith* (1848) 1 H.L. Cas. 513: "abandonment, in cases of constructive loss, is an exploded doctrine, and there is no difference between a notice of abandonment and the cession of a salvage on receiving payment of the sum insured"; and *Stewart* v *Greenock* (1848) 9 E.R. 1052, per Lord Chancellor Cottenham, at 183: "In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it", for further analysis see below.
[84] External changes in the circumstances may still alter the ability of the assured to successfully claim for a total loss as explained by Lord Abinger above.

3.2.2 *Small changes to the cession's requirements*

It is at the end of the first half of the 19th century that a different pattern would start to emerge. The judges found that the service of abandonment on its own was not enough for the underwriter to be ceded with the ship or cargo. A new requirement was introduced, namely that of the assured being previously fully indemnified for his claim. The reasons behind such a change of stance and perception were not clear in the judgments and the judges' analysis. It can be speculated that the motives were to ensure that the assured would be eventually satisfied before the insurers were in the position to force him to vest his asset in them. The need for satisfaction of the assured's loss was followed consistently in almost all cases and, so, this introduction (of the need for payment) could also be considered as a predecessor of what was later s.79(1) of the MIA 1906. The additional requirement's long incorporation in the law ruling abandonment affected the law even after the introduction of the above section and, in essence, it remains in effect today.

Moving 12 years after *Roux v Salvador*[85], the important case of *Stewart v Greenock*[86] was decided in the House of Lords. This case will help shed ample light on the rules of abandonment at the time. The *Laurel* was struck upon an iceberg while on her voyage. Despite the severe injury, she made it back to Liverpool as her cargo was timber and kept her afloat. While in the river there, she was grounded outside the docks. She was then taken into dock, the cargo was discharged and freight was earned. Surveyors gave a £3.000 estimate of cost for repairs and so the owner abandoned the ship to the underwriters and claimed as for a total loss. The underwriters refused to pay, since, according to them, the price of the vessel was £7.500 meaning no constructive total loss had occurred.[87]

The main issue in the House of Lords was whether the right to the freight earned by delivery of the timber was ceded to the underwriters on account of the abandonment granting them all rights incidental to the property. For the solution, it

[85] Supra.
[86] *Ann Stewart and Others v The Greenock Marine Insurance Company, and the Directors of that Company* (1848) 9 E.R. 1052.
[87] On a side-note, this case was followed in the House of Lords by Scottish appeals case *Scottish Marine Insurance Co. of Glasgow v Turner* (1853) 1 Macq. 334.

was imperative to establish the time of abandonment and whether abandonment had any retrospective effects.

In the first division, Lord President and Lord Mackenzie held that abandonment transferred to the insurers all the rights of the assured as to freight.[88] Of the opposite opinion were Lord Fullerton and Lord Jeffrey, who held that the underwriters were not entitled to any part of the freight. Lord Justice Clerk, Lord Moncreiff, Lord Medwyn, Lord Robertson, and Lord Wood, held that, through abandonment, the freight belonged to the underwriters, while Lord Ivory, Lord Cunninghame, Lord Cockburn, and Lord Murray, retained that the underwriters were not entitled to take credit for any freight, but were bound to settle as for a total loss, leaving the freight to be recovered by the owners. The Judges of the First Division, after careful consideration of these opinions, pronounced as an interlocutor that the defenders, the Greenock Marine Insurance Company, who were underwriters on ship, were entitled, in accounting with the pursuers, to have placed to their credit their due proportion of the freight. The decision was appealed.

On this level, the disagreement was on the point of the amount of rights transferred through abandonment, namely if it included the right on freight, and not whether there had been any transfer at all. The court did not even consider the fact that the underwriters had rejected the notice of abandonment as one which could alter the end result of the matter at hand, thus hinting at the rules of abandonment as they were enforced in older cases. It would later be discussed whether the time of abandonment was of any essence to the rights transferred, since it was supported that, if freight was earned beforehand, then it would not be ceded.

To illustrate the principles on abandonment, we should have a deeper look into the submissions of the parties and the opinions of the Lords. To start with, Sir F. Thesiger and Mr. Watson[89], with Mr. Anderson, for the appellants, said that abandonment throws the risk to the abandonee and, consequently, the owner must cede all the property insured, or all that remains of it, to the underwriter, since this

[88] Note that this follows the principles laid out in *Davidson v Case* (1816) 5 M. & S. 79 (and all preceding case law) in that respect.
[89] At 165-167.

cession is the preliminary step to his recovery.[90] Sir F. Kelly and Mr. Wickens[91] for the respondents were not precisely of the same opinion. They supported that, through the ship's abandonment by the owner to the insurer and full payment of the value of the ship from the latter to the former, the underwriter became entitled to the ship and to all incidents thereto[92], freight included.

Lord Campbell[93], while on the topic of a constructive total loss being described as a total loss with a right of salvage, mentioned that, when the assured, by a notice of abandonment, converts the loss into a constructively total, everything in the ship vests in the insurers from the moment at which the loss occurs.[94] Specifically, he continued, it was at the time when the owner declared by abandoning the ship that she was so damaged as to be considered a total loss.

Lord Brougham[95] wanted to examine the importance of the insurer covering only damages to the ship, as opposed to freight on top thereof. On that topic, he commented that this was a simple case of constructive total loss, in which the underwriters, having paid on a total loss basis, claimed that the vessel should be theirs from the moment of the casualty, along with all its incidents. This was so on account of the assured's abandonment, which obliged the underwriters to treat the loss as total. Lord Brougham then went on to disagree with Lord Campbell and the rule provided, *inter alia*, in *Bainbridge* v *Neilson*[96], on the issue of the significance of the acceptance of the notice of abandonment *vis a vis* the cession of the abandoned property. Specifically, he said that there was no distinction between the present case and that of

[90] Also see *Thomson* v *Rowcroft* (1803) 4 East, 34, *Leatham* v *Terry* (3 Bos. and P. 479) and *McCarthy* v *Abel* (5 East, 388) on the principle that an abandonment pending a voyage, carries to the underwriter on ship the right to recover the freight. In these cases, the abandonment took place during the voyage, in which the assured gave up everything to the underwriter on ship, who so became the assured's substitute. Being the actual carrier of the goods, it was his vessel that earned the freight and therefore he was the person entitled to receive it.

[91] At 171.

[92] "By the payment of full value for it they acquired a complete right to the ship", at 171.

[93] At 172-173.

[94] It is noteworthy to state that his lordship right afterwards, at 181, went on to point out the fact that the notice of abandonment was not accepted by the insurers. This was remarked due to its connection with the *Bainbridge* v *Neilson* (1808) 10 East 329, *Smith* v *Robertson* (1814) 2 Dow. 474, and *Patterson v Ritchie* (4 Maule and S. 393) rules, whereby the acceptance is that by which the parties are bound, which is the only time at which time onwards the rights of the underwriter arise. As we can see the two rules are mutually exclusive, as the rights will either vest upon abandonment or upon acceptance.

[95] At 173-175.

[96] 10 East, 329.

Case v *Davidson*[97] and that the only question that was not there distinctly and in terms decided was whether the ship vested in the underwriter from the time of the abandonment or from the date of the casualty. If the underwriter refused to accept the abandonment, then that would not in the least degree prevent the assured from recovering. To use his exact words: "Nothing depends on the acceptance or non-acceptance of the abandonment".

This last remark is in direct contrast to the law as it is today, in which the acceptance or rejection of the notice of abandonment is one of the largest parts of the factual basis of any constructive total loss case. The outcome of such a case in our days would, most probably, have had a completely different outcome, since the notice of abandonment was declined and that would mean that no immediate obligation to indemnify the assured would take place, nor would the insurers be vested in the remainders of the ship and the freight earned therefrom.[98]

To conclude on the *Stewart v Greenock* case, we should cite the words of Lord Chancellor.[99] He stated the common rule that, in all cases where a subject matter insured is constructively lost, the assured is entitled to claim as upon a total loss, with the obligation to give to the underwriters all the remains of his insured property that was recovered, together with all benefits and advantages incident to it. He then added that, in other words, such property by that action alone "vests in the underwriters *automatically*" [my emphasis]. In support of the above, Lord Chancellor mentioned the case *Benson* v *Chapman*[100], where the ship, soon after leaving the port of loading, sustained damage amounting to a constructive total loss. The captain repaired the ship at expenses beyond what a prudent owner would have incurred and brought the cargo home. On the issue of abandonment of freight, the Court held that the total loss of the ship carried with it the total loss of the freight. Chief Justice Tindal, in synopsis, said that the assured had abandoned his ship to the underwriters and so through and as of abandonment it was theirs. The same applied to freight, because the assured no longer had any means of earning it, or the possibility of receiving it, even if earned.

[97] (1816) 5 Maule and S. 79; 2 Brod. and B. 379; 5 Moore, 117; 8 Price, 542.
[98] With the reservation of the right of subrogation; MIA 1906, s.79(1).
[99] At 182-184.
[100] (1843) 6 Manning and Granger 792.

Of all the opinions heard in this case, it was only Lord Brougham, who explicitly referred to the restrictive nature of payment for the total loss, which obligated the assured to transfer all his rights on the insured asset to his underwriters. [101] In his admittedly thought-provoking and innovating view, abandonment and payment were harmoniously connected in a mutually dependent motif. Without abandonment, the assured could not recover for his damage and, without indemnification, the insurers could not get any benefit, which the subject matter insured could confer on them, such as the earned freight.

3.2.3 *The academics' perspective at the time*

Two mentions to books of the time must be made in connection with the *Stewart v Greenock* [102] case, which will provide for the academic aspect of the discussed issue. The first, being of American origin, is *Phillips on Insurance*[103], where it was characteristically written that the effect of a valid abandonment is to transfer the property in the subject matter insured. But also, that payment of a total loss by the insurers, or their ability to pay for such a loss, in consequence of abandonment, is the key fact giving them title to the property, or what remains of it, analogically to what was covered by the policy. Secondly, in *Marshall on Insurance*[104] it was recognized that by the abandonment, the insured yields up to the insurers all his rights, titles, and interests in the subject matter insured, or what may remain, which, from the time of the service of the notice of abandonment, becomes property of the insurers. This operates as a transfer to them, proportionately and respectively to their subscriptions and unaffected by any chronological priority of the policies, even in cases of over-insurance. This transfer has the idiosyncrasy of a retrospective effect for the insurers,

[101] "The payment of a total loss by the insurers, or their ability to pay such a loss, in consequence of an abandonment, gives them a title to the property, or what remains of it", at 173-174.
[102] (1848) 9 E.R. 1052.
[103] Phillips on Insurance, 417, 418, 2nd ed., Boston, 1840; and *Stewart v Greenock* (1848) 9 E.R. 1052, per Lord Brougham, at 173-174.
[104] See page 612, 3rd ed.; and *Stewart v Greenock* (1848) 9 E.R. 1052, per Lord Brougham, at 177.

who are presumed to have been owners of the things insured from the time of the casualty.[105]

Of the two authors, only the first mentions payment by the insurer as a requirement for the rights on property to pass, whereas Marshall seems to adhere to the principles of abandonment as they were structured in the 18th and early 19th century. What is interesting is that the American opinion in the theory of abandonment was already one step ahead of the English courts, which required almost a decade more, in order to start producing case law of the same *ratio decidendi*.

3.2.4 *Hinting towards s.79(1)*

From the mid 19th century onwards, one notices a form of continuity in the court's perception of abandonment. The next major case was *North of England v Armstrong*[106]. The ship, valued at 6.000l., was run down and sunk by another ship. The underwriters paid the full amount as for a total loss. The owners of the ship in fault were then obliged to pay an amount reaching 5/6ths of the insurers' indemnification by order of the Court of Admiralty, although the real value of the ship was 9/6ths and there was no other insurance to cover the difference. The issue raised was in relation to the beneficiary of the remuneration, as abandonment and payment had been effected and the true value of the sunken vessel was at 1/3rd higher than the amount paid by the insurers. It was finally decided that, due to the nature of the policy being of a fixed value, as between the underwriters and the assured the value of the ship was at 6000l. for all intents and purposes and that, therefore, any damages recovered of the nature of salvage belonged entirely to the underwriters.

The above decision seemingly relates to the rules of subrogation as seen in s.79(1), in that the underwriters, having paid for a total loss in cases of abandonment, are subrogated in all of the assured's rights on the subject matter insured.[107] Since, at

[105] At this point the Roman legal rule "Quod repudiatur, retro nostrum non fuisse palam est" was cited, which loosely translates into: "That which is denied [abandoned] cannot become [y]ours again".
[106] *North of England Insurance Association v Armstrong* (1869-1870) L.R. 5 Q.B. 244.
[107] Although the exact wording of the section states that the underwriter may elect to take over after payment for the loss if he wishes so.

the time, there was no distinction between what is today ss.63 and 79, it is essential that we proceed to the examination of the case. Cockburn C.J., perceived as clearly established that, in cases of total loss, whatever may remain of the vessel in the form of salvage or any rights accruing to the owner of the property insured and lost "pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it". Once again, we see the requirement of the assured's full satisfaction, as in *Stewart v Greenock*[108]. Interestingly, in his immediately previous words, Cockburn C.J. said that all of the assured's rights on the insured property pass on the service of the notice of abandonment and the accompanying claim for a total loss. This approach can only include one of the following meanings. Either it is a precursor to s.79(1) and it, thus, deals more with the rules of subrogation than with those dealing exclusively with the notice of abandonment in cases of constructive total losses; or it is the condition precedent needed for the completion of the transfer which was initiated by the property's abandonment. In order to elaborate on the second proposition, it is presented as a hypothesis of the rules at the time that the law continued to see the service of the notice of abandonment as the key fact in the constructive total loss process, and especially on indemnity and the transfer of rights, though it was the payment of the claim that would trigger the agreement. So, the establishment of cession would occur on abandonment, but the conclusion of the whole transaction would take place on payment. This would fittingly explain the construction of the Act by Rix LJ in the *Kastor Too*[109], which is very similar to this analysis.[110] Interestingly, both interpretations closely relate to today's evaluation and application of the MIA 1906 rules and can, therefore, explain the detachment from the actual and true wording of the sections therein.

A brief mention, with what is most possibly the same opinion as the above, must be made to the words of Lord Blackburn in the House of Lords case *Simpson v Thompson*[111]. The judge commented on the transfer of property as a result of abandonment and held that it was undoubtedly automatic (as above) with a retrospective effect tracing back to the time of the casualty. But in terms of the time

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Also, e.g. see *Sir G. Honyman, Q.C.* (with *Udall*), for the plaintiffs, at 245-246.

[108] (1848) 9 E.R. 1052, per Sir F. Kelly and Mr. Wickens for the respondents at 171 and Lord Brougham at 173-174.

[109] [2004] EWCA Civ 277.

[110] For the full presentation of Rix LJ's ratio, see below the "Post-MIA 1906" part.

[111] (1877) 3 App Cas 279, at 292.

this transfer was concluded, there were two time-points proposed: the time the assured claimed for the loss as constructively total and the time of indemnification on a total loss basis.[112] It has been proposed that Lord Blackburn is expressing the view that the cession of rights is made on settlement of the loss, meaning the payment.[113] But even if it is accepted that what is proposed is a choice between alternatives, which is far less concrete than what was seen in the above cases, it is still obvious that the law had changed and that the strict norms of the old cases were no more.

3.2.5 *The slow rise of the acceptance's importance*

Following the case law on the road to 1906, we find Lord Blackburn, again, in the case *Keith* v *Burrows*[114]. There, the ship, which transferred a cargo of wheat from the US to the UK, was unable to discharge, as the mortgagees took possession due to the two owners' default. What is important to keep from this case is the part, where Lord Blackburn[115] stated as a long lasting rule that "where a ship has been sold and transferred in the course of a voyage, or where it has been transferred by operation of law, which would be the effect of an abandonment accepted by the underwriters, or a recovery of a total loss, which would amount to a transfer from the time when the loss occurred, in such cases the transferee of the ship takes all the benefits to be got from the completion of the voyage".[116] Though the notion of automatic transfer of the assured's rights upon abandonment was still perceived as the rule, the acceptance of the notice of abandonment and the fact of full indemnification by the underwriters as

[112] "Where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters". Also, on Lord Blackburn's parallelism with the effects in the case of a mortgagee, see *Keith v Burrows* Law Rep. 2 Ap. Cas. 636.

[113] See *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, per Scrutton LJ, at 687; and see Susan Hodges, *Law of Marine Insurance*, Cavendish Publishing Limited, 1996.

[114] (1877) L.R. 2 App. Cas. 636.

[115] At 656.

[116] For the purposes of completeness we should add that it was held that the cargo buyers were entitled to the delivery of the cargo on payment of freight, for that the bills of lading could not, under the circumstances of the case, be altered, and that the 55s. per ton, introduced into the bought-note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, and though called "freight" did not properly bear that character. Therefore it was not transferred along with the ship to the mortgagees.

the trigger for the rights' transfer started becoming the norm. This clearly left behind the spontaneous effects of the act of abandonment.

The case of *Kaltenbach v Mackenzie*[117], while very important in the law governing the notice of abandonment and the abandonment itself, has little, though still some, to contribute to the current topic.[118] As will be shown below, relativity to the current research is mostly found in the words of Brett LJ, whereby the changing trend in the law on constructive total losses was further supported.[119] His lordship made an extensive presentation of the law on abandonment and its accompanying notice clearly distinguishing the two and thereupon stated his agreement in that "whenever there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity". Commenting on the time when the doctrine of abandonment arises and takes effect, he insisted that "the doctrine of abandonment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss; but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place. But that abandonment takes place at the time of the settlement of the claim; it need not take place before".

As a result, the transfer of the property will be made true and complete upon the pecuniary satisfaction of the loss, notwithstanding the fact that the actual right to abandon and the abandonment itself have taken place beforehand, at the time of the casualty. Brett LJ's perception of the rules of abandonment proves to remain

[117] (1878) 3 CPD 467. Facts: The *Amiral Protet* was insured by Lloyd's for 100l. While carrying a cargo of rice from Saigon to Hong Kong she struck on the Britto Bank. While in dry dock for repairs, the surveyors reported that the expense of the repairs would exceed the value of the ship when repaired, but she was nonetheless repaired. After being back at sea and without signs of imminent danger by her state, the ship was sold by public auction. The dispute revolved around the issue of whether a notice of abandonment had been served, if a constructive total loss had been established and should that be proved, if the sale of the ship was the best solution instead of insisting upon the abandonment and a full indemnification therefrom. A rule was afterwards obtained by the plaintiff for a new trial, on grounds of wrongful determination of the matter and misdirection of the jury.
[118] E.g. see Brett LJ at 470-479.
[119] At 470-471.

consistent and becomes all the more established as we draw closer to the time of the MIA 1906, which strengthens the belief of constituting the roots of the law's understanding today.

In *Kaltenbach v Mackenzie*[120] there was extensive use of the fundamental House of Lords case *Rankin v Potter*[121] due to its relevance with the ratios decided upon in both cases, namely the construction of abandonment, the necessity and factual proof of a notice of abandonment under each circumstance and the validity of the constructive total loss claim. In the latter of the two cases, the ship was seriously injured in the outward voyage. She was then insufficiently repaired and a later survey showed that the full repairs' cost would exceed the value of the ship and the amount of freight to be earned. On receiving this intelligence the assured abandoned the vessel to the underwriters. As the court was mostly occupied with the issue in reference to the notice of abandonment, we shall proceed straight to the parts important to us.

Starting with Brett LJ's part of the long judgment, we are not presented with a clear view of his opinion on the time of the transfer of the rights in the abandoned property.[122] The judge used only a simple statement that would seem to imply a return towards the old rules of immediate rise, application and effect of abandonment. But no certain conclusion can or should be made by such a brief examination of the rules on abandonment. While Brett LJ was discussing the principles of constructive total loss he said: "If the ship is insured and due notice of abandonment given to the underwriter on ship, the property in the ship passes to the underwriter on ship". Several pages later, however, his lordship maintained the notion of how abandonment was structured according to the most recent of case law (as presented above).[123] Having recognised the assured's right to claim for a constructive total loss, he said that "if he does so, then, on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does by taking

[120] (1878) 3 CPD 467.
[121] (1873) LR 6 HL 83.
[122] At 99.
[123] At 118-119.

satisfaction from the person indemnifying him, cede all his right in respect of that for which he obtains indemnity".

This must, of course, not be taken in a strict fashion that would result in saying that the assured has to abandon his property after being fully indemnified for his loss, as this would be a paradox, since payment for a constructive total loss is predicated on the assured abandoning the subject matter insured. Instead we should infer that, after full payment on a total loss basis has been made, it is then that the actual cession of all rights on property will pass to the underwriter.

This was supported by the *dicta* in the very old non-marine case *Mason v Sainsbury*[124], where the assured was indemnified by the insurer for a fire and the latter was then held to be entitled to recovery by action in his name against the party in fault. This was based on the rules of salvage, wherethrough the subject of salvage being transferred on the principle of equity, which operates without the need for a notice of abandonment.

Per Lord Hardwicke in the case *Randal v Cockran*[125] in the same timeframe, it was held that, at first instance, it is the assured who suffers the loss, but after he is satisfied for that loss by the insurer, it is the insurer who bears that loss and should be satisfied by the third party causing the casualty. In *Godsall v Boldero*[126], a case of life insurance, the same principle was applied. Although it would later be overruled in *Dalby v The India and London Life Assurance Company*[127], this would happen on a different basis, since a life insurance is not a contract of indemnity and so the principle itself was not questioned.

What is evident by the above case law is that, opposite to the automatic transfer on the moment of abandonment, the closer we get to the 20th century, the more essential payment for the satisfaction of the total loss claim becomes in ensuring the passing of rights. The right to treat the property as constructively total and the right to abandon it in order to receive full payment seem to be considered as clearly vested in the assured at the moment of a qualifying casualty; it is the right of the

[124] (1782) 3 Doug. K.B. 61.
[125] (1748) 1 Ves. Sen. 98.
[126] (1807) 9 East 72.
[127] (1854) 15 C.B. 365.

insurers to be vested in all rights and burdens of the subject matter insured that is dependent on them paying in full.

Proceeding to Mr Justice Blackburn's view in the *Kaltenbach* case, we notice a much clearer opinion on the matter.[128] Here, Blackburn J makes a clear turn towards the much earlier case law of the 18th and early 19th century, such as *Hamilton* v *Mendez*[129], *M'Carthy* v *Abel*[130] *and Bainbridge v Nelson*[131]. The vesting of all the abandoned rights was considered by him automatic upon abandonment and claiming for a total loss. The learned judge characteristically said that "when the party indemnified has a right to indemnity, and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify". He continued to consider any expenses made after abandonment to be a concern of the remunerating party as of the time of abandonment. This is the reason why this last party ought to be promptly informed of the assured's election to serve the notice and exercise his right to abandon his insured asset; namely, so that the insurer may take steps towards his own protection. It was then presented as a principle of law, inclusive of marine insurance law, that "an election, once determined, is determined for ever, and such a determination is made by any act that shews it to be made". This bears great similarity to the Roman Justinian Code rule which reads: "Quod repudiatur, retro nostrum non fuisse palam est"[132], which is also mentioned and used in earlier English case law.[133]

Subsequently, Blackburn J, said on the role and function of the notice of abandonment, that it is the regular mercantile mode of notifying the underwriters on the assured's will to come upon them for a complete indemnity. That notice, once given, is conclusive in that, if the assured is still determined and able to claim for a total loss, then everything that was abandoned is ceded to the underwriters. The judge also made a very interesting reference to a statement of Chief Justice Abbott, in

[128] At 119-120.
[129] (1761) 1 Wm. Bl. 276.
[130] (1804) 5 East 388.
[131] (1808) 10 East 329.
[132] "That which is denied [abandoned] cannot become [y]ours again".
[133] See *Stewart v Greenock* (1848) 9 E.R. 1052, at 177; and paradigm on the application of the principle: Exchequer Chamber, *Clough v London and North-Western Railway* (1871-72) L.R. 7 Ex. 26.

Cologan v London Assurance[134]. Chief Justice Abbott said that, as a general rule, abandonment cannot have the effect of converting a partial into a total loss, but, nonetheless, the act of abandonment will on its own exclude any presumption, which might have arisen from the silence of the assured, that he still meant to adhere to the adventure as his own. Clear conduct signifying the opposite will is obviously nullifying the notice's power a priori.[135] Finally, a citation was made to the principle expressed by Lord Abinger in *Roux v Salvador*[136], after stating the circumstances able to give rise to the assured's right to a constructive total loss.[137] Specifically, the Lord said that if the assured elects to abandon, as the subject matter insured still exists in specie and is in his hands, then the principle of indemnity will rule that he should cede all his rights on it and within a reasonable time after he receives intelligence of the accident (i.e. serve a notice of abandonment). Consequently, the underwriter will be entitled to all the benefit of what remains of the property abandoned and that the latter may take measures at his own cost for realising or increasing its value.

Examining Mr. Baron Martin's part in the *Rankin v Potter*[138] case, an extensive analysis of the notice of abandonment and abandonment itself can be found. Though priceless in value, we shall not enter into it in full.[139] Instead, proceeding to

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[134] (1816) 5 M. & S. 447.

[135] See: *Mitchell v Edie* (1787) 1 Term Rep. 608, as explained in *Roux v Salvador* (1836) 3 Bing. N.C. 266, where, the insured ship carrying sugar and bound for London was captured and taken into Charlestown, where the cargo was sold. As Lord Abinger conjectured, the market for sugar was very good and so the assured was satisfied in taking the proceeds, but the holder of the proceeds became insolvent and so it was held that it was too late to come upon the underwriters for a total loss.
Also see: *Stringer v English and Scottish Marine Insurance Company* (1869) L.R. 5 Q.B. 599, where it was said that "Where the cargo still subsists in specie, and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his, so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: qui commodum sentit sentire debet et onus".

[136] (1836) 3 Bing. N.C. 266, at 286.

[137] At 121.

[138] (1873) LR 6 HL 83.

[139] As it is very relevant but non-conclusive, a footnote seems appropriate for the following passage: "The word "abandon" in reference to constructive total loss, is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be". By abandonment the underwriter becomes "the absolute owner of the ship, a thing of value, capable of being repaired and earning freight, if the abandonee thought fit", per Lord Baron Martin, at 144.

the more pertinent paragraphs, we notice that Mr. Baron Martin, while commenting on the effects of third party actions to the rights of the assured and the liability of the underwriter, he seems to be agreeing more with Blackburn J, than with the more progressive Brett LJ. This is evident when he states that the assured lacks a factual and legal basis, on which he may claim any freight earned after he has abandoned his ship and all rights incidental thereto to the underwriters. Reference was made to two House of Lords cases, namely *M'Carthy v Abel*[140] and *Scottish Insurance v Turner*[141]. The former is found above in conjunction with the *Bainbridge v Nelson*[142] case. In the latter, the ship was damaged to a point justifying a constructive total loss claim. This could only be assessed after its arrival at the port of destination. The assured abandoned to both underwriters, on ship and freight, with the first accepting and so becoming entitled to the freight. The assured then claimed against the underwriter on freight as for a total loss. The House of Lords held, reversing the judgment of the Court of Session in Scotland, that the assured had effectively deprived himself of any entitlement to the freight by his act of abandonment to the underwriters on ship.

The last piece of evidence on the results of abandonment from the currently examined case can be extracted from Lord Chelmsford's words.[143] There, the judge followed the notion of automatic transfer of rights upon abandonment, thus agreeing with Mr. Blackburn J and Mr. Baron Martin. He said that, where a notice of abandonment is given, it is conclusive proof that the assured intends to claim from the underwriters for a total loss and that then the assured must give up to the underwriters all that remains of the property insured, along with all benefits and burdens incident thereto and so it is vested in the underwriters.[144]

With a ratio of three to one, the prevailing opinion on the issue discussed was that the act of abandonment needed no additional actions in order for her effects to be brought to bear. This formulates a great antithesis to the forming tendency in the previous case law on the restriction of these absolute results through the introduction of the need for acceptance or the condition precedent of payment on a total loss basis.

[140] (1804) 5 East 388.
[141] (1855) 4 H.L. Cas. 312.
[142] (1808) 10 East 329.
[143] At 156.
[144] See *Stewart v Greenock Marine Insurance Company* (1848) 2 H.L. Cas. 159, per Lord Cottenham, at 183.

Though not necessarily utterly incompatible, these notions do seem mutually exclusive in their original form. What is meant is that surely one can combine them, as it is today, i.e. the takeover is decided automatically, the acceptance makes it conclusive and payment allows for the completion of the transaction. But there still seems to be some conflict and lack of uniformity in the rules of abandonment. So, in order for a judicial consensus to be reached, some legal and terminological tinkering of the theory was still needed. Once again, the important fact to be distilled from the *Rankin v Potter*[145] case is the disagreement of the majority of judges to the rules laid out in the immediately older cases.

3.2.6 *A brief examination of the "right to salvage" approach of abandonment*

For the purposes of enjoying a respite from the search on the cession of property, we shall have a look into the notion of the abandoned property being transferred as benefit of salvage. In the *Rankin v Potter*[146] case, Blackburn J[147] provides his view into the issue through reference to the work of Phillips.[148] It was stated that the notice of abandonment and the abandonment itself are two distinct terms with equally differentiated functions. Accordingly, as abandonment is effectually a transfer, it may only apply in cases where there is property or rights able to be ceded. Therefore, when nothing remains of the subject matter insured, no assignment may be done and abandonment is rendered excessive as it bears no results.[149] Nevertheless, should the assured not abandon, then, according to Blackburn J, the better rule on this form of cession would regulate that the assured will recover according to the state in which the subject matter insured is at the time of the trial. The reason provided was that, under a declaration for a total loss, the assured may still recover for a partial loss. The underwriter, though, should be privileged to the advantage of whatever can reduce the loss into a partial one for as long as the assured

[145] (1873) LR 6 HL 83.
[146] (1873) LR 6 HL 83.
[147] at 128-129.
[148] Willard Phillips, *A Treatise on the Law of Insurance*, 4th ed., Little, Brown, and Co., Boston, 1854, chapter 17 on Total Loss and Abandonment.
[149] See Phillips, supra, sect.1491; and similarity to MIA 1906, s.62(7).

is delaying in his choice and declaration. Conversely, if the assured elects to claim for a total loss, then this will equate to abandonment and, therefore, give the underwriter a right to salvage.[150] The required reasoning behind this is that the assured would enjoy the proceeds of his property in the adjustment of the loss exactly as it would happen in a salvage loss situation, notwithstanding that the salved value may not have come into his possession.[151]

It should be noted that according to today's law, the above structure would not be entirely valid. Since the notice of abandonment is a *conditio sine qua non* to the treating of the casualty as constructively total, there could be no indemnification as for a total loss without it.[152] Moreover, in cases where no remnants of the subject matter insured are in existence, abandonment is still almost always made by reasons of security, as some value may be found, or a part of the subject matter insured recovered. In cases of constructive total loss, a notice is served as a means of declaration of treating the loss as constructively total and as a way for the underwriter to secure any rights on the property that may occur at a later date.[153] On the other hand, in cases of actual total loss, abandonment is operational by law and no need for a notice exists.[154]

[150] See Phillips, supra, sect.1494.
[151] See Phillips, supra, sect.1497 and dicta in *Roux v Salvador* (1836) 3 Bing. N.C. 266 and *Knight v Faith* (1850) 15 Q.B. 649.
[152] Marine Insurance Act 1906, s.62(1); there is an exception in the necessity of the notice of abandonment in cases where there is nothing to abandon, see MIA 1906, s.62(7).
[153] E.g. Attorney General v Glen Line Ltd (1930) 37 Ll L Rep 55, where the ship was seized by German authorities, abandoned to the underwriters and fully indemnified for by the latter. After the war, the ship was sold and an issue arose on the party entitled to the proceeds of the sale.
[154] Marine Insurance Act 1906, s.57(1); *The Kastor Too* [2004] 2 CLC 68, per Rix LJ, at 76: "in the case of an actual total loss, where the cession operates as a matter of law"; *Roux v Salvador* (1835) 1 Bingham (New Cases) 526, at 529: "If a ship were dashed to pieces, it is clear that abandonment would not be necessary, even though the timbers should afterwards be sold. It is, indeed, a common practice to abandon such a salvage; but this is merely as a matter of courtesy, for the assured may either keep the salvage, or bring his action as for a total loss"; and *Kaltenbach v Mackenzie* (1878) 3 CPD 467, per Brett LJ, at 471: "With regard to the notice of abandonment, I am not aware that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused".

3.2.7 *The lack of uniformity on the requirement for acceptance*

Moving back to the case law, we meet, in 1881, the non-marine case of *Castellain v Preston*[155]. This case functions as an example of deviation from the conformity towards the law of abandonment as it was previously established since the mid 18th century. There, Chitty J noted, as an obvious distinction between cases of marine insurance and of buildings' insurance that, in the former form and in cases of constructive total loss, when the subject matter insured is abandoned to the underwriters, then the property is directly vested in them.[156] In the Court of Appeal, Bowen LJ did not disagree thereto.[157] Moreover, he added that this is so on account of the marine insurance policies not being any more contracts of gambling but contracts of indemnity. Finally and approaching the doctrine of subrogation, he stated that the insurer is entitled to the advantage of every right of the assured, whether it is derived from contract or due to remedy on tort, or from any other right, by the exercise or acquisition of which, the insured loss has been diminished. Admittedly, this case is not an in-depth analysis in the rules of abandonment. Nonetheless, it provides for the views of distinguished commercial judges, who seem to be advocates of the older approach to the functionality of this phenomenon, namely that abandonment automatically cedes the insurer with the property. The above fact also points towards the lack of consistency in the pre-MIA 1906 era and denotes the need for a concrete legal frame, thus leading to the laborious work of Sir Mackenzie Chalmers, the MIA 1906.

Next in our quest through the cases of the pre-MIA 1906 era is the *Sea Insurance Co. v Hadden*[158]. *In that case, the* ship was chartered and insured; freight was also covered, but under a different policy. She then became a constructive total loss by collision and was abandoned to the underwriters on ship, while the shipowners also received an amount by the third party in fault for the suffered damages sustained

[155] (1881) L.R. 8 Q.B.D. 613, later reversed in (1882) L.R. Q.B.D. 380, but not on the comment reported above.
Facts in short: A vendor sold a house, which he had also insured against fire. After the date of the contract, but before the date fixed for completion, a fire broke out and the vendor was fully indemnified by the insurer. The contract of sale contained no reference to the fire insurance. The sale was afterwards completed, but no reduction to the price was made on account of the insurance money received by the vendor.
[156] At 618.
[157] At 402.
[158] (1884) 13 Q.B.D. 717.

on ship and freight. In this Court of Appeal judgment, Brett MR proceeded with the question on the fate of damages received by the wrongdoing party in account of the damaged vessel being already abandoned to the insurers, which he found as previously undetermined.[159] A logical inference had to be used from the reasoning of older cases' judgments.

From the case *North of England Insurance Association v Armstrong*[160] the judge concluded that the underwriter upon the hull, who has fully indemnified the assured for a total loss, is entitled to any pecuniary sum recovered by the assured as compensation by a third party. Through *Simpson v Thomson*[161], it was deduced that Lord Blackburn had recognised that the right on freight due but not earned at the time of the casualty was incidental to the insured property. For that reason it would pass to the underwriter, by virtue of the fact that, as of the time of abandonment, the vessel belonged to him. Brett MR then continued to say that if, and only if, the freight is recognised as a right incidental to the insured ship, should the underwriters be entitled to it on account of the latter being abandoned. But as in this case the freight was not earned and could not later be earned, it could also not be ceded to the insurers.[162] The judge then proceeded to the *Stewart v Greenock* [163] case, from which it was extrapolated that the underwriters were entitled upon payment to the benefit of freight which was actually earned. It was finally held that freight, as an incident to the ship that earns (or will, or would earn) it will pass on abandonment to the underwriters.[164] Moreover, as proven above, the underwriters were considered as also entitled to all amounts recovered as damages.

Insisting on the automatic effects of abandonment in connection with the vestment of property and all rights thereto, Brett MR repeated shortly afterwards that it would be a startling proposition that the underwriters on freight should have no salvage and instead that all such salvage would go to the underwriters on ship, but these cases were unavoidably based both on the doctrine of subrogation, as well as on

[159] At 710.
[160] (1869-1970) L.R. 5 Q.B. 244.
[161] (1877) 3 App Cas 279, at 292.
[162] This is in full compliance with the opinion of Blackburn J and Phillips on Insurance in the *Kaltenbach v Mackenzie* case as presented immediately above. Also see: *Rankin v Potter* (1873) LR 6 HL 83.
[163] (1848) 9 E.R. 1052.
[164] Here, also cited: *Morrison v Parsons* (1810) 2 Taunt. 407.

the transmission of ownership on the vessel upon abandonment.[165] It is obvious that, though the general principle is stated above, the ratios deriving from the case law used are not absolutely identical. This would be later clarified, as Brett MR continued his analysis.[166] It was considered that in the present case, the underwriters were suing in order to obtain the damages' remuneration of the third party to the assured, which was gained by way of salvage and in consequence of the ship's loss. But, having the underwriters paid the assured the whole value of the ship, i.e. for a total loss, they were to be granted anything that could be gained by way of salvage on the ship. That is to say all, including the damages later received. It is at this moment that we notice the reappearance of the payment requirement for the effects of abandonment to take place, as the learned judge offered the applicable rule: "The moment the underwriter has paid for the total loss of the ship, if the contract of affreightment is a salvage, he is entitled to the benefit of that contract". The tendency to move back to the simpler rule of automatic cession without the need for any other actions seems to have been mostly abandoned in its entirety, although there has been no mention of the acceptance of the notice of abandonment by the underwriters and the possible effect it may have on the end result. It would be a valid hypothesis, that it was purposefully omitted as irrelevant and without any power to alter the vesting of the rights on the subject matter insured.

3.2.8 *The closing of the 19th century*

Moving towards the end of the 19th century, the rules on abandonment become no clearer than before and the opinions of the judges continue to occasionally follow different paths, even if they seem to maintain the same general direction. As an example of this fact, we may procure the case *Arrow Shipping v Tyne Improvement Commissioners* [167], where the ship collided with another vessel, sank near the approach to a harbour and became an obstruction to navigation. The assured abandoned, claimed for a total loss and was fully indemnified. The harbour authorities

[165] To these very points Cohen Q.C. conceded.
[166] At 712.
[167] [1894] AC 508.

sold the cargo, disposed of the wreck and claimed for the difference between the proceeds and the expenses against the owner of the wreck.[168] Lord Herschell declined to answer the question of whether the underwriters, who had paid the assured for his full amount of damages under the policy, were responsible for the harbour's remuneration. But Lord Watson[169] went on to state his agreement with Lord Cairns[170] in the *River Wear Commissioners v Adamson*[171] in that, where the assured abandons his ship sine animo recuperandi, then this act will divest him of his property and all interests thereto. As of that reason, the underwriters will be the beneficiaries of the ship and, when any further action is taken, such as the wreck removal by the harbour authorities, then it is them who will have to deal with the situation as owners of the asset. This opinion seems to follow the older rule of immediate transfer. It must be noted, that the final decision on this case would not be altered if the transfer was held to be dependent on acceptance and payment for the total loss, as all of these acts took place before the harbour authorities acted on the wreck.

On the other hand, the case *The Red Sea*[172] is more in agreement with the progressive fashion of the late 19th century. There, the steamship, whilst on a voyage from Pensacola to West Hartlepool, became stranded and was abandoned as a constructive total loss with the insurer accepting the notice. The issue arose in reference to the proceeds of the sale of the cargo and whether it should be deducted from the payment for the total loss. Lord Esher, in an effort to approach the legal structure on abandonment, presented the applicable ratio of Lord Ellenborough in the *Case v Davidson*[173] case.[174] The rule that was followed there was that property passes to the underwriter after abandonment has been made and accepted, albeit with a retrospective effect as of the time of the casualty granting the right to abandon. As of that effect, the insurer was entitled to everything the ship could earn as he was henceforth her owner.

[168] As the Harbour Authorities were allowed under the Harbours, Docks and Piers Clauses Act 1847 and the Removal of Wrecks Act 1877.
[169] At 521.
[170] Called Lord Chancellor at the time of the cited case below.
[171] (1876) L.R. 2 App. Cas. 743.
[172] [1896] P. 20.
[173] (1816) 5 M. & S. 79.
[174] At 24.

From the above cases it is fairly obvious that the law ruling abandonment underwent an evolution through time. But this movement was not in all occasions and instances followed, to the point that judges would resort to the old rules. On the simple requirement for a constructively total loss to be established (the notice), the law added the need for the claim to be satisfied before any of the assured's rights could be transferred to the underwriters. In the meantime, the acceptance or rejection of the notice was in some cases taken into consideration as a very important fact, while in other it was omitted entirely. Nevertheless, all the above had a certain result. This was the call for a unified regime to rule abandonment. So, the next logical step was to recapitulate the relevant rules and gather all of those that were recognised as the ones desirable to remain as the ruling law. It was so that the MIA 1906 was born, which would place the case law of almost two centuries in order, although it would also introduce some new features that would spark additional disagreements and discrepancies.

3.3 *The Marine Insurance Act 1906 and the case law afterwards*

Having looked into the law before the turning point of 1906, when the Marine Insurance Act 1906 was introduced, and with a clear view of the abrupt and inconsistent turns it took from time to time, we shall now delve into the case law that followed. The rules governing the cases of constructive total losses and the accompanying abandonment seemed to have crystallised, notwithstanding the fact that the majority was following the general guidelines of the late 19th century case law. But, while the law was formed in the courts, the theory contradicted their findings.

3.3.1 *The Act's draftsman's approach*

It is only just that we start our analysis with the creator of the MIA 1906 and his thoughts and perception on the matter at hand. This is no other that Sir Mackenzie Chalmers, who also recognised the issue of the time-point when the insured property and all rights incidental thereto pass to the underwriter on account of abandonment and of the choice he may have in taking over the asset and the benefits and burdens it contains. Sir Mackenzie Chalmers seemed to be an advocate of following the exact wording used in the Act and supported its literal application. In his work, the word abandonment, being the most fundamental concept in constructive total loss cases, was defined as denoting the voluntary cession by the assured to the insurer of whatever may remain of the subject matter insured along with all proprietary rights and remedies in respect thereof.[175] But then, the question of whether the transfer is absolute or conditional was posed and thus expressed the very dilemma the present work is trying to resolve.[176] The draftsman of the Act gave an example supporting the latter of the possibilities by saying that changes to the factual basis of a valid

[175] See Chalmers' Marine Insurance Act, J.G. Archibald and Charles Stevenson, 4th ed., 1932, Butterworth & Co, p.86. It must be commented that the notes to ss.63(1) and 79(1) in the current, 10th, edition of the work still reflect the views as they appear in the previous versions, which is now expressed as '… the result would appear to be that it is left open to the insurer not to "take over" the interest of the assured, though "entitled to take it over".

[176] See Note D on abandonment, p.166. Also see the amendment made to s.63(1) in the Commons Committee pointing towards the approach that the insurer is free to elect to take over the property and is not automatically vested with it once he has accepted the notice of abandonment, as the words "is entitled to whatever remains" were altered to "is entitled to take over".

abandonment may defeat the ability of the assured to claim for a total loss.[177] On s.79, Sir Chalmers continued, the authorities fully held the proposition that, whenever the insurer settles for a total loss, he is then vested with whatever remains of the subject-matter insured.[178] But there was still the issue of the right to election, especially where the abandoned property may be onerous. The example given was of a wrecked ship in a harbour, where the insurer would pay for a total loss, but with an obligation on the shipowner, whomever that may be at the time, to remove the wreckage at an expense exceeding the value of the wreckage. The question was considered as undecided in England[179], as opposed to France[180], where the insurer retained the right to disclaim the property.[181] In the 9th edition of Sir Chalmers's work[182], there is a clearer view of his opinion[183] through the citing of the cases *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property*[184] and *Arrow Shipping v Tyne Improvement*[185]. Especially this last case was considered to have been the main stimulus for the final wording of s.63(1). Per Sir Chalmers's example above, the issue in those cases was whether the underwriters, who had paid for a total loss, were the owners of the abandoned wreck and should, therefore, also pay for the wreck removal expenses incurred by the harbour authorities. To solve similar problems and avoid impasses, the words "the insurer is entitled to take over the interest of the assured"

[177] E.g. cases of capture and recapture.

[178] Cited case: *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159, per Lord Cottenham, p.183: "The assured must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters".

[179] Cited case: *Arrow Shipping v Tyne Improvement Commissioners* [1894] AC 508.

[180] See Pothier Robert Joseph, *Traite du Contrat d'Assurance de Pothier, Marseille, Sube et Laporte*, 1810, para.136.

[181] For recent commentation and application of Chalmers' work see *Dornoch v Westminster (The FD Fairway)* [2009] EWHC (889), Per Tomlinson J, at 28.

[182] Chalmers' Marine Insurance Act 1906, E.R. Hardy Ivamy, 9th ed., Butterworths, 1983.

[183] Pp.100-102.

[184] [1931] 1 KB 672, per Scrutton LJ, at 687-688, where it was stated that when the total loss of a thing insured is not actual but constructive, that is, where the thing insured is in specie, but the cost of preserving and repairing it would be more than its value when preserved or repaired, the assured must give a notice of abandonment. This in itself does not pass any property or rights in the thing insured to the underwriter. For further analysis of the case see below.
On pre-MIA 1906 case law cited see Simpson v Thomson (1877) 3 App Cas 279, per Lord Blackburn, at 292: "I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid".
Distinguished from *River Wear Comrs v Adamson* (1877) 2 App Cas 743 and *Great Western Rly Co v SS Mostyn (Owner)* [1928] AC 57.

[185] [1894] AC 508.

were included in s.63(1), thus apparently leaving it open to the underwriter not to take over the assured's interest.

3.3.2 *The case law*

This part will move to and examine the case law of the post-MIA 1906 era. As expected and per the pre-MIA 1906 part above, not all cases will be presented, nor will all be extensively reviewed but for the most important and relevant ones. Emphasis will be given to the two major cases *Kastor Navigation v AXA Global Risks (The Kastor Too)*[186] and *Dornoch v Westminster (The FD Fairway)*[187]. The former, because it contains the most accurate view of today's law in the field of abandonment and provides the most conclusive clues on the reasons behind its current construction by the courts and the latter, because it is a perfect recapitulation on constructive total loss, while providing food for thought through an unrestricted perception and opposition of the current regime.

3.3.2.1 *The recognition and analytical approach of ss.63(1) and 79(1)*

Proceeding in reversed chronological order, the first important case is the House of Lords *Attorney General v Glen Line*[188]. There, a British ship in Hamburg was seized by German authorities and so notice of abandonment was given. The notice was accepted and the claim for a constructive total loss was paid in full. After the First World War, the vessel was recovered and sold and the owners accounted to the insurers for the proceeds of sale, which exceeded the amount paid under the policy by a factor of three.

[186] [2004] EWCA Civ 277.
[187] [2009] EWHC 889.
[188] (1930) 37 Ll L Rep 55.

In his judgment, Lord Atkin[189] made a very interesting point. He effectively said that s.63(1) and s.79(1) are distinct in their nature and, therefore, also in the rights they grant to the insurer. A valid abandonment would entitle the insurer to the proprietary rights incidental to the subject matter insured as from the time of the loss. This would be the equivalent of an assignment of rights by way of sale immediately after the casualty. The transferred subject matter would be "whatever may remain" of the assured asset.[190] But the right to sue the wrongdoing third party[191] would be excluded as differentiated from the proprietary rights incidental to the ship passing on abandonment. Additionally, if the insurer is treated as a purchaser after the loss, then by the mere sale he would not be entitled to sue the wrongdoer, as that right would still be attached to the vendor. It was seen as unchallenged that the underwriter on hull damaged by collision and abandoned would be entitled to sue the third party at fault for the loss. But this right would not be sourced from s.63(1), but from s.79(1). In other words, it would be the right to subrogation granting "all rights and remedies of the assured in and in respect of the subject-matter" and not the majorly different (as Lord Atkin perceived it) right of s.63(1) giving "all proprietary rights incidental thereto". In conclusion, s.63(1) would grant the insurer the rights on property and its use, if abandonment was valid and he elected to take over, while s.79(1) would grant the entitlement to the assured's full rights on the property, according to the principles of subrogation once he has paid for the loss on a total loss basis.

The perception of Lord Atkin in relation to the provisions of the MIA 1906 is remarkably different from other judges'. As of that, a minor comment to his rather unique hypothesis is in order.[192] He said that s.63(1) functions like an assignment of rights, but only grants proprietary rights as per a sale, unlike s.79(1) which would give full rights per the right of subrogation. The reason for this distinction was the sections' wording. Leaving the matter of construction aside, it would seem that the answer to our fundamental question as to when the insurer is able to take over the subject matter insured would be: on payment. Through Lord Atkin's analysis the insurer may have the additional advantage of an entitlement to partial security from the time of a valid

[189] At 61.
[190] Including freight, if that is earned after the loss took place; see Case *v* Davidson (1816) 5 M&S 79.
[191] I.e. the one that caused the loss.
[192] E.g. later, among other judges, Rix LJ, in *The Kastor Too* [2004] EWCA Civ 277, will also rely heavily on the difference of wording between the two sections of the Act in his approach of the issue.

abandonment up to payment for the loss, but, in the time inbetween, he would still not have full rights of possession on the property's remains. What must be recognised is that s.63(1) is not completely overlooked, or nullified by analysis, as in later case law, even if there is a difference of conception with the draftsman of the Act.[193]

A final remark on the analysis of Lord Atkin is that, though he was correct in distinguishing the difference between the rights vested by sale and those by subrogation, there is also a third tier of complete transfer.[194] The right to sue the wrongdoing third party that passes on subrogation does not permit the insurer to claim under his own name, but rather under the name of the assured.[195] In that way, the insurer may only keep an amount up to the sum paid for the loss. In case the insurer wishes to sue under his own name and to retain the full amount recovered from the third party, then an assignment of cause of action from the assured to the insurer must take place.[196] This constitutes the third tier of rights transferred mentioned above.

One year after the decision of the *Attorney General v Glen Line*[197] case, the substantial and commonly cited case *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property*[198] was decided. In this case, the subject insured was a parcel of diamonds on a Dutch steamship from Amsterdam. The British authorities found the diamonds and placed them in the custody of the Marshal of the Prize Court, which ordered their detention and sale. After the order and before the sale, the assured served a notice of abandonment to the underwriter, who accepted it and paid as for a total loss. The proceeds of the sale were then ordered by the Prize Court to be handed to the predecessor in title of the Administrator of German property, who was sued by the insurer as abandonee.

[193] See above, per Sir Mackenzie Chalmers.
[194] Subrogation here is meant as an equitable right defined by the contractual terms; see *Napier and Ettrick* v *Hunter* [1993] 1 All ER 385.
[195] That is why, if the assured is incompliant and refuses to concede to the use of his name in the insurer's proceedings against the third party, then the insurer may issue proceedings in his own name against the third party and also joining the assured as co-defendant; see *Esso Petroleum Co Ltd v Hall Russell & Co (The Esso Bernicia)* [1988] 3 WLR 730.
[196] See *Compania Columbiana de Seguros* v *Pacific Steam Navigation Co* [1965] 1 QB 101.
[197] Supra.
[198] [1931] 1 KB 672.

Scrutton LJ made an attempt to break down the concept of abandonment.[199] Thereon he said that, when the total loss of the subject matter insured is not actual but constructive, then the assured must give a notice of abandonment.[200] But, the Lord continued, this act alone is insufficient for the property or the rights in the thing abandoned to pass to the underwriter. In previous to the *Allgemeine* case law, it was held that the property and rights incidental to it passed to the insurer (as benefit of salvage) upon payment of the total loss by the underwriter.[201] But here, it was crucial for Scrutton LJ to be reported that the principles of abandonment as ruled by s.63(1) and those of subrogation, as presented in s.79(1), are distinct in their function, their results and the results' justification. Per the *Simpson v Thomson*[202] case, the right of subrogation grants the ability to recover damages against the third, wrongdoing, party in respect of the thing insured. Subrogation in this manner follows on payment for a total loss and must be exercised in the name of the assured and in respect of his right.[203] On the other hand, s.63(1) was not perceived to function in the same manner. Contrary to the above, the insurer's entitlement to take over the abandoned property is based on reasons other than payment for a total loss. The right derives from the validity of abandonment, the underwriter's acceptance of that fact and, as the insurance contract is one of indemnity, the law's effort for avoidance of a double gain. Moreover, and according to Scrutton LJ[204], the abandoned property may be inchoate with severe liabilities.[205] If the insurer were to be obliged to undertake these burdens, then the whole process of abandonment would be severely hindered and the construct of constructive total losses would lose much of its practical application. For that reason, Scrutton LJ concluded, s.63(1) offers the insurer the option of not taking over

[199] At 687.

[200] That is, where the thing insured is *in specie*, but the cost of preserving and repairing it would be more than its value when preserved or repaired (see MIA 1906, s.60).

[201] See *Simpson v Thomson* (1877) 3 App. Cas. 279, per Lord Blackburn, at 292 : "I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid".

[202] Per Lord Blackburn, at 292.

[203] Issues in the pre-MIA 1906 era arose in regard to the payment for a total loss, which (even if not by mere abandonment and acceptance of the notice) made the insurers owners of the abandoned property, as that could very well be a damnosa hereditas, or the insurer could not sue the third party due to conflicting interests (for example one cannot sue himself). E.g. *Simpson v Thomson* (1877) 3 App. Cas. 279; *River Wear Commissioners v Adamson* (1877) 2 App. Cas. 743; *The Mostyn* [1928] A. C. 57; *Arrow Shipping Co. v Tyne Improvement Commissioners* [1894] A. C. 508.

[204] At 688.

[205] See *River Wear Commissioners v Adamson* (1876) L.R. 2 App. Cas. 743; *The Mostyn* [1928] A.C. 57; and *Arrow Shipping Co. v Tyne Improvement Commissioners* [1894] AC 508.

the property, if he wishes not to opt into such a responsibility, while the assured is nevertheless secured in receiving full indemnification for his claim.

Regardless of the above, the turning point in the *Allgemeine* case was the fact that the assured agreed to the transfer of rights and property in writing and as of that reason the insurers were ceded with the subject matter insured. In detail, the notice of abandonment was delivered, accepted, the claim was fully satisfied and thereupon the assured signed a document stating that the insurers were ceded with all the assured's rights in the property. This conduct of both parties, and especially the payment of the total loss against a cession of the insured's interest and the keeping of the document of cession by the underwriters lacking any repudiation thereafter were evidence enough that abandonment was conclusively accepted and the rights on property ceded. These rights included whatever remained of the subject matter insured and all proprietary rights incidental thereto, any subrogation rights and all proprietary rights and rights to claims for damages against third parties in relation to the loss. Support in the above, and especially the significance of acceptance of the notice, was found in the words of Greer LJ.[206] He said that as the underwriter accepted the abandonment and the cession of rights, he "thereby took over the interest of the assured in whatever remained of the subject-matter insured and all proprietary rights incidental thereto".[207]

It is rather peculiar, to say the least, that Scrutton LJ would be so firm in separating ss.63(1) and 79(1), while recognising that acceptance of the notice was sufficient for the insurer to receive the asset covered by the policy. Having noted this, it can only be concluded that, in spite of the judge looking at the MIA 1906 in its structured form with separate sections delivering a distinct function, this case is eventually not so different from late pre-MIA 1906 case law, which recognised the importance of the acceptance of the notice of abandonment in order for abandonment to be complete.[208]

[206] At 696.
[207] MIA 1906, s.63 quoted.
[208] E.g. see *Smith v Robertson* (1814) 2 Dow. 474 and *Cologan v London Assurance Co* (1816) 5 M. & S. 447.

3.3.2.2 *Returning to the absolute*

Moving to a case of a smaller but still significant impact to the matter discussed we meet *Oceanic Steam Navigation v Evans*[209]. There, it was held that mere abandonment could not amount to a transfer of rights and property. The *Celtic* sustained damage and the assured abandoned her. The insurers refused acceptance in fear of taking over any serious responsibility due to the danger she imposed to navigation of other ships. Lord Justice Greer clearly stated that, without acceptance of the notice of abandonment, no transfer of property may be effected.[210] So, the owner was not divested of ownership of the wreck. Interestingly, the acceptance of the notice received much importance, since it was recognised as the main requirement for the insurers to be vested with the subject matter insured. Parenthetically, but in close connection to the above, it was also decided that there can be no possibility of the asset becoming a *res nullius* by virtue of the abandonment's offer and the notice's rejection, because there is always a party in possession of the insured property that is responsible for any damage it may cause.[211]

The case *Court Line Ltd v The King*[212] provides extra means of continuity in the law governing abandonment that reach today's view. The *Lavington Court* was torpedoed in the Atlantic while carrying a general cargo for the Minister of War Transportation and sunk six days later while in tow. The issue was on the necessity for pay of hire or not on account of the vessel becoming a total loss. The assured abandoned the vessel and was fully indemnified and so the vessel was considered as vested in the insurers. While defining the different meanings of the word "abandonment", Lord Justice Scott mentioned that one of the major differences between the two alternative grounds in s.60(1) for claiming a constructive total loss is that, in the latter case, the financial estimation is made by the shipowner, while the probability of the total loss becoming actual falls on the master on the spot, or rather it

[209] (1934) 50 Ll. L. Rep. 1.
[210] At p.3.
[211] Additionally see: Susan Hodges, *Law of Marine Insurance*, Cavendish Publishing, 1996, p.11; *Blane Steamship Ltd v Minister of Transport* [1951] 2 KB 965, per Cohen LJ, at p.990, where he agrees with Greer LJ on the fact that: "It does not follow that, because notice of abandonment is given to an insurer, therefore the vessel which may have some value, is abandoned to all the world, or that it has no owner at all"; *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* (1946) 79 Ll L Rep 417, at 433; *Dee Conservancy Board v McConnell* [1928] 2 KB 159, at p.163; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1930] 1 KB 672, at p.688.
[212] (1945) 78 Ll L Rep 390.

certainly did fall in the 19th century.[213] The aforementioned estimation would be made on financial reasoning with mere pecuniary calculation of the possible outcomes and expressed in the form of a notice, or "a mere mental decision by the owner", who would decide to exercise the s.61 option. According to Scott LJ, the result of this notice of abandonment in legal terms is that, should it be accepted by the insurer, or be established as valid against him, then it would pass the abandoned property to him. According to s.63, Scott LJ continued, a valid abandonment would necessarily mean cession of the insured property to the underwriter. This act was distinguished from abandonment as set out in s.60(1), where it would be made as a product of the actual total loss appearing to be unavoidable.

What is clearly inferred is that Scott LJ is an advocate of the view that acceptance of the notice of abandonment, either expressed or implied, would have the inevitable result of conclusively admitting the liability of the insurer, along with the sufficiency of the notice.[214] Same results would be reached through any other circumstances that would render the notice valid for the assured against the insurer.[215] This acceptance would conclude the transaction intended through the abandonment and so the assured's abandoned property with all rights incidental thereto would pass to the insurer.

Following the MIA 1906, it is perfectly understandable, that, once the insurer has accepted the notice of abandonment, he has simultaneously admitted his liability for the loss as constructively total. Justification, though, of such an admission leading directly to the insurer being ceded with the assured's rights on the property proves elusive at best. It is rather plain in the Act that, once a valid abandonment has been made, the insurer is entitled to take over the subject matter insured.[216] Even if one constructs the meaning of the words "valid abandonment" as meaning abandonment under an accepted notice, then the right to election seems to have been completely unobserved. Moreover, unlike most cases, which place great significance on payment, Scott LJ seems to have completely disregarded this part of the abandonment

[213] At 397.
[214] See MIA 1906, s.62(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".
[215] At this point it is suggested that Scott LJ is referring to events regarding the general conduct of the insurer or even to the operation of the doctrine of equitable estoppel preventing the insurer from declining the validity of the notice of abandonment or refusing full payment.
[216] See MIA 1906, s.63(1).

transaction as well. In reference to the equality of power between the parties involved, it should be recognised that, if one only looks at ss.62(6) and 63(1), then Scott LJ's analysis would not bring unjust results to the assured in relation to his right to payment. This could be enforced by the courts should the matter prove to be otherwise unresolved. Finally, it is observed that the judge kept an approach with great similarity to the pre-MIA 1906 case law. This is especially so in regard to the cases of the 1850's and before, as well as to some exceptional cases of the late 19th century, which were unconcerned with the underwriters paying for the loss.[217] In respect of the above, the passing of the MIA 1906 looks astonishingly ignored.

In the same war period, the case of *Pesquerias y Secaderos de Bacalao de Espana SA v Beer*[218] was decided. This was an action against the underwriters under a time policy of insurance in respect of four trawlers. These vessels were seized by rioters in Spain, of which one was sunk and the remaining three requisitioned and converted. The three converted vessels were returned to the assured, who claimed the cost of reconversion. The underwriters refused payment. Mr. Justice Atkinson, while discussing the effect of subsequent recovery, to the service of the notice of abandonment and the claim for a constructive total loss, or partial recovery of the subject matter insured and being of the opinion that the issue is not conclusively solved, touched upon the effects of abandonment.[219] He said that through the notice, the assured merely makes an offer to cede his insured asset. This offer remains in force unless and until it is accepted by the insurer. Up to the time of such acceptance, the assured is entitled to rely on subsequent events, which may restore the subject matter insured in its former state and so limit his claim proportionately to that change, should he find it preferable to claim for a partial loss.[220] It was noted that, if this previous rule was not so, then s.62(6) would surely be otherwise worded. Thus, it would be strange for the section to retain its current words if the notice of abandonment was irrevocable also in cases where it would have not been accepted.

[217] See previous chapter: "Introduction and pre-MIA 1906 case law"; e.g. *Case v Davidson* (1816) 5 M. & S. 79, per Lord Ellenborough, at 82; and *The Red Sea* [1896] P. 20, per Lord Esher, at 24.
[218] (1945) 79 Ll L Rep 417; This is the King's Bench division judgment, but the points in the Court of Appeal and the House of Lords are irrelevant to our research.
[219] At 433.
[220] See *Brotherston v Barber* (1816) 5 M. & S. 418.

Assisting the above point is Halsbury's Laws of England[221], where it was stated that if the notice of abandonment is not accepted, then it is vulnerable to a subsequent restoration of the abandoned property, or to acts depicting the assured's preference to treat the loss as partial and not total, which would make the notice ineffectual. What is in actuality stated here is that the mere service of the notice is not sufficient enough for abandonment to proceed and that acceptance is essential, as, according to s.62(6), this is what renders abandonment irrevocable.

We can easily deduce that Atkinson J is of the opinion that the notice of abandonment and the claim for a constructive total loss do not by themselves result to a transfer of property and rights. The judge, though, does not elaborate on what an irrevocable abandonment means. Looking at the rest of the case law, it would be clear to anyone that the majority of cases would support the notion of the irrevocability entailing a situation unalterable by subsequent events; a crystallised situation. But one could venture on to say that the judge in fact had in mind the role that the assured has to play. Namely, that the assured is prohibited from retracting his offer of cession and not that the whole of the transaction is decided upon and finalised. The judge was very emphatic on the assured's part in the process of abandonment. He made the reference to the revocability of the notice until the time of acceptance and the freedom of the assured to choose whether he prefers to treat his insured property as constructively totally or partially lost. The judge also insisted on this freedom of action on behalf of the assured, when commenting on s.56(4)[222], where he said that the word "may" that is used should not be interpreted as "must", thus leaving the assured with the right to maintain his claim as for a total loss up to the time of the insurer's acceptance of the notice of abandonment. This right was recognised to exist up to the date of the writ or the agreed date, should the circumstances still allow for such a choice.[223] What can be seen is that the importance on the whole transaction between assured and insurer is given to the discretion of the assured in the pre-acceptance period. It could, therefore, be concluded that when the judge says that abandonment is made irrevocable, then this means not that the property must pass, but

[221] Vol. 18, par. 538, at p. 373.
[222] "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".
[223] E.g. the subject matter insured is still in a state justifying a constructive total loss and not merely a partial loss.

that the assured is no longer allowed to go back on his offer of cession. In other words, the right conferred by s.63(1) in the form of the insurer's election to take over is unaffected and so the insurer is not precluded from acting on that right due to s.62(6)'s irrevocability. Reversely, it could be said according to the above approach, as explained above, that the assured is prohibited from altering his position towards the insurer in terms of treating the loss as constructively total.

3.3.2.3 *The two leading and contradicting cases; The Kastor Too approach*

At this point we have reached the early case law of the 21st century and especially one of the most important cases in regard to total loss, *Kastor Navigation v AXA (The Kastor Too)*[224]. It is in the words of Rix LJ that the prevailing opinion on the governing law can be seen and examined for its roots and inner characteristics. The *Kastor Too* was on a laden voyage from Aqaba to Vizagapatnam, when a fire broke out in the engine room. Fifteen hours later, she sunk in deep water. No notice of abandonment was served. The claim was for an actual or, alternatively, a constructive total loss.

Rix LJ made a long analysis of facts and law, but only the more relevant parts of his judgment will be presented. The judge first made a reference to older cases.[225] Specifically, he mentioned the words of Lord Mansfield in *Hamilton v Mendes*[226] who was perceived as authority. Mansfield LJ had pointed out the issue of whether the assured could recover as for a total loss, when, at the time action was brought, at the time of his offer to abandon his property and at the time he received information of the casualty, he had only suffered a partial loss. In reply, Rix LJ stated that, unless the underwriter had accepted the assured's notice of abandonment, then the assured would only be able to be indemnified for the loss that existed at the time action was brought. For that reason, it was the prevailing law that in case a lost ship was recovered before action was brought, while the notice had not been accepted, the claim for a total loss would be defeated, while the innate claim regarding the partial

[224] *Kastor Navigation Co Ltd & Anor v AXA Global Risks (UK) Ltd (The Kastor Too)* [2004] EWCA Civ 277.
[225] At 37-38.
[226] (1761) 2 Burr 1199.

loss preserved.[227] The justification of this rule was also found in the words of Mansfield LJ[228] in that the contract of insurance is ruled by the fundamental principle of indemnity and, therefore, the insurance policy should not be used in order to recover as for a total loss, when facts proved the loss to be only of a fractional nature.[229]

At a later part, Rix LJ continued on the subject of abandonment and especially on the effects of it and the rights that the assured and insurer have due to this transaction.[230] The judge approached the matter from s.61, which grants the assured the right to abandon, where he found the word "abandonment" missing. This indicated that the s.61 election is made in regard to the legal concept of abandonment and not in reference to the actual physical act. The legal concept, according to Rix LJ, encloses the notion of the vestment of the insured property to the underwriter[231], which is present in both actual and constructive total loss cases.[232] This cession of interest would only occur upon payment. In parallel, the underwriter should be willing to accept the abandonment, since s.79(1) speaks of the underwriter's entitlement to take over the assured's interest in the abandoned property.[233] At this point we see the connection that Rix LJ created between ss.62(6), 63(1) and 79(1). In cases of constructive total losses, the judge continued, as the notice of abandonment is an

[227] See *Polurrian Steamship v Young* [1915] 1 KB 922.
[228] At 1210.
[229] Also see: *Livie v Janson* (1810) 12 East 647, per Ellenborough CJ, at 654: "The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against".
[230] At 76.
[231] See MIA 1906, ss.63 and 79; and *Rankin v Potter* (1873) LR 6 HL 83, per Martin B, obiter, at 144: As the definition of constructive total loss, the one accepted was that given by Chief Justice *Tindal* in *Roux v Salvador* (1835) 1 Bing. N.C. 526; (1836) 3 Bing. N.C. 266. Also "abandonment" was considered, notwithstanding its perfect understanding in its ordinary, common and natural use, as highly artificial and technical. In reference to constructive total loss it was seen as meaning "a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it". Its effects were described as transferring the assured's property on the ship to the underwriter as "a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be". In the numerous discussions which preceded the final establishment of the doctrine of constructive total loss, nothing was more strenuously urged in favour of it than that by abandonment the underwriter became the absolute owner of the ship, a thing of value, capable of being repaired and earning freight, if the abandonee thought fit. A constructive total loss is grounded upon a calculation".
[232] E.g. see *Kaltenbach v Mackenzie* (1878) 3 CPD 467.
[233] See *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, per Scrutton LJ, at 687-688.

absolute requirement for the claim and the abandonment, with certain exceptions[234], and a choice is required in relation to abandonment, it is that decision which will also express the insurer's will to take over the abandoned property, or not, according to his relevant s.79(1) election right. Such accepted abandonment would only take effect after payment of the claim[235] and would have a retrospective effect reaching back to the time of the casualty. As a final addition, it should be mentioned that Rix LJ continued to say that the notice of abandonment, even if valid, is not able to effect abandonment without any additional acts by the parties.[236] The notice, it was said, should be considered only as an offer to cede property and rights and as a formal recognition on the part of the assured, that, should the underwriter will so, he will, upon payment for the claim, be entitled to the complete interest in the subject matter insured, or whatever remains of it, as from the time of the casualty. But, by the time the aforementioned offer is accepted, it is thereforth irrevocable and, if declined, it is treated as any other offer and may be withdrawn.[237] Closing the citation of Rix LJ's judgment, we end with his very interesting, and potentially confusing, comment. He said that, if the notice of abandonment is neither accepted, nor rejected, while it is still valid, then it will fall upon the court to "confirm its validity, with the consequences provided for under s.63".

It is at this juncture, that some observations should be made to Rix LJ's judgment in the above presented parts. Moving directly to where the effects of abandonment, the effects of the acceptance of the notice of abandonment and the interrelation between the sections of the Act[238] are commented, we find what some may refer to as logical fallacies.[239] To be more precise, two specific points arise. The first is related to the interpretation of the word "abandon" in s.61, which was based on the communality of that interpretation's use in actual and constructive total loss cases. The second point is on the fusion made between the right of subrogation and the right of abandonment, which results in a paradox of logic.

[234] E.g. MIA 1906, s.62(7).
[235] i.e. for the constructive total loss.
[236] At 77.
[237] See *Royal Boskalis Westminster N.V. v Mountain* [1997] LRLR 523, at 556.
[238] See MIA 1906, ss.61, 62(6), 63(1) and 79(1).
[239] At 76.

But let us proceed to the justification that Rix LJ gave and have a more detailed look therein. Rix LJ started with s.61[240], where he construed the word "abandon" as that of the legal concept of abandonment in general. There is indeed confusion in various parts of the MIA 1906 as to the meaning of the word and the way it is used in each section.[241] Notwithstanding that fact, the word in s.61 is used as the distinguishing factor of and a condition precedent to the claim of the assured for indemnification on a total loss basis, as opposed to treating the loss as partial and claiming only that amount. It must be stipulated that this use is common in both actual and constructive total loss cases[242], but the paramount rationalisation of its inclusion in the section is a matter of differentiation of choice between either aspects of total loss. Moreover, in terms of the meaning of the word "abandon" as it is used in s.61, it could be effortlessly said that it is referring to the physical act of abandoning the assured property to the underwriter, as it is expressed by the service of the notice of abandonment along with the continuing will to abandon the property, and not referring to the general legal concept of abandonment. In defence of this approach and in conjunction with the first argument presented in this paragraph, it is mentioned that, in reality and in practical terms, it is the notice's service that is needed, in order for the distinction between the cases where the assured is, and those where he is not, to claim for a constructive total loss in a procedurally correct way. Furthermore, if Rix LJ's construction of s.61 was to be followed, it would appear as though the judge was more prompt to adhere to a pre-MIA 1906 approach of automatic transfer of property and rights directly upon abandonment. The reason would be that if s.61, which entitled the assured to claim for a constructive total loss, encloses the concept of abandonment as the vesting of property in the insurer, then it is inferred that the assured is able to claim for such a total loss only if he cedes his property. But in actuality and as the judge later accepts, the assured only proposes the cession through the notice of abandonment and, in post-MIA 1906 case law, the property vests in the insurer after the offer to abandon has been made, after acceptance of the notice and

[240] "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".
[241] See next chapter; and *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.29-03.
[242] As it is also stipulated that the general concept of abandonment is as it was presented by Rix LJ: "The cession of the ship to the insurer", at 76.

upon full satisfaction of the constructive total loss claim.[243] For these reasons it should be said that the word "abandon" in s.61 should not bear the meaning Rix LJ appropriated and that the fact of the common use of the general concept of abandonment in actual and constructive total loss cases does not justify by itself that meaning in s.61.

After the judge's prelude on abandonment, we proceed to the bedrock of the current commentary. According to the judge, the aforementioned cession of interest will only take place upon payment for the claim (effective retrospectively as of the time of the casualty). But this cession will be dependent on the insurer's will to accept it, according to his entitlement to take over the abandoned subject matter insured (as detailed in s.79(1)).[244] The underwriter's will to receive the assured's interest, in cases of constructive total loss, where a notice of abandonment is necessary, is clearly indicated by the notice's acceptance. So, once the insurer has accepted, he will have clearly shown that he wishes to exercise his entitlement to the abandoned property, which he will then receive upon payment.

Firstly it is pointed out that there is either a confusion between the functionality and effect of ss.63(1) and 79(1), or the former section is completely overlooked. Granted, the judge does mention s.63, but that was only in cases where the insurer has given no response to the notice of abandonment and the dispute has reached the courts. Additionally, it is true that s.79(1) grants the right that the insurer may take over the assured's interest after he has paid for the assured's loss, but it is a right of subrogation that applies in all loss cases, whether total or partial, where payment for the claim has been made. It certainly also applies in constructive total loss cases, but there also applies s.63, which compared to s.79(1) is more specialised in its function, i.e. only in constructive total loss cases under a valid abandonment.[245] Furthermore, in relation to case law, the fact that the two sections serve different roles

[243] At 77.
[244] At this point the judge uses the word "abandonment", but as he previously defined the word as the cession of the assured's interest, then it is permitted to say that he meant for the condition of the passing of property to be the willingness of the insurer to accept the abandonment in its general concept (and not in particular the notice of abandonment or the physical act of abandonment).
[245] "(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".

and are, as well as should be, distinct from one another can be found, inter alia, in the case *Simpson v Thomson*[246] in the judgment of Lord Blackburn, to which both Tomlinson J[247] and Scrutton LJ[248] conceded.

The approach followed by Rix LJ leads to an idiosyncratic, albeit peculiar rule, in that it embraces a circular reasoning, which nonetheless seems to be the governing law today: The insurer has two options when served with a notice of abandonment, namely, either to accept or reject it. If the insurer recognises that the assured has a right to a successful claim for a constructive total loss, he will accept the notice. If he also wants to take over the abandoned property, then he will have to indicate his will to do so. But this indication will be considered as already made on the acceptance of the notice of abandonment. The problem with this train of thought is that, although the insurer is recognised as having a choice in whether he will take over the abandoned property, this choice is restricted by the fact that he has recognised the assured as entitled to a full remuneration. Therefore, he has no true option. He will either accept the notice, pay and mandatorily be vested with the property, or reject the fact that the assured is rightfully claiming for a total loss.[249]

It must be clarified and necessarily repeated that Rix LJ does not accept that transfer is automatic upon acceptance. Nonetheless, he applies a linear logic that prejudges the transfer at the time of acceptance. Although he states that payment is necessary for the transfer, the insured is precluded from choosing a different path. This is a deterministic reasoning that defies the sequential, but also flexible, structure of the MIA 1906, as it was also explicated by Sir Mackenzie Chalmers, the Act's

[246] (1877) 3 App Cas 279, at 292.
[247] *Dornoch v Westminster (The FD Fairway)* [2009] EWHC (889), at 26.
[248] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, at 687: "Lord Blackburn in 1877, before the Marine Insurance Act , in Simpson v Thomson (1877) 3 App Cas 279 said, at page 292: 'I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incidental to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid.' He distinguishes the case from subrogation to a right to recover damages against a third party in respect of the thing insured, which he says follows on payment for a total loss, but must be exercised in the name of the assured and in respect of his right".
[249] It is accepted, that s.79(1) still grants the option of taking over the property after payment even in cases where the notice of abandonment is rejected; also see s.62(4).

draftsman, and accepted by Lord Atkins in *Attorney General v Glen Line*[250] and later by Tomlinson J in *Dornoch v Westminster*[251].

The result of such a construction in the insurance market is the unique phenomenon that is in effect today: the insurers ab initio reject the notice of abandonment in fear of the abandoned property bearing severe responsibilities, and having a very low value. They then hypothesise the issuing of a writ as of the day of the notice's service so that a constructive total loss will be established and later circumstances will not change the recognised nature of the loss in order to facilitate and secure the interests of the assureds, i.e. their clients. Finally, they pay the assured as for a total loss and take over the abandoned asset, if they wish to, using s.79(1) and the rights of subrogation. It cannot be denied that it would be far more easy if the insurers accepted the notice when they wanted to indemnify the assured for what they considered as a valid claim for a constructive total loss, while retaining the right to elect to take over the asset by virtue of s.63(1) (and the equivalent right of s.79(1)). Meanwhile, in cases where they disagreed with the validity of the assured's claim they could reject the notice and if it was proven that the assured should be indemnified in such a manner, then pay the full amount of the claim and take over the property through s.79(1).

3.3.2.4 *The two leading and contradicting cases; The Dornoch speculation*

Aside from the opposition found in theory, as it will be presented below, a different means of examination on abandonment was also offered by Tomlinson J in the case *Dornoch v Westminster*[252]. The facts of this case are much more complicated than in *The Kastor Too*, but they justify the significance it holds. The *FD Fairway*, a unique mega-size hopper dredger, collided with another vessel near China. The damage sustained was of such an extent as to justify a constructive total loss claim and notice of abandonment was served. The vessel's hull and machinery policies were written in two layers. The primary layer of up to €5 million was underwritten by

[250] (1930) 37 LIL Rep 55.
[251] *(The FD Fairway)* [2009] EWHC (889).
[252] *(The FD Fairway)* [2009] EWHC (889).

seven insurance companies and the excess policy by Westminster (the claimants). The hull and machinery underwriters fully indemnified the assured and claimed that they had impliedly accepted a notice of abandonment and therefore they were entitled to possession of the vessel. The complication was that the assured had sold the subject matter insured to one of its subsidiary companies for €1.000 before some of the underwriters had elected to take over, which was a diminutive fraction of her true value. Consequently, a dispute on what was owed to the underwriters, who elected to receive the wreck, was initiated; i.e. the proceeds of the sale, the wreck itself, or the true value of the wreck. Tomlinson J proceeded to an extended overview of the functions and effects of abandonment, while expressing some alternative ideas.

Starting from the pre-MIA 1906 cases, the judge[253] referred to the automatic cession of the abandoned property and all rights incidental to it from the assured to the underwriter upon payment for a total loss as benefit of salvage, citing the words of Scrutton LJ in *Allgemeine Versicherungs*[254], as well as those of Lord Blackburn in *Simpson v Thomson*[255]. Next to be examined was the theory of automatic transfer of the assured's proprietary rights by the mere service of the notice of abandonment, which came from the same era as the above perception. But, it was quickly disapproved as unjust, since the abandoned property could very well be a means of severe liability rendering it instantaneously as unsolicited.[256] Such a situation, though, could arise under the former of the two approaches, as the underwriter was given no choice in whether he wished to receive the subject matter insured. Tomlinson J then agreed with Scrutton LJ on this being the reason behind the introduction of s.63(1), which gives the insurer an entitlement to take over the interest of the assured in whatever may remain.[257] It was important for Tomlinson J to insist thereon and, in so doing, to clarify the fact that, since the insurer is entitled to take over the abandoned asset, he may then as well decline such a cession, notwithstanding the fact that he might have already recognised the assured's right to an indemnification for a constructive total loss (i.e. he may accepted the notice, but retained the choice on the

[253] At 26.
[254] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, at 687, as presented above.
[255] (1877) 3 App Cas 279, at 292.
[256] See the possibility of a "damnosa hereditas" property, *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras.30–06 and 30–35.
[257] At 27.

takeover). Tomlinson J placed great emphasis on the word "entitled", which he perceived as a vast change in comparison to the pre-MIA 1906 law. Additionally, this judgment is one of the very rare occasions to grant such importance to that particular section of the Act. Returning to the judgment itself, the judge continued with a reference to s.79(1). He noted that the language used bore great similarity to that of s.63(1) with the exception of the phrase "all proprietary rights incidental thereto".

While on s79(1), Tomlinson J. pointed out that there is a clear distinction between the two types of takeover to which the insurer may proceed. One is the entitlement to "the interest of the assured in whatever may remain of the subject-matter", while the second is the subrogation in "all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss". The former was accepted as a free choice given to the insurer after he has paid the full amount of the claim; in the same manner as the right to election provided by s.63(1) in the insurer "taking over the interest of the assured in whatever may remain of the subject matter". The latter of the two was considered to be obligatory taking place due to and immediately after the payment for the total loss according to the phrase "he is *thereby* [Tomlinson J's emphasis] subrogated".

As the introduction of the MIA 1906 was a pivoting point in the history of the law of Marine Insurance, Tomlinson J could not avoid citing the opinion of the mind behind it, Sir Mackenzie Chalmers, and especially the part in connection with ss.63 and 79.[258] Thereon, the draftsman of the Act said that abandonment is a cession of any remains of the subject matter insured to the insurer. But this transfer cannot be absolute, as it is conditional upon a subsequent change in the relevant circumstances relating to the loss before action is brought. Additionally, the insurer retains an entitlement on receiving the abandoned property, or disclaiming it, should he perceive it as onerous. Support of this last premise is found in the wording of the Act as it was finally written, which was changed from "is entitled to whatever remains" to "is entitled to take over". Moreover, commenting on s.79(1), Sir Chalmers stated that it is certain in all cases of total loss that, upon payment, the insurer is vested with whatever remains of the subject matter insured along with any rights attaching to it,

[258] At 28.

which is also the obligation of the assured to do when his claim is thus satisfied.[259] To the above, Tomlinson J agreed.

In the *Dornoch* case, an interesting approach to the issue of proprietary transfer upon acceptance of abandonment was made. Tomlinson J made an attempt to tackle the issue using the right to subrogation as the centre piece of his reasoning.[260] The origins of the enquiry can be found in the fact that, according to one opinion expressed in the case, the insurers' election to take over the vessel was made only after the assured had sold her and therefore s.79(1) should come into consideration.[261] According to the facts of the case, the insurers had agreed to pay for a constructive total loss, while endorsing the claim settlement "net open market residual value of vessel to be accounted to insurers". The judge then looked at the legal reasons for such a benefit. The most clear, but very circumstantial, reason was that this was a specific condition requested by the underwriters and therefore it bound the parties as a contractual obligation irrespective of, but not against, the Marine Insurance rules. Nevertheless, and through a more general perspective, as presented above s.79(1) provides the insurers with subrogation rights if, and only if, they have satisfied the assured's claim. These rights would function without time restrictions and in spite of the insurer's acceptance of the abandonment, or its declination.[262] Included in the subrogation rights is the interest of the assured in whatever remains of the subject matter. But, should the insurer elect to take over the subject matter insured after the sale, the only remaining interest would be the proceeds of the sale. Consequently, the right to the proceeds should be deriving from the subrogation rights of s.79(1). Additionally and in compliance to the above, Tomlinson J mentioned that, if the assured sells the subject matter at an undervalue, without notice to the underwriters and having already been paid for a constructive total loss, then the insurer would be able to sue the assured for damages on the ground of his subrogation rights being

[259] See *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159, per Lord Cottenham, at 183: "The assured must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters".
[260] At 30.
[261] Per Mr. Weitzman for the defendants.
[262] See *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-35 and para.30-36, fn.198.

prejudiced. An assertion was made on the fact that the insurer would acquire an equitable lien on the proceeds of the sale, as their attainment would be a subrogated recovery.[263] A final remark of great significance should be posed in that Tomlinson J actually proposed through the above analysis that an underwriter can fully rely on s.79(1) and the rights of subrogation deriving therefrom in order to attain a right over the subject matter insured and completely evade the complexity of s.63(1). Should this opinion be true, then this whole debate would be rendered moot.

The next step Tomlinson J took was towards s.63(1) and commented specifically on the meaning of the word "irrevocable" and on its connection with the second sentence of that section.[264] The judge started with a synopsis of how the notice of abandonment elevates a partial loss claim to a constructive total loss claim.[265] After the service of such a notice it is the insurer that will have to respond on the matter presented. If his choice is to reject it, then the offer will still stand and the assured's rights will remain unharmed, while repetition is unnecessary.[266] This rejection will show that the insurer does not accept the validity of the notice and, as for its permanency, the judge observed that it is revocable. On the other hand, according to s.62(2), should the notice be accepted, then "the abandonment is irrevocable". A fine deduction was then made on the topic under discussion and its connection to s.63(1). This would be the question of whether, by payment for a constructive total loss, the underwriters received an equitable interest in the wreck. In other words, did the insurers enjoy a form of security interest until their final decision on taking over the asset was made? This interest would constrain the assured's freedom of movement and especially his will to dispose of the asset in whatever way he saw fit. It would restrict his ability to give title to the vessel and would entail serious consequences on any purchaser of the property. It is noted that there is a great similarity of the above to the function and effects of s.63(1) in conjunction with the law of Equity.[267]

Moving back to the judgment, Tomlinson J, distinguished between the use of the word "irrevocable" and that of "complete", "perfected", or another such word

[263] See *Lord Napier and Ettrick v Hunter* [1993] AC 713.
[264] At 31-35.
[265] See MIA 1906, ss. 57(2), 61, 62(1) and 62(7); *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523, per Rix J, at 557; and *The Kastor Too* [2004] EWCA Civ 277, per Rix LJ, at 77.
[266] MIA 1906, s.62(4).
[267] See the provided equitable lien over the property after acceptance of the notice of abandonment.

which would denote the completion of the process of abandonment. What was meant was that the verb used is not unequivocally descriptive of the whole process, nor is it indicating towards a specific part of it. The second sentence was then to be used as a means of clarification. Its function would be to explain the first and especially the word "irrevocable" used therein; i.e. when the insurer accepts the notice of abandonment, then he admits he is liable to the assured for his total loss claim and concedes to the validity of the notice. The judge then stated that it would be unnecessary for the Act to provide at that point that the acceptance of the notice would admit its sufficiency, if such acceptance was to, without more, achieve the cession of interest from the assured to the insurer. The details on what was subject to the insurer's entitlement to take over were to be found in s.63(1). It was rightfully observed that the section immediately followed s.62(6). Having noticed Sir Mackenzie Chalmers also addressing the topic in the same sequence, the judge considered this as an indicator to the correct succession in which the sections should be read and analysed. That is to say, s.62(6) is and should remain unable to independently amount to a deprivation of an entitlement which is first described and granted in s.63(1).

It was finally agreed by Tomlinson J that, on the assumption of the cession of property occurring on payment for the claim and not upon acceptance of the notice, then, by the principles of equity, an equitable lien would be imposed for the benefit of the insurer.[268] Most importantly, the judge said that this would take place due to the fact that the insurer will have already, by acceptance of the notice, agreed to pay for the constructive total loss and to take over the assured's interest. The benefit of such a hypothesis, according to the judge, would be that the lien would provide security for the insurer from the time he made the irrevocable promise and irrevocable election up to the time of the transfer of the rights upon satisfaction of the claim. What is rather confusing, is the fact that the judge seems to be overlooking the right to a choice granted by s.63(1). This was his starting point in his judgment and he had agreed on its value and significance. However, in this illustration the election of the insured in relation to the taking over of the property is considered as irrevocably premade by the acceptance of the notice of abandonment, although the premise above was that the

[268] At 40.

property would vest on payment, not that the irrevocability of s.62(6) included the acceptance of the wreck.

The unfortunate product of the judge's analysis on the results of the entitlement presented in s.63(1) was that it proved irrelevant to the issues presented to him and, for that reason, no firm *ratio* was offered. Nonetheless, Tomlinson J heard the arguments of the advocates, presented the relevant case law and commented on both. To be more precise, it was said that by accepting notice of abandonment the insurer accepts its validity and his liability for a constructive total loss claim, as mentioned in s.62(6), although he does not also elect to take over the wreck, since it is a right deriving from s.63(1).[269] The fact that no advocate referred to the issue of whether an election to take over the wreck would, before payment, cause cession of the property lead to further discussion. According to the judge, two inconsistent views can be found in Arnould on the current topic.[270]

One opinion instructs that the property is passed automatically upon the acceptance of the notice of abandonment. This was considered to be a pre-MIA 1906 remnant when even the abandonment on its own was sufficient for the transfer to be effected. According to Lord Atkin in *Attorney General v Glen Line*[271] , and in agreement with Tomlinson J's views on the matter, confusion is often caused by not distinguishing the legal rights given by abandonment, as presented in s.63, from the rights of subrogation, in s.79. Lord Atkin then stated that, under the rules of abandonment, the rights to the assured's interest are set in existence on a valid abandonment, while the right of subrogation only arises on payment; as it also appears in the MIA 1906. The term "valid abandonment" used by the Lord was considered by Tomlinson J to be the equivalent of an "accepted abandonment". It must be noted that, although at first instance the two terms seem to bear no dissimilarity in their effects, this equivalency is what has to be the confusing factor in today's law. It is in many an

[269] At 37.
[270] *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-09.
[271] (1930) 37 Ll L Rep 55, at 61.

occasion that judges, including Rix LJ in *The Kastor Too*[272], thought of the entitlement of s.63(1) to be the same as that of s.79(1) with the latter overpowering the former. Thereon Tomlinson J, in agreement with Lord Atkin, recognised the independence of the acquisition of any proprietary right under s.63(1) from the act of payment, as opposed to s.79(1), where the concepts of payment and transfer of rights is indistinguishable. Nevertheless, it was conceded that property would pass on acceptance, unless formalities, such as registration of ships, were needed for the conclusion of the title's transfer, in which occasion an equitable interest would be created entitling the insurer to request the finalisation of the process.

A second opinion was that s.63(1) obliges the vesting of the full interest of the assured to the insurer who has accepted the notice of abandonment.[273] This was proposed as a better means of security than that of the equitable lien, since the insurer would then be in possession of all of the assured's rights instead of what is effectually an incomplete right to the vessel. In connection to the issue of additional formal procedure, it was supported that the full interest would function under an equitable title, until such steps were taken so as to complete the transfer. This approach was rejected by Tomlinson J by virtue of *The Kasor Too*[274] and para.30-06 of *Arnould*[275], whereby no immediate transfer is made upon acceptance; a right to an election to take over is given until payment takes place; and when payment is completed the property will vest retrospectively from the time of the casualty, since the insurer accepted the notice and through that action he showed his willingness to be vested with the asset. Interestingly, throughout the whole passage of the judgment, as seen up to this point, Tomlinson J seems to be in disagreement with what is presented as the foundation of the above opinion's rejection; i.e. Rix LJ's opinion on the construction of ss.62(6), 63(1) and 79(1). Rix LJ had approached the matter on the basis that acceptance of a notice of abandonment indirectly, that is in effect through ex post prejudice, amounts to an exercise of the election available under section 63(1) and is effective as of the payment for the loss. Tomlinson J disagreed claiming that the notice's acceptance can offer no more than what is stated in the second part of s.62(6), that, in any case, the insurer cannot take over any interest greater than that which the insured retains and

[272] Supra.
[273] At 38.
[274] Supra, per Rix LJ, at 76.
[275] *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013.

that Rix LJ's perception must have flowed from s.79(1)'s concluding words, "as from the time of the casualty causing the loss", which Rix LJ must have applied to s.63(1) as well. However, it was eventually accepted by Tomlinson J that both Rix LJ and his opinion's incorporation in *Arnould* are correct and that they dictate the governing law on the particular argument in the *Dornoch*[276] case.

At a later point, Tomlinson J proceeded to state, as a commonly accepted rule, that payment for the casualty as a total loss along with an express election to take over the property is sufficient for a transfer of the assured's interest, or at least of equitable title thereto.[277] It was, though, not clear what would constitute such an election and what the takeover would transfer. In other words, was the notice's acceptance inclusive of the takeover election? And would the takeover transfer true or equitable title on the abandoned property?

It is agreed that if the law did not provide the insurers with some form of security until their final decision was made, or, as presented above, until the property is finally transferred to the insurer, then it would certainly be flawed given the irrevocability of the insurer's promise of indemnification. So, is it not severely deficient when it precludes the insurer from accepting the notice in fear of being burdened with a damnosa hereditas and forces him to ignore s.63(1) relying solely on his rights of subrogation?

A very good point was made by the judge from a very practical point of view. It is a given that underwriters fear an irreversible cession of ownership. Similarly, Tomlinson J observed, an assured would not be extravagant in assuming that an unqualified acceptance of his notice of abandonment is simultaneously also an irrevocable commitment on behalf of the insurer to receive the property abandoned to him. This is understandable and follows common logic. What is disputable, though, is the basis on which Tomlinson J relied. He said that s.62(6) would be in support of such an opinion, since, as acceptance of the notice already secures the insurer's liability for a constructive total loss, there would be no sense in including the obligation to irrevocably accept the sufficiency of the notice if the insurer did not also

[276] *Dornoch v Westminster (The FD Fairway)* [2009] EWHC (889).
[277] At 41.

have the intention of exercising his right to take over the subject matter insured. Naturally, the recognised sufficiency of the notice may only mean that the insurer acknowledges that the notice conforms with the ss.61 and 62(1) specifications, so that the assured's partial loss will be able to be treated as a constructive total loss. Secondly, it also acknowledges that no further actions are required for the claim for a constructive total loss to be recognised as valid.

The final conclusion of Tomlinson J, and an intriguing point on the non-definite nature of the law, was that his core demonstration was the fact that insurers are endowed with proprietary rights in the subject matter insured in their favour, either by acceptance of notice of abandonment, or by their election to take over. These rights may be either the full title, or equitable title.

It is rather regrettable that Tomlinson J put all this effort in examining the particular parts of the Act and the words of distinguished judges and did not reach a final conclusion that would potentially solve the severe conundrum and place the legal theory regarding the discussed issue in clear order. As for the issue of the transfer becoming fully binding upon acceptance, the judge was more in favour of the opinion that denies such a result. On the other hand, he did not conclusively disprove the hypothesis of Rix LJ that the Act's legal construct on the transfer of title is predicated on the insurer irrevocably electing such a responsibility through the acceptance of the notice of abandonment. What can be safely concluded from the above is that the learned judge, in such a major case of the early 21st century, put forward views and opinions that contradicted the established legal regime, which held the potential of producing a healthier and more logically stable result, even if the outcome was not so decisive as to change the law.

3.4 *The Hypothesis*

Having seen the positions of the judges in the pre- and post-MIA 1906 case law, their strengths and deficiencies, it is at this juncture that a full proposition must be offered. In synopsis, the methodological outlook will be that of a linear overview of the Act, meaning a view of the relevant sections in their numerical sequence. Nevertheless, the approach of the pertinent sections will also be collective, in order for a dynamic synergy to be found. Looking at the Act as a whole will help understand the reasons behind each section and the logic that transpires them. No one can deny the fact that the Act was purposefully organised in the fashion in which it survives today and that there is a purpose to its pattern.[278] Both the above methods will help establish a functional, practical and uncomplicated theoretical model. The paramount goal is to resolve the current deficiencies and harmonise what is otherwise a paradoxical system that rules the constructive total loss cases.

Using a simple format, the following structure is proposed:

- If a loss has occurred that can qualify as a constructive total loss (ss.56, 60), and
- the assured chooses to treat the loss as constructively total (s.61),
- by serving a notice of abandonment (s.62), and
- the insurer chooses to accept the notice, then

according to s.62(6):

- the assured is prohibited from retracting his offer (i.e. his notice becomes irrevocable), and
- the insurer conclusively admits that the abandonment is valid, that the notice is sufficient and that he will pay for the constructive total loss;

according to s.63(1), since the abandonment has been accepted by the insurer and thereby became conclusively valid, the insurer can choose to take over the assured's interest in what remains of the subject-matter (and all proprietary rights incidental

[278] See: R Ferguson, *Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes*, 1977, 4 Brit JL & Soc'y 18, where Ferguson noted, inter alia, that Chalmer's codification ideology was consistent.

thereto). If he does not wish to do that, then he will still be obliged to pay for the loss (see above: acceptance and s.62(6)).

Once he has paid, then, due to this payment and according to s.79(1), he may choose to take over the assured's interest in whatever remains of the subject-matter (and all of the assured's rights and remedies).

Both rights sourcing from ss.63(1) and 79(1) are not to be prejudiced by the notice's acceptance.

It should be noted that the actual effects of and the legal issues in relation to the insurer's acceptance of the notice of abandonment are the epitome of the importance in terms of cases of total loss, the exercise of the right to abandon and the insurers' response thereto.

As the law stands now, the construction of the relevant parts of the MIA 1906 solidify the relationship and agreement of the two parties at the time of acceptance of the notice. Though this provides a degree of certainty in terms of the rights each party enjoys (yet not absolute, as the market is not consistent on its views on that issue), it also leaves no space for flexibility, which is a market's absolute demand. Accordingly, it has forced the insurers to almost always reject the notice of abandonment leaving both parties legally uncovered (with no forcible payment and no legal security, respectively). With the notice rejected, it is of great significance for the assured, that the insurers also state that they establish a hypothetical time point at which a writ on that claim will be considered to have been issued, so that the damage caused at that point will be finally decided as total. If the insurers do not officially agree to indemnify the assured, or treat the writ as if issued, then the insurers have additional incentives to reject the notice and delay, hoping that the subject matter insured will be recovered or restored and consequently avoid payment.[279]

[279] E.g. cases of piracy, such as *Masefield v Amlin (The Bunga Melati Dua)* [2011] EWCA Civ 24, where the vessel and cargo was seized by pirates but was shortly afterwards returned on payment of the ransom.
Also see *Sprung v Royal Insurance* [1999] 1 LRIR 111 case, where the insurers delayed indemnification to the point where the assured was further damaged due to pecuniary lack.

But, according to the proposed structure, the above difficulties are overcome, while the parties are also satisfied in achieving their goals without additional and impractical risks. From the time of acceptance it is, as a matter of law, certain that the assured will be fully indemnified as for a total loss, while the insurer is entitled to the remains of the subject matter insured and all rights incident thereto. By stating that the notice of abandonment is irrevocable and not the whole abandonment, there is no possibility of the assured retracting his offer to abandon and so the insurers are not endangered of losing the possibility of acquiring the property, if that was their goal. Furthermore, with the insurers still having an election to keep the subject matter and with the abandonment not being automatically concluded and irreversible, the insurers have the privilege of opting out of taking over the very badly damaged or expensively retrievable property, while in the meantime being able to keep it if it is commercially prudent. In other words, both needs for certainty and flexibility are met, without risks, detours, elaborate approaches or a need to look outside the existing law and to a new system as a solution to the present issues.

3.4.1 *Justification*

3.4.1.1 *Equity and Contract Law*

The first point that we should approach is the nature of abandonment, in order to understand how this exchange works. Specifically, the role of equity law, especially the doctrine of equitable estoppel, and contract law, since the process of abandonment is and is based on a contractual agreement, namely the policy. These two different sets of rules have an inherent importance to the degree of freedom in the parties' movements through the abandonment process and bear meaning in relation to the connection of s.62(6)'s two parts, as well as that between ss.62(6) and 63(1).

It is not uncommon to see a party supporting one of the two legal systems as the defining set of rules for abandonment.[280] But in the analysis below it will be shown that Equity and Contract Law form a common complex.

3.4.1.1.1 *The Estoppel Approach*

If one is to apply the doctrine of equitable estoppel in the abandonment matrix, then it is of essence to comprehend its function.[281] The primary characteristic is that it arises where a person, the representor, has made a representation, which led the representee to act thereon leading to his (the representee's) detriment.[282] In these cases, the court may grant an equitable remedy.[283]

The Estoppel has two aspects: the Proprietary, which applies to property and contracts alike and which can give rights where none existed;[284] and the Promissory,

[280] E.g: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-23.
[281] For further analysis see *Thorner v Major* (2009) UKHL 18, per Lord Hoffman and on Proprietary Estoppel per Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury.
[282] See *The Kanchenjunga* [1990] 1 Ll Rep 391, per Lord Goff, at 398-399.
[283] This is the prohibition of the representor in going back on his representation. It is noted that the equitable remedies are subject to the discretion of the court (as opposed to Common Law remedies), that an act in personam is required and that damages would be inadequate.
[284] The view that the Proprietary estoppel is not distinct, but a part of the Promissory estoppel was expressed in *Cobbe v Yeoman's Row management Ltd* [2008] UKHL 55, per Lord Scott, at 14.

which only applies to contracts and can only be used defensively.[285] The estoppel relevant to the current research is the latter, the Promissory.

The Promissory Estoppel is idiosyncratic in that it can make a promise binding even though no consideration was provided.[286] What it requires is a clear and unequivocal promise or representation[287], intended to affect the legal relationship of the parties[288], which indicates that the promisor will not insist upon his strict legal rights. Finally, this promise or representation must have been relied upon by the representee[289] and, on that point, it must be inequitable for the representor to go back on the representation[290].

An early example of the court's perception on that matter was the 19th century case *Hudson v Harrison*[291]. In short, it was held that the insured cargo was constructively totally lost and that the insurers' conduct lead to an acceptance of the notice of abandonment. This acceptance was a representation on which the insurers could not go back and therefore refuse the assured of his full indemnification.[292] Park J characteristically said that "the underwriters could not be allowed to say that the loss was not total, after they had admitted, that it was, and acquiesced in the abandonment as for a total loss".[293] This bears great similarity to the equitable estoppel principle and it would be very logical to infer its application in the case, though it was not expressly stated so by the court.

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[285] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; *Combe v Cambe* [1951] 2 KB 215 on Equity being a shield, not a sword; and *Tool Metal Manufacturing v Tungsten Electric* [1955] 1 WLR on the ability of the Promissory Estoppel to suspend, but not extinguish, rights of the other party.

[286] See *Central London Property Trust v High Trees House* [1947] KB 130, per Lord Denning and below on Contract Law, Offer-Acceptance-Consideration part.

[287] *Collin v Duke of Westminster* [1985] QB 581.

[288] *Spence v Shell* (1980) 256 EG 819.

[289] *WJ Alan v El Nasr Export and Import* [1972] 2 QB 189.

[290] D&C Builders v Rees [1965] 2 QB 617.

[291] (1821) 3 Brod. & Bing. 97.

[292] Additional details: The insured cargo was partly lost and partly impregnated with salt water so far as to render it non-merchantable. The assured served a notice of abandonment, but the underwriters did not clearly respond with an acceptance or rejection of the notice. Later, some of the underwriters forbade the sale of the remaining cargo and also rejected the abandonment. The court held that the subject matter insured was totally lost and therefore the assured was entitled to abandon. This right was crystallized by the conduct of the underwriters, who by not clearly, unequivocally and in reasonable time replying to the notice of abandonment were held to have acquiesced in it.

[293] At 108-109.

Later that century, the case *Provincial v Leduc*[294] brought forward the previously not encountered view that acceptance of the notice of abandonment effected a mutual equitable estoppel prohibiting the parties from going back on their representations; i.e. the offer to cede the property on the assured's part and the obligation to pay along with the reception of the property on the insurer's part. Sir Barnes Peacock examined the hypothetical scenario where the insurer would have had accepted the notice, raised the abandoned vessel and then sold her receiving a considerable amount in excess of the salvage expenses.[295] In that paradigm, the assured would be estopped from both retracting his notice and claiming the proceeds of the sale as his own. Similarly, after the insurer has accepted the notice, he is estopped from relying on any grounds that would contrast said acceptance;[296] i.e. he would be obliged to pay for a total loss and in parallel, if he wished so, he could sell the vessel, and keep the proceeds as his own.

3.4.1.1.2 *The Contract Law Approach*

Not all cases, though, are in agreement with the role that equity has to play in the rules of abandonment in marine insurance cases. It is mostly supported that the transaction between the assured and the insurer is better viewed under the Law of Contract. The notice of abandonment is the offer, which, upon acceptance,

[294] *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224. The rule that by acceptance the insurer recognises the loss as constructively total and therefore cannot refuse it at a later point bears great similarity to what is today the latter part of s.62(6). Having in mind that at that time, as was also seen in that case, the rights on property were considered as transferred, at the latest, upon acceptance of the notice of abandonment (Per Sir Barnes Peacock, at 243: By acceptance of notice "the whole interest of the Plaintiff in the thing abandoned was transferred to the Defendants, and became their property" and other pre-MIA 1906 case law; e.g.: *Hamilton* v *Mendez* (1761) 1 Wm. Bl. 276; *M'Carthy* v *Abel* (1804) 5 East 388; *Bainbridge v Nelson* (1808) 10 East 329; *Stewart v Greenock* (1848) 9 E.R. 1052), it is inferred that the doctrine of equitable estoppel would also prohibit the insurers from denying the takeover of the subject matter insured. In today's view, though, as the transfer of property is dependent upon the relevant election of the insurer, the above effect of estoppel would most probably not be accepted without objections; it must be said that in modern times it has not been tested in court.

[295] At 242-243.

[296] In this case the insurers tried to rely on a breach of warranty in order to be discharged from all liability.

contractually binds the parties.[297] In support of the contractual concept[298] was Lord Justice Brett in *Kaltenbach v Mackenzie*[299]. There, he started with the fact that only in marine insurance contracts of indemnity does a necessity for service of the notice of abandonment emerge and specifically in cases of constructive total loss.[300] After that, he went on to examine the origins of the notice of abandonment.

The first theory he presented was that of several judges of his time, who considered the notice of abandonment as a "necessary equity", as in constructive total loss cases the insurer was considered to be in need of the freedom to act in the way he saw best towards the preservation of the thing abandoned from further deterioration. This theory, though, was rejected by Brett LJ as doubtful. The judge was in favour of the view that the notice was introduced into the contracts of marine insurance by the consent of the contracting parties: the shipowner and the underwriter; a manner similar to many other terms.[301] As the requirement for the service of the notice became a standard term in insurance policies, it so became part of every contract and a condition precedent to the validity of the claim for a constructive total loss. As a reason for such a condition, Brett LJ proposed that the marine losses were of such

[297] See: *Robertson v Royal Exchange Ass Corp,* 1925 S.C. 1; (1924) 20 LL. L. Rep. 17; *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523; *Kastor Navigation Co Ltd v AFG MAT (The Kastor Too)* [2004] 2 Lloyd's Rep. 119; and Pesquerias y Secaderos de Bacalao de Espana SA v Beer (1945) 79 Ll L Rep 417, per Atkinson J, at 433; *Norwich Union Fire Ins Soc Ltd v Price* [1934] A.C. 455 PC, per Lord Wright, at 466, where he insisted on the contractual nature of total loss and the adherence to the words of the agreement, but for the rules of common law and the law merchant (which is in effect customary law of the market), up to the point where they do not conflict with the contents of the MIA 1906, and at 467: The Australian equivalent of s.62(6) "presupposes something which is not only in form but in reality a notice of abandonment and acceptance", the sub-section "does not apply at all where NoA or acceptance is void or a nullity because based on false intelligence and made under a fundamental mistake" and finally, "mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract" (specifically on the grounds of mistake, see: *Bainbridge v Neilson* (1808) 10 East 329, per Lord Ellenborough, at 341, though today it is much more difficult to void the agreement on that ground, see: *Great Peace Shipping Ltd v Tsavliris Salvage (Intl) Ltd* [2003] Q.B. 679; *Shogun Finance Ltd v Hudson* [2004] 1 A.C. 919); *Fraser Shipping Ltd v Colton* [1997] 1 Lloyd's Rep 586: s.62(6) does not preclude an underwriter from avoiding a binding acceptance on subsequently discovery of non-disclosure, in the same fashion as the acceptance of adjustment, which can be set aside in cases where the loss was caused by an uninsured peril (see: *Shepherd* v *Chewter* (1808) 1 Camp 274; *Steel* v *Lacy* (1810) 3 Taunt 285; *Scottish Metropolitan Assurance Co* v *Samuel & Co* [1923] 1 KB 348; *Holland v Russell* (1863) 4 B & S 14; *Castle Insurance Co* v *Hong Kong Islands Shipping Co* [1983] 2 Lloyd's Rep 376; and *Attaleia Marine Co Ltd* v *Iran Insurance Co (The Zeus)* [1993] 2 Lloyd's Rep 497).

[298] I.e. that abandonment is only ruled by the contractual agreement of the parties and that equity has no place therein.

[299] (1878) 3 CPD 467.

[300] At 471-472.

[301] E.g: Warranties in Marine Insurance policies; see *The Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd's, per Lord Goff of Chieveley.

peculiarity that demanded it. To be more precise, the important fact was that the losses occurring at sea did not take place under the immediate notice of all parties concerned. So, a loss could very well occur in any part of the world and under such circumstances that the underwriter could have no opportunity of ascertaining the validity of the relayed, by the assured, information. As the assured was the only source of information, if he was let free to delay claiming for a total loss at his own leisure, he could take considerable time while assessing the market and then throw a disfavouring loss upon the underwriter. According to the judge, this was a particular danger that the insurers wanted eliminated and so the notice's requirement was introduced in the policies. So, it can be effortlessly seen that, in the opinion of Brett LJ, abandonment and the notice are dependent on Contract Law and not Equity Law.

The Contract Law theory engulfs three requirements for a contract to be formed and bind the parties: Offer; Acceptance; and Consideration[302], whose application on the abandonment process we shall test.

The Offer is an expression of the offeror's willingness to contract on specified terms, with intention to become binding as soon as it is accepted by the person to whom it is addressed.[303] This is not to be confused with an Invitation for submission of an offer.[304] An invitation precedes the offer and is an open request to attract offers, which the invitator is free to accept or reject.[305] Another distinction is between a

[302] It is also accepted that there is also another requirement: An intention to create legal restrictions. This intention is assumed in commercial agreements; unless expressly stated otherwise: *Rose & Frank v Crompton Bros* [1925] AC 445; and unless it is a "comfort letter", i.e. a statement of facts (which is not a contractual promise): *Kleinwort Benson v Malaysian Mining Corporation* [1989] 2 All ER 626. On the other hand, it is assumed that there is no such intention in: social and domestic agreements between husbands and wives, parents and children, parties sharing a house, other social agreements.

[303] For the construction of the offer two tests apply: the Objective test and the Reasonableness test; see *Morgan v University of College Stalford* [1994] ELR 187; and *OT Africa Line v Vickers* [1996] 1 Lloyd's Rep 700.

[304] This distinction is important in the construction of the notice of abandonment and the reply of the insurer. It is commonly perceived that the notice is an Offer and not an Invitation, as the assured is already therethrough invoking the constructive total loss provisions of the policy and making his offer (i.e. to give the remains in exchange for a full indemnity). To state the opposite would not be deprived of all merit; e.g. the notice is an invitation to the insurer to give an offer in relation to the abandoned property (if it is considered as a constructive total loss, the amount payable under that and whether they would like to take over the subject matter insured); but it would surely mean stretching the law and unnecessarily complicating the abandonment process.

[305] E.g: Advertisements; see *Partridge v Crittenden* [1968] 1 WLR 1204; and catalogue and price lists: *Grainger v Gough* [1896] AC 325.

Unilateral and a Bilateral offer and, consequently, contract. The former is a promise (to pay, or to do) given (e.g. by A) in exchange for the other party (e.g. B) proceeding or refraining from proceeding to an act, without the need for a promise (by B).[306] The latter is the most common type in the insurance market and is, in short, a promise exchanged for a promise. All offers must, of course, be communicated[307] and the offeree must have clear knowledge of the offer[308].

An offer is terminated by specific ways[309], of which the most important ones are Acceptance and extinguishment by a Counter-Offer. Acceptance means a final and unqualified expression of assent to the terms of the offer[310], which, per the offer, must also be communicated[311]. A counter-offer, on the other hand, introduces new terms or attempts to vary the terms that were proposed. As it provides for a new basis of agreement, it destroys the original offer, which is thereforth incapable of acceptance.[312]

The final piece in the formation of a contractual agreement is the Consideration, namely the promise of the receiver of the offer.[313] This must move from the promisor[314], not be merely passed by a third party such as an agent or broker[315], and, more importantly, it must be sufficient, although not necessarily adequate[316].

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[306] E.g: an offer in a newspaper, which is no mere advertisement and invitation to offer: *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256.
[307] See *Taylor v Laird* (1856) 25 LJ Ex 329.
[308] See *Inland Revenue Commissioners v Fry* [2001] STC 1715.
[309] I.e: Acceptance, Express Rejection Refused, Extinguished by Counter-Offer, Revocation, Lapse of Time, Non-Compliance with Condition-Precedent, Death of one party.
[310] The acceptance must correspond exactly to the offer: the Mirror Image rule; otherwise it is a counter-offer. Also, silence cannot constitute acceptance: see *Felthouse v Brindley* (1863) 142 ER 1037; and *The Leonidas D* [1985] 1 WLR 925, per Lord Goff. This is not so in unilateral contracts, as acceptance can be inferred by full performance: see *Daulia v Four Millbank Nominees* [1978] 2 W.L.R. 621; *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256; and *Bowerman v Association of British Travel Agents* [1995] NLJ 1815. Finally, acceptance may be inferred from Conduct: see *Brogden v Metropolitan Railway* (1877) 2 App Cas 666.
[311] See *Entores v Miles Far East Corporation* [1955] 2 QB 327, per lord Denning.
[312] See *Hyde v Wrench* (1840) 49 ER 132. This is not to be confused with a mere request for information which does not invalidate the offer; see *Stevenson Jaques v McLean* (1880) 5 QBD 346.
[313] For complete definition see: *Currie v Misa* (1875) LR 10 EX 153; and *Dunlop v Selfridge* [1915] AC 847.
[314] See: *Tweddle v Atkinson* (1861 121 ER 762.
[315] See: *Re McArdle* [1951] Ch 669; exception: Lampeigh v Braithwaite (1615) 80 ER 255.
[316] Sufficient here is perceived as real, tangible (able of pecuniary valuation), valuable (of actual value); see *Chappell v Nestle* [1960] AC 87. An extreme application of the above is the case *Thomas v Thomas* (1842) 2 QB 851, where just GBP(£)1 per year for rent was considered to be sufficient consideration.

3.4.1.1.3 *The common effect of Equity and Contract Law and their synergy*

From what is provided up to this point, it is observed that the effects of Equity and Contract law to the abandonment process are the same, while they also work in conjunction with each other. According to the Law of Equity, there are two representations during the abandonment exchange: The assured's notice of abandonment is considered as a representation of the assured's will to vest the subject matter insured into the insurer once the insurer has accepted said notice; and the insurer's acceptance is considered as a representation of his will to adhere to the contents of the served notice. Once these representations are communicated and relied upon by each party respectively, then both the assured and the insurer are estopped from going back on them.[317] This means that they have to fulfil their promises.

Under Contract Law, the notice of abandonment is perceived as an offer made to the insurer for payment of the loss, which the insurer then accepts containing therein the consideration to the offer. As this is then a binding bilateral contractual agreement, both parties are prevented from denying what was promised. This means that they have to meet their obligations.

It is thus shown that, though through a different path, equity and contract law conclude on the same result binding the parties in, effectively, the same manner. Ergo, they do not oppose each other, but function in unity protecting both parties from a possible failure to fulfil their commitments. It would certainly not be out of the ordinary to say that both Equity Law and Contract Law apply to the abandonment procedure; what we have is essentially a contractual agreement to which Equity brings balance as per any other contract.

Performance of an existing duty is not sufficient consideration; see *Collins v Godefroy* (1831) 109 ER 1040; and *Stilk v Myrick* (1809) 170 ER 1168. Where one party performs more than agreed then this is sufficient consideration: see *Glassbrook Bros v Glamorgan County Council* [1925] AC 270, where additional police force was requested to arrive on promise of additional payment; and *Hartley v Ponsanby* (1857) & E&B 872, where disserting sailors returned to the ship on promise of additional pay even though the ship was then undermanned.

[317] Assuming of course that there is inequity in going back thereon.

3.4.1.1.4 *The issue of the promises' content*

Aside from the theoretical conundrum on the nature of the law applied to abandonment, there is no objection on the actual effect either rule sets has: once agreed, the parties are bound. The most fundamental point on which one must focus is that of the contents of the Offer and Consideration, or the Representations made by each side. In other words, as the insurer accepts the notice of abandonment, the importance is located at what is subjected to that acceptance. The rule now states that the assured, through the notice of abandonment, offers the subject matter insured and all his rights thereon in exchange for a full indemnification on a total loss basis, while the insurer, through his acceptance of the aforementioned notice, both accepts his obligation to pay for a total loss and agrees to receive the subject matter insured and all of the assured's rights on it no matter its state.[318]

But the acceptance of the insurer is, at first instance, an acceptance of the notice of abandonment and its contents, since that was the Offer (or Representation) and, therefore, it is not a direct acceptance of the abandonment (in the sense of the offered property) itself. Therefore, if, in the notice of abandonment requesting a full indemnification on a total loss basis, the assured does not include an unconditional transfer of the insured property (on a "take it or leave it" basis), then the insurer would not be automatically burdened with it just by accepting the notice.

In the commercial market, it is not at all uncommon for offers, and indeed concluded contracts as well, to include options and rights of choice on what can be taken and given by either party. A perfect example of this common practice is a typical leasing contract: the parties have agreed on the lease of a certain property, with the option for the lessee to, at will, buy the property (e.g. automobile lease) or extend the lease (e.g. property lease) at the conclusion of the lease period.

In a similar fashion, it can be said that the contents of the notice of abandonment are that the assured requests full indemnification on a total loss basis (according to the relevant insurance policy clause and the facts justifying such a claim) and offers to cede to the insurer the subject matter insured and all his rights thereto, if

[318] And this, in spite of ss.63(1) and 79(1) granting a right to election.

he wishes to receive them. Moving to the other side of the transaction, the insurer could, on that basis, be stating that he accepts that the facts justify a total loss claim, that the policy does cover the assured for that claim and that he will pay accordingly. But, in relation to the subject matter's cession, he could be saying that he will retain his right to opt for it at a later stage. These statements would definitely constitute binding representations and therefore form a binding contract.

But even in the extreme of construing the option to take over at a later point as materially different from what the assured offered, there would still be a binding contract under contract law: The insurer's proposal would amount to a counter-offer, which would form a binding agreement once accepted by the assured (and we may rest assured that he would always accept upon receiving acknowledgement of the insurer's liability to pay).[319]

A disbelieving observer could state that the MIA 1906 provisions relating to what has been proposed directly above are dissimilar and that they would impose a different result. But we must not forget that not all of the Act's sections are of mandatory nature and, therefore, those that are not, such as the ones under examination, can be substituted by the contracting parties' agreement.[320] So, by looking into what the parties did in fact agree, that argument would be defeated. Nevertheless, it can be easily noted that what was seen as the content of the parties' exchange bears great similarity to ss.62 and 63. So, let us bring them too under consideration.

Let's assume that the parties do not follow the above exchange of communication, but trade little words amounting to an agreement that would rely heavily on the MIA 1906 sections.[321] Then the assured would be effectively proposing in his notice of abandonment the contents of s.1, on claiming the amount agreed to according to his loss, s.60, on the facts elevating the loss to a constructively total one,

[319] See *Kusel v Arkin (The Catariba)* [1997] 2 Lloyd's Rep 749, where Colman J. construed the wording of the parties' correspondence holding that the assured had not clearly enough given a notice of abandonment but merely requested a clarification of intent and that the insurers, through their reply, had either given an offer, or, alternatively, a counter-offer awaiting the assured's reply.
[320] E.g: ss.4 and 17, MIA 1906.
[321] Also assuming that the Insurance Policy does not contain any clauses to the contrary.

and s.61, that he is abandoning the subject matter insured and treating the loss as constructively total. Should the insurer, in a similarly simplistic pattern, accept that offer, we would have to turn to s.62(6) in order to realise the results stemming therefrom. It is undisputed that the insurer would have conclusively admitted that the notice is sufficient for the assured to make such a claim and that he is liable for that loss. What is unclear is the first part of the section, its connection to the second part, namely "where a notice of abandonment is accepted the abandonment is irrevocable", and the role and synergy of ss.63(1) and 79(1).

3.4.1.2 *Abandonment and Irrevocability in s.62(6)*

The relevant section of the MIA 1906 contains two words that have sparked many a debate. These two words are "abandonment" and "irrevocable". The former is equivocal in its meaning, while the latter in its connection with the second sentence of the section and the extent of its effect, as will be explained below.

3.4.1.2.1 *Abandonment*

Starting with the word abandonment, we notice that it is used more than once throughout the MIA 1906 and, most interestingly, containing different meanings.[322] Sir Mackenzie Chalmers, the draftsman of the Act, recognised the multiple meanings of the word "abandonment".[323] He characteristically said that "abandonment denotes the voluntary cession by the assured to the insurer of whatever remains of the subject-matter insured, together with all proprietary rights and remedies in respect thereof" and that "secondly, but incorrectly, it is used as equivalent to notice or tender of

[322] See: *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, per Tomlinson J, at 25; and *Kastor Navigation v AGF MAT (The Kastor Too)* [2004] 2 CLC 68, per Rix LJ, at 53.
[323] Chalmers' Marine Insurance Act, J.G. Archibald and Charles Stevenson, 4th ed., 1932, Butterworth & Co, p.86.

abandonment, that is to say, the act by which the assured signifies to the insurer his intention to abandon what remains and claim for a total loss". Lord Wright[324], agreeing thereto, expressed the view that abandonment and notice of abandonment are "two separate and distinct things, though they are frequently confounded together in expression".[325] Thus, we can tell that the confusion in the use of the word chronologically precedes the MIA 1906 itself and as per the perception of the rules on abandonment, so too the misperception regarding that word has survived to our days.

The main definition of "abandonment" has remained almost intact, as per the "voluntary cession" definition above[326]; i.e. a voluntary cession of all that remains of the subject matter insured, before the total loss claim. But in s.60(1), it has been construed to mean the physical abandonment[327], or abandonment of the subject matter insured to its fate. That is to say, not to a third party, as for example the underwriters.[328] Moreover, in ss.61 and 62, abandonment is viewed as the assured's election[329] to abandon the subject matter insured, therethrough expressing his choice of treating the insured asset as constructively totally lost; notwithstanding the fact that

[324] In *Norwich Union Fire Ins Co Ltd v Price* [1934] A.C. 455 PC, at 465.

[325] Also see: *Rankin v Potter* (1873) LR 6 HL 83, per Lord Chemsford, also see advice of Baron Martin in same case, at 144; and *Kaltenbach v Mackenzie* (1878) 3 CPD 467, per Brett L.J.

[326] E.g. *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras.29-03, 30-02 and 30-28.

[327] See *Court Line Ltd v The King* (1945) 78 Ll. L. R. 390, per Stable J, at 400: "The subject-matter insured must be an 'animo dereliquendi sine animo revertendi et sine spe recuperandi'"; *Bradley v Newsom* [1919] A.C. 16, where it was found that abandonment of the vessel or the cargo is a fact objectively viewed; and same in *Robertson v Nomikos* [1939] A.C. 371, per Lord Wright, at 382: "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".

[328] See: *Kastor Navigation v AFG MAT* [2004] EWCA Civ 277; *Court Line v The King* (1945) 78 LL. L. Rep. 390, 397. It has been expressed as an opinion, that the abandonment to the insurers is the effect of the s.61 decision. But that option would still be relative to the meeting of the constructive total loss requirements under s.60(1), which is not the same with the property cession to the underwriters; see *Kastor Navigation v AFG MAT* [2004] EWCA Civ 277; and *Robertson v Petros Nomikos Ltd* [1939] A.C. 371, 381-382.

[329] The word "election" does not contain its traditional meaning as a final decision and it is not considered to be irrevocable until it has been accepted by the insurer, since contra-indicative conduct can provide for an irrevocable presentation not to claim for a CTL, or an indication of the notice's withdrawal; see *The Kastor Too*, per Rix L.J., para.78, p.137: "It is rather that, in the absence of treating the constructive loss as total loss, the assured may be taken to have elected to have treated it as partial loss".

the notification of the choice is actually made through the notice of abandonment, which is also the property's vesting offer.[330]

Most indicative of the above was the case *Court Line v The King*[331], where the desertion of the ship by her master and crew was considered as a different kind of abandonment than the typical act. This was an abandonment in reference to s.60(1) of the MIA 1906. The distinction between that type and the one contained in ss.61 and 63 was underlined by Scott LJ[332]: the former was the abandonment of a ship to her fate, which would then justify an abandonment to the insurer, while the latter was the abandonment of a ship to her underwriters, as well as the assured's declaration of making up his mind that he will give notice of abandonment to the insurer under s.62(1), in fear of losing his s.61 right of election. To that, Rix LJ[333] acceded, albeit distinguishing Lord Wright's view in *Robertson v Petros Nomikos*[334]. Scott LJ, finally, made a general comment, similar to that of Sir Chalmers above, that "abandonment" is often used as shorthand for "notice of abandonment".[335]

3.4.1.2.2 *Application of the correct meaning and the second sentence of s.62(6); the Irrevocability's extent of effect*

Given the controversy related to the term "abandonment" and the importance of its definition, we reach the point where we have to apply the correct meaning to the word "abandonment" in s.62(6). To paraphrase Lord Ashbourne in *The Crystal*, this section may not be clear, its interpretation difficult and its language infelicitous, but it can be made to work smoothly and without difficulty, and this is what we shall do.[336]

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[330] See: *Royal Boskalis Westminster NV v Mpuntain* [1997] L.R.L.R. 523, 556; *The Kastor Too*: "That notice, however, does not effect abandonment, even if it is valid. It is essentially an offer to cede, a formal or even informal recognition, that, if the insurer so elects, he will, upon payment, be entitled to a complete interest in the thing insured or what remains of it as from the time of the casualty. If that offer is accepted it becomes irrevocable. If it is rejected, like any other offer it can be withdrawn".
[331] (1945) 78 Ll L Rep 390.
[332] At 397.
[333] *Kastor Navigation v AFG MAT* [2004] EWCA Civ 277, at 76.
[334] [1939] AC 371, at 382.
[335] At 48.
[336] *Arrow Shipping Co Ltd* v *Tyne Improvement Commissioners (The Crystal)* [1894] AC 508, per Lord Ashbourne, at 524, while discussing s.56 of the Harbours, Docks and Piers Act 1847. Please note that

In the writer's opinion, the correct meaning would be: "notice of abandonment", in the sense of the assured's Offer or Representation. To be more precise, the word would refer solely to the assured's part in the abandonment transaction. This approach would bring the following results: The assured would be unable to retract his offer at a date later than that of the notice's acceptance, thus ensuring the stability of the parties' relationship; the insurer would not be automatically burdened with a potential hazard[337], which he did not wish to take over ab initio; the insurer will have ensured his willingness to fully indemnify the assured, as well as his recognition of a valid claim and service of a valid notice of abandonment; and finally, the insurer will be keeping the right to take over the subject matter insured at a later date according to s.63(1) and the similar right of s.79(1), after payment and without being prejudiced by said acceptance.

Proceeding to the reasons for such a construction, we must point out that one of the oldest and most fundamental requirements of law is certainty.[338] This is more important in relation to the parties' choices in cases of abandonment.[339] As the assured is required in constructive total loss cases to immediately respond and choose whether he will treat his loss as partial or total[340], then this construction of "abandonment" would be fully compatible with the spirit of Marine Insurance law. Moreover, the response of the insurer would be clear and binding, satisfying in that

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the referenced part is not quoted, nor it is used for its legal or factual relevance, but it is rather paraphrased and used for its use as a *maxim*.

[337] If the cargo or ship has suffered a CTL, then most probably it will certainly be in dire need of extensive expenditure, as by default, in order for one to claim for a constructive total loss, the expenses for recovery or reinstatement of the abandoned property must be very close to, if not above, the insured value; e.g. s.60, MIA 1906.

[338] See: *Lockyer v Offley*, 1 TR 252, 259; *Sailing Ship Blaimore v Macredie* (1898) AC 593, 597; *Vallejo v Wheeler* (1774) 98 ER 1012, 1017, per Lord Mansfield: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established in one way or the other. Because speculators in trade then know what ground to go upon"; Mackenzie Chalmers' preface to 1st edition of Digest on Marine Insurance law, at p.X: "In dealing with rules of law, which may be modified by the stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection"; and Mackenzie Chalmers, Codification of Mercantile law, 1903, 19 LQR 11, 14-15: "The object of the man of business is not to get a scientific decision on a particular point, but to avoid litigation altogether. On a whole, he would rather have a somewhat inconvenient rule clearly stated than a more convenient rule worked out by a series of protracted and expensive litigations pending which he does not know how to act".

[339] E.g. in relation to the service of the notice of abandonment, see: *Kaltenbach v Mackenzie* (1878) 3 CPD 467, per Cotton LJ, at 479-480, and Brett LJ, at 472-473.

[340] See MIA 1906, s.62(3).

way both parties' needs, namely full indemnification on the assured's part and highest possible mitigation of loss (in surplus of the legal principle's satisfaction of no double gain[341]).

It is an effortless observation that s.62 only deals with the notice of abandonment, i.e. its effects and the accompanying burdens (as the title of the section also suggests "Notice of abandonment"). This is clearly done from the assured's point of view, displaying his rights and obligations in relation to the service and the reception of the notice of abandonment. Also, the latter part of s.62(6)[342], which imposes clear duties on the insurers in case they accept the notice of abandonment, avoids a direct inclusion of the underwriters and preserves the section's point of reference, namely the notice. The only exception to this pattern is s.62(9)[343], where the insurer is directly related to the section's contents. But even then, it is the notice that is in the spotlight. This emphasis on the notice is undeniably obvious. As an example we may look to s.62(4), where the Act makes a discernible effort towards the survivability of the notice of abandonment in favour of the assured, even though, in the case described in that specific sub-section, the notice has been rejected by the insurer. It would be useful at this point to borrow the very first phrase of Prof. Merkin's commentary on s.62(6)[344], which offers support to the above: "This section is concerned only with preserving the assured's right, following a constructive total loss, to recover an indemnity based on total rather than partial loss; this is achieved by the service of a notice of abandonment".

An interjection should be made here to add the view of Atkins J in the *Pesquerias v Beer*[345] case, where he said that the assured's notice of abandonment is an offer remaining active until accepted and that, up to that point, one may look into events that could restore the assured's property. This was considered as the reason for s.62(6) stating that after acceptance "abandonment is irrevocable"; i.e. so that the

[341] Marine Insurance Policies are contracts of indemnity and therefore profit is not their legal justification; e.g. see: *Castellain v Preston* (1883) 11 QBD 380, Brett LJ, p.386.
[342] "The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice".
[343] "Where an insurer has re-insured his risk, no notice of abandonment need be given by him".
[344] Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010.
[345] Pesquerias y Secaderos de Bacalao de Espana SA v Beer (1945) 79 Ll L Rep 417, at 433.

insurer would not, after acceptance, bring forward a defence of later events lessening his obligation of payment (from total to partial). It is noted that the learned judge correlated the sub-section to the notice and not to the whole process of abandonment and that he perceived the irrevocability to be intended as the stabiliser of the initial parties' relations, as well as of the claim's nature; it was not perceived as defining the insured asset's prospective owner.

As the word is construed today (i.e. as essentially providing for a lack of choice to the insurer, other than that of acceptance or declination of the notice of abandonment[346]), it forms an antithesis with and eradicates what are otherwise two statutory rights, which are explicitly presented as elections and not obligations.[347] In other words, ss.63(1) and 79(1) offer the insurer the choice to take over what remains of the insured asset. It would, therefore, be incongruous to impose such a wide restriction thereon.[348] The proposed understanding, on the other hand, is systemically sound in relation to the reasons for the separation of ss.62(6) and 63(1), as well as with the existence of the latter section (s.63). Tomlinson J[349] and Scrutton LJ[350] supported this by stating that s.63 was introduced with the purpose of not having an unavoidable transfer of property due to acceptance of the notice of abandonment. If taking over of the subject matter insured was without an option, then there would be no reason for s.63(1) to be written independently, but instead it would be incorporated, if at all preserved, in s.62(6). It is indeed curious to see a function for the former section according to the current approach of the rules of abandonment. While on that matter, it is fit to state that the two sections providing for an election show that the draftsman of the Act had in mind to grant the freedom of choice to the underwriter on whether to take over a very expensively restorable or repairable subject matter insured; which is only logical considering that the insurer's main role is one of restoring the

[346] On irrevocability see: *Smith v Robertson* (1814) 2 Dow. 474; *Hudson v Harrison* (1821) 3 Brod. & Bing. 97; Bourlay-Paty: "Par leur acceptation volontair il s'est fait un pacte entre les parties qui a tout termine", 4 Bourlay-Paty, Droit Com. 380.
[347] S.62(6): "…the insurer is *entitled* [my emphasis] to take over the interest of the assured" and s.79(1): "…the insurer (…) becomes *entitled* [my emphasis] to take over the interest of the assured".
[348] Provided also that the sections are of equal stature and so none is given more merit over the other.
[349] In *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, at 27.
[350] In *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, at 687.

financial equilibrium of the assured (namely to indemnify), not of performing also as a means of disposal of severely damaged and dangerous property.

Support to the above can be clearly found also in Sir Mackenzie Chalmers's annotation of the Act[351] and in Tomlinson J's judgment in *Dornoch v Westminster*[352]. The former followed a very structured and logical approach towards the correlation and complementation between the Act's sections. Under that scope, he approached s.63 as the commonsensical continuation of s.62; i.e. after dealing with the issues of the service of the notice of abandonment, we then proceed to tackle the rights of the parties on acceptance of the notice and after acceptance has taken place. Similarly, the right of subrogation (s.79), as also applicable to cases of constructive total loss, makes for the final part of the process, though it belongs to a separate group of sections. But, as it is separate and of general application (i.e. in both total and partial losses), it is unprejudiced by one party's elections (as per the s.62 acceptance for instance). In other words, due to the structure of the Act itself and the explanatory approach of its draftsman, it could be said (and should be concluded) that s.62(6) is the preface of the abandonment procedure, with ss.63 and 79 constituting the middle and end of the structure, respectively.

Tomlinson J was even clearer in his presentation of his view on the matter. He tried to construe s.62(6) and therethrough observed something of great significance: the word used was "irrevocable" as opposed to "complete", "perfected", or any other word indicating that the process of abandonment has become concrete, clear and definite in its results. It is at this point that the second part of the sub-section comes into play. If the second sentence is seen as explaining what the word "irrevocable" means and how it affects abandonment, then the approach followed by Tomlinson J is to be found only as consistent with the structure of s.62 and its connection to the other parts of the Act.[353] This would mean that, should the insurer accept the notice of abandonment, he would then only be admitting his liability for full payment for a constructive total loss and also admitting the validity of the assured's offer of cession. If it is not so and acceptance of the notice of abandonment, without any other qualifications, achieves the session of interest from the assured to the underwriter (a

[351] See: Chalmers' Marine Insurance Act 1906, E.R. Hardy Ivamy, 9th ed., Butterworths, 1983.
[352] [2009] 1 C.L.C. 645, at 35.
[353] Once again this is most important in relation to ss.63(1) and 79(1).

fact denied by certain cases[354]), then it is unquestionably unnecessary for the Act to explicitly explain, inter alia, that one of its consequences is admittance of the notice's sufficiency.

Finally and in agreement with Sir Mackenzie's view, Tomlinson J found most curious the fact that, per today's approach, abandonment in general is held to be irrevocable, and, therefore, s.62(6) affects, defines and nullifies rights recorded at their earliest point after s.62.[355] For that reason, the judge continued, the consequences of s.62(6) could only be received as the results of acceptance on the notice itself and as unable to amount to the exercise of a right described for the first time in the next section.

After all, as Lord O'Hagan said, *qui haeret in litera, haeret in cortice*, which means: he who clings to the dry and barren shell (namely the literal), misses the truth and substance.[356]

For reasons of completion, it must be said that there is a connection to be found between the Act's provisions and the Contract and Equity Law analysis in the previous part of the chapter. It is undisputed that at the stage of acceptance, the agreement between the assured and the insurer is made and binds them[357], but, as already said, it is important to acknowledge what the acceptance holds. It is thusly not illogically assumed that the second sentence of s.62(6) is (in full or in part) what the insurer accepts. So, as the acceptance refers to the notice of abandonment and not the abandonment in whole, the insurer would be actually accepting his liability to pay on a total loss basis and the validity of the notice of abandonment, but not also that he is at that very moment accepting the abandoned property as his own. The Act, we can

[354] E.g. *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1930] 1 KB 672; *Oceanic Steam Navigation v Evans* (1934) 50 Ll. L. Rep. 1.

[355] That is to say s.63(1), which provides what it is that the insurer is entitled to take over in cases of valid abandonment and s79(1), which deals with the rights of subrogation after payment for a loss.

[356] *River Wear Commissioners v William Adamson* (1876-77) L.R. 2 App. Cas. 743, per Lord O' Hagan, at 758.

[357] While its conclusion will come with the payment of the total loss and the meeting of any typical requirements needed; for instance, in cases of vessels: the inscription of the new owner's name (the insurer's) in the appropriate registry; e.g. MSA 1995, Part II (ss.8-23) and Sched.1, and Merchant Shipping (Registry of Ships) Regulation 1993; reg.56(1)(c).

say, was merely explicit in with what it was burdening the parties and that the separation of the two sentences in a disjunctive, rather than conjunctive, manner was, perhaps, an error in syntax. Equally under Equity Law, the same result would be produced.

In terms of Equity in particular, it is of interest to synoptically present Rix LJ's view.[358] In *The Kastor Too* case, he seemed to be applying the mutual estoppel approach to the Act's sections and, specifically, to the issue of s.62(6) and the rights to take over.[359] This was done in the sense that the assured is estopped from retracting his offer to cede and the insurer is estopped from denying indemnification, but also from denying the abandoned property's take over, because of his acceptance of the notice of abandonment. But under this peculiar construct, according to the analysis of Equity's mechanisms above and following the MIA 1906 sections, the insurer's representation will have the contents of s.62(6), which is unconnected to and non-inclusive of any proprietary transaction. Therefore, the right to take over would be unprejudiced and so the insurer would not be estopped from denying taking over the abandoned asset. As it was analysed in the Contract and Equity Law section above, the important point of reference is the contents of each party's representations and it is a fact that a strong basis for s.62(6) overpowering ss.63(1) and 79(1) has yet to be found.

3.4.1.3 *Issues with s.63(1)*

[358] *The Kastor Too* [2004] 2 Lloyd's Rep. 119, at 76.
[359] Per the *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 220 approach.

At this juncture our analysis moves to the next relevant parts of the MIA 1906, the already mentioned s.63(1)[360], as well as the much relevant s.79(1)[361]. These sections include two rights of distinct nature, and origin. One is dependent on and included in abandonment, while the other is so on subrogation. They are also triggered by different events, namely a valid abandonment and payment for the loss, respectively. It is important to add that the rights conferred by these sections can exist in parallel and in conjunction to one another, as, for example, s.63(1) can only be applied to constructive total loss cases, but s.79(1) can apply to cases of partial, as well as total loss.[362] Notwithstanding the above, in relation to constructive total loss cases, they bear one important common effect, the cession of the assured's property to the insurer.

3.4.1.3.1 *The election to take over of s.63(1)*

This section has been much overlooked, or bypassed without many cases referring to it. Where it has been reported, it is either prejudiced by the acceptance of the notice of abandonment or loses its importance in the face of s.79(1).[363] This does not entail that there are no issues arising out of it, nor that its significance should be thusly diminished. Specifically, the two issues discussed below that are sourced by the above fact are, firstly, connected to the relationship with s.62 (and especially sub-section 6) and, secondly, to the issue of what constitutes a "valid abandonment", which triggers the right of the insurer to take over the abandoned asset.

[360] For additional details on this section's functions and its origins, see: *Cammell* v *Sewell* (1858) 3 H & N 617; and *Houstman* v *Thornton* (1816) Holt NP 242; and Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010.
[361] For the basis of the right to subrogation, see: *Banque Financiere de la Cite* v *Parc (Battersea)* [1998] 1 All ER 737, at p 744.
[362] On the general principles of the insurers' right to subrogation see: *Lord Napier and Ettrick v Kershaw* [1999] 1 All E.R. 545.
[363] E.g. see Tomlinson J in *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, at 36 and 39; Lord Atkin, in *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55, at p.61; and *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-09.

As we discussed in a previous chapter, in most pre-MIA 1906 cases, acceptance of the notice of abandonment was considered as not required for a transfer of property. It was only the fulfilment of the abandonment procedure's typical criteria that was needed.[364] But there is case law which disagreed thereto. Bramwell L.J., in *Englinton v Norman*[365], was quite clear on that matter. "A man", he said, "cannot become an owner without his assent". The underwriters, he continued, had a right to become owners if they chose, but would not become so untill they chose to exercise their right.

This can be effortlessly conveyed in today's system by the statement that the insurers shall become owners of the abandoned property if they so choose to and according to the provisions of the MIA 1906; which allow for such a choice after the one in reference to the notice of abandonment itself. A possible reply to this conveyance could be that this choice is only made at the time of the notice's acceptance (or rejection). But, in response, the various relevant sections of the Act should be considered.[366] Since freedom of choice was clearly given above, per Bramwell LJ, as a principle, then this must be the bedrock of the sections' construction. For that reason, seeing as there is a tier of election beyond that of the reception of the notice of abandonment, then this additional stage should not be omitted or otherwise nullified (namely the right of s.63(1); and the corresponding right of s.79(1)).

3.4.1.3.2 *Valid abandonment*

In order for s.63(1) to be triggered, a "valid abandonment" is required. To most, these words initially seem to be vague and subject to multiple interpretations. It

[364] See: *Stewart v Greenock Mar Ins Co* (1949) 2 H.L.C., per Lord Cottenham at 183; but opposite dicta in *Eglinton v Norman* (1877) 46 L.J. Ex. 557, 559, per Bramwell L.J.
[365] (1877) 46 L.J. Ex. 557, 559.
[366] See: *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, Tomlinson's comment, at 39, on that approach, as it was adopted by Rix LJ in *The Kastor Too* [2004] 2 Lloyd's Rep. 119, at page 136, paragraph 76, and Arnould [*Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013]; in summary he disagreed, as he found that opinion to be an unnecessary elaboration of the abandonment process and a confusion of the ss.63(1) and 79(1) due to their similarity in wording.

is also a fact that case law has not been consistent in how it has treated this requirement and so we have reached a point where even if s.63(1) comes into play, the above phrase is considered to mean, either full and complete abandonment in order for the section's option to be open to the insurer, or an irrevocable abandonment following the peculiar construction of s.62(6).[367] It is the belief of the writer that such an approach is erred in that it misinterprets the wording and structure of the Act and therethrough deprives the parties of rights and elections that would have simplified the abandonment process and eased their decisions. By forcing such a complex concept, s.63(1) becomes dependent upon the irrevocability of abandonment, as portrayed in the various cases that construe it as referring to the whole process of abandonment. Similarly, the above approach identifies this right to the s.79(1) right of subrogation, denying another layer of elective right.

Moving to the case law, we see in *Court Line v The King*[368] that Scott LJ approached the matter shortly, but produced a clear result.[369] He found that a "valid abandonment" in s.63(1) must mean an abandonment by the assured that qualifies to the passing of the property from the assured to the insurer and was distinguished from what is contemplated in s.60(1), which is an act done in consequence of an actual total loss appearing unavoidable. So, a need for the inclusion of the property's cession, as a certainty (i.e. of the completed abandonment process), was recognised and not for the initial fulfilment of the abandonment's criteria irrespectively of the property's ownership. In the *Attorney General* case, Lord Atkin also perceived the phrase as having that meaning.[370]

On the other hand, in fear of his wording being misunderstood to mean that there is a need for a fully accepted abandonment, Tomlinson J in the *Dornoch* case clarified it as meaning an abandonment that only needs to fulfil the typical conditions for a constructive total loss claim and be communicated through a notice of abandonment.[371]

[367] E.g. see *The Kastor Too* [2004] 2 Lloyd's Rep. 119, per Rix LJ, at 76.
[368] (1945) 78 Ll L Rep 390.
[369] At 397.
[370] *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55, per Lord Atkin, at p.61.
[371] See: *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, per Tomlinson J., at 36-39.

The same conclusion was reached by Sir Mackenzie Chalmers.[372] In his work, up to and including the 10th edition[373], he retained the same opinion on the interpretation of the MIA 1906 and specifically on the issue of the right of s.63(1) not being prejudiced by the acceptance of the notice of abandonment. While discussing the right of s.63(1), he was adamant in that there is no absolute transfer of property through abandonment. To that argument's defence he offered that the transfer of property, or as he referred to it a "valid abandonment", according to abandonment is not absolute, but rather conditional upon the continuing satisfaction of the constructive total loss criteria. This was to mean that a valid abandonment can be defeated by a second act; e.g. through the recapture of the property, the lessening of the restoration expenses' amount to a point not justifying a constructive total loss claim, or through any other fact degrading the loss to a partial one (barring the cases, where, notwithstanding the above, the insurer is willing to pay on a total loss basis). Similarly, the draftsman continued, an insurer can disclaim an onerous property, which is properly abandoned to him.[374] Therefore, an abandonment may be "valid" without the need for the notice of abandonment to be accepted and, much more, without the need for the whole process of abandonment to have been concluded.

In terms of written works on the theory thereto, there is one that should be mentioned.[375] It is the commonly cited 19th century work of Phillips on Insurance.[376]

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[372] Sir Mackenzie Chalmers, *Chalmers' Marine Insurance Act* 1906, J.G. Archibald and Charles Stevenson, 4th ed., Butterworth & Co, 1932, at p.86.

[373] Chalmers' Marine Insurance Act 1906, E.R. Hardy Ivamy, 10th ed., Butterworths, 1993.

[374] As examples of such a leisure he brought forward the fact that the Commons Committee changed the final wording of s.62(6), of the Marine Insurance Act 1906, from "is entitled to whatever remains" to "is entitled to take over". He also mentioned the same right appearing in French Law; see *Traite d'Assurance*, paragraph 136.

[375] There is another book approving of the same approach, though it is not so directly given. It is the relatively recent book of Susan Hodges (*Susan Hodges*, *Law of Marine Insurance*, Cavendish Publishing, 1996, p.9-10). Therein she too agreed with the notion that the s.63(1) right is unprejudiced by the acceptance of the notice of abandonment, though she supported this through a rather peculiar train of thought. It was shown that s.63(2) is a section giving entitlement to the underwriters to take over the freight after they have accepted the notice of abandonment. The only alternative to this approach that was found would be the automatic transfer of proprietary rights as of the time of acceptance or payment as expressed by Lord Diplock in the case *Simpson v Thomson* (1877) 3 App Cas 279, at 292. It was, so, implied that as the section did not offer that automatic option, it would so too be so in regard to s.63(1).
Also see: *F.D. Rose*, Marine Insurance: Law and Practice, 1st ed., LLP, 2004, Ch. 24 *Effect of Abandonment*, para.24.52 *Rights over subject-matter*, where while addressing the possibility of an abandoned property becoming a res nullius, he said that ss.63(1) and 79(1) are bringing their results

In there, the author investigated, inter alia, what a "valid abandonment" was and the results it brought. His initial phrase was that "It is the effect of a valid abandonment to transfer the property in the subject". He then went on to say that payment for the total loss claim by the insurers, following the abandonment of the property lost, will give them title to the property and its remains in proportion of the amount insured. Per Sir Chalmers, he too commented on later events that may reverse the validity of the abandonment and insisted on the consideration of the time when the loss occurred. Considering that in the 19th century the option of s.63(1) was not existent, that there was also no need for acceptance of the notice and that there is great similarity to Sir Chalmers's approach above, then, if Phillips's words were to be transferred to the current setting of maritime law, he would undoubtedly be in agreement with the proposition that "valid abandonment" is the abandonment that has satisfied the legal requirements so as for the assured to be able to claim for a constructive total loss, instead of a partial loss (that is to say being made according to the proper procedure and justified by the facts of the case, especially at the time of the loss). Accordingly, the abandonment's validity would be accepted as independent of the notice's acceptance, which would, in turn, only be completely extraneous thereto.

From the above we may now with certainty say that s.63(1) is applicable to all cases where abandonment has been legitimately effected, or, in other words, where the constructive total loss criteria have been met. It is also independent of any other acts and facts, such as the indemnification for the claim, or even the irrevocability of the notice or the abandonment as a whole. Seeing the independence of the section towards the completion of the abandonment process and its fervent relation to the notice of abandonment in particular, then, in addition to the previous part of this chapter, the above extrapolation forms yet another reason for s.62(6) to be construed in such a way so as for the irrevocability to not encompass the entire abandonment

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to bear, including the acquisition of the assured's interest, not automatically on abandonment or payment (opposite of Rix LJ in *The Kastor Too* case), but only under the provision that the insurer has made the elections contained therein. The sections also provide, the author continued, the "where the assured still has an interest, the insurer *may* [my emphasis; and see Tomlinson's comment in the *Dornoch* case on the s.62(6) wording and its significance] take it over".

[376] 2 Phillips on Insurance, 417, 418, Boston edit., 1840.

procedure, but only the notice of abandonment in the sense of the assured's offer alone.

Parenthetically, there is the issue of the section's non-application to cases where the notice of abandonment has not been accepted. This can lead someone to believe that the acceptance of the notice and the right to election are strictly connected per the current theory on the abandonment's irrevocability. But this leap of logic leads to the hyperbole of s.62(6) subduing s.63(1). Moreover, it is the lack of the insurer's will to indemnify the assured as per a total loss and the accompanying lack of a basis for a security for the insurers, as there is no right to secure, that denies them the s.63(1) right.[377] This last point has been consistently treated by the courts as settled and will not be further discussed.

3.4.1.4 *Issues with s.79(1) and the matter of Subrogation*

As a reminder of the general target of this chapter, it is repeated that the writer is searching for proof that: through s.62(6), namely the notice's acceptance, the assured secures his right to indemnification; through s.63(1) the insurer receives a right to elect to take over the subject matter abandoned to him; and through s.79(1) he gains the same right to elect to take over, after payment for the loss. This is contrary to the current perception of the law regulating the cases of abandonment and the long standing belief of the market that the above sections are prejudiced from the fact that the notice was accepted. Below, we dissect s.79(1) and see its contents individually and in connection with the other two relevant sections of the Act.

3.4.1.4.1 *Generalia specialibus non derogant*

The first issue to be encountered under s.79(1) is that, in comparison to s.63(1), it is not as specific to the process of abandonment. For that reason, the legal principle

[377] E.g. see *Dornoch v Westminster* [2009] EWCH 889 (Admlty), per Tomlinson J., at 41 and 55.

of *generalia specialibus non derogant*[378] could be considered as preventing s.79(1) from overpowering the former, as it was considered in some past cases. On the contrary, as the election of s.63(1) is considered to be pre-ordained by the acceptance of the notice of abandonment, which renders all of the abandonment's procedure's options as irrevocably decided, then, according to the above legal principle (s.79(1), as more general, would be dependent, if at all considered in the process, on the effects of the more specialised s.63(1)), it would be concluded that s.79(1) should be in a similar way prejudiced in terms of the right of election based on subrogation.

But it is because of the fact that the right of subrogation forms a separate part of the Act that it confers a distinct right to the insurer and is, and should be, unhindered by the previous parts. The insurer's right to subrogation is one of the triptych contribution-abandonment-subrogation. These may be interrelated in practice, as it is not uncommon for marine insurance law cases to include issues on most if not all of these rights, but this does not mean that they are also, in their theory and without additional acts by the parties, precluding the exercise of said rights.[379] In particular, abandonment and subrogation are clearly separate and independent, in that, inter alia, they have different requirements, they are triggered by dissimilar facts, transfer diverse rights and are unconnected, barring the fact that subrogation will follow abandonment in chronological order as the final step of the insurance and indemnification procedure. Thusly, abandonment, and respectively subrogation as well, would not, by itself and without more obstruct the right of subrogation or otherwise prevent the options conferred by that right, such as the election to take over the subject matter abandoned. To be more specific, the point the writer is trying to make is that s.62(6)'s irrevocability, irrespective of how it is applied,[380] should not be considered to encompass the right of subrogation and therefore, s.79(1) should operate free of the notice's acceptance. This would be in an analogy to the cases where, notwithstanding the fact that the notice has been rejected, the insurer may still indemnify the assured as for a total loss and still claim the rights of s.79(1) unprejudiced by the above rejection.[381]

[378] "The general [rule] cannot dominate the special [rule]".
[379] E.g. see *O'Kane v Jones (The Martin P)* [2003] EWHC 2158 (Comm).
[380] See: 3.4.1.2 Abandonment and Irrevocability in s.62(6), above.
[381] This is now trite law.

3.4.1.4.2 *Subrogation: election or inherent right*

A further matter of interest on the relevant section, notwithstanding its brief analysis below, is whether the subrogation process is one operated automatically by law after the insurer has paid for the assured's loss, or if it is a right granted by the insurer's election. The significance of this question is that if the answer is the latter, then the insurer will be able to exercise said right when and if he wishes, while, with the former answer, this would not be possible and the insurer would have to be burdened.

On that point, the learned judge of the *Dornoch*[382] case said that, though in general cases the right to subrogation is granted by operation of the law, in cases of constructive total loss it is not conferred upon the insurer involuntarily; and that he was unable to find any authority to the opposite. The wording of Lord Goff in *Napier*[383] and of Lord Blackburn in *Simpson v Thompson*[384] provided for the general rule, but Tomlinson J distinguished s.79(1), as the above views were inconclusive to the current point. This section was clearly seen as dependent upon the insurer's election to be subrogated in the assured's rights. Tomlinson J repeated this approach in another point of the same case.[385] There, he agreed with Scrutton LJ in the *Allgemeine*[386] case and the formulation of Chalmers in that the insurer has an option and not an obligation to take over, or, in the words he used, that "it is left open to the insurer not to take over the interest of the assured, though entitled to take it over".[387]

3.4.1.4.3 *The separation of s79(1) and its relation to ss.62(6) and 63(1)*

This part will deal with the issue of whether s.79(1) consists of separate parts representing different rights and how their constructions interrelate with the other two relevant sections of the MIA 1906. The subrogation section of the Act reads: "Where

[382] [2009] 1 C.L.C. 645, at 53.
[383] *Lord Napier and Ettrick v Hunter* [1993] 1 All ER 385, at p.745.
[384] (1877) LR 3 App Cas 279, at 292–293.
[385] At.27.
[386] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672.
[387] Chalmers' Marine Insurance Act 1906, E.R. Hardy Ivamy, 10th ed., Butterworths, 1993.

the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, *and he is thereby* [my emphasis] subrogated to *all the rights and remedies of the assured in and in respect of that subject-matter* [my emphasis] as from the time of the casualty causing the loss". Given the idiosyncratic syntax of the section, there have been several opinions expressed, which hold that the section is actually split in two parts and that this separation has a distinct effect to the function of s.63(1).[388]

One of these opinions is that the first part of the section deals with the issue of the subject matter insured being ceded to the insurers as a matter of right to salvage.[389] It is this part that is supposed to transfer the proprietary rights and it is based on the fact that the insurer has paid for the total loss, so that the assured has no loss, but also, because of this right and the indemnity principle disallowing for a double gain, the subject matter insured is the insurer's to dispose of as he sees fit.[390] This right of ownership is existent in both constructive and actual total loss cases.[391]

The second part, the same theory continues, is the one dealing with subrogation.[392] Therefrom stems the right of the insurer to be subrogated in the rights

[388] See: Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010, on s.79.

[389] See: *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, per Scrutton LJ, at 687; and per-MIA 1906 case law, e.g. *Stuart v Merchants* (1898) 3 Com Cas 312, 314, 315, per Bigham J, who, while discussing the matter of a third party having the right to the subject matter abandoned (per an object abandoned to the world) referred to the abandoned property as salvage.

[390] See *Castellain v Preston* (1883) 11 QBD 380, per Brett LJ, at p.386: "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong".

[391] As of the time of payment, the results of abandonment trace retrospectively back to the time of the loss. On the liabilities of each party: the assured cannot evade his pre-loss obligations, see *Dee Conservancy Board* v *McConnell* [1928] 2 KB 159 and *The Ella* [1915] P 111; obligations created after abandonment and payment have been made burden only the insurer, see *Barraclough* v *Brown* [1897] AC 615 and *Boston Corporation v France Fenwick* (1923) Ll LR 85; and liabilities between the abandonment and payment are for the assured to bear up to the point where the insurer pays and takes over as of which point he is responsible, see *The Kastor Too* [2003] Lloyd's Rep IR 262; *Dornoch* v *Westminster* [2009] EWHC 889 (Admlty); *Blane Steamships* v *Minister of Transport* [1951] 2 KB 965; and *Arrow Shipping v Tyne Improvement Commissioners* [1894] A. C. 508.

[392] This is definitely so for indemnification made under legal obligation, see *Lord Napier and Ettrick* v *Hunter* [1993] 1 All ER 385; and *King* v *Victoria Insurance* [1896] AC 250; and perhaps also so under an

of the assured to turn against the third party who has caused the loss and in reference to any payment that the wrongdoer might have effected to the assured in respect of such a loss.[393] This right of subrogation, per the authority case *Lord Napier and Ettrick v Hunter*[394], is based on the law of equity[395] with contract law specifications[396].

Not much unlike the above distinction of the section in two parts, Tomlinson J in the *Dornoch*[397] case pointed out that s.79(1) has two types of takeovers and under that criterion he split the section in two elements. One was the entitlement to the interest of the assured on the subject matter insured and the second was the entitlement to all of the assured's rights and remedies. His opinion was very much

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ex gracia payment, see: *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249; and *England v Guardian Insurance* [2000] Lloyd's Rep IR 404.
Also see possible clause: Subrogation waiver clause, whereby the insurer agrees to not be vested with the assured's rights and go against a third party; e.g. see International Hull Clauses, cl.28 and 36; *National Oilwell v Davy Offshore* [1993] 2 Lloyd's Rep 582; *Enimont Supply SA v Chesapeake Shipping (The Surf City)* [1995] 2 Lloyd's Rep 24; and *Timberwest Forest* v *Pacific Link Ocean Services Corporation* 2009 FCA 119.
As an alternative to subrogation, see: assignment; under which the insurer sues under his own name and keeps any additional amount recovered by the third party, see: *Compania Columbiana de Seguros* v *Pacific Steam Navigation* [1965] 1 QB 101.

[393] Any sum that is given with the purpose of reducing the assured's loss, even if given ex gracia, see: *Randal* v *Cockran* (1748) 1 Ves Sen 98; *Blaaupot* v *Da Costa* (1758) 1 Eden 130; *Stearns* v *Village Main Reef Gold Mining* (1905) 21 TLR 236; *Colonia Versicherung AG v Amoco Oil* [1995] 1 Lloyd's Rep 570, affirmed in [1997] 1 Lloyd's Rep 261. This sum will be deduced from any indemnification owed by the insurer, see: *Goole and Hull Steam Towing v Ocean Marine Insurance* [1928] 1 KB 589; *Randal* v *Cockran* (1748) 1 Ves Sen 98; *Blaauwpot* v *Da Costa* (1758) 1 Eden 130; *Mason* v *Sainsbury* (1782) 3 Doug 61.
This is due to the basic subrogation principle that payment by the underwriters does not discharge the liability of the third party, see *Yates* v *White* (1838) 1 Arnold 85; *Elf Enterprises (Caledonia)* v *London Bridge Engineering* [2000] Lloyd's Rep IR 249; and *Caledonia North Sea Ltd v British Telecommunications Plc* [2002] Lloyd's Rep IR 261, where the House of Lords reversed the latter reinstating the rule that insurers are, for the purposes of subrogation, the last resort indemnifiers.
Exceptions: ancilliary uninsured losses' payments, see: *Sea Insurance v Hadden* (1884) 13 QBD 706; and *Attorney General v Glen Line* (1930) 37 Ll LR 55, or payments for personal discomfort, see *Burnand* v *Rodocanachi* (1882) 7 App Cas 33.

[394] [1993] 1 All ER 385.

[395] The right to subrogation can be denied if equity would find against its use, see: *Morris* v *Ford Motor* [1973] QB 792; *The Surf City* [1995] 2 Lloyd's Rep 242; and where the insurer would then have to go against the co-assured which would lead to a vicious circle of claims between the assured parties and the insurer, see *Simpson v Thompson* (1877) 3 App Cas 279;; *Tate Gallery (Trustees)* v *Duffy Construction* [2007] Lloyd's Rep IR 758; *Tyco Fire & Integrated Solutions (UK)* v *Rolls-Royce Motor Cars* [2008] EWCA Civ 286; on wilful misconduct, see: *The Yasin* [1979] 2 Lloyd's Rep 45; *National Oilwell* v *Davy Offshore* [1993] 2 Lloyd's Rep 582; and *Co-operative Retail Services* v *Taylor Young Partnership* [2002] Lloyd's Rep IR 555; *BP Exploration Operating v Kvaerner Oilfield Products* [2005] 1 Lloyd's Rep 307; in relation to non-insured third parties for whose benefit the contract was made, see: *Mark Rowlands v Berni Inns* [1985] 3 All ER 473; and in relation to sisterships, see: Institute Time Clauses Hulls, cl.9, Institute Voyage Clauses Hulls, cl.7 and International Hull Clauses, cl.7.

[396] E.g. see: *Woolwich Building Society* v *Brown*, 1996 [unreported].

[397] [2009] 1 C.L.C. 645, at 53.

like the one of Lord Atkin, below, and relates to the difference of the ss.63(1) and 79(1)'s wording in regard to what they confer to the parties involved. It is indeed not helpful that the judge did not meticulously expand thereon, but his position was nevertheless clear.

Irrespective of the distinction of s.79(1)'s rights as adopted in each case, and to conclude on this specific matter, it is a generally accepted rule of law that the insurer receives both. The significant case *Castellain v Preston*[398] proves to be very helpful on that point. Brett LJ said that, in order for the doctrine of subrogation to be properly applied, the words' full and absolute meaning should be used.[399] That was meant as the placing of the insurer in the assured's position, which would entail that the underwriter would be entitled to the advantage of all the assured's rights, whether based on contract, in remedy for tort, or otherwise. This breadth of application would serve the doctrine of subrogation's largest possible form and it was a point upon which Brett LJ insisted as an absolute necessity of the doctrine of subrogation. In other words, whether the rights of s.79(1) are separate, or not, once the insurer is subrogated in the rights of the assured, he has all of his rights. But what s.63(1) grants, given the above distinctions, is another matter entirely.

Our starting point is, as already stated, Lord Atkin's view, which also links the right to subrogation with the other sections of the Act. In the *Attorney General*[400] case, Lord Atkin tackled the issue of whether the phrase in s.79(1) "he is thereby subrogated to all the rights and remedies of the assured" refers to both the election to take over the abandoned asset and the assured's rights, or only to the latter. On that point, he clearly disagreed with the opinion presented to him that, in accordance with the rules of abandonment (s.63), the insurers were entitled to take over all proprietary rights incidental to whatever may have remained of the subject matter insured including the assured's right on compensation by any third party.[401] He expressed the view that on a valid abandonment, the insurer becomes undoubtedly entitled to

[398] See *Castellain v Preston* (1883) 11 QBD 380, per Brett LJ.
[399] at p.388.
[400] *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55.
[401] In accordance with the relevant Peace Treaty.

proprietary rights incidental to the subject matter insured as from the time of the loss. The most intriguing part, though, was when Lord Atkin stated that the insurer is placed in the same position as if the subject matter insured was given to him on assignment by way of sale immediately after the loss; an analogy not encountered elsewhere.

This equivalence of s.63(1)'s right with the rights from a sale adds noteworthy complication to Lord Atkin's approach. The insurer was perceived by the judge as taking over "whatever may remain" of the subject-matter insured up to and including the property of the ship and any loss and gain from her, such as any freight earned. The right to move against any third party responsible for the wrongful act, which caused the loss and sourced the right to abandonment, was left outside of s.63(1)'s scope. The reason was that the right to sue the wrongdoing third party was held to be much different from the proprietary rights incidental to the ship passing on abandonment. Moreover, per the "rights from sale" analogy, should the insurer be a purchaser of the subject matter insured after the casualty had taken effect, then said sale, on its own, would not grant the right to sue the wrongdoing third party, as that particular right would remain with the seller. On the other hand, it was a given fact for the judge that an underwriter on hull, which was damaged by collision and abandoned as a constructive total loss, would be entitled to the benefit of the right of the assured to sue the wrongdoer. But this right was seen as deriving from s.79, whereby the underwriter was subrogated to "all rights and remedies of the assured in and in respect of the subject-matter" and not just to "all proprietary rights incidental thereto".[402]

It is important to clarify the rights granted by each section, as it has a great impact on the "irrevocability" issue, especially if one accepts the current rules on abandonment. This is so, since, without a predetermined result, per the current view, it is these rights that will be gradually given to the insurer and so their clarification becomes important for the position of each party in each stage of the abandonment process. Back to Lord Atkin's decision, it must be expressed, that if he was right, then he might have been the most insightful of judges in that part of the law. There is logic

[402] Also see: *Sea Insurance Company v Hadden* (1884) 13 Q.B.D. 706, per Brett MR, Baggallay LJ and Lindley LJ.

to be found in his train of thought: once the insurer has accepted the notice of abandonment, he may take over the abandoned asset, manage it and earn any freight or proceeds by the sale, but not meddle in any additional matters extraneous to his rights and conduct; and, once he has fully indemnified the assured, he may then have full rights on the subject matter insured, as per the owner by a full legal transfer.

A reason for such a construction can be the fact that, since, after payment, there is nothing left for the assured to claim on or from the subject matter insured and he has no loss anymore, he should respectively enjoy no more rights on the abandoned property; reversely, until full indemnification of the assured is effected, then the insurer should not have full rights on the subject matter abandoned. Support to Lord Atkin's opinion may also be the theory stating that by making the s.63(1) election, the insurer receives an equitable lien on the subject matter insured, while only through s.79(1) does this become an equitable right, which grants full rights thereon.[403] This means that the s.63(1) election is that of lesser rights in comparison to those given by subrogation. But it is important to stress out the fact that it is only one of the theories and that it is not yet consistently and conclusively proven in cases judged by courts of the highest level.

Another helpful observation on the matter may be that the right conferred by s.79(2) is distinctly not of title, but expressly one of subrogation to "all rights and remedies of the assured in and in respect of the subject-matter insured", per the second part of s.79(1).[404] There is a certain obvious association of the two sub-sections' parts and specifically between the phrases "entitled to take over the interest of the assured" and "title to the subject-matter insured". So, it could be said that it is plain enough that s.79(1)'s separation in two parts is correct and that the right to the title on the property and the rest of the assured's rights on the subject matter insured are separate, as seen from the comparison of the wording in ss.63(1) and 79(1).

It is recognised that the different wording in the two sections of the Act is rather peculiar and the reasons for such dissimilarity is lost to us. One approach is that the right of s.79(1) was always included in the law ruling the cases of abandonment

[403] See: Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010, on ss.63(1) and 79(1).
[404] For the roots of section 79 see: *Brooks* v *MacDonnell* (1835) 1 Y & C Ex 500.

and that it was s.63(1)'s election that was introduced afterwards. This second right was also connected with the fact that the property was ceded to the insurers at the time of abandonment and was progressively moved towards the end of the process, namely the payment for the loss. The s.63(1) right of takeover would also provide very useful in complicated cases, such as the *Arrow Shipping*[405] case, where even before any issues on the ownership and the accompanying responsibilities arose, the involved parties could have already resolved them.

The difference of the words used could, therefore, very well be an error in wording, a formulation's inaccuracy if you will.[406] There is indeed a clear distinction of words between being "entitled to take over the interest of the assured and all proprietary rights incidental thereto" and being "entitled to take over the interest of the assured and thereby subrogated to all the rights and remedies of the assured", but it is not at all obvious that this is a structural differentiation tracing to the roots of the respective rights, as through both expressions one may conclude that, notwithstanding said differences, the rights given are essentially the same. In order for Lord Atkin's analysis to be true, there is a need for a substantial difference of not only the wording, but of the content of the two sections as well. If it is given that a right on property grants a right to claim against a third party, then the insurer, by gaining the s.63(1) right on the abandoned asset, would be entitled to all rights and remedies as per s.79(1). Unless there is no fundamental difference between the two, Lord Atkin is correct in his argument on distinguishing the subrogation rights from that from a sale of property.

The logic that transpires Lord Atkin's approach and the opinions in agreement with his is not easily defeated. But in the opinion of the writer, the difference between the two sections' phrases is immaterial; it is a mere drafting mistake that does not offer any substantial alteration of rights. And given that the fundamental principle on the matter is that "the insurer cannot take over any interest greater than that which the insured then retains"[407], it is not at all absolutely obvious why, since the maximum of

[405] *Arrow Shipping v Tyne Improvement Commissioners* [1894] AC 508.
[406] And not the first one to be encountered in the MIA 1906; e.g. see construction of the rules on Sue and Labour, especially in relation to ss.55(2)(a) and 78(4).
[407] See: *Dornoch v Westminster* [2009] EWHC 1782, per Tomlinson J, at 14-16; and at 39 on Tomlinson J's opinion on Rix LJ's approach.

rights is set, the takeover is not to grant full rights right from the earliest point that the Act allows.

At this juncture it should be parenthetically added that subrogation does not function in the same way under constructive total losses and partial losses. In terms of the latter, it is established that the underwriters have no right whatsoever to take over any part of the subject-matter insured. This is so first and foremost under s.79(2), along with the appropriate case law.[408]

3.5 *In conclusion*

It is indeed remarkable that the MIA 1906 is treated as a simple recapitulation of the pre-MIA 1906 case law. Sir Mackenzie Chalmers was supposed to have made a synthesis of the case law until that point[409]. But he did more than that. He made an effort to change certain parts of the law that needed a nudge and, contrary to his critics, he may have been quite considerate, if not insightful, in retaining parts of old case law that were considered as abandoned.[410] Otherwise, it is not at all reasonable for him to be fervent on the fact that the insurer may elect to take over and that he is not instantaneously burdened with the abandoned property only by the fact of the notice's acceptance. If his work was a mere pictographic representation of the law at his time, then his opinion on what he created as the sections of the Act must have been reflected in at least some of the pre-MIA 1906 cases. None of these cases, though, offer such *ratio decidendi*. It is in many post-MIA 1906 cases that the entitlement of s.63(1) is recognised and it is the connection with the pre-MIA 1906

[408] E.g. see: *Brooks v MacDonnell* (1835) 1 Y & C Ex 500; and Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010, on s.79(1). For further information, see Chapter 4 and especially sub-chapter 4.3.5 Subrogation, a two-edged blade, below.

[409] It is a given fact that Sir Chalmers used many legal findings of previous case law, in order to reach his final synthesis of what became the MIA 1906; e.g. see *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 K.B. 672, at 678, where s.63 of the MIA 1906 was perceived to originate from the words of Lord Blackburn in *Simpson v Thomson* 3 App Cas 279, 292.

[410] E.g. s.10 on Bottomry. It is a fact, that bottomry was even during Sir Chalmers's time long obsolete and has not resurfaced until today. Nonetheless, having abandoned, but otherwise harmless, provisions of law included in an Act is only prudent in case they re-emerge and not indicative of bad drafting.

beliefs that transmorphs the wording and structure of the MIA 1906 in such a way that the changes which the Act sought to bring are nullified. So, if the notion of automatic and irreversible transfer of property is just a remnant of the past (i.e. pre-MIA 1906 case law), then it should be abolished from modern law, especially since the wording and intention of said law is in disagreement.

Finally, in conclusion of this rather long analysis of these very few parts of the MIA 1906, what is certain is that the law is not at all settled on the topic discussed. The judges accept a different, even if slightly so at times, approach on each occasion in accordance with the current views thereto and the specific idiosyncrasies of the case with which they are presented.

Nevertheless, a common rule that would effortlessly apply and that would be easily accepted by both the assureds and the insurers is not out of reach. As shown in the beginning of this analysis, the process of abandonment, whether shown from a contract law, or an equity law, or a joint, as proposed, perspective leads to the inference that there should be no predetermined transfer of property only by the fact that the notice of abandonment was accepted. On the contrary, the taking over of the abandoned property should be considered as subject to the two rights of election, as given by a valid abandonment and the right of subrogation. These sections should be allowed to operate independent of each other and, most importantly, to confer the rights, remedies and results they encompass freely of other sections' implications.

In terms of the proposed hypothesis's advantages, as a solution to the existing uncertainty to the suggested approach, we can state the following. The first and foremost is legal consistency and coherency of rules, which, in turn, leads to the ultimate requirement and purpose of any legal system: functionality and certainty. As shown above, the legal discrepancies are lifted and s.62 functions better both on an esoteric level, as well as in conjunction with ss.63(1) and 79(1). Secondly, another product of this understanding is legal flexibility. The underwriter is not automatically burdened with taking over a, most probably, *damnosa hereditas*[411], while avoiding the instability in terms of the fate of the subject matter insured until election after payment by rejecting the notice of abandonment. This leads to the mutual satisfaction

[411] This is a most probable outcome, as for a constructive total loss there is a definite requirement for the expenses of the subject matter insured's resoration to be higher than its final value.

of the parties involved and the fact that they gain the full effect of their choices, supposing of course that no party behaves fraudulently or harms the other intentionally.[412] The assured will be fully indemnified and the insurer will not be bound to accept an unwanted asset that may cost him far more than it's worth. By not following the proposed solution, today's complexities will continue to lead to overcomplicated cases such as the *Dornoch*[413] case. Instead, the insurers could accept the notice of abandonment and, by so doing, secure the assured's right to indemnification and their right to the subject matter insured under a two-point option.[414] In addition, the assured will receive the full amount for which he was insured, while retaining control of the subject matter insured (until the insurer takes over); the underwriter will have fulfilled his obligations stemming both from the policy and from the agreement on abandonment and if there is any gain in the wreck or remaining cargo, then there will also be some profit for the party eventually in possession.

Within these parameters, it is proven that s.62(6) should be differently construed, much closer to the spirit of the sections and the Act's legal frame and that acceptance of the notice of abandonment on its own should not be perceived as conclusively leading to the property's transfer. It is very often, as seen in this case, that the ankylosis of past interpretations weighs down the practical side of an otherwise not so complicated legal system.

Chapter 4

[412] Which, though far less likely, is still plausible, as was the case in *Dornoch v Westminster* [2009] EWHC 889, where the judge himself recognized the rarity of that kind of case.
[413] [2009] EWHC 889.
[414] The assured would have received the full value of the vessel insured and the insurers would have acquired an equitable lien on the ship, thus allowing the assured to only sell the asset successfully to a bona fide for value purchaser. The lien would after payment for the loss automatically become an equitable right on the subject matter insured crystallising the insurers' rights on it.

Recoveries - Material and Pecuniary

Having established the mechanisms of the notice of abandonment, its power and effects, we shall now deal with matters following the service of the notice and its acceptance. Most importantly, this part of the current research will discuss what happens to the subject matter insured, i.e. the rights of the parties thereon and at which time and through which means they change hands.

This chapter is split into two basic parts: Cases where the notice of abandonment is accepted, but no election to take over the insured's rights over the subject matter abandoned has yet been made; and Cases, where the notice has been accepted and the election to take over has also been made. These parts are further sub-divided into two sections, which deal with matters before and matters after payment for the loss on a total loss basis.

4.1 *Notice of abandonment accepted, without election to take over (yet)*

In cases where the notice of abandonment is accepted, s.62, and no election to take over has yet been made, s.63(1), then the assured has not yet ceded the subject matter insured and does not yet have to. This means that it is in his possession and ownership, in the same way as before the service of the notice.

At this point, the insurer is obliged under MIA 1906, s.62(6), to fully indemnify the assured for the casualty on a total loss basis, even though he has not chosen to take over. Once the insurer's payment takes place, then he has an additional chance to take over. This is so in accordance with the rules of subrogation, as contained in MIA 1906, s.79.[415]

4.1.1 *The assured's right to the wreck's disposition*

[415] See: 3.4.1.4 Issues with s.79(1) and the matter of Subrogation (above); and 4.3.5 Subrogation, a two-edged blade (below).

And, so, here comes the first question. Under these circumstances, and in the period in-between the insurer's rights of election to take over, the assured is not obliged to cede the subject matter abandoned to the insurer, as the latter has not yet chosen so. Does this mean that the assured has full and complete rights of ownership, possession and management over the subject matter in the exact same way as prior to tendering the notice? Put differently, does the assured have any obligation to preserve the subject matter itself, or any proceeds gained by a sale, or any remains gathered therefrom, until that time, when the insurer may irreversibly express his choice to take over, or not?

In order to answer these questions we will need the assistance of the previous Chapter's analysis over the nature of the notice of abandonment.

In short, it was presented that, there are two approaches to how the notice of abandonment works: one under equity law and one under contract law.[416] As maintained by the equity law approach, the notice operates as a representation of fact and intention by the assured towards the insurer and *vice versa* for the insurer's positive response to the notice. This being a representation, the doctrine of equitable estoppel is activated should any party act in opposition to what it represented.[417] According to the contract law approach, the parties take three steps in what will become a binding contract: offer, acceptance and consideration.[418] The most important part is what is contained in the insured's offer or representation. This was concluded to be not the irrevocable cession in case of the notice's acceptance, but rather the option of cession. The difference is that the insurer does not have to take over if he accepts the offer, or abides by the representation, but only accept that the facts justify a total loss claim, that the policy does cover the assured for that claim and that he will pay accordingly, while having the right to choose whether to take over.

As a result, the parties' position in relation to their rights towards the subject matter insured should be unaffected, but also unrestricted. This is in full compatibility with the MIA 1906, ss.62(6), 63(1) and 79(1). Great emphasis should be placed on the

[416] E.g see: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-23.
[417] For further information see *Thorner v Major* (2009) UKHL 18, per Lord Hoffman and, on Proprietary Estoppel, per Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury.
Also see previous Chapter, sub-heading *The Estoppel Approach*.
[418] For additional information, see previous Chapter, sub-heading *The Contract Law Approach*.

words "entitlement" and entitled contained in ss.63(1) and 79(1), where the right of election to take over is contained.

This is a right conferred upon the insurer, without the exercising of which, no harm may come to either party. The insurer has pointed out that he does not wish to undertake any rights and burdens accompanying the subject matter insured, and consequently, the assured is to remain with the same connection he enjoyed up to that point in time.

One right that is considered to immediately vest in the insurer on the subject matter abandoned right after acceptance of the notice and under is an equitable lien.[419] But in consistency with what has been presented in the previous chapter and above, such a right should only be granted to the insurer if he has chosen to be associated with the ship or cargo abandoned. In an analogy with cases of non-accepted abandonment, we could say that, as the insurer sets himself apart from the property abandoned and is fully disassociated therewith receiving no rights and no liabilities thereover through rejection of the notice of abandonment, then here too the insurer should not have a legal or equitable connection without his consent.

Furthermore, the purpose of the equitable lien is to secure the transfer of property after payment for the loss, where the insurer has chosen to take over. Conversely, where no such election has been made, there is no need for security. This would lead to the equitable lien not rising. This is the law and it was clearly held to be so in the *Dornoch* case.[420] Therein, it was held that payment for the loss by itself does not vest upon the insurer any rights in relation to the property abandoned. Therefore, until the insurer has elected to take over, it was found as perfectly acceptable for the insured to dispose of the subject matter insured, without at all consulting the insurer.[421]

Without an obligation or a right to take over, or to be otherwise bonded with the subject matter, we must conclude that, where the insurer does not exercise his

[419] Though not definitive *ratios,* see: *Arrow Shipping Co v Tyne Improvement Commissioners* [1894] AC 508); *Kastor Navigation Co Ltd* v *AGF MAT (The Kastor Too)* [2004] EWCA Civ 277; [2004] 2 Lloyd's Rep 119; and *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty).
[420] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty). Also see in agreement: *Lord Napier and Ettrick v Hunter* [1993] AC 713; and *Re Ballast plc, St Paul Travelers Insurance Co Ltd v Dargan* [2007] Ll Rep IR 742.
[421] *Dornoch v Westminster (No 2)* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep 191, at 50 and 55.

right to take over, he has no such link. Accordingly, with the insurer having refused a proprietary interest and being clear about his intentions, the assured should not be burdened with any duties of preservation of the vessel or cargo insured, its proceeds in case of a sale, or any remains that may surface.[422]

Should the insurer proceed to his entitlement of election afterwards, under the s.79(1) right to take over, then he will be entitled to whatever may remain, be that pecuniary or physical in nature.[423]

4.1.2 *The insurer's indefinite entitlement*

Another issue, which touches upon the parties' rights before and after payment for the casualty is the length of the insurer's entitlement to elect to take over under ss.63(1) and 79(1). Can the insurer choose at any future time, irrespective of what has transpired in the interim?

It would seem that, *prime fascie*, the answer is to the positive. There appear to be no authorities to the opposite and, therefore, the insurer should not be restricted by a time limitation. This seems to be the commonly accepted opinion.[424]

What one must not forget, though, is the general provisions that could confine this right, since the relevant sections of the Act provide for no definite means of election and since there is also nothing preventing the insurer from losing this right.[425]

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[422] See in agreement: R.Merkin, *Marine Insurance Legislation,* 4th ed., Lloyd's List Group, 2010, pp. 91-92 on s.63(1).

[423] See: *Napier v Hunter* [1993] A.C. 713*; Randal v Cockran (1748) 1 Ves. Sen. 98*; *Blaauwpot v Da Costa* (1758) 1 Ed. 130; *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1962] 2 Q.B. 330* at 339–341; *Hobbs v Marlowe* [1978] A.C. 16 at 39; *Banque Financiere de la Cite v Parc [1999] 1 A.C. 221,* at 231; and *St Paul Travellers Insurance Co Ltd v Dargan* [2006] EWHC 3189 (Ch); [2007] Lloyd's Rep. I.R. 742.

[424] E.g., see: *Arnould's Law of Marine Insurance and Average,* 18th ed., Sweet & Maxwell, 2013, at 30-01.

[425] See: *Earl of Eglinton* v *Norman* (1877) 3 Asp MLC 471, 475, *per* Bramwell LJ: "a man cannot become the owner of anything without his assenting to the ownership. I think [the underwriters] had a right to the ownership which they could elect to exercise or not. If they did not, they might lose that right, but until they did they were not owners"; overruled in *Arrow Shipping Co Ltd* v *Tyne Improvement Commissioners (The Crystal)* [1894] AC 508), but not on this point. Also see: *Allgemeine Versicherungs-Gesellschaft Helvetia* v *Administrator of German Property* [1931] 1 KB 672, 687-688, *per*Scrutton LJ.

To this, the insurer's conduct is key, in similarity to its importance on the matter of the notice of abandonment's acceptance.[426] To be more specific, the insurer may not proceed to express statement of his willingness to take over or not, but through his conduct he may be held to have exercised his right of election. Most importantly this exercise will be imposed upon him through the law of equity and, specifically, the doctrine of equitable estoppel, as the insurer will not be able to go back on what he demonstrated as his intention.

To elaborate, if the insurer makes an unequivocal representation though his conduct that he will, or will not, take over the subject matter abandoned[427], an act which will certainly affect the legal relationship of and between both parties[428], and this is relied upon by the insured[429], then the insurer will be estopped from going back thereon[430] and he will have to continue his course based on the election already made.

Practically, this makes sense. As is the case with most constructively lost properties, especially ships, there is a multitude of liabilities accompanying the asset, from which both insured and insurer wish to keep the greatest distance possible. For this reason, it is logical that if the insurer shows that he wants to take over, then the insured will be more than happy to oblige and dispose of any burdens the wreck may have. It would, therefore, be wrong, and for that matter inequitable, if the insurer then came back and stated that he did not wish to take over and that all liabilities are for the insured to bear. The same would apply in cases where the insurer has expressed his willingness to not take over, as the insured would then have to plot a course towards the minimisation of any further losses and liabilities, which would most probably mean high expenses, even if it only entails the wreck's towage and translocation costs. Here too it would be inequitable for the insurer to take advantage

[426] See previous Chapter: *What amounts to an acceptance of the notice of abandonment*.
[427] *Collin v Duke of Westminster* [1985] QB 581.
[428] *Spence v Shell* (1980) 256 EG 819.
[429] WJ Alan v El Nasr Export and Import [1972] 2 QB 189.
[430] See *The Kanchenjunga* [1990] 1 Ll Rep 391, per Lord Goff, at 398-399.
Also see: *Hudson v Harrison* (1821) 3 Brod. & Bing. 97, per Park J., where the acceptance of the notice of abandonment was held to be a representation denying the insurers from going back and refusing full indemnification to the assured; *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224, per Sir Barnes Peacock, , at 243, which was the first case to introduce the doctrine of equitable estoppel into the theory behind the notice of abandonment; *Hamilton* v *Mendez* (1761) 1 Wm. Bl. 276; *M'Carthy* v *Abel* (1804) 5 East 388; *Bainbridge v Nelson* (1808) 10 East 329; and *Stewart v Greenock* (1848) 9 E.R. 1052).

of the insured's expenses and claim the wreck as his own, having thus circumvented the enormous relevant costs.

It is, for this reason, widely advisable that an insurer, especially when not willing to take over, takes any precaution necessary to clarify his position.[431]

4.2 *Notice of abandonment accepted, with election to take over*

Where the notice of abandonment has been accepted and the insurer has, in conjunction thereto, elected to take over the subject matter insured in accordance with s.63(1), the assured retains the subject matter in his hands, but not in the same way as before. Firstly, the property abandoned will function under an equitable lien for the benefit of the insurer. Secondly, the insured is not supposed to sell or otherwise dispose of the abandoned asset. And thirdly, the insured is expected to cede and, even if not actively pass on the property, then certainly facilitate this cession to the insurer.

These are not simple matters and raise several questions, which have attracted the interest of this research.

4.2.1 *The equitable security of a lien*

The issue of the equitable lien is closely related to the right of subrogation, which will be adequately analysed below. For matters of coherency, it is synoptically presented here that: Once the insurer has accepted the notice of abandonment, he is bound to pay for the insured's loss. Once he has elected to take over the property abandoned, he will become its owner once payment is made (with retrospective effects, tracing back to the time of the casualty). After payment, he will be subrogated in the rights of the insured (s.79(1)). Subrogation is incident in all contracts of

[431] E.g., see: *Arnould's Law of Marine Insurance and Average,* 18th ed., Sweet & Maxwell, 2013, at 30-01; and F.D.Rose, *Marine Insurance: Law and Practice,* 2nd ed., Informa, 2012, at 24.50.

indemnity and any relevant payments. Subrogation is an equitable principle.[432] Subrogation creates an equitable proprietary interest by way of lien in favour of the party subrogated, namely the insurer.[433]

It has been presented in some cases that the right of subrogation derives from implied terms of the policy,[434] but given the express provision of the MIA 1906, no doubt should remain over the source of this right and any debate is only for historic and academic value.

This equitable lien is not the same as a common or legal lien. The common lien depends on possession and functions as a right of retention. The equitable lien operates independently of possession. Additionally, as opposed to the common lien, which brings a negative right on the possession, the equitable lien is a positive right on the party having the lien, namely the insurer. What is very interesting is that, though the equitable lien is derived from subrogation, which is sourced by payment, the enforcement of the equitable lien's effects is not dependent upon the prior satisfaction of its existence's prerequisites.[435] In other words, the insurer does not have to first pay and then get the rights in accordance to payment, but rather enjoys the lien due to the prospect of payment. This is logical, though, as the equitable lien is a means of security, which will ensure the performance of the agreement, as made by the parties through the service of the notice of abandonment, its acceptance and the exercise of the statutory right of take over.

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[432] See: *Napier v Hunter* [1993] A.C. 713; also see: *Arnould's Law of Marine Insurance and Average,* 18th ed., Sweet & Maxwell, 2013, at 31-02; and F.D.Rose, *Marine Insurance: Law and Practice,* 2nd ed., Informa, 2012, at 24.66.

[433] This right can be modified by agreement, e.g. see: *Thomas & Co v Brown (1899) 4 Com. Cas. 186*; *Lucas (L) v Export Credit Guarantee Dept* [1973] 1 W.L.R. 914; [1974] 1 W.L.R. 909 HL; *The Marine Sulphur Queen* [1973] 1 Lloyd's Rep. 88 USCA, on waiver of subrogation; *The Yasin* [1979] 2 Lloyd's Rep. 45,holding that there was no implied term preventing the insurers from being subrogated in the insured's rights, charterers, against a third party, the shipowners, who were not co-assureds. Were they co-assureds, then the isnsurers would have been prohibited by reasons of circuity of action, see: *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582; *Cooperative Retail Services Ltd v Taylor Young Partnership Ltd [2001] Lloyd's Rep. I.R. 122*; and *Tyco Fire & Integrated Solutions (U.K.) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ. 286. Finally, for difficulties of such clauses' construction, see *Talbot Underwriting v Nausch, Hogan & Murray (The Jascon 5) [2006] Lloyd's Rep. I.R. 531*, per Moore-Bick L.J. at 14-22.

[434] See: *Napier v Hunter* [1993] A.C. 713, per Lord Templeman, at 736, and Lord Browne-Wilkinson, at 751; *Yorkshire Ins Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 Q.B. 330, at 341; and not in absolute agreement *Banque Financiere de la Cite v Parc* [1999] 1 A.C. 221, per Lord Hoffmann, at 231.

[435] See: *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty); *Snell's Equity* (31st edn), para.42–03; *Hewett v Court* (1982) 149 CLR 639, per Deane J, at 663–664 and *Lord Napier and Ettrick v Hunter* [1993] AC 713, per Lord Templeman at 738C–G, per Lord Goff, at 744G–H, and per LordBrowne-Wilkinson, at 752D–G.

The most recent case establishing the equitable lien's vestment into insurers is Tomlinson J's *Dornoch v Westminster*[436] case. In that case, it was expressly stated by the judge[437] that, even though full cession of the property will take place after payment, upon acceptance of the notice of abandonment and upon election to take over, equity would impose an equitable lien in favour of the insurers.

This was held so due to the insurer's irrevocable promise to pay as per a total loss and because of his irrevocable election to take over the interest of the assured in the wreck. In agreement to what was presented above, the equitable right's purpose was found to be the security of the insurer's position in the interval between the making of the irrevocable promise and election, and the transfer of the right on payment. There was an effort by one of the parties to show that, since the equitable lien is dependent on payment, the system should be viewed as not granting the lien before payment has been effected. This reasoning was summarily dismissed by Tomlinson J[438], as inconsistent with the purpose of the lien, being a security interest, and the contents of the MIA 1906.

4.2.2 *The assured and the subject matter insured, do's and don'ts*

Once the notice of abandonment has been accepted and the election to take over made by the insurer, he immediately has a right of equitable lien over the subject matter insured. It is important to see what repercussions this right has in terms of the assured's powers over the property abandoned, especially considering that the insurer's position is one in equity, which means that only an equitable remedy can be granted and that, given that the right is a lien, it is not, yet, a full right of ownership.

Firstly, though there is no implied term in the insurance contract,[439] it is one of the assured's obligations to not prejudice the insurer's position in relation to any

[436] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty).
[437] At 40.
[438] At 41, 47 and 48.
[439] See: *SGIO v Brisbane Stevedoring* (1969) 123 CLR 228.

recoveries he may have. If he does, for example by entering into an agreement with a third party and hindering the insurer's ability for recuperation, the repercussions can potentially be very severe. These consequences can range from claiming damages against the assured, on the basis of loss of the right to subrogation by non-*bona fide* agreement,[440] to refusal of indemnification and even avoidance of the policy for non-disclosure of the material fact of such an agreement.[441]

Accordingly, the assured should not dispose of the subject matter insured, either by way of sale, or otherwise. The only exceptions are cases of urgency, where the property is further handled for the sole purpose of preserving its value or avoidance of further damages and liabilities.[442]

If the assured sells the asset insured, then, by looking at the House of Lords case *Napier v Hunter*[443], we have the following results. Firstly, the insurer will seek to recover the property and reverse the sale.[444] This should be successful where the third party purchasing the property was aware of the insurer's right of subrogation or of the insurer's right of lien on the ship or cargo sold. In the *Napier* case, for example, it was completed by way of an injunction. It is noted here that monies recovered by the assured are traceable into the hands of third parties.[445]

But, given that the lien is an equitable right, it can be partially overcome, though not completely defeated, by equitable means. A perfect example is where the third party purchasing the abandoned property was a *bona fide* purchaser without any knowledge of the insurer's rights thereon. In such a case, the insurer will not be able to get the property back. He will, nevertheless, not be without remedy, as the proceeds

[440] See: *Commercial Union Assurance v Lister* (1874) LR 9 Ch App 483.
[441] See: MIA 1906, s.18; *Tate v Hyslop* (1885) 15 QBD 368; and *Thomas & Co v Brown* (1891) 4 Com Cas 186.
Also see: *Commercial Union Assurance Co v Lister* (1874) LR 9 Ch App 483; *Mercantile Steamship Co v Tyser* (1881) 7 QBD 73; *The Bedouin* [1894] P 1; *Scottish Shire Line v London and Provincial Marine Insurance Co* [1912] 3 KB 51; *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430; and *Helicopter Resources Pty Ltd v Sun Alliance Australia Ltd* 1991 Vic LEXIS 524.
[442] E.g., see: *Court Line Ltd v The King* (1945) 78 Ll. L.R. 390, per Stable J.; and *Bradley v Newsom* [1919] A.C. 16; and *Robertson v Nomikos* [1939] A.C. 371.
[443] *Napier and Ettrick v Hunter* [1993] 1 All ER 385.
[444] As it was attempted with success in *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty), though it must be mentioned that the *lex fori* and the laws of insolvency were played an important role thereon.
[445] E.g., see: *Elgood v Harris* [1896] 2 QB 491, where the monies were in the hands of a broker.

of the sale will substitute the object of his right; that is to say, the assured will owe the proceeds instead of the property, as the latter is no more in his sphere of influence.

Since the assured is aware of the insurer's rights, he, or his solicitors, should keep the proceeds in a separate fund, or keep them otherwise in such a way so as to be easily traceable.[446] In such cases, the insurer's equitable lien will be easily enforceable. Additionally, because of the separability, or traceability of the funds, where the assured has become insolvent, the underwriter's right to the proceeds will not be prejudiced, as he will be able to recover before any creditors charge into any proprietary remains.[447]

Reversely, in cases, where the proceeds are not easily traceable, there is an issue as to what remains for the insurer to take over. If nothing is passed to the insurer, then the insured will evidently be in breach of the indemnity principle, which bars double gains for the insured (in this case, it would be the full indemnification as per a total loss and the proceeds of the property's sale).

The most possible result in such cases would be that a trust would form between the insurer and the insured. Under this trust, the insured would hold the excess, which he should not be keeping as his own, for the insurer.

This approach enjoys support by case law since the 18th century. In the case *Randal v Cockran*[448], the insurers were claiming their right to whatever their insureds were entitled from the King's general letters of reprisal on the *Spaniards.* The letters were issued for the benefit of the insureds, as they had suffered losses by unjust Spanish captures. Although the insureds were fully indemnified by their respective insurers, the commissioners would not suffer the insurers to lay claim to any part of the prizes. The court held that an insurer, after satisfaction of the insured's claim, stands in the exact place of the latter in respect of any property salved and any potential restitution in proportion to what he has paid thereto.

[446] See: *Napier and Ettrick v Hunter* [1993] 1 All ER 385, per Lord Templeman, at 738–739, and Lord Browne-Wilkinson, at 752.
[447] See express *ratio decidendi* in: *Napier and Ettrick v Hunter* [1993] 1 All ER 385; and *Re: Miller, Gibb & Co Ltd [1957] 1 W.L.R. 703*.
[448] (1748) 1 Ves. Sen. 98.

The *Lord Chancellor*, Lord Hardwicke L.C., opined that the insurers were protected by equity. In spite of the fact that the original party in loss was the insured, after indemnification, it was the insurer suffering the same. To our present point, the judge stated that, in relation to any goods restored *in specie* or for any compensation made for them, and from the time of satisfaction, the assured stands as a trustee for the insurer, in the same ratio as the amount paid to the assured.

The same was held to be the law in the case *Blaauwpot v Da Costa*[449]. Summarily, Lord Northington found that the proceeds of reprisals gained by one of the assureds, which were kept his executors, were retained in trust for the insurers. The list of cases grows on a continuous line up to the 20th century[450]. Therefore, it should be admitted that this is the law in regards to this issue.

There have been other diverging opinions, as, for example, that of Stirling L.J. in the Court of Appeal case *Stearns v Village Reef Gold Mining*[451]. The judge expressed his dissenting view that in such cases, where the assured has made a recovery by a third party before indemnification by the insurer, is not in trust therewith, but rather is the debtor, while the insurer is the creditor.

Additionally, Lord Diplock has expressed his opinion that the principle of subrogation is fully outside the equity law spectrum. Instead, he has opted for a common law approach, whereby the whole transaction and relationship between the insured and the insurer is operated through express and, in lack thereof, implied terms of the insurance contract.[452] Consequently, though the end result in relation to who is entitled to what would remain unaltered, the insurer should not enjoy an equitable lien over the abandoned property and no trust would form in case the assured treats any salvage or proceeds as his own.

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[449] (1758) 1 Ed. 130.

[450] See: *White v Dobinson* (1844) 14 Sim. 273, per Lord Lyndhurst L.C., who supported the insurers' claim on the assured's fund granted by the third wrongdoing party (this was a collision case); *Commercial Union v Lister* (1874) L.R. 9 Ch. App. 483, per Sir George Jessel M.R., who expressly held the assured to be a trustee of his excess recoveries for the insurer; and *In re Miller Gibb* [1957] 1 W.L.R. 703, where a recovery made by the assured going in to liquidation, in respect of an indemnified loss, was ordered to be held for the insurer by the liquidator.

[451] (1905) 10 Com. Cas. 89.

[452] See: *Yorkshire Insurance v Nisbet Shipping* [1962] 2 Q.B. 330, at 339–341; *Hobbs v Marlowe* [1978] A.C. 16, at 39; and *Banque Financiere de la Cite v Parc* [1999] 1 A.C. 221, at 231.

These, though, are rare views deviating from a long series of agreeing decisions and, so, they leave little doubt as to what is the proper standing of the law today. Especially the latter must be treated as defeated in the *Napier v Hunter*[453] case. This was a dispute with not uncommon facts, i.e. the assured had a loss, he was fully indemnified by his insurers, he then also received monies from the wrongdoing third party and, finally, the insurers sought to recover these monies under their right of subrogation. The issues presented to the court were two: 1. whether the insurers were entitled to the third party monies, before the assured had been indemnified by the underwriters, and 2. whether the insurers had any proprietary right against these amounts, or merely a common law claim in debt, in the same way as a creditor.

On the first issue, it was held that the timing of the third party recoveries did not affect the insurers' right of subrogation; i.e. whether they were made before or after payment for the loss.[454] On the latter matter, the insurers were found to have an equitable lien over the recovered amounts, as held by the assured's solicitors, who were restricted by injunction from disposing thereof, without first satisfying the insurers, as presented and analysed above. The notion of common law involvement, specifically as presented by Lord Diplock in *Hobbs v Marlowe*,[455] was expressly rejected by Lord Goff,[456] who found that the principle of subrogation, as he put it, derived not from common law, but from equity. The equitable interest, as security, and as opposed to a full trusteeship imposed on the assured, was preferred on the basis that the right to a lien would protect the insurer's interest so far as the satisfaction of the indemnity principle, i.e. no double gain for the assured.[457] Also, in relation to Lord Diplock's *obiter dicta*, as expressed in *Yorkshire v Nisbet*[458], offering that equity will only intervene in order to enable the insurer to sue in the name of the insured the judges of the House of Lords were in direct disagreement.[459] It was added, this in relation to Stirling L.J.'s view in *Stearns v Village Reef Gold Mining*[460], above, that, even if the parties' relation was only governed by contractual terms, whether express

[453] [1993] A.C. 713.
[454] See: *Napier v Kershaw* [1993] 1 Lloyd's Rep. 10, per Staughton L.J., in the Court of Appeal, at 22-23.
[455] [1978] A.C. 16, at 39.
[456] At 740.
[457] per Lord Goff, at 744–745, and Lord Browne-Wilkinson, at 752.
[458] *Yorkshire Insurance v Nisbet Shipping* [1962] 2 Q.B. 330, at 339–341.
[459] at 743, 749.
[460] (1905) 10 Com. Cas. 89.

or implied, the insurer could still acquire an equitable proprietary interest, since contractual promises have such power.[461]

The importance of this case was the establishment of equity as the insurers' right's basis. This is both in terms of the equitable lien and of the trust formed. The agreement with older case law made this position concrete in modern marine, and non-marine, insurance law.[462]

4.2.3 *Payment, the turning point*

Full indemnification of the assured for the casualty, that is to say payment by the insurer, is a key element in constructive total losses. Firstly, it denotes the final step of the abandonment process towards its completion. Secondly, it grants the insurer with an additional chance to take over, if he has not already done so at the time of the notice's acceptance. Thirdly, once the insurer pays, he becomes full legal owner of the subject matter abandoned, with his right extending retrospectively back to the time of the casualty, i.e. *ex tunc*.[463] Finally, the insurer is subrogated not only into all the rights and entitlements of the assured on the subject matter insured, but also into all the remedies and liabilities the insured may have, in proportion to the payment made.

Given that subrogation is based on a contract of indemnity, the insurer cannot assume any of the insured's rights without payment.[464] Finally, as was noted in the

[461] per Lord Templeman, at 736.
Please note that Lord Browne-Wilkinson, at 751–752, distinguished *Stearns v Village Reef Gold Mining* (1905) 10 Com. Cas. 89, because it dealt with a recovery prior to the insurer's indemnification leaving nothing to be subjected to a trust and because the case dealt with mistaken overpayment.
[462] E.g., see: *In re Miller Gibb* [1957] 1 W.L.R. 703; and *White v Dobinson* (1844) 14 Sim. 273.
[463] See: *Stewart v Greenock Mar Ins Co* (1848) 2 H.L. Cas. 159; *Sea Ins Co v Hadden* (1884) 13 Q.B.D., at 711; *The Red Sea* [1896] P. at 24, per Lord Esher M.R. But in case of prize courts this rule is not followed and an insurer will not be able to pursue the return of the subject/matter insured as retrospective owners from the time of the casualty, see: *The Gothland* [1916] P. 239n and *The Zaanland* [1918] P. 303, per Sir Samuel Evans P.
[464] See: *Edwards v Motor Union Insurance* [1922] 2 K.B. 249, per McCardie J., at 254-255; *BOAG v Standard Marine Insurance* [1936] 2 K.B. 121, per Branson J.; [1937] 2 K.B. 133 CA; *Burnand v Rodoconachi* (1882) 7 App. Cas. 333, per Lord Blackburn, at 339; *Castellain v Preston* (1883) 11 Q.B.D. 380, per Brett L.J., at 388, and (1863) 11 Q.B.D. at 401, per Bowen L.J.; and *Simpson v Thomson* (1877) 3 App. Cas. 279, per Lord Cairns L.C., at 284.

Stringer case[465], one of the primary purposes of payment and transfer is for someone to bear the burden of responsibility for the property[466], as well as have the rights thereto[467].

4.2.4 *Enforcement of the lien*

In the proper sequence of events and the transaction of abandonment, the insurer will be the full legal owner of the abandoned property in proportion to what he paid for the casualty. But what if the assured does not abide by the rules? If there is any part, which the assured has to play in the transition of property, he is bound to oblige. Besides, he should voluntarily ease any such transaction, as it is in his interest for the insurer to fully take over, because he will no longer incur any liabilities as of the time of the loss.

Aside from the examples given above, such as the injunction preventing disposal of monies owed to the insurer in the *Napier* case, the insurer also has in his arsenal the ability to enforce his right through an order for transfer of legal title, or through a sale order. Where the insurer has fully indemnified the assured and the latter has additionally received proceeds by way of sale, or monies otherwise paid to the assured for the same loss claimed against the insurer, then the insurer has two options: 1. Either claim the proceeds, or monies, passed to the assured by third parties, under a personal right for such pecuniary gains had and received to the use of the

[465] *Stringer v English and Scottish Marine Insurance Company* (1869) L.R. 5 Q.B. 676, at 688: "Where the cargo still subsists in specie, and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his, so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: *qui commodum sentit sentire debet et onus*".

[466] Typical responsibility includes salvage payments to third parties, maritime or statutory liens; see: *Sharp v Gladstone* (1805) 7 East 24; *Barclay v Stirling* (1816) 5 M. & S. 6. In any case, the responsibility must be connected to the cause of the loss and the assured must not be solely accountable for the responsibility, see: *Sea Ins Co v Hadden* (1884) 13 Q.B.D. 706; *Eglinton v Norman* (1877) 46 L.J.Ex. 557, per Lord Coleridge C.J. and Brett L.J.

[467] See: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-28.

insurer under subrogation,[468] or, reclaim the indemnification paid to the assured as money paid under a mistake of fact, to the extent of overpayment and so long as the assured receive the proceeds or moneys before being indemnified, which is a right independent of that of subrogation,[469] or, alternatively, 2. The insurer can have a restitutionary claim to regain any money he has overpaid to the assured by way of indemnity.[470] The only way of, partially, defeating the equitable lien is by sale to a *bona fide* party, i.e. one acting in good faith, without knowledge of the insurer's rights on the property sold.[471]

When it is said that the lien is partially defeated, it means that the assured will still owe any proceeds so gained, so, theoretically, he should not have gained anything. This was so in the *Dornoch* case,[472] although the assured attempted to circumvent the rule. The assured sold the wreck for €1,000.00 to one of his subsidiary companies. Had he been able to escape, he would have a net gain of approximately US$30-40 million.

Also, in terms of the transfer of property, it was mentioned, at 12, that even if formalities are required for the completion of the title's transfer, such as registration of a ship's new owner,[473] the insurer's equitable interest in the property would entitle him to require its formal transfer, where possible. Specific means of enforcement were not mentioned, but it is logical to assume that all means applicable to a proper owner against a reluctant vendor of the property would vest in the insurer. This position is supported by additional case law[474] and, as we shall see below, it is in full agreement with the Merchant Shipping Act 1995, s.16, which expressly states that both contractual and equitable rights on a British ship can be enforced in the same manner as with any other type of personal property.

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[468] See: *Napier v Hunter* [1993] A.C. 713, per Lord Browne-Wilkinson at 752–753.

[469] See: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.31-41. Also, please note that such behaviour by the assured, i.e. receiving moneys and also claiming for indemnification, can lead to his claim becoming fraudulent, therewith being rejected and the insurer requesting remedy in the form of damages (e.g. any money paid under this false claim), or even avoidance of the policy. See: *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 A.C. 469.

[470] See: Rose, *Marine Insurance Law and Practice*, 1st ed., 2004, para.27.89.

[471] See: *Napier v Hunter* [1993] A.C. 713.

[472] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty).

[473] E.g., see: Merchant Shipping (Registration of British Ships) Regulations 1993 (SI 1993/3138).

[474] See in agreement: *Scottish Marine Insurance Co v Turner* (1853) 1 Macq H.L. Cas. 334, per Lord Truro.

4.2.5 *The equitable lien's strength; alternatives*

The insurer's security is an equitable lien on the property abandoned. After payment, though, this lien will be transmorphed into an equitable proprietary right of ownership on the subject matter insured. This mechanism, among the many benefits, has some weak points, upon which several parties have commented in the past.

Starting with the case law, we find in the *Dornoch*[475] case the argument that instead of the equitable lien, the insured should immediately after election to take over (after acceptance of the notice of abandonment) receive full interest in the property. This was supported by the fact that the equitable lien was ineffective as a mean of security and could be easily defeated by means of a *bona fide* sale, as was attempted by the shipowners.

Tomlinson J., [476] while describing the functions of the equitable lien, recognised its weaknesses, but also presented its virtues; e.g. this lien does not require possession, it operates instantaneously by virtue of equity, it needs no express agreement, it confers positive rights enforceable, instead of imposing a burden on the assured, and it can be enforced by the same means as a common law right to property, inclusive of an preventative injunction.[477] Tomlinson J. found, on top of the fact that the insurer cannot acquire a full interest without prior full indemnification, one of the most basic of requirements in terms of abandonment, that this is the better option for the insurer.

In addition to what Tomlinson J. offered above, it is further submitted that the equitable lien is not at all weak, as it may seem at first sight. Further strengths include its resilience as a form of persisting security even in cases of bankruptcy or insolvency, according to the *Re Miller, Gibb*[478] case. In the case *England* v *Guardian*

[475] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty), at 37.
[476] At 47.
[477] On the matter of injunction, see: See *Napier* v *Hunter* [1993] AC 713, 739; and *White* v *Dobinson* (1844) 14 Sim 273. And on the equality with a contractual, or quasi-contractual relationship, see: *Snell's Equity* (31st edn), para.42–03; *Hewett v Court (1982) 149 CLR 639,* especially per Deane J., at 663–664; and *Lord Napier and Ettrick v Hunter* [1993] AC 713, especially per Lord Templeman, at 738C–G, per Lord Goff, at 744G–H, and per LordBrowne-Wilkinson, at 752D–G.
[478] [1957] 1 WLR 703; also see: *Napier* v *Hunter* [1993] AC 713.

Insurance,[479] it was held that the equitable lien takes priority over the Legal Aid Board's statutory charge.

There are other instances, where the equitable lien's strength has been questioned. For example, in *England* v *Guardian Insurance*[480] it was argued that the strength of the lien, being equitable, was as resistant as its bearer's own conduct. So, where an insured is shown to have acted inequitably, he should not be allowed to be vested in, or to rely on an equitable lien.

This point, though, was not allowed to stand. Inequitable conduct was not found to be able to defeat the insurer's proprietary interest in the pecuniary gain of the assured. As equity in engaged where other remedies are inefficient, the equitable lien would not be at all related to any inequitable conduct. Against the insurer's wrongful acts, the assured enjoyed adequate shield under the common law, i.e. a set-off against the insurer's claim on the assured's gain, or even a claim for damages,[481] and specifically under an implied term of the insurance contract restricting the insurer from prejudicing the assured's position due to his exercising the right of subrogation.

In cases where the election to take over is made at the time of payment, instead of immediately at the time of the notice's acceptance, the equitable lien's power is not diminished. It will certainly not have secured an interest of the insurer since the time of the notice's service, as there would have been no right to secure before the election to take over. But, on the other hand, equity will still protect him from the time of the election to take over and onwards, until the full passing of property to him. This will be achieved, as before, under an equitable proprietary right, with the aforementioned means of security and defence.

[479] [2000] Lloyd's Rep IR 404, 418-419.
[480] [2000] Lloyd's Rep IR 404, 416-418.
[481] See: *Kitchen Design & Advice* v *Lea Valley Water* [1989] 2 Lloyd's Rep 221; and *Yorkshire Insurance* v *Nisbet Shipping* [1962] 2 QB 330.

4.3 *Additional matters*

4.3.1 *The extent of the insurer's take over*

It is firstly stated that an insurer, who has already elected to take over the abandoned property, will be bound both by contract and in equity to complete the transaction. The assured my agree differently therewith, but, until such time, the insurer is held to the transaction's completion by his contractual obligations, he has the obligation to perfect his promise and representation of take over, as agreed through the acceptance of the assured's offer, i.e. the notice of abandonment, and, under the equity's operation of imposing what is equitably ought to be done.

Given that the insurer will be ceded with the subject matter abandoned, then what is it that will pass to him? In one compact sentence, we could say that the insurer will only get that for which he has paid.

Put more elaborately, the insurer will take over such rights and liabilities on the subject matter insured, as in proportion to the percentage of the property that he has covered. For example, if the has covered half of the property's worth, he will become owner of half, with the other half belonging to the assured, or whomever may have purchased, or taken over that part. If there are more underwriters than one, then each will take over the portion insured, if they choose to take over and after payment is effected, in accordance with *Whitworth Bros v Shepherd*[482] and *Dornoch v Westminster*[483].

Specifically in the *Dornoch* case, it was unambiguously stated that, in cases of multiple insurance, as in almost all subjects of marine insurance, there is apportionment of the acquired rights and burdens,[484] provided that each underwriter has paid his proportion of a total loss respectively. Abandonment is available, *pro tanto*, to each underwriter separately, even if under the same policy and, so, even if some choose not to take over, others may validly elect and succeed in getting the

[482] (1884) 12 SC (4th) 204.
[483] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty). Also see: Marine Insurance Act, s.79(1).
[484] At 58-60.

property.[485] The same applies in cases of double insurance, self-insurance and deductibles.[486]

Subrogation will pass on to the insurer any accompanying rights in terms of the subject matter abandoned, whether deriving under contract, tort, the common law, or equity.[487] This includes any discretionary remedies, granted by the courts in diminution of the loss, i.e. remedies to which the assured has no absolute right, such as interest[488], payments by way of gift, or without legal obligation,[489] third parties' repairs,[490] unabated proceeds of sale,[491] governmental payments on commandeered properties,[492] damages for deceit,[493] and payments for delay caused by foreign exchange control[494]. Exceptions include personal claims, such as a claim for libel[495] and claims for personal injuries[496].[497]

In any case, what the insurers may take over cannot be more than what they have covered, nor what the assured already has in his possession. Should they demand more than that, the assured will have no obligation to satisfy their claim and will be perfectly justified to abandon what he must and nothing more.[498]

For the fulfillment of the indemnity principle, the assured should not be allowed, without the consent of the insurer, to keep any right that would allow him to

[485] At 60.
[486] At 61.
[487] See *Castellain v Preston* (1883) 11 QBD 380, per Brett L.J., at 388–389; and *England v Guardian Insurance* [2000] Lloyd's Rep. I.R. 404.
[488] See: *Cousins H Ltd v D & C Carriers* [1971] 2 Q.B. 230; *Metal Box v Currys* [1988] 1 A.E.R. 341. Contrast *The Commonwealth* [1907] P. 216, at 223–224.
[489] E.g., see: *Burnand v Rodoconachi* (1882) 7 App. Cas. 333; *Merrett v Capitol Indemnity Corp* [1991] 1 Lloyd's Rep. 169; *Colonia Versicherung AG v Amoco Oil* [1997] 1 Lloyd's Rep. 261; *Castellain v Preston* (1883) 11 Q.B.D. 380; and *Talbot Underwriting v Nausch, Hogan & Murray (The Jascon 5)* [2006] Lloyd's Rep. I.R. 531.
[490] See: *Darrell v Tibbitts* (1880) 5 Q.B.D. 560.
[491] See: *Castellain v Preston* (1883) 11 Q.B.D. 380.
[492] See: *Stearns v Village Main Reef Gold Mining Co* (1905) 10 Com. Cas. 89.
[493] See: *Assicurazioni Generale de Trieste v Empress Assurance Corp* [1907] 2 K.B. 814.
[494] See: *Re Miller, Gibb* [1957] 1 W.L.R. 703.
[495] See: *Assicurazioni Generale de Trieste v Empress Assurance Corp* [1907] 2 K.B. 814.
[496] See: *Law Fire Assurance v Oakley* (1888) 4 T.L.R. 309.
[497] Further on this, see: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para31-17.
[498] See: *Havelock v Rockwood* (1799) 8 T.R. 268.

have a double gain.[499] For this reason, it is important that the insurer, aside from any recoveries already made, whether physical or pecuniary, also receives any potential benefit, in the form of a claim against third parties. It is submitted, that any wrongdoing third parties causing the assured's loss will not be absolved of their liability simply by way of the assured's indemnification by his insurer.[500]

In such cases, where the insurer will take over the assured's rights against any third parties, he will have to pursue the claim in the name of the assured, to which the assured must assist. In *Yorkshire v Nisbet*[501], it was supported that the assured's permission to the insurer's proceedings in the former's name is an implied term of the insurance contract. This was subject to the assured being fully indemnified for his claim. It was also mentioned that, should the assured not facilitate the insurer's subrogated right, then he would be liable to the insurer for damages due to breach of the relevant duty. Additionally, according to *The Esso Bernicia*[502], the insurer can force the assured to comply by instigating proceedings in his own name, while joining the assured and the wrongdoing third party as defendants.

Conversely, where the insurer has not paid for the loss and he, nevertheless, still tries to enforce his right of subrogation against a third party, then such action, if without the sanction of the assured, will be defeated as a nulliuty.[503]

It is understandable that any excess in recoveries from the third parties will be accounted for the benefit of the assured.[504] Such recoveries will be held in trust by the insurer and for the benefit of the assured.[505] Equally to the indemnity principle

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[499] E.g. see: *Darrell v Tibbitts* (1880) 5 Q.B.D. 560; and Re Driscoll [1918] 1 Ir.R. 152.

[500] See: *Colonia Versicherung AG v Amoco Oil Co (The Wind Star)* [1997] 1 Lloyd's Rep. 261; *Dufourcet v Bishop* (1886) 18 Q.B.D. 373; *The Charlotte* [1908] P. 206; *The Yasin* [1979] 2 Lloyd's Rep. 45; *Randal v Cockran* (1748) 1 Ves. Sen. 98; *Mason v Sainsbury* (1782) 3 Doug. 61; and *Yates v Whyte* (1838) 4 Bing. N.C. 272. This reasoning was doubted in the *Elf Enterprises (Caledonia) v London Bridge Engineering Ltd* [2000] Lloyd's Rep IR 249, bt was reversed in the House of Lords case *Caledonia North Sea v British Telecommunications Plc* [2002] Lloyd's Rep IR 261.

[501] *Yorkshire Insurance v Nisbet Shipping* [1962] 2 Q.B. 330, at 341

[502] *Esso Petroleum v Hall Russell (The Esso Bernicia)* [1989] A.C. 643. Also see: *Yorkshire Ins Co Ltd v Nisbet Shipping* [1962] 2 Q.B. 330, at 341; *John Edwards v Motor Union Insurance* [1922] 2 K.B. 249, at 254; *Morris v Ford Motor* [1973] Q.B. 792, at 801; and *Netherlands Insurance v Karl Ljungberg (The Mammoth Pine)* [1986] 2 Lloyd's Rep. 19, at 22.

124. See the cases cited in the preceding note, and *King v Victoria Ins Co [1896] A.C. 250*.

[503] Clear derivation from MIA 1906, s.79(1) and (2).

[504] See: *Yorkshire Insurance v Nisbet Shipping* [1962] 2 QB 330; but opposite: *North of England Iron Steamship Insurance Association v Armstrong* (1870) LR 5 QB 244.

[505] See: *Lonrho Exports Ltd v Export Credit Guarantee Department* [1996] 4 All ER 673.

restricting the assured, the insurer is not allowed to keep any additional monies than up to the amount already paid to the assured. An exception can be made, for any costs for pursuing the claim and where the insurer has acquired an assignment of right of action. That is to say, that the assured will grant the insurer his full right to go against third parties. In these cases, the insurer will be able to act against third parties even before full indemnification of the assured and to keep the additional recoveries. It is supported, though, that the insurer will not be able to keep the full amount in excess of the indemnification monies, but rather a nominal amount.[506]

4.3.2 *The Merchant Shipping Act 1995 and the 64 shares of a ship*

It is well understood that the subject matter insured can either be cargo, or a vessel. When the right of ownership is transferred under the right of subrogation, a cargo, as any common type of chattels, will be passed without the need for any further formalities. In terms of the passing of a ship, though, there are additional concerns to take into account. This would, firstly, be the transfer system of the ship's country of registry, i.e. the *lex situs rei*[507]. Under English law, there are specific rules governing the registration and passing of a right on a ship, which can be found in the relevant Merchant Shipping Acts.[508] Accordingly, the mere fact of abandonment and subrogation will not be enough for the insurer to actually fully take over the insured part.[509]

It is a long standing principle[510] that a British ship's ownership is split into sixty-four shares. Therefore, a problem arises, where the insurer has insured for and takes over a part of the ship, which is less than one share. Even this slight portion remains as his right to own the vessel by that amount, per any other case of partial

[506] See: *Compania Columbiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101.
[507] See: *The WD Fairway (No 2)* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep 191, at 80-103.
[508] On strict compliance thereto, see: *Scottish Mar Ins Co of Glascow v Turner* (1853) 4 HLC 312; 1 Macq 334 (HL (Sc)), 342n, per Lord Truro.
On the fact that rights are transferred, see: *Whitworth Bros v Shepherd* (1884) 12 SC (4th) 204. But for full transfer to be effected, see requirements in: MSA 1995, s.16, Sched.1, para.1(1) and (2).
[509] See: *Scottish Mar Ins Co of Glasgow v Turner* (1853) 4 HLC 312n; 1 Macq 334 (HL(Sc)), 342n, *per* Lord Truro.
[510] But also see: Merchant Shipping (Registration of Ships) Regulations 1993 (SI 1993 No 3138), reg.2(5)(a).

insurance, since there is no requirement in law for the ship's insurance to be taken in parts of registrable size. The same applies for interests not officially registered; i.e. the insurer may be subrogated therewith, without any legal issues, in accordance with *Scottish Marine Insurance of Glasgow v Turner*[511] and the Merchant Shipping Act 1995, s.16, Sched.1, para.1(1)-(2), which grants express freedom of disposal to a ship's owner.[512] But what is the relationship that the insurer shares with the assured?

There was an attempt to resolve the situation in *The Commonwealth*[513], where it was supported that the owners and the underwriters will be joint tenants of the property proportionately to the amount they covered (i.e. the percentage of insurance for the insurer and self-insurance for the assured, respectively). In *Whitworth v Shepherd*[514], the insurer had acquired a portion of one-eighteenth, minus twenty per cent due to the assured's expenses for repairs, which amounted to less than one share. The insurer was held to not be able to become the actual owner of any part of the ship. In this case the matter was further perplexed by the fact that by the time of the take over, the assured had mortgaged the vessel to an extent greater than her value.

As we have seen above, the rules of trust have played an important role in keeping a balance between over-recoveries between the two parties. Accodingly, we could say here that, since the insurer will not be having a registrable portion of the ship, this amount of the shares will be kept by the assured in trust for the benefit of the insurer. The insurer will still be the portion's owner, but will have limited power thereover. The assured, on the other hand, will have full power over his portion and for the insurer's part, he will be able to fully manage it, but with consideration to the best interest of its owner. This is supported by several cases, though not in absolute consistency.[515]

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[511] Per Lord Truro: "The act of abandonment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby invested the insurers of the ship with all the rights which belonged to the owners".

[512] The section reads: "the registered owner of a ship or of a share in a ship shall have power absolutely to dispose of it provided the disposal is made in accordance with this Schedule and registration regulations" but this "does not imply that interests arising under contract or other equitable interests cannot subsist in relation to a ship or a share in a ship; and such interests may be enforced … in the same manner as in respect of any other personal property".

[513] *The Commonwealth* [1907] P. 216.

[514] *Whitworth v Shepherd* (1884) 12 SC 204.

[515] See: *Williams' and Bruce's Admiralty Practice* (3rd edn), pages 30–31; and *The Kent* (1862) Lush 495. Contrast *The Elizabeth and Jane* (1841) 1 W Rob 278.

This position is not at all random. Tomlinson J is in agreement, as he positioned himself in the *Dornoch* case.[516] There, he stated that, in principle, the insurers were entitled to have "the appropriate number of whole one sixty-fourth shares" transferred, in order to be registered in their name, while for the remaining parts not amounting to a full share would be held on trust by the assured for the benefit of the insurers. The judge went on to clarify that in the *Whitworth* case, the insurers had not been registered as owners at the time when the mortgage was effected and, for this reason, their interest in the vessel was only in equity. The mortgagee must have been a, or in the shoes of a, *bona fide* purchaser for value without notice of the insurers' interest and it was thus that he remained free of the insurers' interest.

Further to the requirements of transfer, it is noted that normally, this will be done through a bill of sale.[517] But, if the insured vessel is a wreck, i.e. a vessel incapable of being used as a ship, then the rules are different. The Merchant Shipping Act 1894, s.21 , as amended by the Merchant Shipping Act 1906, s.52 provided that, where the ship is totally lost, whether actually or constructively, any owner could serve a notice to the registrar stating the fact of such loss, thereby closing the relevant registry of the ship in that book. Accordingly and in agreement with the *Manchester Ship Canal* v *Horlock*[518] case, ships that had been constructively lost would enable a full transfer of rights, e.g. through a sale, without the requirement of a bill of sale. The current regime in force, namely the Merchant Shipping Act 1995, Part II (ss.8-23), Sched.1, and the Merchant Shipping (Registration of Ships) Regulations 1993, reg.56(1)(c), provide that the Registrar may close a ship's registration, where a ship has been destroyed. The term destroyed includes instances of shipwrecking, demolition, fire and sinking. These rules will apply to almost all cases of ships physically constructively totally lost (that is to say not ships that may be recovered unscathed; e.g. piracy cases) making, in this manner, the transfer of proprietary rights between the assured and the insurer much easier.

[516] *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty), at paras.61 and 66.
[517] Merchant Shipping Act 1995, s.16, Sched.1, para.2(1).
[518] *Manchester Ship Canal* v *Horlock* [1914] 2 Ch 199.

4.3.3 *The misunderstanding of SoGA 1979, s.32(2)*

As stated, the insurer not only takes over the subject matter, but is also subrogated in all of the assured's rights thereof. This includes the right to go against any wrongdoing third party. Interestingly, there is a specific legal route that most probably no insurer has ever touched upon. Perhaps rightfully so, as most of the maritime trade has not realised the potential of the following legal probability, in spite of the fact that it has been around for well over 100 years.[519]

This route deals with the passing of risk in a sale of goods and the Sale of Goods Act 1979, s.32(2).[520] In any sale of goods, the seller has to deliver the goods to the buyer. In a sale of goods on shipment terms, the seller has to take the goods on-board a vessel, which is treated as delivery to the buyer himself. The SoGA 1979, s.32(2) requires that such a seller will make a *reasonable* contract of carriage (i.e. the contract of carriage as contained in the bill of lading, as tendered to the buyer), or else the buyer may refuse to treat delivery of the goods to the carrier as delivery to himself. The refusal of delivery is very important, because the risk of physical damage or loss of the goods, which had passed to the buyer on or as of shipment, will revest in the seller. For this reason, any damage caused or any lost realised in relation to the goods will be for the seller to bear.

This is important to marine insurance and total losses, because there are plenty of cases (though not restricted to total losses), where the seller has not made a reasonable contract of carriage, the goods have been damaged or lost completely, the assured claims against the goods' insurers, and the latter, having indemnified the assured, in this case the buyer, eventually remain the party damaged, although it was the seller, who was at fault.

In the same way as any buyer of goods being able to use SoGA 1979, s.32(2), so could any insurer of such buyer utilise its effects after being subrogated in the

[519] See: Sale of Goods Act 1893, s.32(2), which was also the intellectual child of Sir Mackenzie Chalmers and which is now SoGA 1979, s.32(2), in the exact same form.

[520] SoGA 1979, s.32(2): "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."

buyer's rights against the seller. Due to the rarity of this section's use, it would be helpful to make the appropriate analysis to the benefit of both theory and practice.

First and foremost, we shall examine what is the meaning of a reasonable contract of carriage. The principle deriving from the above section originates from case law dating at least back to the early 19th century. At that time, the rule was held to be that the seller had the burden of securing the carrier's liability as to the safe delivery of the shipped cargo, so as for the buyer to be able to claim against him, should anything go wrong with therewith.[521] Towards the end of the 19th century, the results of this rule's breach became clearer and were held to be that the delivery to the buyer would be held to not have been proper; this, in turn, would bring the seller in the difficult position of having breached the sale contract at least for non-delivery of the goods. It was even at that time required, as per today's s.32(2), that damage to the goods had taken place. It is parenthetically offered that this prerequisite has a certain rationale, as without damage to the goods, one can with difficultly establish damages to one's self, though without damage to the goods, the seller will be allowed an escape, even though he had made an unreasonable contract of carriage. After the end of the 19th century, very little has been judicially offered in clarification of what is a reasonable contract of carriage owing mostly to the rarity of the section's use (then under SoGA 1893 and now SoGA 1979).

The common inference seems to be that the seller is supposed to make a contract of carriage, which will be on usual terms,[522] which will protect the cargo while carried[523] and which will offer protection to the buyer against the carrier[524].

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[521] See: *Clarke v Hutchins* (1811) 14 East 475, especially per Lord Ellenborough C.J., at 476, which discussed the seller's duty of right delivery in close connection with matters of insurance; and same rule in *Buckman v Levi* (1813) 3 Camp 414, at 415.

[522] *Ceval Alimentos SA v Agrimpex Trading (The Northern Progress)* [1996] 2 Lloyd's Rep. 319, per Rix J (as he then was), at 328. Also see same principle in *Tsakiroglou v Noblee Thorl-GmbH* [1962] A.C. 93, per Lord Radcliffe, at 121-122, and Lord Guest, at 132-133; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper* (1940) 68 Ll. L. Rep. 75, per Lord Caldecote, at 81; *TW Ranson v Manufacture d'Engrais et de Produits Industriels Antwerp* (1922) 13 Ll. L. Rep. 205, per Greer J, at 205; and *Burstall v Grimsdale* (1906) Com. Cas. 280, per Kennedy J., at 290. Also see: Incoterms 2010 Rules, articles A3(a) and A8 of the C.I.F. terms.

[523] *Texas Instruments v Nason (Europe)* [1991] 1 Lloud's Rep. 146, per Tudor Evans J., at 149; *Gatoil International v Tradax Petroleum (The Rio Sun)* [1985] 1 Lloyd's Rep. 350, per Bingham J., at 95; *Thomas Young v Hobson* (1949) 65 T.L.R. 365, per Tucker L.J., at 366; *D M Duncan Machinery v Canadian National Railway* [1951] Ont. Rep. 578, per LeBel J., at 583; and *B C Fruit Market v The National Fruit* (1921) 59 D.L.R. 87, per Stuart J., at 95.

[524] See *Hansson v Hemel and Horley* [1922] 2 A.C. 36, per Lord Summer, at 45. This is a corner-stone case of sale of goods, especially in relation to transfer of risk and property from seller to buyer.

Though the majority of case law[525] would insist on that the seller must utilise what clauses and terms are usual for the appropriate market at the time of the contract (of carriage)'s fixture, there are some opinions pointing towards a broader approach under s.32(2). Such an approach would include the terms only to be reasonable within the context, nature and purpose of the contract of carriage, even if not usual for the contracted transfer.[526]

In relation to protection of the cargo, this would entail any and all measures necessary for the safe transportation and discharge of the goods at the port of destination. One of the reasons, aside from the obvious of selling sound and merchantable goods,[527] would be that the sellers are expected to possess reasonable knowledge of any special characteristics and any idiosyncratic traits of the goods they are trading. Examples of special requirements are, for example, packing and stowing[528], and heating[529]. Additionally, protection of the cargo relates to the carrier's liability for improper carriage and stowage. For this reason, if the carrier is absolved, by means of a seller's undertaking the risks of carriage, then this would be considered to be an unreasonable contract of carriage.[530]

Thirdly, the buyer must be able to be vested with the right to claim against the carrier, which will be succeeded through the seller tendering to the buyer full and proper set of shipping documents.[531] This set will effectively transfer all of the seller's rights under the contract of carriage contained in the bill of lading proving the cargo's condition upon shipment and the carrier's responsibilities, a.k.a. continuous

[525] *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper* (1940) 68 Ll. L. Rep. 75; *Tsakiroglou v Noblee Thorl-GmbH* [1962] A.C. 93, per Lord Guest, at 132; and *Sanders v MacLean* (1883) 11 Q.B.D. 327, per Brett M.R., at 337.
[526] See: *Tsakiroglou v Noblee Thorl-GmbH* [1962] A.C. 93, per Lord Radcliff, at 121-122; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper* (1940) 68 Ll. L. Rep. 75, per Lord Caldecote, at 81; and *The Northern Progress* [1996] 2 lloyd's Rep. 319, per Rix J. (as he then was), at 328.
[527] See: *Mash & Murell v Joseph I Emanuel* [1961] 1 Lloyd's Rep. 47, per Diplock J., at 55.
[528] *Tsakiroglou v Noblee Thorl-GmbH* [1962] A.C. 93, per Lord Radcliff, at 339.
[529] *The Rio Sun* [1985] 1 Lloyd's Rep. 350, per Bingham, at 360.
[530] See: *Thomas Young v Hobson* (1949) 65 T.L.R. 365, per Tucker L.J., at 366, where the good's were shipped at shipper's risk (and not in carrier's risk as they should be) and where the cargo was also not properly stowed and secured. Also see: *B C Fruit Market v The National Fruit* (1921) 59 D.L.R. 87, per Stuart J., at 95, on carrier's liability to properly carry the goods under the necessary conditions (here, heating of cabbages).
[531] See: *Hansson v Hemel and Horley* [1922] 2 A.C. 36. Also see: *Texas Instruments v Nason (Europe)* [1991] Lloyd's Rep. 146, per Tudor Evans J., at 148-149.

documentary cover;[532] in C.I.F. sales, the buyer will also receive the right to claim against the insurer through assignment of the policy and implied consent by the insurer, which is also vital in the trade. With these tools, the buyer will be able to get a remedy for any damages his goods may have suffered. But, if there are any flaws within these documents, and especially in relation to the contract of carriage, then the buyer will not be in such a position. Consequently, this contract of carriage will be considered to be unreasonable.

Other than the above, there has been extensive debate in the market as to what constitutes a reasonable contract of carriage, in cases where the carrying vessel has all proper certificates, e.g. it is fully classed with an approved society, but the post-casualty evidence points to the contrary. In a recent unreported arbitration case, a vessel was chartered from Italy to the UK under CnF terms. The vessel was fully classed, but mid-voyage, some cracks appeared on the side of the hull resulting in her detainment by the Gibraltar authorities. The vessel was in such state that the port authorities considered it too dangerous for another ship to even go along her for transhipment of the goods, as there would be too much stress on the weak hull and she would most probably break in half. Experts found that the wastage of the hull's steel was at around 90%, thus leaving a thickness of about 1.2mm. This was clearly an unseaworthy vessel. The tribunal, though, both at first instance and on appeal held that the classification certificate was adequate enough to show that the contract of carriage was reasonable.

It is submitted that the market's view should not be regarded as correct. Where there are such extreme conditions, such as blatant unseaworthiness, the contract of carriage is and should be treated as unreasonable, even in cases of opposite express agreement by the parties.[533] Granted, s.32(2) states that it is in effect, unless there is otherwise authorisation is given by the buyer. But such an authorisation should not be allowed to exceed certain limits and should be construed very strictly. In the above example, the vessel was not only endangering the cargo on-board, but also the other

[532] See: *Soon Hua Seng v Glencore Grain* [1996] 1 Lloyd's Rep. 398, at 401; and *Holland Colombo Trading Society v Segu Mohamed Khaja Alawadeen* [1954] 2 Lloyd's Rep. 45, especially, per Lord Asquith of Bishopstone, at 53.

[533] E.g.: GAFTA 100, lines 78-80, where there is no express requirement for the carriage on a seaworthy ship; and *Bigge v Parkinson* (1862) 7 H. & N. 955, where the express agreement of the parties superseded any obligation to the contrary.

ships in the harbour and, most importantly, the lives of the seamen working on her. Another example would be where the is agreement for the use of a specific type of vessel, without any further details over the preservation and care for the cargo. If the introductory sentence of s.32(2) is read broadly, then this agreement should be enough for the seller to get the services of a vessel of such type as agreed, but which has no other characteristics suitable for the cargo, such as heating/cooling, insulation, fumigation, protection from tainting, securing by straps or lashes etc., namely an uncargoworthy vessel.[534] It is rather obvious that this should not be allowed and such a contract of carriage should be treated as unreasonable.

Accordingly, should an insurer ever be in such a position, where there has been an unreasonable contract of carriage, as SoGA 1979, s.32(2), is construed, and he has come to indemnify the assured buyer, then he may use this section to revest the risk in the seller, against whom the assured for the benefit of the insurer, or the insurer in the name of the assured may move, as described above, and receive the necessary monies as damages for the breach of the sale contract. This will bring the insurer into a pecuniary equilibrium, as otherwise, he would have indemnified the assured under the insurance policy, but would have not been able to claim this amount from the wrongdoing third party.[535]

4.3.4 *Other rights passing on payment; salvage and freight*

For matters of completion, a summary of two rights additional to the ones presented above and transferred to the insurer on payment for the loss and subrogation into the right of the assured will be presented below.[536]

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[534] E.g., see: *Liverpool City Council v Irwin* [1977] A.C. 239, especially, per Lord Cross of Chelsea, at 258, which dealt with the requirement of cooling the cargo.

[535] For further information, see the work of R.Faint, who sparked the re-initiation of this section's use resulting in the revisiting of various academic works: R.Faint, *The "Reasonable Contract of Carriage"; An alternative look at the duty imposed by section 32(2) of the Sale of Goods Act 1979*, 1st ed., Southampton University, 1992. Also see: F.Lorenzon, L.Skajaa, Prof.Y.Baatz, C.Nicoll, *Sassoon: CIF and FOB Contracts*, 5th ed., Sweet & Maxwell, 2012.

[536] E.g., see: *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty), per Tomlinson J, and *Attorney General v Glen Line Ltd* (1930) 37 Ll L Rep 55, per Lrd Atkin stating that on a valid abandonment the insurer becomes no doubt entitled to proprietary rights incidental to the

The first such right is salvage of whatever may remain. An example of salvage is proceeds of Spanish ships captured by way of reprisals, as distributed by the British Government to the assureds[537]. Another example is the assured's right to claim a general average contribution.[538]

One of the most common fights between insurers and assureds in cases of subrogation is that of freight earned and owed to the ship.[539] The general rule is that any freight earned after the loss is for the insurer's benefit.[540] Reversely, any freight earned before the casualty is for the benefit of the assured.[541] This is not so, where freight is earned by a substituted ship.[542] Also, in cases of underwriters covering hull and freight separately, freight is for the benefit of the underwriter of freight.[543] Where

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subject-matter insured as from the time of the loss; he is put in the same position as though the subject-matter insured was assigned to him by way of sale immediately after the event which constitutes the loss.

[537] See: *Randal Cockran* (1748) 1 Ves. Sen. 98; *Blaauwpot v Da Costa* (1758) 1 Eden 130; *Burnand v Rodocanachi* (1882) 7 App. Cas. 333

[538] *Walker v United States Ins Co*, 11 Serg. & Rawle 61 (1824); 2 Phillips, s.1709.

[539] See: see: *Ann Stewart and Others v The Greenock Marine Insurance Company* (1848) 9 E.R. 1052; *Case v Davidson* (1816) 5 M. & S. 79; affirmed by Exchequer Chamber: *Davidson v Case* (1820) 2 Brod. & B. 379.

Exception: if the freight is earned by a substitute ship, see: *Hicjie v Rodocanachi* (1859) 28 L.J.Ex. 273. Exception: if the policy provides that the underwriter is not to claim freight; then it is salvage to the underwriter of the freight if he pays for the CTL, see: *Coker v Bolton* [1912] 3 K.B. 315. Exception: if the freight is earned before the journey or for the part that is earned before the casualty, see: *The Red Sea* [1896] P. 20 at 26, although in *Sea insurance Co v Hadden* (1884) 13 Q.B.D. 706 CA, the court held that the freight earned as damages for the trip after the casualty was receivable by the assured, not the abandonees of the ship; approved by *Glen Line v Attorney-General* (1930) 36 Comm. Cas. 1. Finally, see: MIA 1906, s.63(2).

[540] *See: Case v Davidson* (1816) 5 M. & S. 79; affirmed in *Davidson v Case* (1820) 2 Brod. & B. 379; *Stewart v Greenock Marine Insurance Co* (1848) 2 H.L. Cas. 159; and *The Red Sea* [1896] P. 20.

[541] See: *The Red Sea* [1896] P. 20; and *Miller v Woodfall* (1857) 8 E. & B. 493.

[542] See: *Hickie v Rodocanachi* (1859) 28 L.J.Ex. 273.

[543] See: *Coker v Bolton [1912] 3 K.B. 315* in conjunction with Marine Insurance Act 1906 s.63(2); and *Baillie v Moudigliani* (1785) 1 Park, Ins., 116.

Specifically see: *Leatham v Terry* (1803) 3 B & P 479, where the assured had taken a policy on ship and a separate on freight. After the ship's detainment in Russia under embargo, the assured abandoned the ship to the underwriters on ship and the freight to the underwriters on freight. The ship was later released and earned freight accordingly which the assured received. In an action by the underwriters on freight against the assured, the court held that they were entitled to recover the freight so received by him; and *Thompson v Rowcroft* (1803) 4 East 34, where a ship-owner insured his ship with A and his freight with B. Due to an embargo, he abandoned the ship and freight to the respective underwriters and received therefrom the whole amount of their subscriptions on a total loss basis. He also undertook to assign to the underwriters his interest in the ship and to the underwriters on freight specifically to assign all rights of recovery and compensation. The ship was liberated at a later stage and earned freight, which was received by the assured and claimed by both sets of underwriters. The court held that the weight of argument might preponderate more in favour of the underwriters on the ship, yet the assured, who had received the freight from the shippers of goods, was liable under his express undertaking to pay it over to the underwriters on freight, without deducting the expenses

freight is earned in a voyage subsequent to that during which the loss occurred and the freight lost from the original voyage is claimed, it seems that the latter proceeds should be taken into account on the basis of equity law.[544] What is certainly taken into account is the freight's proportion of general average and particular charges.[545] Another argument in relation to freight is that it is a personal right of the assured and not one incident to his interest in the subject matter insured. There has been an effort to evade such occurrences by using a freight waiver clause.[546] Finally, where the cargo has been totally lost, if the assured has already paid freight *pro rata*, he cannot recover this from the insurer.[547]

4.3.5 *Subrogation, a two-edged blade*

Through subrogation, the insurer will not only acquire all of the assured's rights, but also all of his liabilities in relation to the subject matter insured in the same way as the assured will be divested of all such encumbrances.[548] These can include severe claims and the costs could effortlessly outweigh the benefits from such a take over.

Examples of expenses can be the liability to pay salvage to third parties for saving and restoring the abandoned property, liens imposed thereon, expenses for earning any pending freight.[549] These burdens can only encumber the insurer as of the time of the casualty onwards. So, any liabilities incurred before that time are for the

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of provisions, wages, etc, which were charges on the owner before the abandonment, and on the underwriters on ship afterwards.

[544] See: *Atlantic Maritime Co Inc v Gibbon* [1954] 1 Q.B. 88. The point was considered as *obiter* and, so, there is not certain rule of law to be derived therefrom. Also see: *Everth v Smith* (1814) 2 M. & S. 278.

[545] *The Red Sea* [1895] P. 293, per Bruce J.

[546] E.g., see: ITC – Hulls 1983, cl.20; MIA 1906, s.63(2); and *Coker v Bolton* [1912] 3 K.B. 315 on construction.

[547] *See: Baillie* v *Moudigliani* (1785) 1 Park 116.

[548] See: *Barraclough v Brown* (1895) 1 Com. Cas. 262 at 329; (1896) 2 Com. Cas. 249; [1897] A.C. 615; following *Arrow SS Co v Tyne Improvement Commissioners (The Crystal)* [1894] A.C. 508, distinguished, however, in *Smith & Sons v Wilson* [1896] A.C. 579 PC. Also see: *Boston Corporation v France Fenwick & Co Ltd* (1923) Ll LR 85; *The Wallsend* [1907] P. 302; and *Sheppey Glue v Medway Conservators* (1926) 25 Ll. L.R. 32.

[549] E.g., see: *Sharp v Gladstone* (1805) 7 East 24; *Barclay v Stirling (1816) 5 M. & S. 6*; and *Gilchrist v Chicago Insurance* (1899) 104 Fed.R. 566.

assured to cover.[550] The assured, though, cannot part through abandonment to the underwriters with his contractual or tortious liabilities attaching to him personally.[551]

4.4 Conclusion

In terms of the assured's possible recoveries, whether material or pecuniary, we noticed the importance of the underwriter's actions in response to the notice of abandonment and his rights of election both after acceptance of the notice and after indemnification of the loss. The most important matter to mention, though, is that the system of abandonment as seen in the MIA 1906 (i.e. without the vast changes brought upon it by certain cases) is a good one, though not perfect and with intrinsic complexities on certain points, protecting both parties' rights.

Without election to take over under s.63(1), the subject matter insured remains under the ownership of the assured. This entails that the full set of rights deriving therefrom, as per before the loss, are still in the assured's hands and he may freely dispose of the subject matter as he sees fit, while also being entitled to full indemnification for his loss. Freedom does not come without restrictions, since under the indemnity principle, should he receive indemnification from the insurer, he will owe to the latter any proceeds he may have acquired by the disposition. By these means, a fair balance is struck and all parties operate well within the purpose and confines of marine insurance law.

In spite of this balance, certainty and short resolution being key aspects of the law's operation, these are not necessarily assisted by the fact that the insurer appears to not be time constrained for his exercising of his right to take over the subject matter insured, both under s.63(1) and s.79(1) (though technically there is a limit for the former as it is absorbed into the latter after payment for the loss).[552] The rules of

[550] *Williams v Smith* (1804) 2 Caines 20; 2 Phillips, *Ins.*, s.1716; *Sea Insurance v Hadden* (1884) 13 Q.B.D. 706. See also *Eglinton v Norman* (1877) 46 L.J.Ex. 557, per Lord Coleridge C.J. and Brett L.J., overruled by *The Crystal* [1894] A.C. 508, but on a different point.

[551] See: *Dee Conservancy Board v McConnell* [1928] 2 K.B. 159; *The Ella* [1915] P. 111; and *Eglinton v Norman* (1877) 46 L.J.Ex. 557.

[552] We have already mentioned that under s.79(2), i.e. for partial losses, there exists no such right of takeover whatsoever.

equity and specifically the doctrine of equitable estoppel could assist in severely limiting the insurer's right into equitable margins, though these are neither pre-set, nor very clear and always prove to be fact-sensitive.

Equity's role in this legal plexus is also present where the insurer has made the s.63(1) election, whereupon he receives an equitable lien upon the subject matter insured. This becomes automatically an equitable right on the property abandoned, making the underwriter a proper owner of the property's part that he insured and for which he indemnified the assured. Thus the underwriter has always his right of take over secured even though the ship or cargo may still be in the assured's hands. Even where the insurer is to take over a part of a ship that is less than 1/64th, his right is still existent and in the safekeeping of the insured.

The two greatest points of care remain the non-reversal of the subject matter's sale to a *bona fide* purchaser[553] and any conduct that could show acceptance, rejection or waiver of certain rights, such as the right to the property's remains, or that would prejudice the rights of the other party and thereby cause damage to it, such as the insured's conduct in the *Dornoch* case. These need careful consideration by both parties; as does the fact that the take over functions retrospectively from the time of the loss. Therefore, the insurer should be careful as to the treatment of the subject matter insured and the instructions given to the insured for the handling thereof until that time as the property may finally pass, as must the insured, too, be careful as to not be liable to the insurer for any damage (including depreciation) recklessly caused.

Other issues, of which the parties need to always be aware, are that the s.79(1) right to subrogation transfers both all of the insured's benefits and all of his burdens on the subject matter insured. These include any liens, liabilities for claims but also any rights to move against 3rd parties in the name of the assured or in the insurer's own name (after a completed take over or after an assignment of the insured's right of action to him) and the great benefit of SoGA 1979, s.32(2), as analysed above, which still remains much unexplored.

[553] The proceeds of the sale will still be owed, but the potential price that could have been realized if the property was passed on to the insurer and sold by him could be greater.

Chapter 5

Can the wreck become a res nullius by operation of abandonment? The fate of wrecks and the responsibility of the parties thereto.

One of the major issues in the international shipping world is damaged ships being left to their own fate after being badly damaged. Such incidents are not focused in any specific part of the sea, though the most troublesome ones occur when ships are left within port limits, in areas of low manoeuvrability, such as navigable rivers, and in places of high traffic, thus providing a high danger to navigation.

This phenomenon owes to the willingness of certain parties to dispose of any burdens and alight themselves of any liabilities relating to the wreck. Such liabilities can be to third parties that may be both directly damaged, e.g. shipowners through a collision at sea, and indirectly affected, such as ports via obstruction of their operations, or local communities due to environmental disruption.

By leaving the wreck at sea to deal with the whims of fate, is to effectively try and change its legal *status* in terms of ownership, possession and any accompanying liabilities, which may attach thereto.

One possible route for a ship to change such *status*, under the rules of marine insurance law, is through the exercise of the right of abandonment and the right of subrogation[554], and it is within these limits that a theory emerged, which would lead to a ship being characterised under the ancient term *res nullius*.[555] This concept of a wreck becoming a *res nullius* is indeed an old one, though it has survived to our days. Cases tracing back to the first years of the 19th century[556] have been documented to have been engaged with the very same question, with which even modern case law[557] has dealt.

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[554] As described in MIA 2906, ss. 62 onwards and 79.

[555] E.g. see: *The Thetis*, 3 Hag. Adm. 228, per Sir John Nicholl; and Roman law (Digest Bk. XLVII, Tit. 2, Sect. 43, sub-ss. 10 & 11; Institutes Bk. II., Tit. (1) (47, 48): rule of *res nullius fit primi occupantis* (which means: The first possessor of a no one's thing becomes the owner by right of occupancy).

[556] E.g.: *Thompson v Rowcroft* (1803) 4 East 34; *Leatham v Terry* (1803) 3 B & P 479; and *Robertson and Thomson v French* (1803) 4 East 130.

[557] E.g.: *Hapag LloydA.G., Stork Amsterdam and Fitzgerald v Texaco* [1976] 1 Lloyds Rep 565.

The main logic behind this construction is that the assured gives the notice of abandonment to the underwriter and, if the underwriter rejects the notice, then the subject matter abandoned becomes a *res nullius*. To elaborate, it is supported that, as the assured abandons the subject matter insured, it is no longer in his hands, and, as the underwriters do not take over the subject matter, it so remains in no one's hands.

Should this be possible, then the figurative landscape of abandonment in marine insurance law and the literal landscape of the seas would radically change. Such a regime would offer the best means possible for vessel- and cargo-owners of escaping any and all liabilities through the mere act of abandonment, whilst retaining the right to a full indemnification.

In this chapter, the various arguments presented in the case law, whether resulting in favour or against such a notion, will be examined in search of any legal merit that might exist in proving, or disproving, the *res nullius* idea. But the current examination will also take a step further. An alternative method resulting in transforming a wreck into a *res nullius* will also be sought. It has been supported, and has been implemented on many an occasion, that a shipowner in possession of a severely damaged ship may leave her as she lies in a port, river, or other navigable waters and be, consequently, divested of all rights of possession and ownership. In contrast to the typical means of abandonment[558], this type has been known as abandonment to the world at large, or abandonment to the high seas, and constitutes a more general type of abandonment unrestricted by the marine insurance law's relevant sections. Apart from the case law clearing the owner of all ties to the wreck, there has also been case law offering that, irrespective of the subsequent lack of possession and ownership, abandonment to the world does not part the owner of the wreck from his liabilities. Should this be the rule, then using abandonment to the world as an escape route would defeat its purpose, as the owner would still have to pay for any damages or expenses claimed against him thereafter. All theories, main or alternative, will be put to the test.

Finally, the current chapter will close with an examination of the current UK legal regime. This will include any general statutes and specific port, harbour and

[558] See the criteria for exercising the right to abandon, the service of the notice of abandonment and the following acceptance of the insurer.

river regulations, dealing with the liabilities and registrations of ships, which could assist or prevent the application of the above theories and retain or dismiss any rights of possession, ownership and liabilities.

5.1 *What is a wreck? The differentiation of derelicts and the types of abandonment*

It has been observed on many instances that the terms wreck and derelict are confused. In truth, as far as their legal interpretation is concerned, their distinction and understanding is quite clear. As we shall see, the clarification is important especially in correlation with the different types of abandonment, as analysed below, and, accordingly, when examining the plausibility of the *res nullius* idea along with any liabilities, which the parties may have.

Following upon a maritime casualty, a *wreccum maris*, or wreck as it is commonly known, is: (a) A sunken or stranded ship; or (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or (d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.[559] This term is wider than and includes the terms derelict, flotsam, jetsam and ligan[560], as portrayed in s.255(1) of the Merchant Shipping Act 1995.[561]

A derelict, or *res derelicta*, on the other hand, is a ship or cargo, whether afloat or not, that is abandoned without hope of ever returning. That is to say, it is

[559] See: Wreck Removal Convention Act 2011, Schedule, Art.1, s.4; said Act implements the Nairobi International Convention on the Removal of Wrecks 2007.
The word itself comes from the Normans' "wrecke" (as found, for example, in the Merchant Shipping Act 1894, s511) and the Scandinavians' "rek" and used to be defined as "where a ship is perished on the sea, and no man escapeth alive out of the same, and the ship or part of the ship so perished, or the goods of the ship, come to the land of any lord, the lord shall have that as wrecke of the sea. But if a man, or a dog or a cat, escape alive, so that the party to whom the goods belong, come within a year and a day, and prove the goods to be his, he shall have them againe".

[560] Flotsam: floating wreckage of a ship or its cargo; Jetsam: part of a ship, its equipment, or its cargo that is purposefully cast overboard or jettisoned and that sinks or is washed ashore; and Lagan or Ligan: cargo that is lying on the bottom of the ocean, sometimes marked by a buoy, which can be reclaimed later (for Derelict, see separately below).

[561] Exact quotation: "Interpretation: 'wreck' includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water".

abandoned in a physical sense and not as under the exercising of the Marine Insurance Act 1906 right of abandonment.[562]

In *Halsbury's Laws of England*[563], the description is more apt and detailed: A derelict, as depicted therein, is property, whether vessel or cargo, abandoned at sea by those in charge without hope on their part of recovering or intention of returning to it;[564] a vessel is not derelict when it is only left temporarily with the intention of returning to her, even if management of the vessel has passed into the hands of a third party (e.g. salvors or harbour authorities). The test applied is the intention and expectation of the master and crew at the time of quitting her.

A vessel deserted by her master and crew with the intention of abandoning her remains derelict, irrespective of whether they subsequently try to recover her (which is different from merely returning to her). So, the crew may subsequently return to the derelict and render salvage services, thus later claiming a salvage award. This does not mean that the vessel has become a derelict if abandonment was not made with the intention of never returning. Accordingly, the same effect will take place under abandonment of the same nature owing to disease, heavy seas (e.g. getting swept off), or any other external force.

An important distinction to be made is between the abandonment by the crew, as described above, and the decision and relevant action of the owner to similarly abandon the vessel to its fate and never exercise rights of ownership thereon. In the first case the vessel is characterised as derelict by the mere action of the master and crew, despite the fact that this act may also be representing the will of the owner. On the other hand, abandonment by the owner will engulf the process of the wreck becoming derelict, as the crew will certainly leave it once the owner has left it to its fate, but it will be an abandonment of a different type; namely one of the three presented below, or the alternative of abandonment to the world, as explained later in this chapter.

[562] It is submitted, that this type of abandonment is mentioned under MIA 1906, s.60(1) and is not to be confused with the right to abandon under ss.62 onwards.
[563] **Butterworth, 3rd ed., 1955, at** p.722, para.1092.
[564] Also see: *Simmon v Taylor, Leishman, Bastian, Dickie, Contract Services, Evermore Marine Technical Services* [1975] Vol.2 Lloyd's Rep 338.

A good explanation of the wreck and derelict mechanisms is provided through the House of Lords case *Bradley v Newsum*[565]. In that case, the steamship Jupiter was torpedoed by a German submarine off the coast of Scotland, whilst carrying a cargo of timber. The crew were compelled to take to their boats under threat of being shot. Under the impression that the ship had sunk, the master so informed the owners. The vessel was in fact found waterlogged and towed into Leith. The cargoowners contended that the vessel was a derelict by the time the salvors found the ship. For that reason, they considered this to be abandonment of the vessel and, consequently, of the contract of carriage entitling them to take possession of the goods free of freight.

The House of Lords disagreed with the cargoowners' view and held that the master and crew left the vessel under circumstances that did not make the vessel derelict. Lord Finlay L.C.[566] stated that "the fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control". Further on, in his judicial decision, he said that the crucial question is whether the vessel was in fact a derelict when she was picked up by salvors, in the legal sense, namely whether the master and crew, notwithstanding the intensions of the owner, had abandoned her without any intention of returning thereto and without any hope of recovery. As Lord Finlay found, it was an external force that made the crew yield and quit the vessel and, so, the vessel was not a derelict. The involuntariness of the acts was the key factor, which would equate the situation with the crew being carried off the vessel by physical violence by the German submarine's crew and not just threats. Being more explicit, the judge referred to the essential feature of the captain and crew's state of mind in order for the ship to become a derelict, posing the question of *quo animo*[567].

Another case offering a clear view on what a derelict is, would be *Sinmon v Taylor*[568], of the Singapore High Court. The facts in summary were, in reversal to the *Bradley v Newsum* particulars, that a German submarine was sunk by a British submarine in the Strait of Malacca during World War II and almost twenty eight years

[565] [1919] A.C. 16.
[566] At 343.
[567] That is to say: What was the intention of the acting parties.
[568] *Simmon v Taylor, Leishman, Bastian, Dickie, Contract Services, Evermore Marine Technical Services* [1974] Vol.2 Lloyd's Rep 338.

later an independent operation to salvage mercury was instigated, while the Federal Republic of Germany claimed ownership on the vessel's remains.

The argument of relevance to the current matter was that the submarine was a derelict and, therefore, a *res nullius* free for anyone to salvage. Chua J held, to the contrary, that, since the commander and crew did not form or have the intention to abandon the submarine when the subject matter was torpedoed by the British submarine; accordingly, the U 859 was not derelict in the legal sense. After quoting *Halibury's Laws of England*[569] and the *Bradley v Newsum*[570] case, Chua J expressed that a derelict in the legal sense of the term is a vessel voluntarily abandoned by her master and crew without any intention of returning to her, and without hope of recovery. Force, either in the form of threats, or even seizure of the subject matter and physical extraction of the master and crew, would not make the vessel a derelict. It was additionally stated that, when a vessel is derelict, it does not necessarily follow that the owner's property is lost in it. Any salvors operating on the derelict have the right to possession and control, but they would not own the wreck. To be specific, a salvor would have a possessory lien on the salvaged property.[571]

Additional details, especially on salvors' rights, can be found in *Morris v Lyonesse Salvage Company*[572], where Dunn J found that, in order for a salvor to establish he is in possession, he needs to establish that he has *animus possidendi* and that he has exercised such use and occupation as is reasonably practicable. Most interestingly, the judge held that the word derelict was used in salvage cases in a different sense as in cases of a *res nullius*, namely under the limited meaning that the subject matter is not in the direct and absolute possession or control of any owner.[573]

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[569] *Supra*.
[570] 14 Asp. Mar. Law Cas. 340, per Lord Finlay L.C., at p343.
[571] See: *Halsbury's Laws of England*, Butterworth, 3rd ed., 1955, at p. 753 para. 1150.
[572] [1970] Lloyd's Rep. 59. The issue was whether three wrecks, the *Association,* the *Romney* and the *Firebrand,* which, under the command of Admiral Sir Clowdisley Shovell, sunk during a storm, after their service during the war between the UK and France of Louis XIV and upon returning from operations in the Mediterranean, which were found by the claimant 260 years later, were derelicts and whether he could be in his possession thereof and salvage whatever valuable materials could be found therein.
[573] Also see: *The Tubantia* [1924] P. 78; Ll.L.Rep. 158, per Sir Henry Duke, P., at pp.87 and 92; *Cossman v West* (1887) 13 App. Cas. 160, at 181: In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; *Hogarth v Jackson*, Moo. & M. 58; *Young v Hitchens*, 6 Q.B. 606; *Keeble v*

Moving to the next step, i.e. abandonment and its correlation with the currently discussed points, we find that abandonment by a shipowner has been extensively used to contain different types of actions and without proper configuration of its workings. This fact has repeatedly brought major judicial confusion. Abandonment in marine insurance law is used and divided in three separate aspects. These aspects, as already explained in the previous chapter,[574] are: 1) the initiation of the abandonment procedure, meaning the formation and service of a notice of abandonment; 2) the abandonment to the underwriters, meaning the assured's voluntary cession of the subject matter and necessary prerequisite for a total loss claim; and 3) the physical abandonment of a vessel or cargo, meaning the material discarding of the subject matter (as opposed to the legal sense, per the cession of all rights to the underwriter).[575]

Under the third sense and according to marine insurance law, abandonment is meant as the master and crew leaving the vessel (as described above, in relation to the meaning of the term derelict). The alternative, which has been used by the courts, is abandonment of a similar nature acted by the owner, namely abandonment to the world. This means that the owner will no longer exercise any rights of possession and ownership in a similar manner as the master and crew leaving the ship, but with the additional legal results of such an action. As of the time of the owner's abandonment to the world, that is to say, as from the time that the owner elects to leave the subject matter insured to its fate and never return, it is rather obvious that the subject matter

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Hickeringhall, 11 Mod. 74; 3 Salk. 9; Holt's Rep. 14, 17, 19; and *Carrington v Taylor*, 11 East 571; and *Skinner v Chapman*, Moo. & M. 59.
In similar disputes, see: *The Thetis*, 3 Hag. Adm. 228, per Sir John Nicholl, on how property may be derelict on the seas without being a *droit* of the Admiralty court.

[574] Chapter 3: Is the transfer of rights automatic as of the time of acceptance of the notice of abandonment? The meaning of s.62(6) and the significance of s.63(1); under Abandonment and Irrevocability.

[575] See: MIA 1906, s.60(1); *Court Line Ltd v The King* (1945) 78 Ll. L. R. 390, per Stable J, at 400: "The subject-matter insured must be an '*animo dereliquendi sine animo revertendi et sine spe recuperandi*'"; *Bradley v Newsom* [1919] A.C. 16, where it was found that abandonment of the vessel or the cargo is a fact objectively viewed; and same in *Robertson v Nomikos* [1939] A.C. 371, per Lord Wright, at 382: "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".
Also see: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras. 29-03 and 30-02; *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889, per Tomlinson J, at 25; *Kastor Navigation v AGF MAT (The Kastor Too)* [2004] 2 CLC 68, per Rix LJ, at 53; *Norwich Union Fire Ins Co Ltd v Price* [1934] A.C. 455 PC, per Lord Wright, at 465; and Chalmers' Marine Insurance Act, J.G. Archibald and Charles Stevenson, 4th ed., 1932, Butterworth & Co, p.86.

will also be considered derelict, since the crew will have left it without any intention of returning.

Reversely, however, the act of having a ship become derelict, through her physical abandonment by her master and crew, being otherwise unqualified, does not mean that the wreck will belong to the high seas, with no individual having any rights of possession thereon and being free for anyone to grasp. It is submitted that the fact that there was a physical abandonment in the above manner does not, without else, disperse the legal connection between the owner and the wreck. The owner will have to abandon his property himself, either through abandonment to the underwriters, or to the world, if at all possible). Accordingly, the assured may still have a right to abandon in the marine insurance law sense, since the characterisation of a ship, or cargo, as derelict only deals with the physical connection therewith, which is looked upon objectively.[576] To sum up in simple words, a wreck will not necessarily become a *res nullius* through physical abandonment.

It is at this point that the true reason for the current analysis of the terms wreck, derelict and abandonment is made obvious. The similarity between the operation and definition of the term derelict and the way that abandonment by the owner has been viewed is great. But no matter how close they are, these concepts are equally apart. Abandonment by the master and crew is not the equivalent of abandonment by the owner.

One exception could be found, where the two could coincide both in time and in terms of the person acting. In modern cases, where the master is unable to reach the owner, or in older cases where instantaneous communication, e.g. through radio, was non-existent, or in its infancy, the master could act *bona fide* as a prudent assured and exercise the authority on the vessel and cargo to "give [them] up for lost".[577] That is to say, the master can independently make a decision to sell or completely abandon a ship and its cargo both physically and legally, which was considered to be of the same effect, as per a similar decision directly by the owner. This is only possible under

[576] See: *Robertson v Nomikos[1939] A.C. 371*, per Lord Wright and Lord Porter; *Rickards v Forestal [1942] A.C. 50,* per Lord Wright, at 84; and *The Bamburi [1982] 1 Lloyd's Rep. 311,* per Staughton J. at 314.

[577] See: *Court Line Ltd v The King (1945) 78 Ll. L.R. 390*, per Stable J. in that the vessel must be a derelict; *Bradley v Newsom [1919] A.C. 16*; and *Robertson v Nomikos*, per Lord Wright, on that abandonment in this sense is "an objective fact".

extreme conditions where the vessel or cargo is or will definitely become a total loss, whether actual or constructive, by insured perils and the master is called to immediately make a decision as a matter of urgent necessity, in order to minimise the loss and preserve any, if at all, value of the subject matter insured, thus maximising the benefit of salvage.[578] It is evident that this bears great similarity to the abandonment to the world, which is considered to be vested in the owner and no one else.[579]

In summary, it is hereby stated that: Firstly, in terms of wrecks and derelicts, wreck is a word general to derelict and, for that reason, when the term derelict is encountered in the case law presented below, it should not be confused as something alien to wreck, or bearing dissimilar results; and that, Secondly, in terms of the types of abandonment, abandonment by the master and crew is different than the abandonment by the owner to the world, and that these types are equally different from abandonment to the underwriters, in the sense of a rights' cession. In the

[578] *Idle v Royal Exch Ass Co (1819) 3 Moore 115; 8 Taunt, 755*; ibid. (1821) 3 Brod. & B. 151; *Robertson v Clarke* (1824) 1 Bing. 445; *Robertson v Carruthers* (1819) 2 Stark. 571; *Cambridge v Anderton* (1824) Ry. & Mood. 60; 2 B. & Cr. 691; *Doyle v Dallas* (1831) 1 M. & Rob. 48; *Gardner v Salvador* (1831) 1 M. & Rob. 116; and see the judgment of Lord Abinger in *Roux v Salvador (1836) 3 Bing. N.C.* at 288; and *Cossman v West (1887) 13 App. Cas. 160*. Parsons (Vol.2, pp.80-90) insisted with some force that mere bona fides is insufficient, the sale must also be necessary: "Necessity and good faith must concur": *Patapsco Ins Co v Southgate* (1831) 5 Peters, R. 604. And this position was confirmed in this country by the Privy Council. in *Cobequid Mar Ins Co v Barteaux (1875) L.R. 6 P.C. 319*, in which case their lordships quoted with approval a passage from Arnould (2nd edn, p.236) to the same effect. See also *Australian Steam Navigation Co v Morse (1872) L.R. 4 P.C. 222*; *Kaltenbach v Mackenzie* (1878) 3 C.P.D. 467.
Additionally, this is not to be confused with the notion that the sale or abandonment on their own are what upgrade the incident into an actual total loss. As Barley J said in *Farnworth v Hyde* (1866) L.J.C.P. 207, at 210: "there is no such head in insurance law as loss by sale". Also see *Gardner v Salvador* (1831) 1 M. & Rob. 116 (per Bayley B, "bona fides in the captain will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do"); *Navone v Haddon* (1850) 9 C.B., per Maule J., at 44; and *Vacuum Oil Co v Union Ins Soc of Canton* (1926) 25 Ll. L.R. 546, per Bankes L.J., at 550.

[579] See: *Court Line v The King* (1945) 78 Ll.L.Rep. 390, per Scott LJ, at 397, who said that, opposed to the financial estimate, in constructive total loss instances, which would be done by the owner, the probability of actual total loss would be made by the master on the spot, even in the era of easy and quick wireless communication. The learned judge also noted that abandonment by the master and crew, leaving the ship with the intention of never returning, may lead up to and justify a subsequent abandonment to the insurer, but that the two are "wholly different acts, and distinct in kind"; *Roura & Forgas v Townend* [1919] 1 K.B. 189; *Robertson v Nomikos* [1939] A.C. 371, per Lord Wright and Lord Porter; *Rickards v Forestal* [1942] A.C. 50, per Lord Wright, at 84; *The Bamburi* [1982] 1 Lloyd's Rep. 311, per Staughton J, at 314; *The Kastor Too* [2004] 2 CLC 68, per Rix LJ, at para.75; *Robertson v Petros N Nomikos Ltd* [1939] A.C. 371, 381–382; and *Bank of America National Trust & Savings Assn v Chrismas (The Kyriaki)* [1993] 1 Lloyd's Rep. 137, 151.
Also see: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras. 29-03 and 30-02.

following parts of this chapter, we shall examine the possibility of a *res nullius* primarily under the latter two types of abandonment.

5.2 *The classic question of res nullius*

The first theory we shall examine, which is also the archetypal theory, states that a vessel may become a *res nullius* after a notice of abandonment is given from the ship- or cargo-owners to the underwriters for the cession of all rights and liabilities on the subject matter insured, and after this notice is rejected by the insurer.

This theory suggests that, as the assured offers the subject matter to the insurer, it thereby leaves his sphere of ownership, possession and responsibility. At that moment it is open for the insurer to take it over for himself. If the insurer rejects the abandonment (namely the cession) and, of course, the relevant notice, then the subject matter is left in the open, without any party exercising any rights thereon.

It is generally accepted in our days that this type of abandonment cannot operate in such a way as to end up with a *res nullius* wreck. Below will be presented a restricted list of cases, due to the sheer volume and the similarity of results thereof, which dealt directly with the matter and which will help us reach a firm result. We shall then engage with the theoretical issues presiding over the above proposition.

5.2.1 Case law

5.2.1.1 *The generic case law*

Our first stop is the case *Oceanic v Evans*[580], which was previously examined in relation to the automated functions of an accepted abandonment. The facts, in short, were that the steamship *Celtic* went on rocks and became a total loss near the entrance

[580] *Oceanic Steam Navigation v Evans* [1934] Vol. 50 Ll.L.Rep. 1; as appealed from the decision of Mr. Justice Branson: (1934) 48 Ll. L. Rep. 159.

to Cork Harbour. The harbour authorities incurred certain expenses in buoying, lighting and destroying the vessel, which they claimed against the assured and his insurer.

One of the arguments presented by the assured was that the vessel was abandoned before the expenses were incurred and the claim brought forward by the harbour authorities. For that reason, the assured contended he was freed of any right of ownership and possession, as well as of any liability on the vessel, since it became a *res nullius*. Lord Justice Greer[581] directly opposed such a notion. He did not contend that the *Celtic* was a constructive total loss at Roche's Point and that the Oceanic Steamship Navigation Company desired to claim by giving notice of abandonment. On the other hand, all in which the notice of abandonment could result was that "the owners offered to abandon what remained of the vessel, in the position in which she was, to the insurers on hull" and nothing else. He then clearly said that the service of the notice of abandonment to the insurer cannot lead to the abandonment of the vessel to the world, "so that it has no owner at all and becomes what lawyers prefer to describe, using the Latin language, as *res nullius*".

Parenthetically, it is mentioned that Greer LJ was adamant in that, on this instance, there is no evidence to support that this was an "abandonment to the world" case. The criterion of differentiation between the two types of abandonment was held to be the assured's conduct after the incident. That is to say that the assured tried to secure some profit out of the remains of the vessel, which would indicate that he had not abandoned her to all the world, and still regarded himself as the owner "able to sell the opportunity to recover such of this vessel as was worth recovering to a salvor or a person undertaking to remove the wreck".

The important point to keep from the above is the unambiguous statement of Greer LJ that, through abandonment to the underwriter and its rejection by the latter, the wreck may not become a *res nullius*. To the contrary, the owner is not divested of the wreck's ownership until the time the insurer elects to exercise his right to take over the abandoned property. The preponderant law seem to be this, since, without

[581] At p.3.

acceptance of the abandonment and the notice, no transfer of property may be effected.[582]

Secondarily, it is noted that the main issue with the wrecks and their accompanying liabilities is that they are blocking or endangering navigation and it is under this prism that most parties are concerned; legal implications aside. Additionally, and very interestingly, Greer LJ recognised the existence of the option of abandoning to the world at large and its connection with a *res nullius* result thereafter. The judge did not object to the notion, nor did he at any time disconnect the abandonment to the world premise from its *res nullius* result. The judge was equally interestingly clear in distinguishing between the two types of abandonment and their respective results.[583]

Similarly to Greer LJ, Lord Murray in his judgement in the *Robertson v Royal Exchange*[584] case was too of the opinion that the law of marine insurance and the operation of the notice of abandonment allowed for no gap, in which the "*res nullius* through abandonment and its rejection" theory could survive.

This was a constructive total loss case, where the *SS Tarv* went ashore and was accordingly abandoned to the underwriters, who refused to accept the abandonment. The insurers contracted salvors, who negligently allowed for further damage to the ship. In the insurance policy, there was a clause disclaiming any acceptance of abandonment for the insurers in case they acted towards recovering saving or preserving the property insured.

The court was presented with the argument that by rejection of the notice of abandonment, the vessel became a *res nullius.* Lord Murray[585], while addressing this line of reasoning started with the law governing the matter. He acknowledged that it is sometimes broadly laid down that the legal effect of a notice of abandonment is to

[582] See: *Blane Steamship Ltd v Minister of Transport* [1951] 2 KB 965, per Cohen LJ, at p.990, where he agrees with Greer LJ; *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* (1946) 79 Ll L Rep 417, at 433; *Dee Conservancy Board v McConnell* [1928] 2 KB 159, at p.163; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1930] 1 KB 672, at p.688; and Susan Hodges, *Law of Marine Insurance*, Cavendish Publishing, 1996, p.11.

[583] For more on this last point, please see the relevant analysis below.

[584] *Robertson v Royal Exchange Ass Corp* (1925) S.C. 1; (1924) 20 LL. L. Rep. 17.

[585] At 8.

separate the owner of the subject matter insured from his interest therein, thus resulting in *res nullius* properties, which are open to the world to intervene and salve the abandoned asset, without extracting any rights from the divested owner, nor imposing on him any liabilities. I was also presented to him that, similarly to such a salvor, the underwriter would be in no different position. But both the above contentions were rejected.

Even in cases of "*de facto*" abandonment, as the judge meant what we referred to as physical abandonment of a vessel or cargo by the ship's master and crew, whereunder the subject matter abandoned would become derelict and where notice of abandonment has been tendered to the insurer, the contractual relation under the policy would not allow for any right to pass to or intervene from any third party. What the judge was saying here was that, if the assured offers to abandon to the underwriter, then no other party may acquire or will be able to acquire any rights on the abandoned asset. The transaction of rights and liabilities, if any, will only be between the assured and the insurer. What is more, the insurer will not be operating as a common salvor, because the subject matter insured will not be left to the world for him to salve, but it will, instead, be transferred to him by virtue of the abandonment, as the cession of the assured's full interest.

The notice of abandonment was treated by the judge to only be a means of notification of the assured's election to abandon the subject matter insured to the insurer. This was so treated in accordance with s.62(1), MIA 1906. The notice was considered to be "merely an intimation as between these [i.e. assured and insurer] parties, given by the assured, that he abandons the property and places it at the disposal of the underwriter." It was very clear in the judgement that the notice's service itself does not impose any obligation on the underwriter, pursuant to s.62(6), MIA 1906. The insurer will have to expressly accept the notice, either through a positive action, or through his conduct. But if he does not, then no rights are detached from the assured and accordingly they do not attach to any other party; the interest in the subject matter survives to the owner.

Lord Murray, per Greer LJ above, also made a reference to abandonment to the world at large. Specifically he mentioned that this was not such a case. However, it is of interest that he would consider such a possibility, which was also considered to

be distinct from abandonment as a cession and from the physical abandonment of the insured property.

The same conclusion was reached by Lord Justice Cohen in *Blane Shipping v Minister of Transport*[586]. The ship was on a journey from Sydney to Adelaide, but was stranded south of Sydney Heads. The charterers' notice of abandonment was rejected, though it was agreed by the insurer for the assured to be placed in the same position as if a writ had been issued.[587] The defendant, who was the shipowner, also abandoned under the same policies on the ship with the same underwriters, but his abandonment was accepted. The arisen dispute was about whether the owner or the charterers were entitled to indemnification based on the clauses of the chartering agreement, which gave the charterers a right to buy the vessel under certain conditions; a right which in this case was declined by the owner.

Cohen LJ[588] was provided with evidence proving that the damage inflicted on the vessel was serious and that she was not immediately salvageable. In other words, she was "destroyed as a cargo-carrying ship".[589] Although the judge did not go on to specify whether the loss was actually or constructively total, he did comment on the effects of the notice of abandonment, as served by both the shipowner and the charterer. It was supported by Mr. Scott Cairns in the course of his argument that the effect of a notice of abandonment is that, once given, but not accepted, the property becomes a *res nullius*.[590] Support thereto was offered by Bailhache, J., in *Boston Corp v France, Fenwick & Co*[591]. Cohen LJ counter-offered the cases of *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German property*[592] and *Oceanic Steam Navigation v Evans*[593], which concluded the opposite. The judge then

[586] [1951] 2 KB 965.
[587] As mentioned in previous parts, this assists the assured in the establishment of the facts as leading to a total loss, as otherwise the time frame within which a total loss may be disproven is effectively until the parties go to court.
[588] At 990.
[589] Using the language of Goddard, J., in *Gulnes v Imperial Chemical Industries LD.* 43 Com. Cas. 96, 101.
[590] As excerpted from Lord Chorley of Kendal, *Arnould on Marine Insurance,* 13th ed., Stevens & Sons, Sweet % Maxwell, London, 1950, para.1213.
[591] 22 Com. Cas. 367.
[592] [1931] 1 K.B. 671.
[593] 40 Com. Cas. 108.

expressly agreed with Greer LJ in the latter case stating that the notice of abandonment, if rejected by the insurer, may not lead to the wreck becoming a *res nullius*, but instead will remain with the owner. The views of Bailhache J., irrespective of their difference towards more recent and firm case law, was also in contrast with the contents of s.61, of the MIA 1906, and with the doctrine of ademption of loss, as explained in Chalmers' work.[594]

It is to be noted that the above part of the *Blane Shipping* decision was an *obiter dictum* to the fundamental matters presented to the court. It is also evident that, though Cohen LJ agreed with Greer LJ's findings, he made no comment of his own on the option of abandonment to the world and a wreck becoming a *res nullius* therethrough. Nevertheless, it is clear that the case law of that time would not allow for a wreck to become *res nullius* owing simply to abandonment to the underwriter and its subsequent rejection. Finally, there was an additional and most significant clue given by Cohen LJ in relation to the theoretical impossibility of the notion under consideration, namely its conflict with s.61, MIA 1906.[595]

5.2.1.2 *The definitive cases on abandonment to the underwriters*

The list of cases grows long indeed and for that reason we shall not proceed to an exhaustive analysis of all relevant case law. It is of great curiosity and should, therefore, be mentioned that the two cases cited above, namely *Oceanic Steam Navigation v Evans*[596] and *Blane Shipping v Minister of Transport*[597], were the very last cases of the 20th century to ponder over the matter of whether abandonment to the underwriters and its rejection can ever amount to a *res nullius* ship or cargo. For that reason and given that the position thereon is unaltered in all post-MIA 1906 cases, we shall conclude with a short presentation of two major and more recent cases, which show the workings of abandonment, as presented in the MIA 1906, and will operate

[594] See: M. D. Chalmers and J. G. Archibald, *Chalmers' Marine Insurance Act 1906*, 4th ed., Butterworth & Co, 1932, at p. 89. Also see: F.D. Rose, *Marine Insurance: Law and Practice*, 2nd ed., LLP, 2012, at 21.39-21.50.
[595] See analysis of the MIA 1906 relevant sections further in this Chapter.
[596] 40 Com. Cas. 108.
[597] [1951] 2 KB 965.

as a bridge to the theory behind it. These judgments are *The Kastor Too*[598], per Rix LJ, and *The FD Fairway*[599], per Tomlinson J.

In *The Kastor Too,* the ship was on a laden voyage from Aqaba to Vizagapatnam, when a fire broke out in the engine room and fifteen hours later she sunk in deep water. No notice of abandonment was served and the claim was for an actual or, alternatively, a constructive total loss.

Of Rix LJ's laborious analysis, it is only the relevant parts which will be cited, namely those in regards to the notice of abandonment, its functions and results. Thereon, the judge started by offering that one major role for the notice of abandonment and its acceptance is to signal that a loss is treated as a constructive total loss, instead of a partial loss.[600] His next step was to examine s.61, of the MIA 1906, where he found that it related to the legal concept of abandonment, as opposed to the physical act of abandonment, since the word "abandon" was missing from the section's wording. In connection to this, Rix LJ continued to say that in cases of constructive total loss the notice of abandonment is a condition precedent to claiming under the policy, with certain exceptions[601], and it is its acceptance by the insurer, which will ensure the underwriter's takes over of the subject matter. In other words, if the insurer does not accept the notice, he does not take over the vessel, or cargo. In addition thereto, he continued[602] stating that the notice of abandonment on its own, even if valid, would not be able to finalise the abandonment process. This was due to the fact that the notice of abandonment was to be treated as an offer of cession of the property and any rights incidental thereto.

According to this approach, the notice functions as an official declaration that, if the underwriter wills to take over the assured asset, then the assured is giving him the complete interest in the subject matter, or whatever may remain of it, subject to full indemnification for the claim. Consequently, as any other offer, the notice is at all

[598] *Kastor Navigation v AGF MAT (The Kastor Too)* [2004] 2 CLC 68.
[599] *Dornoch v Westminster (The FD Fairway)* [2009] EWHC 889.
[600] Per Rix LJ, at 37-38, citing Lord Mansfield in *Hamilton v Mendes* (1761) 2 Burr 1199; and *Polurrian Steamship v Young* [1915] 1 KB 922.
[601] E.g. MIA 1906, s.62(7).
[602] At 77.

times subject to free withdrawal by the assured, whereas, once accepted, its irrevocable effects are realised and, so, the assured will not be able to go back and retract it.[603] Finally, Rix LJ addressed the possibility of neither accepting nor rejecting the notice of abandonment, to which he stated that it should fall upon the courts to deal with its validity and the relevant conduct of the parties proving it to be accepted or not.

It was undoubtedly shown in no part of this major judgment on total losses and abandonment that the learned judge held the service of the notice of abandonment to be of enough power to cause any separation of rights and liabilities in relation to the assured and the subject matter, unless and until it is accepted by the insurer. In the meantime, the assured is treated as fully vested in all of his property's rights, as he enjoyed prior to the service of the notice. This approach is very logical in its conclusion and without any *lacunae* in its premises. It was presented in the previous Chapter that Rix LJ may have shown signs of inclarity and circular logic in relation to the irreversibility of the notice's effects and the underlying justification. In spite of this fact and at this stage of examination, we are not interested in how, when and under which conditions are the notice's results materialised, after the insurer has accepted it, i.e. the actual transfer of property and rights, but merely that it does not alter the legal relation of any party with the subject matter without more. So, if nothing changes inbetween the service of the notice and its rejection, then the vessel or cargo insured cannot possibly fall into another party's hands, more so to become a *res nullius.*

Not dissimilar on this point was the approach of Tomlinson J. in *Dornoch v Westminster*[604]. In this case, the *FD Fairway*, a unique mega-size hopper dredger, had a collision with another ship near China. The owners treated the loss as constructively total and served a notice of abandonment. The insurance policies had two layers and many insurers were involved. A part of them indemnified the assured, though most did not accept the notice, although they were willing to take over the vessel after fully indemnifying the assured. The peculiarity of this case arose when the assured sold the

[603] See *Royal Boskalis Westminster N.V. v Mountain* [1997] LRLR 523, at 556.
[604] *(The FD Fairway)* [2009] EWHC (889).

vessel to a subsidiary company for a fracture of its value, before any of the underwriters had the opportunity to take her over. Accordingly, the main dispute was whether the underwriters were owed the proceeds of the sale made, the true value of the vessel, or the vessel itself; the third option was also the court's final decision effected through a reversal of sale.

Tomlinson J. went to a great length to examine the structure of abandonment and the functions of the notice of abandonment. The judge[605] invested a large part of his decision in the notice's results, after its acceptance, in which we shall not delve. In relation to its operation prior to its acceptance, or rejection, Tomlinson J. stated that, though in pre-MIA 1906 times it may have conferred the definite result of the property's transfer, in the post-MIA 1906 era this is not so. The judge offered that such an automatic transfer of rights on property and its accompanying liabilities would not be fair to the underwriters given that the abandoned property is highly susceptible to severe liabilities and risk and, so, an option to take over, or not, should be presented.[606] At this point, the decision considered the wording of the MIA 1906 itself, which was to be definitive on the matter. In agreement with Scrutton LJ in the *Allgemeine Versicherungs*[607] case, Tomlinson J found s.63(1) to give the insurer an entitlement to take over the interest of the assured in whatever may remain.[608] The judge was insistent on that the insurer has a choice. He even went on to express his considerations on whether the insurer has a choice, even at the time he is accepting the notice of abandonment and immediately thereafter. Evidently, the learned judge was no supporter of a narrow and strict interpretation of the law and of automated results on the parties' actions. So, according to the above, even after the acceptance of the notice and of the abandonment, the rights of ownership and possession and the subject matter's liabilities did not necessarily pass to the assured.

But could these rights and liabilities incidental to the assured property detach from the assured? Tomlinson J., quoting to creator of the MIA 1906, Sir Mackenzie Chalmers, answered this to the negative. In agreement with Rix LJ above, the notice

[605] At 26.
[606] See the possibility of a "damnosa hereditas" property, *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, paras.30–06 and 30–35.
[607] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 KB 672, at 687, as presented above.
[608] At 27.

of abandonment was treated as an offer of cession and not as a cession in itself. That is to say, the notice did not produce any results of its own, but required additional actions. To be more precise, in order for the notice to have any effect on the parties' rights, it needed at least to have been accepted by the underwriters.[609]

So, neither the service of the notice of abandonment, nor its rejection were held to be able to transfer any rights and liabilities incidental to the subject matter insured, nor could they produce any changes to the assured's connection thereto. In other words, Tomlinson J. did not accept that, by service of the notice and its rejection, a *res nullius* may occur.

5.2.2 *The theory behind the rejection of the "res nullius through abandonment to the underwriters" concept*

It is rather clear from the presentation and analysis of the above case law that the relevant judges' ruling will not allow for a subject matter of insurance to become a *res nullius* through abandonment to the underwriters and its subsequent rejection. It has been vigorously explained that the service of the notice of abandonment does not cause any effects on the legal standing of the subject matter without any further actions by either party, especially those of the insurer. But is this reasoning consistent throughout the entirety of the marine insurance law theory? And what is the position of the Marine Insurance Act 1906 on this matter?

5.2.2.1 *The operation of the notice of abandonment – contents, intents, results*

In reference to the notice of abandonment, there are two theories on its mechanisms, which pertain to: equity law and contract law. It is not uncommon for one, judge or otherwise, to adhere to either of these theories, whilst opposing the

[609] See MIA 1906, ss. 57(2), 61, 62(1) and 62(7); *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523, per Rix J, at 557; and *The Kastor Too* [2004] EWCA Civ 277, per Rix LJ, at 77.

other.[610] Nevertheless, under this topic, we shall see that both approaches reach the same conclusion.

The former, namely the equity law approach, which most significantly engulfs the doctrine of equitable estoppel, operates not through initial prohibition of any party's actions, but rather through the *ex post* prevention of one party to act inconsistently with its previous behaviour.[611] To be more specific, if one party, the promisor/representor, makes a clear and unequivocal promise or representation[612], intended to affect the legal relationship of the parties involved[613], and if this promise or representation is then relied upon by the representee[614] and leads him to his inequitable detriment[615], then the representor is estopped from said detrimental action.[616] This is the function of the Promissory estoppel[617], which only applies to

[610] E.g: *Arnould's Law of Marine Insurance and Average*, 18th ed., Sweet & Maxwell, 2013, para.30-23.
[611] For further analysis see *Thorner v Major* (2009) UKHL 18, per Lord Hoffman and, on Proprietary Estoppel, per Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury.
Also see previous Chapter under the sub-heading *The Estoppel Approach*.
[612] *Collin v Duke of Westminster* [1985] QB 581.
[613] *Spence v Shell* (1980) 256 EG 819.
[614] WJ Alan v El Nasr Export and Import [1972] 2 QB 189.
[615] D&C Builders v Rees [1965] 2 QB 617.
[616] See *The Kanchenjunga* [1990] 1 Ll Rep 391, per Lord Goff, at 398-399. It is noted that the remedy will be imposed by a court and that this will be an equitable remedy. Additionally, equitable remedies are subject to the discretion of such a court (as opposed to common caw remedies), an action in personam is required as a prerequisite to the claim and damages must be found to be an inadequate remedy under the specific facts of the case.
Also see: *Hudson v Harrison* (1821) 3 Brod. & Bing. 97, per Park J., where the acceptance of the notice of abandonment was held to be a representation denying the insurers from going back and refusing full indemnification to the assured. Additional details: The insured cargo was partly lost and partly impregnated with salt water so far as to render it non-merchantable. The assured served a notice of abandonment, but the underwriters did not clearly respond with an acceptance or rejection of the notice. Later, some of the underwriters forbade the sale of the remaining cargo and also rejected the abandonment. The court held that the subject matter insured was totally lost and therefore the assured was entitled to abandon. This right was crystallized by the conduct of the underwriters, who by not clearly, unequivocally and in reasonable time replying to the notice of abandonment were held to have acquiesced in it.
The first case to introduce the doctrine of equitable estoppel into the theory behind the notice of abandonment and was *Provincial Ins Co of Canada v Leduc* (1874) L.R. 6 P.C. 224, per Sir Barnes Peacock. The rule that by acceptance the insurer recognises the loss as constructively total and therefore cannot refuse it at a later point bears great similarity to what is today the latter part of s.62(6). Having in mind that at that time, as was also seen in that case, the rights on property were considered as transferred, at the latest, upon acceptance of the notice of abandonment (Per Sir Barnes Peacock, at 243: By acceptance of notice "the whole interest of the Plaintiff in the thing abandoned was transferred to the Defendants, and became their property" and other pre-MIA 1906 case law; e.g.: *Hamilton v Mendez* (1761) 1 Wm. Bl. 276; *M'Carthy v Abel* (1804) 5 East 388; *Bainbridge v Nelson* (1808) 10 East 329; *Stewart v Greenock* (1848) 9 E.R. 1052), it is inferred that the doctrine of equitable estoppel would also prohibit the insurers from denying the takeover of the subject matter insured. In today's view, though, as the transfer of property is dependent upon the

contracts, which can only be used defensively[618] and can make a promise binding, even though no consideration was provided.[619]

Applying the above on the matter under consideration, we observe two promises, or representations, being made. The first is evident in the notice of abandonment, as served by the assured, which is the representation of his will to vest the subject matter insured into the insurer, if the insurer has accepted said notice and after the acceptance. The second representation takes place at the time of the insurer's acceptance of the notice. The acceptance represents the insurer's will to adhere to the contents of the served notice. Once the representations are made, communicated and relied upon by both parties, respectively, then subject to a contradicting conduct being inequitable, both assured and insurer are estopped from going back on their promises. That is to say, after the representations are rendered concrete and are no longer qualified do the parties have to fulfil the promises made. In more detail, the assured will have to cede the insured asset's remains (if the insurer wishes so) and the insurer will have to provide full and complete indemnification to the assured for his loss. Consequently, if the insurer does not accept the notice, i.e. does not satisfy the representation's qualification, no responsibility is assumed by any party. Once the notice is accepted, then and only then is the assured ship or cargo going to change hands, after payment has been made, if one follows the market's and Rix LJ's view[620]; or after a clear election to take over has been made after acceptance of the notice or after payment for the loss[621], if one follows Tomlinson J's and other post-MIA 1906 case law's view[622].

It should, at this point, have already been understood that the service of the notice of abandonment, as a qualified promise of transfer of property, is not

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relevant election of the insurer, the above effect of estoppel would most probably not be accepted without objections; it must be said that in modern times it has not been tested in court.

[617] As opposed to the Proprietary estoppel, which applies to property and contracts alike and which can give rights where none existed. A position that the Proprietary estoppel engulfs the Promissory estoppel was expressed in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, per Lord Scott, at 14.

[618] *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; *Combe v Cambe* [1951] 2 KB 215 on Equity being a shield, not a sword; and *Tool Metal Manufacturing v Tungsten Electric* [1955] 1 WLR on the ability of the Promissory Estoppel to suspend, but not extinguish, rights of the other party.

[619] See *Central London Property Trust v High Trees House* [1947] KB 130, per Lord Denning and below on Contract Law, Offer-Acceptance-Consideration part.

[620] *Kastor Navigation Co Ltd v AFG MAT (The Kastor Too)* [2004] 2 Lloyd's Rep. 119.

[621] See: ss. 63(1) and 79(1), MIA 1906; Also see below on the sections' importance.

[622] *Dornoch Ltd* v *Westminster International BV (The WD Fairway)* [2009] EWHC 889.

equivalent to the actual cession of property. To put it differently, the notice of abandonment by itself does not change any rights or obligations of the parties in relation to the subject matter insured. So, until the insurer has accepted the notice, the insured property will undeniably remain in the hands of the assured. It is, of course, the same in cases of rejection of the notice. As no transfer is effected, there is no legal space, which would allow for the subject matter to become a *res nullius*.

The latter, namely the general contract law theory approach, deals with the conduct of the parties *ab initio*. According to contract law, the parties make a proverbial dance of exchanges, which in their simplest form are: offer, acceptance and consideration.[623]

It is a given that the first step, the offer, is a proposal to contract on specified terms, with the intention of becoming a binding agreement as soon as it is accepted by the offer's addressee.[624] This is dissimilar to an invitation for the addressee to submit his offer.[625] In a constructive total loss scenario, this distinction is important for the proper construction of the parties' exchanges[626] and, specifically, to see whether the assured served a valid notice of abandonment.[627] Additional requirements include the

[623] The more complicated form would include counter-offers, later variations of the contract and other changes and details that are only encumberant to the purposes of this Chapter. A short example we could present is an additional requirement for the successful completion of a contract is the parties' intention to create legal restrictions, which is assumed in commercial agreements, unless expressly stated otherwise, see *Rose & Frank v Crompton Bros* [1925] AC 445, and unless it is a "comfort letter", i.e. a statement of facts (which is not a contractual promise), see *Kleinwort Benson v Malaysian Mining Corporation* [1989] 2 All ER 626. On the other hand, it is assumed that there is no such intention in: social and domestic agreements between husbands and wives, parents and children, parties sharing a house, other social agreements.
For additional information, see previous Chapter under the sub-heading *The Contract Law Approach*.

[624] For the offer's Objective and the Reasonableness test: see *Morgan v University of College Stalford* [1994] ELR 187; and *OT Africa Line v Vickers* [1996] 1 Lloyd's Rep 700.

[625] An invitation precedes the offer and is an open request to attract offers, which the invitator is free to accept or reject. E.g. Advertisements; see *Partridge v Crittenden* [1968] 1 WLR 1204; and catalogue and price lists: *Grainger v Gough* [1896] AC 325.

[626] For the need of a proper construction of the notice of abandonment and whether it is a valid one, or not, see: *Kusel v Arkin (The Catariba)* [1997] 2 Lloyd's Rep 749, where Colman J. construed the wording of the parties' correspondence holding that the assured had not clearly enough given a notice of abandonment but merely requested a clarification of intent and that the insurers, through their reply, had either given an offer, or, alternatively, a counter-offer awaiting the assured's reply.

[627] Accordingly, the notice is an offer and not an Invitation, as the assured is already therethrough invoking the constructive total loss provisions of the policy and making his offer (i.e. to give the remains in exchange for a full indemnity). To state the opposite would not be deprived of all merit; e.g. the notice is an invitation to the insurer to give an offer in relation to the abandoned property (if

communication of the offer[628] and the offeree's clear knowledge of the offer[629]. In terms of the termination of an offer, there is an exhaustive list of means[630], of which the offer's acceptance is the most important to our analysis. Acceptance is a final and unqualified expression of assent to the terms of the offer[631], which, similarly to the offer, must be communicated to the offeror[632]. A counter-offer is another way of terminating the original offer, but it introduces new terms or engages an attempt to vary the proposed terms. As a new basis of agreement, it ends the original offer, which from that point onwards is incapable of being accepted.[633] Finally, there is the final part for the formation of a contractual agreement, the consideration. This is, in effect, what the offeree is to give in return for the gain he will have from the offer made to him.[634] The consideration must be transferred from the offeror[635], not passed by a third party such as an agent or broker[636], and, most importantly, it must be

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it is considered as a constructive total loss, the amount payable under that and whether they would like to take over the subject matter insured); but it would surely mean stretching the law and unnecessarily complicating the abandonment process.

[628] See *Taylor v Laird* (1856) 25 LJ Ex 329.

[629] See *Inland Revenue Commissioners v Fry* [2001] STC 1715.

[630] I.e: Acceptance, Express Rejection Refused, Extinguished by Counter-Offer, Revocation, Lapse of Time, Non-Compliance with Condition-Precedent, Death of one party.

[631] See the Mirror Image rule on the relevance between offer and acceptance; if the test is not satisfied, then we do not have an acceptance of the original offer, but a counter-offer instead. Silence is also no acceptance of the offer: see *Felthouse v Brindley* (1863) 142 ER 1037; and *The Leonidas D* [1985] 1 WLR 925, per Lord Goff. This is not so in unilateral contracts, as acceptance can be inferred by full performance: see *Daulia v Four Millbank Nominees* [1978] 2 W.L.R. 621; *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256; and *Bowerman v Association of British Travel Agents* [1995] NLJ 1815. Finally, acceptance may be inferred from Conduct: see *Brogden v Metropolitan Railway* (1877) 2 App Cas 666.

[632] See *Entores v Miles Far East Corporation* [1955] 2 QB 327, per lord Denning.

[633] See *Hyde v Wrench* (1840) 49 ER 132. This is not to be confused with a mere request for information which does not invalidate the offer; see *Stevenson Jaques v McLean* (1880) 5 QBD 346.

[634] If in search of a complete definition see: *Currie v Misa* (1875) LR 10 EX 153; and *Dunlop v Selfridge* [1915] AC 847.

[635] See: *Tweddle v Atkinson* (1861 121 ER 762.

[636] See: *Re McArdle* [1951] Ch 669; exception: Lampeigh v Braithwaite (1615) 80 ER 255.

sufficient, though not necessarily adequate[637]. Parenthetically, the contract law approach is the most widely accepted view, even in the pre-MIA 1906 era.[638]

By introducing the notice of abandonment into the above theory, we have the notice operating as an offer to the insurer for payment of the loss, towards which the insurer will show his consideration to the offer, through the notice's acceptance, if he accepts, of course. After the acceptance of the offer, there exists a binding bilateral contractual agreement, under which both parties are prevented from denying what was offered and considered, namely the subject matter's remains and the loss's indemnification, respectively.

Conversely, if there is no acceptance of the notice of abandonment, there is no agreement. Without a binding contract, the rights and obligations of the parties in relation to the loss and the subject matter insured are unaffected as before the notice's service. The subject matter cannot solely under an offer leave the hands of its owner,

[637] Sufficient here is perceived as real, tangible (able of pecuniary valuation), valuable (of actual value); see *Chappell v Nestle* [1960] AC 87. An extreme application of the above is the case *Thomas v Thomas* (1842) 2 QB 851, where just GBP(£)1 per year for rent was considered to be sufficient consideration. Performance of an existing duty is not sufficient consideration; see *Collins v Godefroy* (1831) 109 ER 1040; and *Stilk v Myrick* (1809) 170 ER 1168. Where one party performs more than agreed then this is sufficient consideration: see *Glassbrook Bros v Glamorgan County Council* [1925] AC 270, where additional police force was requested to arrive on promise of additional payment; and *Hartley v Ponsanby* (1857) & E&B 872, where disserting sailors returned to the ship on promise of additional pay even though the ship was then undermanned.

[638] See: *Kaltenbach v Mackenzie* (1878) 3 CPD 467, per Lord Justice Brett; *Robertson v Royal Exchange Ass Corp,* 1925 S.C. 1; (1924) 20 LL. L. Rep. 17; *Royal Boskalis Westminster NV v Mountain* [1997] L.R.L.R. 523; *Kastor Navigation Co Ltd v AFG MAT (The Kastor Too)* [2004] 2 Lloyd's Rep. 119; and Pesquerias y Secaderos de Bacalao de Espana SA v Beer (1945) 79 Ll L Rep 417, per Atkinson J, at 433; *Norwich Union Fire Ins Soc Ltd v Price* [1934] A.C. 455 PC, per Lord Wright, at 466, where he insisted on the contractual nature of total loss and the adherence to the words of the agreement, but for the rules of common law and the law merchant (which is in effect customary law of the market), up to the point where they do not conflict with the contents of the MIA 1906, and at 467: The Australian equivalent of s.62(6) "presupposes something which is not only in form but in reality a notice of abandonment and acceptance", the sub-section "does not apply at all where NoA or acceptance is void or a nullity because based on false intelligence and made under a fundamental mistake" and finally, "mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract" (specifically on the grounds of mistake, see: *Bainbridge v Neilson* (1808) 10 East 329, per Lord Ellenborough, at 341, though today it is much more difficult to void the agreement on that ground, see: *Great Peace Shipping Ltd v Tsavliris Salvage (Intl) Ltd* [2003] Q.B. 679; *Shogun Finance Ltd v Hudson* [2004] 1 A.C. 919); *Fraser Shipping Ltd v Colton* [1997] 1 Lloyd's Rep 586: s.62(6) does not preclude an underwriter from avoiding a binding acceptance on subsequently discovery of non-disclosure, in the same fashion as the acceptance of adjustment, which can be set aside in cases where the loss was caused by an uninsured peril (see: *Shepherd* v *Chewter* (1808) 1 Camp 274; *Steel* v *Lacy* (1810) 3 Taunt 285; *Scottish Metropolitan Assurance Co* v *Samuel & Co* [1923] 1 KB 348; *Holland* v *Russell* (1863) 4 B & S 14; *Castle Insurance Co* v *Hong Kong Islands Shipping Co* [1983] 2 Lloyd's Rep 376; and *Attaleia Marine Co Ltd* v *Iran Insurance Co (The Zeus)* [1993] 2 Lloyd's Rep 497).

the assured, and so it cannot fall in a legal vacuum by the offer's rejection by the insurer, as the *res nullius* via abandonment and rejection theory suggests.

Consequently, under neither approach, whether that of equity law or of contract law, can an assured asset become *res nullius* as a result of a rejected abandonment to the asset's insurer. It is of great importance to understand what the parties express with their actions and what their intentions are when acting. Put differently, significance lies with the representations' and offers' contents as made by each side. For the assured's part, there is a promise, or offer to cede the subject matter insured and all his rights thereon, if the insurer wishes so, and a request for full indemnification on a total loss basis, as per the relevant clauses of the insurance policy. Accordingly, the insurer promises, or considers, through his acceptance of the aforementioned notice, that he will fully indemnify the assured and also states whether he agrees to receive the subject matter insured and all of the assured's rights on it no matter its state, or not.

These are all future promises, or offers. They denote events not yet passed. To be more clear, the assured does not actually cede the assured property to the insurer, but merely makes a promise, or offers to prospectively do so, if the insurer so wishes and accepts. Until such acceptance takes place, the promises and offers have only potential effect. So, in spite of whatever transpires after the abandonment's acceptance, prior thereto, no alteration of facts, rights or liabilities transpires.

5.2.2.2 *The Marine Insurance Act 1906 provisions*

Until this point, both the case law and the marine insurance law theory have rejected the possibility of having a *res nullius* through the currently discussed type of abandonment. The *coup de grace* shall be offered by the sections of the MIA 1906 and their proper interpretation.

In a nutshell, the notion presented here is that, following the Marine Insurance Act 1906, the incidence of a constructive total loss does not divest the assured of his

interest in the property, nor transfer it to the insurer. As one of the prerequisites and an example thereof, it is preliminarily offered that there must first be a true constructive total loss[639], service of a valid notice of abandonment and establishment of the conclusively total nature of the loss[640], before one may ponder on whether an asset became *res nullius*.

Proceeding on a numerical sequence, the first relevant section to be encountered is s.62. Therein, we find s. 62(4), which reads: "Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept abandonment". Granted, this sub-section refers mostly to the assured's right to treat his loss as constructively total, instead of a mere partial loss, and to demand full indemnification as per a total loss, according to the facts of the case, his willingness to treat the loss as such[641], the following of the proper procedure and the relevant provisions of his insurance policy. This section is even considered to encase the assured's ability and right to withdraw the notice, should he wish so.[642]

Nevertheless, this could extend to engulf the idea that the assured's rights on the subject-matter are also not prejudiced.[643] As the provision is included in the Act in order to ensure the continuity of the assured's rights in respect of the loss, and given that the assured's connection to the vessel is of paramount importance[644], it is only

[639] See: MIA 1906, ss.61 and 62(1); but opposite view in: *Bank of America National Trust & Savings Assn v Chrismas (The Kyriaki)* [1993] 1 Lloyd's Rep. 137, 151, on that a loss either is constructively total, or it is not.

[640] That is to say that the loss has not been adeemed before action is brought to court, or before the parties have treated the situation, as if a writ had been issued, thereby clarifying the time limits for the constructive total loss to be downgraded to a partial loss only. For the doctrine of ademption, see F.D. Rose, *Marine Insurance: Law and Practice*, 2nd ed., LLP, 2012, at 21.39-21.50. For case law support, see: *Blane Steamships Ltd* v *Minister of Transport* [1951] 2 KB 965, 991, *per* Cohen LJ on the *res nullius* matter.

[641] See opposite view in *The Kyriaki* [1993] 1 Lloyd's Rep 137, where the court held that a loss, either is, or is not constructively total, in opposition to MIA 1906, ss. 61 and 62(1) and the relevant case law.

[642] See: *Brooks v MacDonnell* (1835) 1 Y & C Ex 500; *Pesquerias y Secaderos de Bacalao de Espa˜na SA v Beer* (1947) 80 Ll LR 318; *Royal Boskalis v Mountain* [1997] LRLR 523); *A* v. *B*, 1996, unreported; *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523.

[643] See: Robert Merkin, *Marine Insurance Legislation*, 4th ed., LLP, 2010, on s.62(4): "One consequence of this provision is that the assured can withdraw a notice of abandonment before acceptance […]". No further consequences are discussed. In accordance therewith and with other work on the matter, the results of this sub-section are left open.

[644] See, inter alia, on Insurable Interest: *Lucena v Craufurd* (1806) 2 Bos & PNR 269; *Feasey v Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 640; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *State of Netherlands v Youell* [1997] 2 Lloyd's Rep 440, on pervasive insurable interest; *Carruthers v Sheddon* (1815) 6 Taunt 14; *Irving v Richardson* (1831) 2 B & Ad 193;

reasonable to presume that the protection of the assured's right on the subject matter insured would be included in the section's sphere of protection and, thusly, not prejudiced by the rejection of the notice by the underwriters. In simple language, this is to mean that rejection of the notice should not deconstruct the assured's rights on the object abandoned.

Should there be no opposition to the above construction, of which none is found up to the date of the current research, nor is expected to appear in the near future, then this approach would prove that the service of the notice of abandonment and its rejection by the insurer is without power to distinguish, or otherwise modify, the assured's rights in relation to his vessel or cargo. Following this *modum intelligendi*, we note that the MIA 1906, s.62(4) is directly not in favour of a *res nullius* through the theory of abandonment and rejection. Obviously, this is compatible with both the case law's and the marine insurance law theory's views.

Next are the sections dealing with when and how property and rights can be transferred in cases of constructive total loss. The first sentence of s.62(6) reads: "Where a notice of abandonment is accepted the abandonment is irrevocable", s. 63(1) reads: "Where there is a valid abandonment the insurer is entitled to take over […]", and s.79(1) reads: "Where the insurer pays for a total loss […] he thereupon becomes entitled to take over the interest of the assured […] as from the time of the casualty."

At this point, we can either follow the market's view on the matter, which coincides with Rix LJ's opinion, as expressed in *The Kastor Too*[645], or the majority view in the post-MIA 1906 case law, along with Tomlinson J's opinion in the *Dornoch*[646] case and the proper construction of the MIA 1906 provisions. Neither will be meticulously presented at this point, as it would not serve the current examination's purpose and due to the very extensive study in the previous Chapter. It is noted that both views reach the same result, *vis a vis* the *res nullius* concept.

Mackenzie v Whitworth (1875) LR 1 Ex D 36; *O'Kane v Jones* (*The Martin P)* [2005] Lloyd's Rep IR 174; and MIA 1906, ss. 4-9.

[645] *Kastor Navigation v AGF MAT (The Kastor Too)* [2004] 2 CLC 68.

[646] *Dornoch v Westminster (The FD Fairway)* [2009] EWHC (889).

According to the former perception, once the notice is accepted, then all rights and obligations under the rules of abandonment crystallise. That is to say, the assured is bound to cede whatever may have remained of the subject matter insured and all his rights thereto, while the insurer is bound to pay as for a total loss and take over the abandoned asset's remains after payment, effective as of the time of the loss. Following this process, we notice that before the notice's acceptance, no rights have passed. Instead, they are pending trigger events. If the notice is not accepted, then the situation does not become concrete and, therefore, there is no passing of property and rights. The *res nullius* concept does not propose the contrary. But it does offer that the assured's rights on the abandoned property are passed into a legal vacuum between the assured and the insurer. Otherwise the property would not become a *res nullius* after rejection of the notice, if it did not first detach from the assured. Such a proposition in found nowhere in the Act in relation to the cession of the assured's rights and the insurer's take over.

Under the latter outlook, neither rights, nor obligations develop in regards to the property's passing to the insurer. The insurer retains his s.63(1) and s.79(1) rights of election to take over the assured remains at the time of or after acceptance of the notice, and after full indemnification of the loss, respectively. Similarly to the stricter opinion of the market and Rix LJ, if the notice of abandonment is not accepted, then no rights arise, no option on take over may be exercised and no property is passed. There is, here too, no evidence to suggest that the subject matter of insurance is pressed out of the assured's hands and into a status of limbo in wait for the insurer's acceptance of the notice. Speaking laconically, we could safely say that, under both positions and without the notice's acceptance, there is no change of rights.

Accordingly, we note again that, not only are the assured's rights not passed, but also that these rights have never been detached from the assured. If this was not true, then the market would cease to operate in the way it has done for decades. To elaborate, in most cases the underwriters will reject the notice of abandonment, but will nevertheless still fully indemnify the assured for his loss. Under the rules of

subrogation, as stated in the Act and supported by case law[647], the insurer retains his right to elect to take over the subject matter insured and all of the assured's rights thereto after full payment for the loss, while rejection of the notice does not preclude such right. Had the assured been deprived of any and all rights of the assured asset, under the *res nullius* mechanisms, then the insurer would not be able to take over any part of, nor right on, the assured casualty through subrogation, as the abandoned asset would now be out of the assured's reach. This is clearly so, because subrogation requires that one party has a right, which will be passed to the other (whether by the parties' acts, or by operation of the law). In addition, the subject matter would become a *res nullius* and roam the seas, or rest on the seabed, free of anyone's rule and adhering to no one's liability for damage done therefrom and claims connected thereto, until a party came and salved it from its fate. This means that, though the underwriters would be able to acquire rights thereover through the rules of salvage, they would not be able to do so through subrogation. In fact, were this true, the insurers would be able to salve the vessel as of the time of the notice's service, thus relinquishing the requirement for payment for the loss before the right of take over is existent. Another illogicality would appear in the fact that this approach would allow not only for the insurers but for any other party as well to salve the property, including the assured. Allowing this operation would amount to creating a superfluous vicious circle of acquisition and deprivation of rights in relation to the assured, or a unilateral disposition of the assured's right on the property by the actions of a third party salving what the assured did not in fact irreversibly abandon, on top of a unilateral deprivation of the underwriters' right to subrogation, as granted by s.79(1). This position is not only unjust, but also false according to marine insurance law theory, case law and practice, and should, therefore, not be validated.

It also follows that, in addition to the above, the assured would not be able to sell or otherwise manage his assured asset after the notice's rejection, not to mention that any claims, including pollution, towage, salvage, or collision claims, both the *in*

[647] See: MIA 1906, s.79(1); *Dee Conservancy Board v McConnell* [1928] 2 KB 159; *The Ella* [1915] P 111); *Barraclough v Brown* [1897] AC 615; *Boston Corporation v France Fenwick & Co Ltd* (1923) Ll LR 85; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* (1931) 14 LT 705; *Oceanic Steam Navigation Co Ltd v Evans* (1934) 50 Ll LR 1; and *Blane Steamships Ltd v Minister of Transport* [1951] 2 KB 965.

rem and *in personam* claims[648], would equate to attempts in futility, as the assured would no longer be the ship's or cargo's owner as of the time of the service of the notice of abandonment and, equally, no new owner would immediately follow, e.g. the isurer as ascertained by the notice's non-acceptance. In such cases, any third party damaged would unjustifiably be left without recourse.

Even looking at cases of accepted notices, we observe that the property still remains in the hands of the assured after the acceptance. The insurer is merely acquiring an equitable lien thereon, which will only after payment for the loss turn into an equitable right. It is a given that the assured is in the position where he should not dispose of the assured asset, under his obligation to preserve the insurer's rights according to the rules of subrogation, unless otherwise entitled to act, e.g. to preserve as much of the damaged ship's or cargo's value as possible.[649] Nevertheless, the abandonment's mode of operation entails that the assured can still make a valid sale to a third party, without notification to the insurer, so long as the third party is acting in good faith.[650] If the *res nullius* concept was right, then, both in cases of rejected and in accepted notices, the assured would not be able to manifest any actions towards the subject matter insured after service of the notice of abandonment. This is fully unsupported by the MIA 1906.

While venturing through the MIA 1906 sections, it is of significant input to summarily add the Act's draftsman's view on the matter. Sir Mackenzie Chalmers verified the above dismissal of the *res nullius* concept. In his bibliographical work[651],

[648] See: *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No2)* [1997] 4 All E.R. 380; [1998] 1 Lloyd's Rep. 1, per Lord Steyn, where it was stated that, though the *in rem* proceedings are targeted against the vessel itself, the main target behind such an action is the ship-owner, who will be obliged to participate in the court proceedings in defence of his property and thus be drawn into the case transforming the proceedings into *in personam* endangering his other assets. For that reason, the Supreme Court held that the *in rem* and *in personam* proceedings are effectively the same, to the point that two proceedings, with the same facts, would be disallowed, even if one is *in personam* and the other is *in rem*.

[649] See: MIA 1906, s.18, *Tate & Sons v Hyslop* (1885) 15 QBD 368; *Thomas & Co v Brown* (1891) 4 Com Cas 186; *SGIO v Brisbane Stevedoring* (1969) 123 CLR 228, on that there is no implied obligation on the assured to not relieve the third wrongdoing party from its liability; *Commercial Union Assurance Co v Lister* (1874) LR 9 Ch App 483, on that the assured may become liable to the insurer if the third party relief is not a *bona fide* agreement.

[650] See: *Dornoch Ltd v Westminster International BV (No 2)* [2009] EWHC 889 (Admlty), per Tomlinson J., at 30; and *Lord Napier and Ettrick v Hunter* [1993] AC 713.

[651] See E. R. Hardy Ivamy, *Chalmers' Marine Insurance Act 1906*, 10th ed., 1993, Butterworths.

Sir Chalmers extensively commented on the sections he created. Therein he defined abandonment as a cession of any remains of the subject matter, which would take place subject to several future conditions, such as the constancy of the loss as constructively total and the exercise of the insurer's right to take over. Without the satisfaction of all of the abandonment's requirements, the draftsman held there could be no transfer. Being an advocate of following the wording of the Act, Sir Chalmers supported that it was upon the insurer to elect to take over the subject matter insured along with all proprietary rights and remedies in respect thereof, as contained in ss.63(1) and 79(1).[652] Specifically on the right of subrogation, it was stated that upon satisfaction of the claim the assured should vest the insurer in all of his rights on the remaining property, had the insurer agreed thereto.[653] But how could the assured do so if the subject matter insured had already parted from his sphere of ownership, as the above *res nullius* theory suggests? It would not be possible and, for that reason, it is illogical to utilise such premise.

The same is concluded by Sir Chalmers through the analysis of these sections, where he examines whether the property's transfer is absolute or conditional.[654] On this dilemma, the draftsman chose the latter, namely that transfer is conditional. As such, it must be that the condition of the notice's acceptance and the appropriate election by the insurer are the factor to pass property and rights. It is for this reason that in Sir Chalmers's work[655], there is clear reference to the cases *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property*[656] and *Arrow Shipping v Tyne Improvement*[657], which were the main stimuli for the creation of the MIA 1906, s.63(1) expressly granting the necessary right of election to the insurer in terms of abandonment and granting such right under subrogation in cases of payment for the loss. Not only was the draftsman himself emphatic on being clear that the insurer has

[652] See J.G. Archibald and Charles Stevenson, *Chalmers' Marine Insurance Act*, 4th ed., 1932, Butterworth & Co, p.86.
[653] See *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159, per Lord Cottenham, at 183.
[654] See J.G. Archibald and Charles Stevenson, *Chalmers' Marine Insurance Act*, 4th ed., 1932, Butterworth & Co, p.166, Note D on abandonment.
[655] Chalmers' Marine Insurance Act 1906, E.R. Hardy Ivamy, 9th ed., Butterworths, 1983, pp.100-102.
[656] [1931] 1 KB 672, per Scrutton LJ, at 687-688, where it was stated that when the total loss is constructive, the assured must give notice of abandonment, which itself does not pass any property or rights in the thing insured to the underwriter; and *Simpson v Thomson* (1877) 3 App Cas 279, per Lord Blackburn, at 292. Distinguished from *River Wear Comrs v Adamson* (1877) 2 App Cas 743 and *Great Western Rly Co v SS Mostyn (Owner)* [1928] AC 57.
[657] [1894] AC 508.

this right, but so was the Commons Committee, which, in reference to s.63(1)'s contents, it preferred to use the words "the insurer is entitled to take over the interest of the assured" and not the phrase "is entitled to whatever remains".

At this point, there should be no doubt left that the results under the *res nullius* concept are fully and unquestionably inconsistent with the operation of marine insurance law, the MIA 1906 and the pertinent case law. For all the above, it is the only logical conclusion that a subject of insurance cannot become a *res nullius* in cases where the notice of abandonment has been offered and rejected.

5.2.3 *Reasoning with the illogical*

As on many other occasions, a search into the pre-MIA 1906 case law could prove useful in deciphering the reasons for the immense antithesis between the *res nullius* due to rejection of abandonment theory and the marine insurance law position.

Having examined the pre-MIA 1906 case law all the way back to the 18th century in the previous Chapter, the writer has formed a hypothesis offering a historical explanation to this conundrum. Abandonment used to be automatic in its results. There was, also, no distinction between abandonment and service of the notice of abandonment. These facts resulted in that, once a casualty took place and the assured abandoned his property to the underwriters, the insurers were liable to fully indemnify the assured and were additionally obliged to take over the subject matter abandoned, including all rights of possession and ownership and all accompanying liabilities. To put it differently, from the assured's perspective, as of the time of the insurer's notification, he was no longer the owner of the ship's or cargo's remains. The owner was the insurer. As it was stated in *Smith* v *Robertson*[658], there was no intermediate stage between abandonment and payment; rights were transferred and payment was a separate issue.

[658] *Smith v Robertson* (1814) 2 Dow 474.

Case in point would be *Mayor & Corpn of Boston v France, Fenwick*[659]. In that case, the *Lockwood* became a wreck in the river Witham, within the limits of the Boston harbour, forcing the harbour authorities to expenditure for her removal. The matter was that the shipowners claimed they had abandoned the vessel to the underwriters, under a notice of abandonment, before the expenses were incurred and, so, they were not liable to the harbour authorities. But, the underwriters had in fact rejected said notice. Lord Blainche[660] reached his conclusion through a peculiar logic. He said that the defendants, the shipowners, were right on principle and authority to be cleared of liability to the harbour authorities for the expenses, as the notice of abandonment was communicated to the latter and, so, it was known that defendants were not the owners when the expenses were incurred. On principle, he continued, in cases of constructive total loss, an owner can only abandon to his underwriters, and having done that, he divests himself of his property in the thing abandoned, and ceases to be its owner. Nevertheless, he did not enter to core of the notice's rejection's importance, nor of the abandonment's operation as a process and as a cession; quite the opposite. He characteristically stated that he had purposefully refrained from expressing any opinion as to whether a valid notice of abandonment unaccepted by underwriters, while it would divest the owner of his property in the wreck, would at the same time automatically transfer the property to the underwriters. He merely went on to shortly comment that, in such cases, there would be enough evidence to show that the vessel would most probably not become a *res nullius*. This is somewhat confusing in that the judge did allow for the assured's abandonment to divest him of ownership and liability, but he did not specifically say to whom this right of ownership would pass.

In later decades, mostly after the second half of the 19th century, we have the introduction of the notice of abandonment and its acceptance by the insurer as a requirement for treating a loss as constructively total and for a constructive total loss claim being successful. It is, thus, possible that the remnant notion of the abandonment's automatic effects resulted in the continuing impression that the assured would no longer be the owner of his property so long as he had abandoned it. The fact that the insurer had to accept the notice of abandonment presented an

[659] (1923) 15 Ll. L. Rep. 85; 28 Com Cas 367.
[660] At 90.

additional barrier for the transfer of property to the insurer. Between the misperception and the rule, the *res nullius* idea emerged: By abandonment the subject matter would no longer be in the assured's hands, while, by rejection of the abandonment, it would not pass into the possession of the insurer.

The belief that abandonment contains automated mechanisms has survived to our days, albeit in a slightly differentiated format. It would, therefore, not be difficult at all for a very strong confusion to have emerged, survived and embedded itself in the 19th century's troubled law of marine insurance.

It is a fact derived from the case law of that time that it was not unanimously accepted by all judges that the *res nullius* theory was erred. The most typical example of vague responses on the subject perpetuating the theory is found in the words of Bailhache J in *Mayor & Corpn of Boston v France, Fenwick*[661], expressing: "I will only say that there is a good deal to be said […] in favour of the wreck in such circumstances becoming a res nullius".[662]

Evidently, this part of the marine insurance law is in need of clarification so as to eliminate all such unnecessary complexities and perplexities. To the writer's opinion, it has been sufficiently proven above that the *res nullius* through rejection of abandonment theory has no merit in our days and, so, this theory should be discontinued.

The rejection of this theory, though, does not bar the establishment of another proposition regarding *res nullius* properties. As mentioned in the introduction of this Chapter, another form of abandonment is that of abandonment to the world at large. Should this theory be logically and systematically solid, then a *res nullius* ship or cargo could result thereunder. It is different and distinct from abandonment as described in the MIA 1906, in the sense that it is a general right, which in very simple words is equal to saying: "right to throw something away", and it will be extensively examined below.

[661] (1923) 15 Ll. L. Rep. 85; 28 Com Cas 367, at p.373.
[662] For further analysis of the specific case, see next part of this Chapter, below.

5.3 *An alternative approach*

The res nullius through abandonment to the world at large theory

5.3.1 *Can a wreck become a res nullius? The positive approach*

Many cases, in particular those decided in the post-MIA 1906 era, are not in favour of the concept that an insured property may become *res nullius* irrespective of the means utilised. It is interesting, though, that, in spite of the vigorous response towards the unacceptability of the "*res nullius* through abandonment and rejection" theory, the "*res nullius* through abandonment to the world at large" concept has not been addressed.

In the history of marine insurance law, very few judges have directly supported the latter theory, while most who have dealt therewith, even if indirectly, seem to have been confused between the types of abandonment. Thusly, the courts continued addressing abandonment and its results in general, without specific clarification of which type of abandonment was taking place, nor translation of what the assured was doing into legal terms. Usually, as we shall soon see, it is mostly representatives of the parties in the court proceedings, who bring up such a notion when it best suits their clients' needs; most commonly for not paying any salvage or wreck removal expenses. Nevertheless, we shall look into all cases where support can be found, as it may be so that such a theory just might be practically and theoretically possible. This research is supported by the fact that, even in our days, a ship or cargo deserted to its own fate is not at all uncommon and that one of the least infrequent reasons for a judicial dispute is a wreck being left in or near a port obstructing and endangering the navigation of other ships.

Parenthetically, we should say that, in the post-MIA 1906 era case law, there has been mention of the right to abandon to the world at large as an existing and valid right of the assured, though not necessarily much further information is given on the matter.[663]

[663] E.g. see: *Robertson v Royal Exchange Ass Corp* (1925) S.C. 1; (1924) 20 Ll. L. Rep. 17, per Lord Murray, at 8; and *Oceanic Steam Navigation v Evans* [1934] Vol. 50 Ll.L. Rep. 1, per Greer LJ, at p.3.

Moving to the contents of the *res nullius* through abandonment to the world at large theory and putting them in very simple words, we find the premise that an owner of a thing can simply throw it away and thereby have no connection to it. Into legal terminology, that is to say the assured may abandon his vessel or cargo to the world at large, thereby divesting himself of all rights of ownership and possession, along with any and all liabilities accompanying the subject matter so abandoned.

Once again, we must clarify that this type of abandonment is not the one contained in the MIA 1906. This abandonment is one of a more general nature, equal to throwing a small mundane object into the high seas from atop of a vessel's wheelhouse.

So, the first and foremost question arising is: Is this concept of abandonment to the world at large recognised as existent and legally sound by any case, book and statute? Secondly, even if the theory exists, can one, the assured in particular, so simply shrug off all interest in rights and liabilities on the assured property?

As a *prima facie* answer to the above, it is offered that, under specific circumstances and for particular purposes, the Court of Admiralty has recognised in the past the ability of property to be so abandoned, when it was, for example, presented with matters of salvage after a casualty.[664] Aside from these cases, we find parts of judgements dealing mostly with the shipowners' liabilities in terms of their ships being left in a port or other navigable waters. Interestingly, some of these cases contain a common flaw; though favourable to the idea of a valid abandonment, they will, more often than not, not distinguish between the types of abandonment used, making our academic work that more difficult, though we may also say, motivating.[665]

[664] See: *Pierce v Bemis (The Lusitania)* [1986] QB 384; also see: F.D. Rose, *Marine Insurance: Law and Practice*, 2nd ed., LLP, 2012, at 24.59; and W.R. Kennedy and F.D. Rose, *On the Law of Salvage,* 1st ed., Sweet and Maxwell, 2013, at 4.059-4.066 and 8.061-8.069.

[665] See: *The Douglas* (1888) 7 PD 151, per Brett LJ; *SS Utopia v SS Primula (The Utopia)* [1893] AC 492, per Sir Francis Jeune; *Arrow Shipping v Tyne Improvement Commissioners (The Crystal)* [1894] AC 508, 519, per Lord Hershell LC.; *Boston Corp v France, Fenwick and Co Ltd* (1923) 28 Com Cas 367, 375-376, per Bailhache J; and *Stuart v Merchants Mar Ins Co Ltd* (1898) 3 Com Cas 312, 314-315, per Bingham J.

5.3.1.1 *Is abandonment to the world at large an option in case law?*

The first step to take is, of course, one towards the relevant case law and our starting point will be a pre-MIA 1906 case, namely *The Douglas*[666]. This is one of the most significant cases of its time and has been used in multiple cases as authority, though most importance was granted on the liabilities of a ship-/wreck-owner, as we shall see later in this chapter. There, the court of appeal dealt with the sinking of the *Douglas*, after her collision with the *Duke of Buckingham*, and her subsequent collision with the *Mary Nixon* in the river Thames. After the sinking of the *Douglas*, her master and crew left the ship without placing any means of warning of the danger to other vessels. Inter alia, the defence of the ship's owners included that, at the time of the collision with the *Mary Nixon*, the ship was a wreck lying sunk on the bed of the river Thames, while, before that point in time, the owners of the *Douglas* "had wholly ceased to have the possession, management, or control of the same", a fact denied by the plaintiffs.

On first instance, Sir Robert Phillimore found that, notwithstanding the fact that no persons were left on board the Douglas, there was *animus revertendi*[667] and, so, the possession, management and control of the *Douglas* was not abandoned by her master and crew. Consequently, it was found that all of her owners' duties and liabilities continued uninterrupted by the sinking constituting the owners, as responsible for the damage.

On appeal, it was submitted that, as the captain and the mate could not abandon their duty to proper care of the wreck to the harbour-master and the Thames Conservancy, so too the owners rights and property could not be abandoned by the same people to said party on behalf of the defendants.[668] In response, it was repeated that the defendants no longer had the power of exercising any rights of possession, management or control over the wreck.[669]

From the judicial panel of three, neither judge had to offer a solid reply to the present question, while, on the other hand, all judges made brief mentions to the rules of abandonment. Lord Justice Brett specifically, made once again an interesting

[666] (1888) 7 P.D. 151.
[667] I.e. will to return to the vessel, precluding a valid intention to abandon.
[668] Per Butt, Q.G., and Q. Bruce, acting for the plaintiffs.
[669] Per *Myburgh, Q.C.,* and *Bucknill, acting for the defendants.*

remark.[670] The judge offered that "if the owners of a wreck abandon it, their liability ceases". Lord Coleridge CJ and Lord Justice Cotton were also supporting the view that, once the shipowner has abandoned control of the wreck, he no longer has any responsibilities thereon.

Unfortunately, it was unclear whether abandonment in this instance was meant as abandonment to the world, or abandonment to the underwriters. It is noteworthy that no mention of underwriters was made throughout the case, nor was it at that time a certainty for one to have insurance cover on one's vessel. In addition, as opposed to the findings of Lord Coleridge CJ and Cotton LJ, only Brett LJ held that the defendants did not abandon *sine animo recuperandi*, which would render the wreck, through a finding of fact by a majority of two, a derelict. For these reasons, we would be more inclined and confident to favour the former type of abandonment, namely abandonment to the world at large.

Seeing, on the balance of probabilities, that this should, by far, be the right answer, then the conclusion to be drawn is, first and foremost, that in the late 1880's abandonment to the world was recognised by courts as a legally acceptable option of the shipowners and, secondly, that, since all liability ceased as of the time of abandonment, a wreck abandoned in suchlike form would become divested of all ownership and, therethrough, become a *res nullius*.

In *The Douglas* judgement, Lord Coleridge CJ referred to two authoritative cases of his time, namely *Brown v Mallett*[671] and *White v Crisp*[672], into which we shall delve next.

In *Brown v Mallett*, the vessel, a barge, accidentally and without any default in the owner or his servants foundered, sunk and went to the bottom of the river Thames wholly covered and concealed, and thus proving to be a danger to navigating vessels. Given that another vessel collided with said barge, the issue was, similarly to *The Douglas*, whether the owner of the sunken ship was responsible to take and use due

[670] See Chapter 3, under The rules in pre-MIA1906 times.
[671] (1849) 5 Common Bench Reports 599; 136 E.R. 1013.
[672] (1854) 10 Exchequer Rep 312; 156 E.R. 463.

and proper care and precautions to guard against the danger of collision with other vessels.

Serjeant Channell[673], arguing for the demurrer[674], supported that the barge-owners were responsible for buoying, or otherwise notifying the other vessels of his sunken barge, as well as for removing the vessel prior to the collision. He went to great lengths in proving that the barge-owners had the clear responsibility for the wreck. This was supported by the fact that there was nothing to show that the owners had parted with possession, care, direction, management and control, or rather, in the words of Maule J, "it was not stated that the barge had passed out of the control of the defendant". The perception that ownership was always accompanied by the relevant liabilities was repeated in several parts of the judgement[675], along with the fact that the barge-owner was never deprived of his rights on the subject matter. A very good example is found at 1020, where it was stated: "This duty of using reasonable skill and care for the safety of other vessels, is incident to the possession and control of the vessel. [...] Of the existence of these rights and of these duties, so long as the possession and control of the vessel continue in the same person, there seems to be no doubt". The judgement goes on to say that a person may cease to have the possession and control of a vessel, without the need for these rights to be transferred to another person, bringing the example of navigation casualties, where the owner would abandon and relinquish possession and control, because of the impossibility of retaining them; and later it would go further to repeat this view: "he [the owner] was bound to use due care to prevent injury to others, as long as his possession and control continued; [...] it seems clear that the duty does not continue in the original owner, when his possession and control have been transferred to another". What the judgment did not categorically clarify as *ratio decidendi* was the extent of the shipowner's liabilities and duties in such occasions in relation to the notification of other vessels and marking of the wreck. It was left open, on one occasion, under the declaration that the effects of such an abandonment are much less clear that the effects in cases where ownership continues uninterrupted or is transferred to another person,

[673] At 1015. Opposed by Sergeant Talfourd, at 1017.
[674] In this case, the Plea was for a verification of the fact that a reasonable time for the defendant to remove his barge had not elapsed before her subsequent collision. The Special Demurrer, which was joined, alleged, amongst other causes, that the Plea raised a matter of fact, which was no answer in law to the action, and that the Plea was in violation of the rules of pleading.
[675] E.g. at 1016 and 1019.

and, on a second one, under the view that when the shipowner's possession and control have been transferred to another party, "the duty does not continue in the original owner, and that, where the possession and control have not been transferred, but have been relinquished and abandoned, we [the court] do not think that the duty always arises, and continues for an indefinite time".

It is a fact that we cannot definitively deduce what the answer of the court would have been, had they been expressly presented with the currently discussed dilemma. But, a safe inference from the above parts of the case can be drawn in that, had the vessel by any means available been out of the possession and control of the owner, then no liabilities would burden him (with the possible exception of the duty to buoy the wreck and inform other navigators, which remained unclear in this judgement).

It is, therefore, the writer's understanding, with the support of that era's case law, in connection with the first parts of this chapter and irrespective of the very specific liabilities discussed, which were eventually not decided whether they would persist without the rights of ownership and possession, that in the *Brown v Mallett* case: if the owner had taken all mariners off-board without any intension of returning, or any will to further exercise any right of ownership, control management and possession thereon, then the vessel would be derelict; that, along with possession and ownership, so too all liabilities would detach from the owner alleviating him therefrom; and that in lack of any reference to underwriters, any mentioning of abandonment must have been meant as abandonment to the world and, therefore, under the above conditions, the vessel must have been so abandoned, free for anyone to salvage it. In other words, the *res nullius* through abandonment to the world at large theory was verified and was effectively applied in this case treating the vessel as *res nullius*, without any continuing liabilities on the shipowner.

Evidently, in the mid 19th century, this theory of *res nullius* was existent, recognised and applied, as a valid and acceptable concept, even if it was not so named and distinguished from other types of abandonment and the theories of *res nullius* properties.

The case *White v Crisp*[676] proves to be clearer than the aforementioned one. There, a vessel sunk in the Bristol Channel, at Cardiff Sands. The wreck lay in the channel under water and fully covered, proving to be a danger to other vessels navigating the river. The wreck was then bought by the defendant transferring to him all rights of ownership, management, and possession thereof. The defendants, though, did not manage to raise the wreck, nor did they place any mark or signal, and, after much effort, they abandoned the wreck to its fate. Subsequently, a vessel struck the wreck and a claim emerged. The issue was similar to the above cases, with the exception of the question: what happens after a transfer to another party and after abandonment of the wreck? The court, therefore, had to rule on this point and offer a *ratio decidendi*, instead of *obiter* input.

Sergeant Channell[677], whilst arguing for the plaintiffs, brought forth case law in support of the defendant's liability of care[678] and denied that abandonment took place, although if the ship was abandoned then this care would have been lifted. On the other side, Mr. Bovill responded for the defendants that no such duty of care existed and that, in cases of abandonment of a ship's possession and control, no liabilities further exist[679].

The judge of the Court of Exchequer, Mr. Alderson B., gave a short, albeit concise judgment. Therein he recognised the severity of the defendant's argument on abandonment. He, too, brought forward the case *Brown* v *Mallett*[680] *and specifically the* part where Mr. Justice Maule states that, when a person uses a river with a vessel, to which he is possessed and has the control and management, then he has the duty to use reasonable skill and care to prevent mischief to others. This is so irrespective of the vessel's state, whether in motion, stationary, floating, aground, under water or above, since the vessel continues to be in his possession and under his management and control.

[676] (1854) 10 Exchequer Rep 312; 156 E.R. 463.
[677] At 464.
[678] See: *Brown* v *Mallett* 5 C. B. 599*; Hancock v The York, Newcastle, and Berwick Railway Co* 10 C. B. 348; *Hammond* v *Pearson* 1 Camp. 515; and *Rex v Watts* 2 Esp. 675.
[679] Further to the response to the above case law, the following was also presented as authority: S*eymour v Maddox* 16 Q. B. 326; *Dimes v Petley* 15 Q. B. 276; and *Mayor of Colchester v Brooke* 7 Q. B. 339.
[680] 5 C. B. 599.

As we can see, possession, and control, of the vessel is the key factor on whether a liability exists and is the very basis of the owner's duties, a fact expressly and vehemently recognised not only by this judge. The owner's liabilities and duties were clearly acknowledged as transferred when possession and control changes hands, so that the receiving party would receive them all and the offering party would be divested thereof.

To the point currently discussed in this chapter, the judge was certain when stating that "on the abandonment of such possession, control, and management, the liability also ceases". He continued to say that "it is clear that either the original owner, or the transferee of the wreck, may abandon it, and so put an end to his liability". So, effectively, according to the judge, abandonment of the wreck would be a form of panacea for the shipowner's burden of liabilities towards any concerned authorities and navigating vessels.

As is apparent, there was again no distinction in terms of the types of abandonment. But, according to the facts of the case and the findings of the court, what other form of abandonment could have been meant, than an abandonment to the world? The conclusion from the judges' perception is also clear; once ownership detaches from the shipowner, he is no longer under any obligation of care or liability towards other parties. It also follows that, having no legal connection to the ship, there is no subsequent owner at the time of abandonment (as opposed to cases of abandonment as under the MIA 1906 – i.e. the cession of property). According to the above, abandonment to the world at large was recognised as a valid option for a shipowner, as was the fact that such abandonment would certainly lead to a wreck becoming *res nullius*, free of all liabilities.

5.3.1.2 *The House of Lords affirmation, with a twist*

Proof that abandonment to the world was a well recognised concept with the specific result described above is found in cases ranging from first instance courts up to and including House of Lord cases. One such case, affirming the above case law's

relevant views, is the much quoted *The SS Utopia*[681], from which we shall only briefly cite the words of Sir Francis Jeune. Whether abandonment to the world is a possibility and what consequences stem therefrom, was not one of the questions presented to the court. Nonetheless, Sir Francis Jeune confirmed that it is possible for a shipowner to abandon to the world and that, if he does so, then he is no longer liable for the fate of the wreck and no liabilities may adhere to him after that point in time.

The twist comes from the fact that, in this case, it was held that, after abandonment to the world, the wreck was not free for anyone to salvage, but instead would directly pass into the hands of the appropriate authorities, be that the Harbour Master or any other official entity in charge and liable for the navigation of the waters, within which the wreck is located. In case there was no such authority to be found directly, then the ship would still not be absolutely free. In such a case, it was assumed that the wreck would be at the free disposal of the King (or Queen, in our days). This is clearly a differentiation from the mainstream view that the abandoned property is at the free disposal of whomever wishes to take over its ownership, possession and liabilities.

Specifically, it was held[682] in relation to abandonment that the duty of exercising reasonable skill and care was "incident to the possession and control of the vessel". In addition, while quoting part of the *White v Crisp* case, it was found by the judge that "to the extent to which the owners have properly parted with the control and management of their vessel, their liability ceases". The means of parting with possession were recognised by Sir Francis Jeune to be more than one, but, equally, that they were all of identical effects. The means mentioned were, among others, abandonment to the world at large, transfer via sale and unilateral transfer via the power of public authorities. Abandonment to the world was not considered by Sir Francis Jeune to be a complex task, but rather an easy one, effected even by a mere notification to the harbour authorities declaring an abandonment of the vessel's

[681] *SS Utopia (Owners of) v SS Primula (Owners of) (The Utopia)* [1893] AC 492, 498.
There the Utopia, having already collided with the HMS *Anson*, lay sunk in the Gibraltar bay and being so she collided with the *Primula.* The Chief Justice of the Vice-Admiralty Court of Gibraltar ruled that both vessels were to blame, while the House of Lords decided to the contrary, i.e. that the defendants had no liability, as possession and control had passed to the harbour authorities, which had the power to transfer them so.
[682] In reference to *Brown v Mallett, supra.*

control, which was what happened with *The Douglas*[683]. On the last mentioned means, i.e. a unilateral act, it suffices to say that, in *The Utopia*, the harbour authorities were held to have validly taken it upon themselves to safeguard the navigation in their area of effect (including marking, lighting, buoying, etc). As a result, these liabilities rested no more on the owners of the wreck, but were instead a burden on the harbour authorities.

The closer we get to 1906 and the implementation of the MIA, the more progress and evolution is evidenced in terms of the rules of abandonment and the notice of abandonment. In dissimilarity to this, the court's position on the *res nullius* through abandonment to the world at large theory remained unaltered. *The Utopia* was decided towards the end of the 19th century, but the courts were still holding it as valid and applicable. The only difference towards the previous case law was that, in *The Utopia,* instead of ending with a vessel, or cargo, which would be owned by no party, i.e. a *res nullius,* until such party appeared and laid claim thereon, the subject matter was immediately passed to the appropriate authorities, along with any and all liabilities accompanying it, or, in lack thereof, it became property of the King. It is, of course, understandable that, from the shipowner's perspective, so long as he is no more burdened with liabilities, nor is he operating under the threat of future claims due to the casualty, then whether the abandoned property passes to a public party or to no party at all is of no importance to him.

As previously recognised, there is, in *The Utopia*, a slight delineation from previous case law. Nevertheless, the basic and most important part of this *res nullius* theory is unaltered and confirmed, namely that from the time when possession, management and control of the property are lifted from its owner, any liabilities and obligations he may have had are lost.

[683] *Supra*.

The above position is not at all illogical. One only needs to look at today's Merchant Shipping Act 1995, s.241, which is appropriately titled: "Right of Crown to unclaimed wreck". This section states that Her Majesty and Her Royal successors are entitled to any unclaimed wrecks found in the United Kingdom or in United Kingdom waters, except where this right has been granted to any other party.

This is not a new concept, as it has been around since at least the early 17th century. For example, in 1601, William Blackstone wrote in his work[684] that in the common law "in order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the uncouth appellations of jetsam, flotsam and ligan… Wreccum maris, wreck of the sea, in legal understanding, is applied to such goods as after shipwreck, are by the sea cast upon the land". Such wrecks, were the King's property, both at common law and later by statute, which provided that "The King shall have the wreck of the sea throughout the realm, whales and great sturgeons taken in the sea [...]".

Similarly to the MSA 1995, s241, this prerogative of the King could be assigned to others, such as the Lord of the Manor, upon whose land a ship might be wrecked. This Lord was customarily allowed to keep an anchor and cable in return for incurring the cost of burying the dead and for caring for the survivors. Any jurisdiction of the Admiralty was applied only in terms of a cause of action wholly at sea and would not at all extend to any issues dealt "within the body of a county". These would be wrecks still afloat or at sea, including any flotsam, i.e. goods floating from a sunken ship, any jetsam, i.e. goods jettisoned, and any lagan, or ligan, i.e. non-floating jetsam, which could also have been buoyed for subsequent recovery.

In terms of the above approach not defeating the "*res nullius* through abandonment to the world" theory, one could offer the following reasoning: should it be accepted that, even if not in private hands a property abandoned to the world at large will be immediately passed to the hands of the local authorities, or in lack thereof, into the hands of the Crown, then it could be supported that the property will not, technically and in a strict understanding of the term, become a *res nullius*. Rather,

[684] William Blackstone, *Laws of England*, Book I, 1601, para.290.

for all intents and purposes, it would in reality become a *res nullius*, with the port authorities, or the Crown, behaving as a salvor immediately intervening after the abandonment's occurrence. The fact that this type of salvage is in existence through statute, or under the Common law, does not alter the fact that for the time between abandonment and the State's take over, even if it is only for a millisecond, the property is an unclaimed wreck laying in no one's hands.

5.3.1.3 *The House of Lords affirmation, with elements of uncertainty*

One of the most popular and commonly cited cases of the pre-MIA 1906 period is the House of Lords case *Arrow Shipping v Tyne Improvement Commissioners, The Crystal*[685]. Though it comes from 1894, i.e. before the MIA 1906 took full and complete effect, it has been considered to be one of the most important and influential of cases on matters of abandonment.

It is a fact that the findings of each Lord presiding thereover were long and went in depth, but, in summary, it is offered that we will here, too, find the judges in agreement with the existence of the right to abandon to the world at large, albeit with some not uncommon elements of uncertainty and inclarity over how abandonment operated and which type abandonment was utilised at each point by the parties. The former part of the judges' view in *The Crystal*, on that abandonment could result in *res nullius* properties, was recognised in following case law, such as in the constructive total loss case *Manchester Ship Canal Co v Holock* [686].

According to the case's facts, the *Crystal* collided with another vessel, without fault of its own, and sank near the harbour's approach, at the mouth of the River Tyne, thus obstructing navigation in and out of the port. The shipowners served a notice of abandonment to their underwriters and claimed for a total loss, under which they were fully indemnified, notifying in parallel the harbour authorities of the abandonment.

[685] [1894] A.C. 508.
[686] [1913] M. 1587; [1914] 1 Ch. 453.

The harbour authority, acting under Statute[687], took possession of the wreck, raised part of the cargo and sold it, dispersed the wreck by explosives, and after deducting the proceeds of the cargo from the expenses sued the assured for the balance.

At first instance, Gorell Barnes J held that the assured was liable to pay for the harbour's expenses, a view affirmed in the Court of Appeal, by Lindley, A. L. Smith, and Davey L.JJ. The House of Lords, though, opted for the opposite[688].

Finlay Q.C. and Scrutton[689], for the shipowners, expressed the view that abandonment of the wreck divests the owner of all rights and liabilities thereon.[690] They went on to support this through *The Edith*[691] and the *Earl of Eglinton's*[692] case, per Bramwell L.J., who held that, if there is abandonment, no liability continues on the shipowner, as also supported by the case *River Wear Commissioners v Adamson*[693]. The list of cited cases is long and, in fact, it is most of the ones presented in the first part of this chapter.[694]

What the learned barristers failed to address was the fact that, as explained above, the aforementioned cases make no distinction between abandonment to the underwriters and abandonment to the world at large. It is true that their purpose was to defend the shipowner and, therefore, whether the underwriters would be liable to the harbour authorities was irrelevant to the case. Since the service of a notice of abandonment and its acceptance were given facts of the case, it can be effortlessly concluded that it was the abandonment in the sense of an offer of cession that took place. But it still remains an issue that the matter of the type of abandonment was not sufficiently clear, indicating the confusion on and the indiscriminate use of the word abandonment.

[687] See: The Harbours, Docks and Piers Act 1847; and the Removal of Wrecks Act 1877.
[688] Also reversing the *Earl of Eglinton v Norman* 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471 case, which was relied upon in the Court of Appeal.
[689] At 512.
[690] Per Lord Cairns L.C. in *River Wear Commissioners v Adamson* (1876) 2 App. Cas. 743, 751.
[691] 11 L.R. IR 270.
[692] *Supra.*
[693] *Supra.*
[694] E.g. *The Utopia*, per Sir F. Jeune; and *The Douglas*.

Sir W. Phillimore and Butler Aspinall, for the harbour authorities, relied heavily on the relevant statutes[695] and their construction. They mentioned that "some one is to repay the local authority" in the sense that "a personal liability must exist". What they said, effectively, was that there is always a party who bears liability for the vessel. The most closely related party to the wreck, they continued, was the shipowners. Therefore, it should be them who will pay for the expenses. Interestingly, it was mentioned that "if the appellants contend that the underwriters were the owners, they should have so pleaded". This implies directly that as the shipowners were divested of ownership through abandonment to the underwriters, then said abandonment would constitute the underwriters as the owners at the time the expenses were incurred. The point, though, was not further commented by the barristers.

Lord Herschell[696] did not approve of the argument that someone should always be liable. He found that the objective of the acts was the protection of the harbours, piers, ports and the relevant authorities from injury, though this should not take precedence over the fact that a certain party may have no rights and liabilities over the vessel in question. On the matter of the current examination, the judge said clearly that possession and ownership was removed from the shipowners. This was undoubtedly so in accordance with the abandonment by the shipowners. As abandonment took place before the harbour authorities' expenses occurred, then, in keeping with the applicable statutes, the shipowners were not liable to the authorities. The "owner" liable for the wreck needed not be the owner at the time of the casualty, nor the owner at the time of the claim.[697]

Remarkably, Lord Herschell[698] said that "it seems clear that before the time when the expenses were incurred by the respondents, the appellants had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership. They had also given notice of abandonment to the underwriters". The judge made an unambiguous statement that abandonment to the world refers only to the physical abandonment and related only to the vessel becoming derelict. No rights

[695] The Harbours, Docks and Piers Act 1847; and the Removal of Wrecks Act 1877; as cited in *River Wear Commissioners v Adamson*, *supra*, per Lord Blackburn, at pp.762; *The Edith, supra*; *Brown v Mallett* 5 C.B. 599; and *White v Crisp* 10 Ex. 312.
[696] At 515-516.
[697] On who is considered to be the owner responsible for the expenses, see: The Harbours, Docks and Piers Act 1847; and the Removal of Wrecks Act 1877.
[698] At 519.

of ownership or possession were considered to be affected by such an act. Abandonment to the underwriters was distinguished and was also held as valid even after abandonment to the world. The results of abandonment to the underwriters were apparent.

At this point in *The Crystal* we notice that there is a severe difference in how the types of abandonment are beheld. The point was not discussed further than this and, more importantly, it was found to be unnecessary to search into who would be the party liable and whether it would be the underwriters to be treated as the owners of the wreck.

Next to offer his views was Lord Watson. In terms of abandonment to the world, he was in agreement with the Lord Chancellor in thinking that abandonment of a sunken ship in the open sea, *sine animo recuperandi,* would divest the shipowners of all proprietary interest. So, according to this finding and in disagreement with Lord Herschell's opinion on the matter, once the ship becomes derelict by the actions of the shipowner (as opposed to those of the master and crew), the vessel is equally abandoned to the world at large, with the explicit result of the shipowner's detachment of all rights of ownership.

It is very curious that Lord Watson would perplex the facts of the case in such a manner. This is so, because, if the shipowner did abandon to the world, then he would not be able to abandon to the underwriters, as he did. The vessel would not be in his hands and so the offer to abandon would not include a cession of right. In connection with Lord Herschell's view of the matter above, there seems to be some confusion between the concept of abandonment to the underwriters and abandonment to the world at large. Unless, at that time, the process of abandonment operated as follows: The ship/cargo is abandoned to the world and the assured then informs the underwriters of the fact, who take over from that point onwards. But abandonment did not function in such a way, nor could it for the reasons already presented. The more reasonable explanation is that there existed a misperception, which lead both judges to peculiar conclusions. Following the pre-MIA 1906 case law's findings on what abandonment to the world brings to bear, Lord Watson was correct in the principle he presented. It is the application of this type of abandonment to this particular case that meets disagreement.

It was rather clear that abandonment through a notice of abandonment could only be abandonment to the underwriters and not one to the world. So, at this instance, Lord Watson's view might have been entangled, per Lord Herschell's assumption, namely Lord Watson wanted to say that the shipowner considered the vessel to be derelict. Even without the mentioning of the notice of abandonment, since there existed underwriters to the vessel, to which the abandonment was addressed and not merely announced, the logical view would be that abandonment referred to them. So, after a successful abandonment thereto, in the meaning of a cession of all interest on the wreck, property would pass to the insurers, without any gaps in ownership and liability. If there were no underwriters, then the shipowner would have been held to have the choice to abandon to the world at large and therethrough be divested of all connection with the vessel, including the liabilities related to the subject matter. It may only be a supposition that at the time when this case was decided, all, or almost all, vessels were covered under insurance and that, though abandonment to the world was possible, when reference was made to abandonment, it would connect directly with the underwriter, who would then be in possession as a matter of law. Therefore, the workings of abandonment were perhaps of such clarity in the market that there was no need for the courts to be definite in distinguishing the two types of abandonment. After all, as was simply expressed by Lord Herschell, that, which was most important to the courts in each case, was the liabilities of the shipowner; and as it has been shown, either type of abandonment would clear the shipowner thereof. It is important, to note once more that, according to the above views, too, the notion of abandonment to the world was recognised by the House of Lords with the result of discontinuing rights and burdens *re* the shipowner.

Lord Ashbourne also offered his opinion on the matters of this case. After commenting on the construction of the relevant statutes, the judge found that the shipowner should not be liable thereunder. During his short remarks upon the merits[699], Lord Ashbourne offered, as an *obiter dictum*, that, should the owner be considered liable, it could be argued that he should not be allowed to evade his liability by a mere assignment of his rights and liabilities, after his vessel had become a wreck and an obstruction. Other than that, he just agreed with what the other judges expressed.

[699] At 527.

Lord Ashbourne's position, though it indicates strongly that it was referring to abandonment to the underwriter as an offer of cession, it is not very helpful in understanding how abandonment to the world was perceived around the 1900's. Lord Morris, instead, had an interesting observation to make. In his judgment, he said that "when he [the owner] gives the harbour authority notice that he disclaims any property in the wreck, the only remedy for the harbour authority is to sell the wreck [...] The owner is in no default by himself or his servants; he abandons the property of the wreck, whereupon it becomes the subject which is to pay for the expense of its removal".[700]

Lord Morris would appear to be an advocate of the existence of a right to abandon to the world at large. He supports the idea that the owner can abandon his wreck to no specific party, whereby no right or liability would remain with him. A similar result would be achieved through abandonment to the underwriters, i.e. the assured would bear no liabilities from that point onwards, but a cession to the underwriters was not suggested by Lord Morris. Valuable as it may be, it remains a brief view on the matter and without having much support to enhance it, notwithstanding which we shall keep it as evidence of the approval of the concept of abandonment to the world at large.

Lord Macnaghten went into the matter deeper than all of his colleagues on the judicial panel, although his opinion on the facts and abandonment proved to be more complicated. He too stated his views on the shipowner's position under the applicable statutes, but he then discussed the issue of ownership and its possible transfer. The judge held that the assured, though he was the owner of the *Crystal* at the time when she became a wreck, he was not so when the expenses took place.[701] It was very curious when the Lord's judgment continued to express that he would lay out of consideration what took place between the owners and the underwriters.[702] This seems to be a very important part of the facts, but is nevertheless omitted on purpose. If the assured had successfully abandoned his vessel, then and only then could he not be the owner of the wreck and subsequently the owner when the harbour authorities removed her through their expenses. In other words, if there was no abandonment, either to the

[700] At 534.
[701] At 531.
[702] At 532.

underwriters or to the world at large, the owners of the wreck would remain in ownership of the wreck and would be liable to the harbour authorities for the removal expenses.

While dealing with what took place between the harbour authorities and the owners, Lord Macnaghten stated that, after the owners were served a notice from the Tyne Harbour authorities on the future removal and destruction the vessel, the owners replied by stating: "the steamer being a wreck in the open sea they had abandoned her as such". The judge perceived this reply to mean that the owners declared they had "abandoned all rights of property and given up all interest in the vessel" and that they thereupon ceased to be owners. The owners were perceived to have lost possession, but it was also held that what did remain with them was "the property in the vessel—that is to say, the right to retake or resume possession of her". It was then immediately added that this right was abandoned plainly and unequivocally and that the owners "disowned the wreck".

Another exemption from the Lord's examination was later made in relation to the necessity of enquiring whether goods abandoned under such circumstances would cause any wrong and whether they would thereupon become *bona vacantia* and derelict, or whether the property would remain in the owner notwithstanding the abandonment. To this question, an answer was not given. Lord Macnaghten[703] characterised the owners' reply letter as their notice of abandonment, with a clear indication that it was a notice effecting abandonment to the harbour authorities, from which the latter would (outside the relevant statute, which was found to be not applicable) derive their power to dispose of the wreck and would therewith divest the owners of the *Crystal* of the property. In the judge's own words, "where [the owner] tells [the harbour authorities] plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him".[704]

It is now essential to establish within which type of abandonment the acts of the shipowner falls, in order to have a clear view of what rights and liabilities remained therewith. According to the facts of the case, a notice to the underwriters

[703] At 533.

[704] As opposed to "where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him".

was given in respect of abandonment, which was accepted, and a successful claim for total loss was made. This means that the assured used his right to abandon the subject matter insured to the underwriters in exchange for full indemnification, per their total loss insurance policy, and managed to cede the property and all rights and liabilities thereon to the underwriters. Therefore, Lord Macnaghten is right in saying that the owners had abandoned all rights of property and that they had lost possession. The objection that arises is to the part where the owners are held to retain the right to retain property in the vessel and to be able to retake their property. After the successful cession to the underwriters, it is they that own the subject matter insured and may dispose of it as they see fit. The assured has no rights thereon any longer.

The judge's view would also suggest that the assured did not abandon to the underwriters, but instead abandoned the vessel in a physical sense, meaning in such a way as to render the wreck derelict. It would only be this type of abandonment that could allow him to retain his legal link to the wreck and be able to reclaim it afterwards. But, these two types of abandonment cannot take place at the same time through the same facts. As stated in the introductory part, an assured may still have his right to abandon his asset to his insurer, after he has abandoned it in a physical sense (i.e. making it derelict), though this will have to be established through a separate act.

Moreover, the owners' letter to the harbour authorities was held to be a notice of abandonment towards the latter. This would mean that abandonment, in the meaning of a cession of rights and property, would be possible not only to the underwriters, but also to other parties, even if no contract granting such a right exists between them. This could be in agreement with the notion that abandonment to the world within the limits of a harbour would make the relevant harbour authorities the possessors of the wreck. However, this explanation would be inconsistent with the rest of the judge's observations, such as the loss of possession and simultaneous retention of the right to ownership. If the judge was hinting towards abandonment to the world, then, Lord Macnaghten would be correct in that the assured would have the right to "retake or resume possession" on the wreck, since the wreck would have been open to everyone to salvage and claim it for himself. But the assured would not have kept a right of property. So, the relevant part of the judge's findings would be

inaccurate. It is for these reasons that abandonment to the underwriters seems to be the most accurate of the above hypotheses.

On a general note, it is astonishing to note such a misconception of what is abandonment and how it operates. The judges of the time, in all their wisdom and knowledge, seemed to have overlooked some intrinsic characteristics of the abandonment's workings. In this case, the apparent confusion in the judgements would seem to be of a somewhat large scale. It is a fact that the law on this part of marine insurance was not absolutely settled at the time, as it was shown in the previous Chapter. But that was more in terms of the validity of small alterations made to previous case law, not to its basic functions. As an assumption in justification thereof, it could be stated that, at that time and prior to the MIA 1906, the law was flexible and in favour of the shipowners, who would appear to be able to both dispose of all liability in the subject matter, enjoy a full indemnification through their insurance contracts, and reclaim the wreck after abandonment was effected by salving the derelict property. According to the writer, though, this supposition, in spite of the fact that it would also be consistent with a right to abandon to the world at large, would have to be a highly unlikely and a legally unsupported scenario.

5.3.1.4 *Who can effect abandonment? The underwriter's involvement*

It is of great interest to note how clearly it can be observed that, in the aforementioned cases, there is no reference made to the vessels' underwriters[705]. This is very curious, given the insurers' involvement in maritime trade and transportation, as well as given the fact that the insurance of vessels and cargos was long established, especially in the London market. Therefore, when it came to abandonment, the underwriters should be one of the first parties to be brought into the matter.

The following case, coming from the Admiralty Division and being decided by its president, Sir Samuel Evans, will help bring some clarity thereover, along with some decisive and clear answers to the question of this part of the chapter. In *The*

[705] If any, of course, as it was not apparent whether the vessels under consideration were covered through an insurance policy.

Ella[706], the homonymous vessel, by negligence of its master and crew, collided with and sank a hopper barge, the *Rosina*, in the port of Southampton. The owners and underwriters of the *Rosina* abandoned her and, so, the statutory harbour authority had to incur expenses for the wreck's lighting, buoying and removal by explosion. The Southampton Harbour Board made a claim for the relevant amounts against the *Ella*'s owners, based on their negligence, or fault towards a public nuisance, proximately causing the loss and said expenses.

The case revolved mostly around the liabilities of the *Ella*'s owners towards other vessels and the harbour authorities, which will be analysed later in this Chapter. For that reason, we shall here only cite the parts relating to the present matter, i.e. abandonment to the world at large and its connection with *res nullius* properties.

Sir R.B.D. Acland K.C. and Mr Dumas, acting for the plaintiffs, the Southampton Harbour Board, argued that, irrespective of the defendant's intentions[707], it was the defendant's vessel that caused the sinking of the *Rosina* and, thus, the obstruction to the port. Since the owners and underwriters of the *Rosina* had abandoned her, it was established that it fell upon the plaintiffs, as the statutory authority, to disperse the wreck[708].

What was effectively said was that, because the owners and underwriters of the *Rosina* had abandoned her, no obligation burdened them and were, thus, free of any and all liabilities towards other ships and the harbour authorities for the obstruction, which their wreck caused by its presence. Mr Dumas was clear in that, had there been no abandonment, the costs would be claimed, without doubt, against the wreck's owners and not against the *Ella*'s owners. But, since it was the *Ella's* master and crew that caused the loss and the subsequent obstruction and the harbour's expenses, it should be the *Ella* that should bear the costs deriving therefrom.

[706] [1915] P. 111.
[707] See: *Rex v Moore* (1832) 3 B. & Ad. 184.
[708] See: *Winterbottom v Lord Derby* (1867) L. R. 2 Ex. 316, at p. 322; *Julius v Bishop of Oxford* (1880) 5 App. Cas. 214; *Dormont v Furness Ry. Co.* (1883) 11 Q. B. D. 496, per Kay J., at p. 502; *Louth District Council v West* (1896) 65 L. J. (Q.B.) 535; and Mersey Docks Trustees v Gibbs (1866) L. R. 1 H. L. 93. Also cited, on abandonment: *The Douglas* (1888) 7 P. D. 151; *The Crystal* [1894] A. C. 508, at p. 516; *Rex v Watts* (1798) 2 Esp. N. P. C. 675; and *Brown v Mallett* (1848) 5 C. B. 599.

Mr Leslie Scott, K.C., and Mr Balloch, on the other hand, disagreed arguing that the harbour authorities had the right to claim their expenses from the owner of the wreck causing the obstruction, namely the *Rosina*, irrespective of whether the wreck was still in the hands of its owners, or not. The volitional act of abandonment of the barge by her owners was accepted by the defendants as an intervening cause, which prevented the owners being sued for the expenses, as there was no remaining obligation upon them to raise the abandoned barge in lack of possession thereon. Notwithstanding this fact, the party targeted through the Harbour Authorities' claim should not be diverted. Consequently, it should not be the owners of the *Ella* that would be responsible for the expenses, as it was not their ship obstructing the navigation in the Southampton harbour.[709]

From the words of either counsel, we find an agreement on the fact that abandonment detached all rights of ownership and possession, and all liabilities from the property. As it was mentioned that abandonment was effected by both the owner and assured of the *Rosina*, and by her insurer, the logical conclusion is that this type of abandonment must not have been meant as the offer of cession contained in the MIA 1906. The insurer has no such recognised right. Consequently, it must have been meant as the right of abandonment to the world. As we shall ponder on this point below, we should firstly state, for now, that both counsels recognised the existence and legality of abandonment to the world and that, when taking effect, this abandonment leads to *res nullius* properties, and secondly, we should study what the court had to say on the matter.

Sir Samuel Evans[710] also mentioned the fact that the wreck was abandonment by the owners and their underwriters, but without making any remarks on the specific type of abandonment being utilised, or any mention of the sequence and detailed consequences of each of these acts. They were treated as one and the same, with common results. The judge went on to consider the liabilities of a wrongdoing party to the public and the relation to the harbour authorities. In terms of abandonment and its link to the above liabilities, he mentioned[711] that the harbour authorities did have

[709] See: *Sharp v Powell* (1877) 3 Asp. M. L. C. 471; *Eglinton v Norman* (1877) 3 Asp. M.L.C. 471; *The Utopia* [1893] A.C. 492; and *The Snark* [1900] P. 105.
[710] At 116.
[711] At 118.

the right to go against the owner of the wreck offering the obstruction to the port[712], but, seeing as the wreck was abandoned, no legal ownership remained therein and, so, any and all liabilities discontinued towards that person. In Sir Evan's words, "the abandonment prevented the plaintiffs from recouping themselves for their expenditure by making the owners repay it".

As a side note we should state that, on the matter of whether the defendants were at fault, the judge was certain that they were[713], either regarding the case from the point of view of the breach of duty of good navigation and seamanship or through negligence of the defendants, or from that of a public nuisance caused through their fault. The judge also affirmed the port authorities' right to go against the third wrongdoing party, as there could be no recourse against the abandoned wreck and, so, the next party liable should be the one against which the wreck's owners would go, if they had not abandoned her. It is also interesting to observe that the port authorities, in accordance with their statutory duty to offer safe navigation in the waters under their supervision, even if they are not the next owners of the abandoned property, per *The Utopia*[714], they are still obliged to fend for the subject matter abandoned and bear any related costs.

In this case, as we can see, the underwriters were brought into the case's frame and their actions bore materiality to the outcome of the abandonment issue. But what was their involvement exactly? In the case of *The Ella*, it was stated very briefly and plainly that the *Rosina*'s owners and their underwriters abandoned her. This is too simple an expression and needs some analysis. The abandonment, which the court mentioned, must be viewed separately from the assured's and the underwriter's view. It is our understanding that in reference to abandonment between the assured and the underwriter, abandonment had the meaning of the offer to cede the subject matter insured in exchange for a full indemnification of the value cover. But from the situational background of the case, we understand that there was also abandonment to the world at large involved, since that is the action that alleviates the right of ownership and any attaching liabilities from the owner, without passing them to any other party. Without this, then we would have another party as clearly owning and

[712] Based on the Harbours, Docks and Piers Clauses Act 1847; mentioned and analysed below.
[713] See: *Louth District Council v West* 65 L. J. (Q.B.) 535.
[714] *SS Utopia (Owners of) v SS Primula (Owners of) (The Utopia)* [1893] AC 492, 498.

being responsible for the abandoned property and any damage done. Therefore, the underwriters must have been the ones abandoning in the latter sense, namely abandoning to the world at large.

To put these acts in chronological order, we can say that: the *Rosina* was abandoned by the assured to the insurer, in the sense of being offered as a cession of property and interest in exchange for a full indemnification of the relevant loss; the underwriters then, having accepted the cession, were the sole owners and the party responsible for the wreck, even if for a fraction of time; the underwriters then left the *Rosina* to her fate and the high seas, meaning that they abandoned her to the world at large. Since it was undisputed that there was no party in ownership of or under liability for the *Rosina*, this is the only sequence of acts and transactions whereby both the owner (i.e. the assured), and the insurer of the *Rosina* could have been freed of all rights of ownership and of all liabilities on the wreck. Having thereby being detached of all such connection, the wreck was left free for the harbour authorities to salvage and dispose of freely.

Going back to the fundamental question considered: To put the above in other words, *The Ella* case supported that abandonment to the world is possible and will lead to the abandoned property becoming a *res nullius*.

An alternative, even if slight, possibility could be that the court meant: in addition to the underwriters abandoning the vessel to the world, so too the assured abandoned her to the world, in parallel to the insurers. But, this premise is somewhat confusing in that, the assured may surely only choose one type of abandonment. If he abandons to the underwriters, the subject matter is then for their taking, while, if he abandons to the world at large, then the underwriters will not be in the position to exercise any power over the vessel, let alone abandon such rights, because no rights would be transferred to them, unless and until they decide to salve the vessel.

The most probable explanation for the use of the above expression in the case of *The Ella* is that, for the court, the important fact was that, irrespective of what transpired between the *Rosina's* owner and insurer, the vessel was eventually abandoned to the world at large. Yet for our analysis it is obviously of great importance. It is granted that the first of the two proposed possibilities is the more

credible and convincing. Nevertheless, under either approach, we are realising that, not only was abandonment to the world at large acceptable in law and leading to *res nullius* properties, but most interestingly it was also available to all parties with a right of ownership on the vessel; this could be the registered owner, an unregistered purchaser of the vessel, or even the underwriter obtaining an equitable right thereon after payment of the total loss claim. This is surely new information.

The *Ella* was not the first time when underwriters were mentioned in this context. One such pre-MIA 1906 case was the House of Lords case *Barraclough v Brown*[715], which touched directly upon all three aspects of abandonment. In this case, we have a repetition of the common scenario, where a vessel sinks within the limits of a harbour and, posing an obstruction to navigation, is removed with the harbour's expenses, which are later claimed against the owner. Specifically, the steamship *J.M. Lennard* capsized and sank in the river Ouse, thus becoming a danger to navigation within the jurisdiction of the Undertakers of Navigation of the Rivers Aire and Calder. The interesting part of the facts is that the assured and owner of the vessel at the time of the loss gave notice of abandonment to the underwriters; the latter accepted the notice and settled for a total loss, concluding the abandonment, and tried to raise her; but, the insurers later abandoned her to the harbour authorities for them to remove, or otherwise use or dispose thereof.

Once again, a terminological decoding is in order, as we have three instances of abandonment with all three different aspects of that word. In the way that the facts were presented, it is understood that, when it is stated that the assured abandoned to the underwriters through a notice of abandonment, he only offered to cede the vessel and all rights thereon to the insurers. The latter accepted said notice, namely the offer of cession, and, so, abandonment to the insurer was effected, in the sense of the actual cession, or transfer, of property and rights and liabilities. Lastly, we have the abandonment from the underwriters to the harbour authorities. This could be explained as an offer to pass on the vessel through the rules of abandonment, but the underwriters have no such right, because it is incident to marine insurance policies, which did not exist as between the insurers and the mentioned authorities. Nor can

[715] [1897] A. C. 615.

this act have the meaning of the transfer itself, since a cession may not take place on its own and without more. Since the harbour authorities were the most proximate of parties to act upon the wreck or to assume ownership[716], then the only reasonable extrapolation is that the underwriters abandoned the wreck to the world at large.

Were abandonment to the world not an option available to any party, the underwriters would be held liable towards the harbour authorities for the expenses incurred, while the underwriters' action of abandonment would be discarded as ineffective. Accordingly, the shipowner, and assured, would not be liable where abandonment would have taken place prior to the incurring of the expenses. On first instance, Mathew J followed this last position and gave judgment in favour of the shipowners, which was affirmed in the Court of Appeal by the Master of the Rolls and Lopes and Rigby L.JJ. The House of Lords was also not of contradictory opinion.

Sir W. Phillimore and Montague Lush, for the appellant[717], supported the idea that, under common law, "an owner [inclusive of the assured and insurer] can abandon in the open sea, but not in an artificial cut, within the "limits of improvement". The proposed structure was that there is a right to an owner of a vessel, or a wreck, to abandon her to the world, so long as she is not within the jurisdiction of a port, harbour, dock or similar authority. This was a new notion and quite opposite to what was stated in *The Utopia*[718], where the appropriate harbour authority was held to be taking over the wreck in case of abandonment to the world. Here, it was proposed that abandonment could not take place, though, in general, the right to abandon to the underwriters and to the high seas was recognised.

Lord Herschell[719] was in favour of the shipowners not being liable to the harbour authorities adding to the previous instances' judgments that the harbour authorities were *ab initio* not capable of recovering through action in court under the applicable law. The judge found the claimants' argument, on abandonment not being effective within port limits, to be particularly interesting, but directly responded thereon by commenting that abandonment, either to an underwriter or to the world, is

[716] See: *SS Utopia (Owners of) v SS Primula (Owners of) (The Utopia)* [1893] AC 492, 498, above.
[717] At 619; bringing for the following case law: *London Association of Shipowners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch. 242; *Bell v Cade* [1861] 2 J. & H. 122; *The Utopia, supra.*; *Smith v Wilson* [1896] A.C. 579; and *The Ettrick* (1881) 6 P.D. 127, 134, per Jessel M.R.
[718] *Supra.*
[719] At 619-620.

effective irrespective of the place, the applicable authority or the public nature of the waters.[720]

In agreement to Lord Herschell's view, Lords Watson, Shand and Davey were also of the opinion that a valid abandonment could be made. They did not offer many details on that process, nor any distinction between the different types of abandonment, but they were, nonetheless, clear in their views.

In this case, we note that judges of the highest tier dicussed the matter of abandonment to the world, its outer boundaries and, of course, its results. It is very interesting to see that, so close to the materialisation of the MIA 1906, neither this concept of abandonment, nor that of *res nullius* properties through this kind of abandonment were defeated. The lack of unanimity on the judges' views deprives none of this finding's importance, though the continuing use of the word abandonment as a generic term is still surprising, particularly for judges of such stature.

5.3.1.5 *The general rule; statutes and the case Law*

Aside from the maritime law cases, there are other tools we can use to clearly establish that an owner of a ship or cargo has the right to abandon to the world at large. These include statutes, principles of property law and cases on ownership.

Starting with land law, we find the rule that there may be voluntary disposal of the land, so long as it is not made with intent to defraud a subsequent purchaser.[721] Secondly, shipowners under English law are expressly vested in the right to use and dispose of their vessels as they wish in accordance with the Merchant Shipping Act 1995, s.16, Sched.1, para.1(1)-(2), which reads: "The registered owner of a ship or of a share in a ship shall have power absolutely to dispose of it provided the disposal is made in accordance with this Schedule and registration regulations". This right "does not imply that interests arising under contract or other equitable interests cannot

[720] At 621.
[721] See: Law of Property Act 1925, s.173(1).

subsist in relation to a ship or a share in a ship; and such interests may be enforced [...] in the same manner as in respect of any other personal property".[722]

Finally and most importantly, we should mention the non-marine case *Robot Arenas v Simon Waterfield*[723]. Mr. C Edelman QC[724] unambiguously held that an owner of a certain property may abandon it in such a way so as to be completely divested of both possession and ownership thereof, so long as he has the intention to abandon the property and has proceeded to some physical act of relinquishment. [725]

In agreement to the judge's view, we find academic authorities, such as the work of Palmer. In *Palmer on Bailment*[726], the meaning of the word abandonment is analysed.[727] It is found to have two meanings:

The first is the colloquial sense, whereby one may "abandon the search for a lost object, whether by reason of other claims on his time, or a belief that the place where the object has been lost is one where others are likely to find it and return it". This person is not legally, but only practically, resigning any proprietary or possessory claims to the chattel, so that, if and when the chattel is found, then the ordinary rules of possession and ownership reapply, meaning that the owner has, by operation of the law, the paramount claim of the return of the lost object's possession.

The second is the juristic sense. This type of abandonment is also called divesting abandonment, where "the finder comes upon a chattel that the owner has previously left or cast away with the intention of divesting himself not only of possession but also of ownership".[728]

The latter type, i.e. the divesting abandonment, is the exact equal of the abandonment to the world at large, as described above. Their results are common, as, under a divesting abandonment, the founder of the property can freely take over and use it as per a salvor of a *res nullius* at sea. What is more, against an accusation or

[722] Also see: *Whitworth Bros* v *Shepherd* (1884) 12 SC (4th) 204, on the insurers' rights on a vessel successfully abandoned to them.
[723] [2010] EWHC 115 (QB).
[724] At 14.
[725] Opposite view, F.D.Rose, *Marine Insurance: Law and Practice,* 2nd ed., LLP, 2012, para.24-60.
[726] N.Palmer, *Palmer on Bailment,* 3rd ed., Sweet & Maxwell, 2009.
[727] At 26-0121.
[728] Also see in agreement: Sir W.Kennedy and F.D.Rose, *The Law of Salvage,* 6th ed., Sweet & Maxwell, 2002, paras.4.059-4.066 and 8.061-8.069.

claim under conversion, the finder can successfully use the fact that the object was divestingly abandoned. All the finder needs is clear evidence of the previous owner's intention to abandon and of some physical act of the object's relinquishment.

5.3.1.6 *Conclusion*

Through the above cases and the supporting authorities, legal theories and statutes, we can safely conclude that the "*res nullius* through abandonment to the world at large" theory was acceptable and recognised by the courts. The judicial decisions presented might not have all been the clearest and most concrete, especially in relation to the unambiguous use of terminology and the following of a flawless train of thought, but the logic employed on interpretation of what was held should prove to be virtually indisputable. Nonetheless, these were not the only cases touching upon abandonment to the world at large and the *res nullius* idea. Below, we shall continue with the examination of case law taking us from the recognised right to abandon to the world at large and the effort of disproving the notion of abandonment leading to *res nullius* properties, up to the persisting confusion between the types of abandonment.

5.3.2 *Can a wreck become a res nullius? The negative approach*

Dissimilarly to the previous part of this chapter, we shall now deal with the reasoning against the notion that one may abandon one's property to the world at large and that a certain property may become *res nullius* therethrough. The case law in disapproval of this theory is virtually non-existent.

The cases that have dealt with *res nullius* properties and abandonment have already been presented above and, as we have already noticed, they will either not deal with abandonment to the world at large, or they will not distinguish between the types of abandonment at all. In most of these cases, the courts accept or treat the MIA 1906 type of abandonment as the only existent one. This leads to a viewing of the "*res nullius* through abandonment" theory from an undetailed viewpoint. Through this conduct, we have now in our hands no case law expressly and irrefutably confirming, or rejecting through a *ratio decidendi* whether a right to abandon to the world at large still exists in our days or not.

A very small part of the case law, especially that of the 20th century, deals with lesser parts of the right to abandon to the world at large, thus, dealing with the "*res nullius* through abandonment to the world at large" theory step by step, but still not as a whole. One such example is cases, which destabilise this theory by dealing with the relationship between possession and ownership, thus affecting the right to throw something away. Other cases deal specifically with whether one is able to just "throw something away" and thereby get rid of all rights and burdens to and from this property. In terms of legislative contributions to this research, we shall see that these instruments too make, unbeknownst to them, an indirect effort to erode the foundations of the "*res nullius* through abandonment to the world at large" theory.

5.3.2.1 *Ownership and Possession; the difficulty of definition and correlation*

Ownership and possession are described in English law as rights. As rights, they play a significant role in any part of human interaction they affect. Similarly, in

terms of abandonment and *res nullius* properties they play protagonist roles.[729] Though they normally operate in unison, which has even led to the assumption of their inability of division, they are not the same and can certainly be easily detached.[730] In most judgements, and especially when abandonment is involved, the judges refer to these rights as both being the subjects of abandonment. More so in cases of abandonment to the world at large, where ownership and possession are always intertwined. So, let us attempt the correct use of these terms and correlate them to abandonment and the *res nullius* theory.

It is rather difficult to precisely define what ownership is, as it it is not a single category of legal rights, but rather a complex bundle of rights.[731] Nevertheless, it is adequate for this exercise to state that the right of ownership is the fundamental right one may have on one's property so as to entitle him to, *prima facie*, freely and without limits use and dispose of it as one sees fit. As is logically understood, the right of ownership carries therewith the burden of liabilities from the utilisation of the property owned.

The concept of ownership engulfs the right of possession. The right of possession on a property is what enables the possessor to physically have the property in one's hands, act thereon and manipulate it, whether literally, as in actually doing so with one's body, or metaphorically, as in enjoying the use of the property, while others are physically operating on it, as is usual with shipowners and the ship's crew.

Reversely from ownership being inclusive of possession, possession is a key requirement to exercising the right of ownership. But, there are exceptions to this rule. For example, cases of voluntary surrender of possession, which is very common when renting a car or an apartment. To elaborate, in these illustrations, when one is renting

[729] See: J. Salmond, *Jurisprudence* ,12th ed., ed. P. J. Fitzgerald, Sweet and Maxwell 1966, at p.215: "The law consists of certain types of rules regulating human conduct and … the administration of justice is concerned with enforcing the rights and duties created by such rules. The concept of a right is accordingly one of fundamental significance in legal history."

[730] See: H. L. A. Hart, *Definition and Theory of Jurisprudence*, where he said that words such as "rights" and "duties" must be viewed within the specific legal context within which they are used, in order for their meaning in those contexts to be understood; and Glanville Williams, *Language and the Law, (*1945) 61 *LQR,* at 71, 179, 293, 384: where the author showed how legal terms, such as "possession" and "ownership", under common use, are often used in different contexts; also see: H. L. A. Hart, *The Concept of Law*, Oxford University Press, 1961.

[731] see: D. Lloyd, *The Idea of Law*, Penguin, 1991, p.323; see also S. Coval, *The Foundation of Property and Property Law*, (1986) 45 *CLJ* 457.

a car, one receives possession of the car, physical and otherwise, but ownership is not passed to one. Similarly, when renting a flat, the tenant, through his tenancy agreement, gets full possession of the flat, thereby temporarily excluding the owner from his exclusive right of use and control, which is inherent in the right of ownership. The owner, of course, still retains the right of ownership.[732]

In the maritime reality, these rights operate in the same exact way; separation of possession does not by itself mean separation of ownership as well. This was made clear in the court of appeal case *Andersen v Marten*[733], where an insured vessel was captured and then condemned to a forcible sale by a prize court. The capture was the fact that brought possession out of the owner's hands and into the captors'. Ownership, however, was not divested until the prize court condemned the ship to a forcible sale.[734]

So, giving up possession to another party does not divest one of one's ownership and having possession is a necessary element of the right to ownership. What if one is to throw away one's property? Practically, he is announcing to the world his willingness to be dissociated with it. Legally and at the minimum, one severs his ties to possession of the property. But, is this act adequate enough for the possession's abandonment to be accompanied by the right of ownership as well?

To this point, we can start looking for assistance in the case *Robertson and Thomson v French.*[735] In this case, the policy of insurance was taken on a vessel, which, upon suspicion of trading with the enemy, namely the Spanish Crown, was captured by ships in the service of the British Crown. It was then abandoned to the underwriters, but, upon her release by the Vice-Admiralty court, she was then sold. One of the issues presented to the court was the recognition of the one true owner of the vessel.

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[732] See: Phil Harris, *An Introduction to Law,* 7th ed., Cambridge, 2007, at p115.
[733] [1908] 1 K.B. 601.
[734] Also see: *Abbott on Shipping,* 11th ed., 1867, per Mr. Justice Shee, p.24; *Stevens v Bagwell* (1808) 15 Ves. 139; *Morrough v Comyns* (1748) 1 Wils. 211; *Alexander v Duke of Wellington* (1831) 2 Russ. & My. 35; *Goss v Withers* (1758) 2 Burr. 683, at p.694; *The Flad Oyen* (1799) 1 C. Rob. 135; *Hamilton v Mendes*(1761) 2 Burr. 1198; *Cory v Burr* (1883) 8 App. Cas. 393; and *Livie v Janson* (1810) 12 East, 648; in terms of enemies' property, see: *The Actæon* (1815) 2 Dod. 48 ; The Felicity. 11. (1819) 2 Dod. 381, at p. 385; *Ruys v Royal Exchange Assurance Corporation* [1897] 2 Q. B. 135.
[735] (1803) 4 East 130.

As it was supported that one of the parties to the proceeding had not successfully proven his title to the vessel, the court made a short comment on the relation between possession and ownership. It was held[736] that unless disproved by the production of the written documents of the ship under the Register Acts, parol evidence of her possession by the assured was satisfactory to show ownership of the ship. This type of evidence proving ownership, arising from possession at a particular period, was strong enough to hold against evidence of prior register in the name of another and a subsequent register to the same person.

Moreover, it was mentioned that proof of possession by the ship's master was ordinary. Just by showing who the owners that appointed and employed him were, the master could show that they were the persons in whom the ownership was. Even the fact that the ship was later sold to another party, which derived its right of ownership under a bill of sale, was not altering the combined evidential strength of the master's statements and the fact of possession, so as to dictate the necessity to produce that bill of sale, or the ship's register, or to give any further proof of such their property; in the judge's words, "the mere fact of their possession as owners being sufficient primal facie evidence of ownership, without the aid of any documentary proof or title deeds on the subject".[737]

What we take out of this case is that possession is very strong evidence of ownership. So strong that if no counter-proof is offered, then no further effort is necessary to show that the object is owned by the possessor. Reversely, we could dare say that, if an object is no longer is one's possession, then this is, at least, a strong indication that one is not the owner of the object. So, taking a step forward, we could say that, if one voluntarily throws one's object away, i.e. abandons said object to the world at large, then one is no longer in possession of the object and, given the possession-ownership relationship, then one is also at least signalling that this object is no longer in his ownership.

[736] At 131-132.
[737] At 136-137.

Another case showing the power of the right of possession is the much more recent *Manchester Ship Canal Company v Horlock*[738]. After a collision with another steamer, the *Solway Prince* was sunk in the fairway of the Manchester Canal, became a total loss and was abandoned to the underwriters. As she was an obstruction and danger to navigation, the canal company notified the owners that it would take possession of, raise, remove, or destroy the vessel, or otherwise exercise its powers under the Merchant Shipping Act 1894, s.530.[739]

The canal company did raise her and then sold her. The prospective purchaser required she would be transferred under a bill of sale, as she was described as a registered ship and the purchaser would then be able to add his name as the registered owner. Before the transfer, the registry was closed (as she was a total loss) and so the buyer refused the complete the sale. The court, though found that the sale could go on and, so, the purchaser had no valid reason to deny completion of the transaction.

In relation to our research, it is important to note that the canal company, though only having possession of the vessel, it was found to be able to successfully sell the ship. Granted, the rigt to a sale was given through a statute. But this statutory right and power was granted by the mere fact that only possession had passed to the canal company. No transfer of right of ownership was even agreed between the owner, or the underwriters (the party owning the vessel after abandonment and payment for the loss) and the canal company. The court held that the canal company still had the right to sell her even without a bill of sale and irrespective of whether the registry was closed or not. So, a statutory right of manipulation of the subject and mere possession were enough for the canal company to raise, transfer and sell the vessel.

This shows the power of possession over an object. This mere right, a right not even as complete and dominant as ownership, was by itself potent enough to give the canal company what we could describe as power of pseudo-ownership (under the

[738] [1913] M. 1587; [1914] 1 Ch. 453.

[739] S.530 reads: "Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat service in that harbour or water or in any approach thereto, that authority may—"(a) take possession of, and raise, remove, or destroy the whole or any part of the vessel; and … … "(c) sell, in such manner as they think fit, any vessel or part so raised or removed, … and out of the proceeds of the sale reimburse themselves (c) for the expenses incurred by them in relation thereto under this section, and the authority shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto …. "

statute). What is more, instead of a the typically necessary bill of sale, in this case, just the delivery order was enough to transfer possession to the purchaser and, consequently, the right to go on-board and start repairs on the vessel. In other words, the purchaser would then have the full rights of an owner.

5.3.2.2 *The ability to "throw something away"*

The relationship between ownership and possession has been shown above, inclusive of the power of possession. Before we proceed to the correlation between these terms and that of abandonment to the world at large, we should look at another point, which has been perceived by some as being an argument tackling the theory under consideration, namely the "*res nullius* through abandonment to the world at large" theory.

This point consists of a very simple and basic question: Can one just throw something away? In other words, is it as simple as that for one to be able to get rid of one's property? This is important, because abandonment to the world at large is effectively the ability to freely and unconditionally discard an object.

Firstly, it should be mentioned that at this stage we shall only look strictly at the capability itself and will exclude the part of liabilities accompanying the right of ownership and, perhaps, surviving after transfer or loss of said right, as it will be extensively covered below.

As a general principle, it was already shown above that, if one is the master of one's property, then one may so dispose thereof without hindrances. Nevertheless, there are cases that will not allow for absolutely free transaction of property. But as we shall see, this is more because of specific restrictions, such as formalities and other parties' rights, than because it is considered to be prohibited.

The non-marine case *Vandervell v Inland Revenue Commissioners*[740] was such a case, which reached the House of Lords. The matter was one of shares in a certain company, which one person gifted to the Royal College of Surgeons and which were claimed to be owed by a trust for the benefit of that person and his ex wife.

Focusing only on the points discussed in relation to discarding of property, it was mentioned that passing of an equitable right to ownership should be made as freely and unencumbered as possible.[741] Gratuitous transfers were found to be valid and it was clear that if one wished to retain no right of any kind with regard to a certain property, then the full right would be transferred.[742] The distinction was made by Lord Upjohn[743], who added to the above that transfer of property must not only include the intention to transfer but must also eventually be successful in moving the property to another party. For example, a mere declaration of intention to transfer would not amount to a valid parting of property; "as I see it, a man does not cease to own property simply by saying 'I don't want it'. If he tries to give it away the question must always be, has he succeeded in doing so or not?" This question was posed, because according to the case's facts, the disposing party did not actually have the authority to unilaterally transfer all of the company's shares and was thus eventually prevented from doing so.

Another example comes again from one of Lord Upjohn's judgements, namely *Wale v Harris*[744], where certain investments were transferred to other parties so as for the transferor to not be burdened with enormous taxation, though the investments were kept in trust for the benefit of the transferor. It was held in this case that the language under which a transfer is made is immaterial if the meaning is plain.[745] Formalities are not necessary, unless obligatory by law, and should not be prohibitory of transfers. So, where the wording used is unambiguously showing the intention to dispose of a certain property, without further qualifications, this should be treated as a valid action. The rule was held to apply to both voluntary assignments and to those for

[740] [1967] 2 W.L.R. 87; [1967] 2 A.C. 291.
[741] Also see: *Grey v Inland Revenue Commissioners* [1958] Ch. 690; *Oughtred v Inland Revenue Commissioners* [1960] A.C. 206; and Re *Wales*.
[742] Per Lord Reid, at 305.
[743] At 312-314.
[744] [1956] 1 W.L.R 1346; [1956] 3 All E.R. 280; a.k.a. *Re Wale* [1956] 1 W.L.R 1346; [1956] 3 All E.R. 280.
[745] Also see *William Brandt's Sons v Dunlop Rubber* [1905] A.C. 454, 462; [1905] T.L.R. 710.

valuable consideration.[746] The primary question still remained: since "a man does not cease to own property simply by saying 'I don't want it'", did he succeed in his endeavour? If the transfer is not valid, it still belongs to him, even if he does not want it. In this case too, the transferor was not found to have completed the transaction for reasons of transactional procedural requirements.

Moving to marine cases, we find that there has been discussion of this point in cases of marine insurance also dealing with abandonment. [747] These cases, though they are clear in that one may not without restraint be divested of property, they are referring specifically to parting therefrom through a notice of abandonment. The notice is related to the statement that the party abandoning does not want the abandoned property any more, but the notice is also meant as the means for the dissolution of the bonds with the abandoned asset.

The writer is not in agreement with this point and has already provided all reasons for which this specific disposal is not possible, under authority, literature, legal theory and the MIA 1906, have already been presented above. Nevertheless, two interesting examples of judge's viewpoints relevant to the above matter will be synoptically presented. First is the view of Cohen LJ in the case *Blane Steamships v Minister of Transport* [748], who supported that, after service of the notice of abandonment, the assured retains the ability to withdraw the notice at any time thereafter. This would not be possible if the property was disposed by the mere tender of the notice. Therefore, the assured would be unable to be parted with his property by the mere operation of the notice of abandonment.[749]

A more abstract opinion from the standpoint of general law, was offered in the *Allgemeine Versicherungs-Gesellschaft Helvetia*[750] case. There, it was stated that an object is always in someone's possession. Consequently, one cannot simply discard it

[746] Also see: *Lambe v Orton* (1860) 1 Drew & Sm 125.
[747] E.g., see: *Oceanic SN Co v Evans* (1934) 40 Com. Cas. 108, per Greer L.J., at 111; *Blane Steamships Ltd v Minister of Transport* [1951] 2 K.B. 965, per Cohen L.J., at 990, 991.
[748] [1951] 2 K.B. 965.
[749] Also see, inter alia, in agreement: *The WD Fairway (No 2)* [2009] EWHC 889 (Admlty); [2009] 2 Lloyd's Rep 191.
[750] *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 K.B. 672.

to the world, but only pass it to someone else. The notice of abandonment was only in reference to the underwriters and they, having accepted it and paid for the loss, were the owners of the assured parcel of diamonds. Under different circumstances, no other party could become or not be any more the cargo's owner via the notice.[751] In reference to general law, the judge quoted Fry LJ's judgement from the case *Colonial Bank v Whinney*[752], who said that "all personal things are either in possession or in action. The law knows no *tertium quid* between the two".

Obviously, the quotation of Fry LJ functions against the right to abandon to the world at large. But, in spite of the reasons for which the judge said it and the specific facts of this case, it could be effortlessly stated that this quote does not provide for antithesis. Authority from the House of Lords was presented above[753], which supported the position that an object abandoned to the world at large is not absolutely free for anyone to salvage, or at least that, if no such party appears, then the abandoned property is not actually a *res nullius* in the strict sense, but would rather be in the ownership and possession of the Crown. Equally harmonical is the position that a property abandoned to the world at large will pass to the appropriate local authorities.[754] So, in combination of the above, abandonment to the world at large would still be possible, as would be Fry LJ's rule, whereby a subject of abandonment would always have to be "either in possession or in action".

There still are issues with this combination of rules, since the ship or cargo so abandoned would, one the one hand be a *res nullius* in a lenient and general sense, meaning that it would no longer be in the hands of a private party, but, on the other hand, it would technically not be a *res nullius* property, as there would exist an owner at all times. In addition, there is no answer given for cases, where the property is abandoned in the high seas, where there is no proper authority, nor power of the crow to take charge. A brief reply would be that, in this case, Fry LJ's rule would not apply, as it would be outside any country's jurisdiction and that, so long as the property abandoned is not causing or can cause any loss, such as through collisions and

[751] Per Scrutton LJ, at 676-677.
[752] (1885) 30 Ch. D. 261, 285.
[753] E.g., see: *SS Utopia (Owners of) v SS Primula (Owners of) (The Utopia)* [1893] AC 492, 498.
[754] E.g. see: *The Ella* [1915] P. 111. Also see: *London Association of Shipowners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch. 242; *Bell v Cade* [1861] 2 J. & H. 122; *Smith v Wilson* [1896] A.C. 579; and *The Ettrick* (1881) 6 P.D. 127, 134, per Jessel M.R.

pollution, then the owner would be free to use it freely, including abandoning it to the world at large. It would be an interesting exercise to search for an example, where a ship or cargo left on the bottom of the abyss could still practically involve its owner in any court action, irrespective of any surviving legal connection thereto or any liabilities still sourcing therefrom. Parenthetically, it should be mentioned that Fry LJ's opinion was a dissenting one in the Court of Appeal, though it was upheld in the House of Lords.

At this point, the writer requests to be excused from reaching a final result on the very point of Fry LJ's approach and abandonment on the high seas and allow it to remain as resolved only to the above extent under this research, since it would unnecessarily stray this work from its true target and lead it to winding pathways of non-marine law. The object of significance is that the right to abandon to the world at large is one granted under the general right to property, it is not directly disputed by any statute or case law and, specifically for shipowners, it is expressly provided under the MSA 1995.

In reference to the examples of non-marine cases provided above, it was shown that the restrictions to the property transfers were not ones that had to do with the general principle and right of free disposition of a certain property by its owner. As for the marine cases, it should be rather obvious and settled at this point that a property cannot become *res nullius* through abandonment to the underwriters.

It should be mentioned that the non-marine authority shown above, proving the existence of the right to "throw something away", namely *Robot Arenas v Simon Waterfield*[755], has not been perceived in the same way as under this work. In his work[756], F.D.Rose, understands that the judge and the work of Palmer[757] prove that there is no right divesting abandonment, that is to say right to abandon to the world at large. The learned academic holds that there is at the most only a superficial divergence between the apparent approach in some maritime law cases[758] from the general rule of common law that an owner retains his title to property, unless and until

[755] [2010] EWHC 115 (QB).
[756] F.D.Rose, *Marine Insurance: Law and Practice,* 2nd ed., LLP, 2012, para.24-60.
[757] N.Palmer, *Palmer on Bailment,* 3rd ed., Sweet & Maxwell, 2009.
[758] E.g. see; *Oceanic SN Co Ltd* v *Evans* (1934) 40 Com Cas 108, 111, *per* Greer LJ; and *Blane Steamships Ltd* v *Minister of Transport* [1951] 2 KB 965, 991, *per* Cohen LJ.

his interest therein is acquired by another. Interestingly, this is in agreement with Fry LJ's position, above. F.D. Rose was clear in that "it is a general rule that property cannot simply be abandoned so as to become ownerless, ie, a *res nullius*". The writer is in disagreement thereto and finds that both Mr. C Edelman QC and Palmer were unambiguous, definite and correct in their positions, namely that the owner of an object can dispose of it freely, including the right to "throw it away" and thus constitute it a *res nullius*. F.D. Rose is absolutely correct, when the question is one of abandonment to the underwriters through a notice of abandonment, as analysed right thereafter in his work[759], but not in the general principle of abandonment to the world at large.

5.3.2.3 *Could there not be a right to abandon to the world at large, at all?*

What if the case law and the written works saying that there cannot be abandonment in the juristic sense were correct? Would it be possible for the right to abandon to not exist at all? The writer repeats that it is not so. But, let us assume *arguendo*[760] that this is true, then we have to abide by the following train of logic:

A party with a right of ownership and possession over a specific property can, in general terms, abandon it; Since abandonment as described above is supposed to not be possible, then this abandonment would entail abandonment only of possession (not of ownership too); If we equate this abandonment to the abandonment to the world at large and if a ship- or cargo-owner abandons in that way his asset, then he is effectively only abandoning his right to possession of the ship or cargo; Consequently, ownership will still be attached to the party effecting the abandonment; The purpose of such a party having the right to abandon to the world at large is to be completely divested of all ties to the property abandoned, including possession, ownership and any accompanying liabilities; By having the right of ownership still attached to the property, the purpose of the right to abandon to the world at large is defeated.

[759] See: D.Rose, *Marine Insurance: Law and Practice,* 2nd ed., LLP, 2012, paras.24.61-24.71.
[760] I.e.: "For the sake of argument".

In other words, if the case law and the written works saying that there cannot be abandonment in the juristic sense were correct, then, even if one has the right to abandon to the world at large, this right is nullified, as it will serve no practical purpose and will only stand as an alternative expression to "loosing an object", that is to say a right in the colloquial sense and not in the divesting one. But in this case, one could not possibly completely "loose" or "get rid of" anything. One would be tied to one's property forever without any means of escape. Any right to property would, then, have a reverse effect of not being a right any more, but rather a burden.

But ownership and possession are not burdens. They are rights. They can potentially bear burdens as part of their performance, but their primary functions, as rights, are to bestow upon their bearer something positive, not an *onus*. If the train of thought, as presented above, is true, then we will have to restructure and redefine many of the cornerstones of present, past and future law. It is, once again, reminded that the writer is not in agreement with the preliminary premise of the above reasoning and still holds that all evidence points to the fact that there exists the general right to abandon ownership and possession and, as a result, the specific right to abandon a ship or cargo to the world at large.

5.3.3 *The Final Inference*

After all the analysis done above, it is at this point that we can safely reach the one logical result in terms of the fundamental question asked: Can there be a *res nullius* property through abandonment?

We have shown above that: the right of ownership includes and is also directly affected by the right of possession; the right of ownership entitles to the full use of the owned property inclusive of the right to discard the property; this discarding is done through the act of abandonment, which only needs an intention to abandon and an act of physical relinquishment; and that this type of abandonment is called divesting abandonment.

Bringing into this reasoning the other terms used in all the above parts of this chapter, we end with the following result: the ship- and cargo-owners have a right to abandon their properties; this type of abandonment is the equivalent to the divesting abandonment, it is called abandonment to the world at large and is different from the right to abandon to the underwriters; what the ship- or cargo-owner needs to show is intent of abandonment and proceed to an act of physical relinquishment; this intent can be expressed through voluntary physical abandonment, which would make the property derelict; this type of abandonment would include the abandonment of both ownership and possession; and that this would undoubtedly lead to the property becoming *res nullius*.

Accordingly, the answer to the question is: Yes, there can be a *res nullius* property through abandonment; and that is abandonment to the world at large.

The next questions of interest are: 1) the reasons for which no modern case law has brought up this point, and 2) whether there are any surviving liabilities on the property abandoned to the world at large. The former will assist in rationalising and understanding why such a very important right has been all but almost obsolete in modern marine insurance law, while the latter, if successful, may prove to be of adequate might so as to defeat the purpose of the right to abandon to the world at large and, thus, render this research a mere exercise in logical reasoning and patience.

5.3.4 *Understanding the peculiarity*

In the case law before the introduction of the Marine Insurance Act 1906, there were occurrences where the relevant ship or cargo was abandoned to the world at large. Plenty examples have been presented above and additional material will be granted below. The courts, subject to the case's facts, were always willing to approve of the assured's right to do so and proceeded to impose the accompanying burdens on

the appropriate authorities, with the ultimate receiver being the Crow, should there be no other intermediate parties.

As of the 19th century and well into the current decade, the courts presiding over maritime cases are either not hearing any arguments based on the right to abandon to the world at large, or even if there is such contention or even room for its validity, they dismiss it. This is rather curious and quite abrupt and shares none of the usual law's smooth transitioning characteristics, as, for example, per the evolution of the law on the operation of the notice of abandonment. What is more, it is rather curious that a 19th century ship- or cargo-owner was given the option to abandon to the world at large and cast his burden in relation to his former property to the open world.

The writer has found that the basic reasons for this phenomenon are three: 1) Confusion on the term abandonment; 2) The introduction of the Marine Insurance Act 1906; and 3) Degradation of the right to abandon to the world at large.

Elaborating on each point separately, we start with the confusion on what is abandonment. This is a fact elaborately shown in various parts of this research.[761] Abandonment has been repeatedly used in a plethora of ways, whether this is service of the notice of abandonment, abandonment to the underwriters as a cession of property and rights, abandonment to the world at large as a divesting abandonment, physical abandonment making the property derelict, colloquial abandonment as a pause of any search and recovery effort, or any other way. The parties acting are commercial entities and, therefore, have limited understanding of the law. As they act within the maritime market, they do not necessarily have a good grasp of into what their actions translate in the within a legal frame. Therein come the courts, which decipher them. The issue is that on many an instance, the judges have also fallen into the same pitfall and instead of solving, they perpetuate the above erroneous pattern. As a result, it is far easier for one to mix and interrelate the various meanings and uses of the term abandonment.

Without clarity, it is no surprise that one sense may be superseded by another; which brings us to the second point. In 1906, the Marine Insurance Act was

[761] For the most recent, see: *Reasoning with the illogical*, above.

introduced. The Act, from all the denotations of the term abandonment, gives importance to almost exclusively one, namely the abandonment to the underwriters as a complete and proper cession of property, rights and burdens. As a result, this was the sense, which was brought into the spotlight and on which both the market and the courts focused. It was the most commonly used sense and it came close to becoming tautological with the term. The confusion was not discontinued in the circles of the market and, sadly, in some judgements as well. Nevertheless, when one mentions the term abandonment within a marine insurance law context, abandonment to the underwriters is the first meaning coming to mind. Via such a course, it was inevitable that the other meanings lost ground, were more infrequently used and received a secondary role in comparison to abandonment to the underwriters.[762]

This, in turn unavoidably leads to the third point raised. The right of abandonment to the world at large, not only received a lesser role in the reality of marine insurance law, but was virtually substituted. The means, through which the right is exercised, are almost identical to those for characterising a marine related asset as derelict. In order to abandon to the world at large, the owner of a property, for example a shipowner, needs a physical act evidencing the abandonment. As he does not have the direct physical possession to the property, but rather materialises this right through the ship's master and crew, then the only physical act to which he may proceed is the voluntary removal of the master and crew from the ship. This will inescapably cause the ship to be characterised as derelict. The two are causally linked. As a result, it is not completely illogical that abandonment to the world at large was effectively degraded into and amalgamated with one of its key components.[763]

Briefly presented, in combination of the above, we have the following continuity: The types of abandonment were used in a mixed way intertwining them with each other; the MIA 1906 promoted the abandonment to the underwriters and inadvertently rooted and imposed it as the basic and prevailing type of abandonment and meaning of the term, thus partly resolving the issue; having the Act's contents as a point of reference, the above factors, in synergy, the right to abandon to the world at

[762] See, for example, *Oceanic Steam Navigation v Evans* [1934] Vol. 50 Ll.L. Rep. 1; as appealed from the decision of Mr. Justice Branson: (1934) 48 Ll. L. Rep. 159.

[763] See, for example, the interpretation of MIA 1906, s.60(1) and the confusion with the right to abandon to the underwriters; *inter alia*, also see on this point: *Court Line Ltd v The King* (1945) 78 Ll. L. R. 390, per Stable J, at 400.

large was merged with the voluntary physical act of abandonment by the master and crew. Thus, the right to abandon to the world at large was practically forgotten.

But forgotten does not mean extinct, nor abolished. In the writer's opinion, it is still there for anyone to use in the maritime world, with the same ease as it is used in the non-marine environment. In a sense, though, it is better that it remains veiled, as with the increasing hazards, which modern potential *res nullius* vessels and cargos can cause[764], the ramifications could be immense.

5.3.5 *Surviving liabilities*

In this, the final part of this chapter, there is only one topic with which to deal. This bears great materiality to the matter of the right of abandonment to the world at large. The right has been sufficiently established. So, the topic may not refuse this right of abandonment to anyone vested therein, but may very well defeat its purpose through the results bore. This topic is the search for any surviving liabilities still attaching to the party abandoning, after abandonment to the world at large has been effected.

The purpose of the abandonment to the world at large is for the party abandoning to be rid of any connection with the property so abandoned. This includes the right to ownership, the right to possession and, most importantly, any liabilities that the property may bear and cause at the expense of that party. It should be self-explanatory that, even if ownership and possession are successfully abandoned to the world at large, if the liabilities are not divested, then there is no point in the entirety of the exercise.

The immense importance of the above can be sufficiently demonstrated by the term given to properties that are so dangerous that every party, which could potentially have a connection thereto, wishes to be immediately disaffiliated therewith,

[764] For example, petrochemical, or other chemical cargos, disruption of the seabed and marine ecosystems by wrecks, environmental hazards just by bunker spills of vessels of the size of VLCCs and ULCCs.

namely *damnosa hereditas*. Such a term, though not so common in the market's common tongue, it is no stranger to being used by judges. Such a judge was Scrutton LJ[765], who so characterised a thing insured, where its ownership only imposed liabilities which any party would want to have. This very fact is what has sparked so many disputes as to ownership of an abandoned property between assureds and insurers.

There are various sources of liabilities and obligations burdening a maritime property's owner, especially for shipowners and specific cargoowners. Two easy examples are statutes and international conventions. Below, we shall go through a variety of them commenting on the most important and characteristic ones and, of course, the case law presenting the parties' rights and construing the allocation of the relevant burdens.

5.3.5.1 *The general position*

Starting from the acceptance of the existence of the right to abandon to the world at large, we notice that there should be no liabilities on the party abandoning. Possession and ownership no longer attach and, so, any burdens that would otherwise in the normal course of action accompany a wrecked property should be detached from the previous owner.

An example of such burdens constitutes the raising of caution of oncoming vessels, where the vessel causing the danger lies. For this, great care must be shown on behalf of the wreck's owner, as seen in another of Lord Ellenborough's cases, *Harmond v Pearson*[766]. The judge held that merely placing a watchman to ward off other ships was inadequate and proper buoying was necessary.

Continuing with this type of liabilities, we move to cases also dealing with abandonment to the world at large. What we find is a long streak of cases from the

[765] See *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 1 K.B. 672, at 688.
[766] (1808) 1 Campbell 515; 170 E.R. 1041.

19th century onwards, which are in agreement with the writer's view, namely that abandonment to the world at large, without the operation of specific provisions applied, such as statutory ones, see below, clears the previous owner of the abandoned wreck from all liabilities including those of notifying other ships of the danger. Perfect examples are *The Douglas*[767], *Brown v Mallett*[768] and *White v Crisp*[769], which were presented in the previous part of this chapter.[770]

In these cases, the vessels involved sunk in navigable waters and became a danger to other ships. Their owners had the obligation to light and buoy them and use any other means to warn other ships of the danger. The owners did not honour their responsibilities and, instead, left the wrecks to their fate abandoning them to the world at large. The courts held in all three occasions that such an abandonment cleared the, what was now previous, owners of their liabilities in relation to the wrecks. As a result, the owners of the innocent vessels, which had collided with the wrecks, did not get any damages due to the lack of signalling.

This is the position in terms of liabilities towards third parties, which do not have specific protection under domestic or international statutes and other instruments.

5.3.5.2 *Harbours, Docks and Piers Act 1847*

For the avoidance of situations, *inter alia*, such as the above, an act was created to protect the position of public authorities. This act, in its current version, is in effect for more than 160 years and is still the basis for distribution of liabilities in relation to ships and cargos causing problems to public authorities of ports, rivers or other navigable waters. It is called the Harbours, Docks and Piers Act 1847. Many a case has based its judicial ruling thereon throughout the eons of this Act's life. Yet because of the Act's longevity, the fluctuations in the commercial and legal reality have caused a difference in the Act's construction.

[767] (1888) 7 P.D. 151.
[768] (1849) 5 Common Bench Reports 599; 136 E.R. 1013.
[769] (1854) 10 Exchequer Rep 312; 156 E.R. 463.
[770] See: *Is abandonment to the world at large an option in case law?*

It is preliminarily submitted that the HDPA 1847 is what one may call an umbrella act, which generally regulates, among other, the liabilities of a property owner, whose property causes damage or expenses to the relevant marine authorities. Under this Act function many other specific ones, which are almost identical, but regulate only a restricted part of the English waters and the authorities responsible therefor. Under this format, any appropriate authority presiding over a harbour, port, river or other navigable water has its own protection regime that will allow it to claim against a wrongdoer. This is absolutely justified, given such authorities' obligations to protect the vessels navigating within their limits.

It is also introductively presented that the section at the centre of focus is HDPA 1847, s.74[771], titled "Owner of vessel answerable for damage to works", and reads: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose willful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel, where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of".

This is noteworthy, because the word "owner", as contained therein, is at the heart of the disputes presented below. As the section calls for the vessel's owner (which is not necessarily the actual registered owner at the time of the casualty) to bear any costs and expenses, there are two major question that arise and should be

[771] Also relevant on several occasions is the HDPA 1847, s.56, with similar content, which reads: "The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on nonpayment of such expenses on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus (if any) to the owner on demand".

thoroughly answered: 1. Who is the specific owner to bear these costs; is it be the one at the time when the obstruction materialised, the one when the expenses were incurred, or the one at the time when the expenses were claimed? And 2. On occasions, where abandonment to the world at large has been effected, what is the result in regards to the imposed liabilities; do they survive the abandonment?

Before proceeding further, we should make a distinction between the liabilities imposed in cases of abandonment to the underwriters and in cases of abandonment to the world at large. The most crucial divergence is that, when there is abandonment to the underwriter taking place, then any and all liabilities so ceded are directly transferred to the abandonee, namely the insurer to whom abandonment was effected. The assured retains no liabilities thereon as of the time of the casualty. So the only party liable is the insurer, who took over. This is a clear position and any burdens in relation to the ceded property unambiguously fall on the receiving party; there is no dispute.

The same, however, does not apply in cases of abandonment to the world at large, because in that case, depending on the continuing attachment, or not, the liabilities will either burden the assured, or they will burden the world in general, or, if applicable, any authority with powers and obligations over the specific waters where the subject matter abandoned lies. We will find cases where both the above happened, with the abandonment to the underwriters being first and abandonment to the world at large second. In such instances, the answer to the basic question of when is the party owning the property liable is even more important, as if it is the owner at the time of the casualty, then the assured will be liable, if it is when the expenses are incurred, or when claimed, then it is either the insurer, if abandonment to the world at large took place before the occurrence, or claim, and it will be no party at all, if abandonment was made after the occurrence, or claim, and if the statutory liabilities survive even after disposition of ownership and property.

5.3.5.3 *Which owner?*

Having ships and cargos change hands very fast, especially in terms of the latter, it is important to know who is liable for any expenses incurred by the port

authorities, as they will make sure to claim them against the relevant party. The answer to this question is clear, though it was not so before the end of the 19th century.

On this point, the House of Lords case *The Crystal*[772] will prove very useful. The facts are simple and have been elaborately presented in previous parts of this research: the *Crystal* collided with another vessel and sank near the harbour's approach posing a danger to navigation, thus causing the necessity of its removal by expenses of the harbour authorities, which sought to recover them from the owners. No negligence was shown on behalf of the owners, who abandoned the wreck to their underwriters and notified the harbour authorities appropriately.

The court held, reversing the court of appeal judgement, that the assureds were not liable for the expenses. This was because, although they were the owners of the vessel when she became an obstruction to the port, by the time the expenses were claimed, they had already successfully abandoned her to the underwriters. The assureds, therefore, fell outside the scope of the HDPA 1847's term "owners".

Lord Herschell L.C. mentioned previous case law, which pointed to the contrary, such as *Earl of Eglinton v Norman*[773], where it was held that the Act's relevant section casts a personal liability upon the persons who were the owners of the vessel at the time she became a wreck and impeded the navigation. The judge discarded them in light of later case law, such as *The Edith*[774], and his personal analysis. Lord Hershcel thought it to be material that the Act's section did not distinguish between cases where the shipowner was at fault for the casualty and the consequent expenses, and where not. So, it would be unjust to preset the burdens of an innocent owner and impose payment of the expenses under all circumstances. Placing much importance on the fact that the expenses' balance may be requested back by the sold wreck's owner, it was perceived that it was meant to be the owner at the time of the balance's request. Equally, when claiming the expenses, the party responsible should be the one at the time when the expenses were incurred. Consequently, as the assureds had already abandoned the vessel and accordingly informed the port authorities, the expenses' claim should have been against the appropriate party. This

[772] *The Arrow Shipping Company v The Tyne Improvement Commissioners, The Crystal* [1894] A.C. 508; Also see *Barraclough v Brown* (1895) 1 Com. Cas. 329; [1897] A.C. 615.
[773] 46 L. J. (Ex.) 557; 3 Asp. M. L. C. (N.S.) 471.
[774] 11 L. R. Ir. 270, see below.

would be the insurers, though it was not expressly found so, as they were not involved in the case. The court did not disagree with the above reasoning and result.

5.3.5.4 *The claim, the liabilities and the abandonment to the world at large*

In identifying the appropriate party, against which the harbour authorities may claim their expenses, it is important to see, not only who the last known owner was, before the time when the expenses were incurred, but also whether that party was still the owner by that time. Put in the format of a question, if there has been abandonment to the world at large before the authorities' expenses, do the liabilities survive, or are they dismissed along with ownership and possession on the property abandoned?

To this, we will start with the most important case, which was cited numerous times: *River Wear v Adamson* [775]. This was a House of Lords case, where the HDPA 1847 was the epicentre of attention and several interesting approaches were made to its construction. According to the facts of this case, the *Natalian* went ashore in the river Thames due to strong wind. By the time she had struck the Sunderland Docks' pier, the crew had already left the ship. It was contended that the relevant section of the Act made the owner of every vessel or float of timber answerable to the port authorities, though a direct enactment, without any limitation of liabilities in regards to whether the master and crew are on board, or whether he maintains the ship's management, or whether he is capable and skills of doing so.[776] Additionally, it was pointed out that the second sentence of the section would make a master or other person in charge of the ship liable where there is wilfulness or negligence on his part, though to the reverse there were exceptions, as in *Rylands v Fletcher*[777]. The only exception appears in cases where there is a pilot on board, which would relieve both the owner and the master. To this, Lord O'Hagan responded that the particular way in which the section was worded shows that direct management is the necessary component for the imposition of the expenses' liability on the owner and master.

[775] *The River Wear Commissioners v William Adamson* (1876-77) L.R. 2 App. Cas. 743.
[776] At 745.
[777] Law. Rep. 3 H.L. 330. In this case, the liability of the shipowner was established, although there was no willfulness or negligence shown, but just that he brought on to the pier something which would be mischievous if not kept under proper control.

Reversely, without management of the ship, there could be no liability. Adding a personal touch here, the writer would like to translate the above into: with abandonment of the wreck to the world at large, ownership and possession is severed, which leads to interruption of management, which in turn allows the owner to have no liabilities for any damage the ship causes after the abandonment.

The contention continued to state that a ship may be under the possession of a certain party, even without direct physical possession thereof. Effectively, it was said that having the master and crew leave the ship is an act only causing it to become derelict, which means that the owner is still in legal possession and should thus bear any liabilities.[778] Inevitability of the loss, was accepted as a general exception, as per the *Dennis v Tovell*[779] case.[780]

On behalf of the shipowner, it was supported that, though it was not unreasonable to hold the owner of a ship liable for ordinary damage caused in an ordinary way, the Legislature never intended to make him liable for damage occurring when the ship was like a helpless log upon the water, when the master and crew were with difficulty saved from death and when the owner had not means with which to exercise any possible control thereover.[781] Accordingly, with some degree of control, liability was to be incurred. Used with the terms of the above analysis, an abandoned to the world at large vessel could not possibly have any liabilities, as any notion of control over the ship would be rendered inoperable.

The first to venture an analysis was The Lord Chancellor, the well respected Lord Cairns[782]. He found, in agreement with the Court of Appeal, that the injury was not occasioned by the voluntary act or negligence of the shipowners, or by any person on board of, or connected with, the ship, and that the casualty could not have been prevented by any human instrumentality, as it was occasioned by a *vis major*. Lord Cairns started with the reasons for the introduction of the Act's section under the

[778] At 746.
[779] 8 Q.B. 10.
[780] Also see *Eglington v Norman* 46 L. J. (Ex.) 557, which was considered by the Lord Chancellor, though, to be differentiated due to dissimilar facts; *Reg v Leigh* 10 A. & E. 398 ; *Nichols v Marsland* 2 Exc. Div. 1 ; and *The Merle* 2 Marit. Cas. 402.
[781] At 747.
[782] At 749.

Common Law concluding that it this was the introduction of a procedural means of compensation for the harbour authorities. This right to claim damages was found to be pre-existent, but through the Act, it was made possible to be asserted and claimed, without also creating a new right of action for damages in the process, especially where one did not exist there before.

Lord Hatherley was not of the same opinion. To him, a more literal construction of the HDPA 1847 should be followed. He also found that it would be injust towards the authorities in charge for any so severe a damage done to be left unclaimed against the party causing it. With him was Lord Gordon.

On the other hand, Lord O'Hagan made the most accurate, and relevant to this research, analysis in the opinion of the writer. In terms of the Act's construction, he mentioned that there is a need to not stick to the literal meaning of the text's wording, or "*Qui hæret in literâ, hæret in cortice*", as he put it,[783] and to harmonise apparently inconsistent clauses and make homogeneous "provisions cast together, hap-hazard, by various minds, differently constituted and looking to different and special objects, without due regard to the harmony of the whole". For this, one would need speculation as to the innocence of the shipowner and the inevitability of the injustice, in this accomplishment, consideration of the admitted innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury.

Lord O'Hagan wished for cases, where a ship had caused damage without any fault of her owner, to be distinguished. In illustration of this, he brought the following example[784]: If necessarily abandoned on the high seas a thousand miles away, the ship drifts ashore after long wandering, and does an injury, or if, taken out of his hands absolutely by a pirate or an enemy, it is brought in his absence, and against his will to attack the coast of *England*; or if, as was put by the Judges of the Appeal Court, the undertakers themselves should have got hold of the owner's vessel and employed it so as to injure their own pier,—in all these cases and in others easily to be conceived, [the shipowner] would be responsible for results to which he had not contributed".

It is evident that the judge thinks that, where there is no connection between the owner and the damage caused by the ship, the owner should not be burdened with

[783] Meaning: "He who sticks to the literal, sticks to the superficial".
[784] At 757.

any liabilities. Similarly, in cases where the ship has been abandoned to the world at large and any ties of ownership and possession have been lost, then the owner should not be liable for any expenses incurred post-abandonment.

This is not loosely concluded by the writer, as Lord O'Hagan continued to state that the vessel was indeed abandoned by its master and crew in such a way so as for her to become derelict. In the Lord's words, "a hard case shall not make a bad law" and so the writer wishes to say that, if the mere act of making the vessel derelict will alleviate any liabilities from the owner, then abandonment to the world at large should be more than enough for the shipowner to bar any claims against him under the HDPA 1847.[785]

The judge continued to say that it is only just to hold a shipowner accountable for damage dealt by his ship where he, or his employees, were in control and there was at least a chance of avoiding the casualty. With such a chance gone, for example when his servants cease to be in charge and the ship becomes an ungovernable log, without the possibility of check or guidance, the hard measure of liability for an act which is not his or his agents', should not be imputed to him. Reversely, if there is default by the shipowner and his servants, then he should be liable for any mischief so caused. This is in accordance with the section's exception applying to cases where there is a pilot on board and in charge. With the pilot there, the ship is not governed by the shipowner and his agents and so any damage caused is for the pilot to answer. Besides, as Lord Justice Mellish stated, the legislature points to something in which man is concerned, that is to say, in which human agency intervenes.

It is interesting to note that Lord O'Hagan distinguished the case *Dennis v Tovell*[786], because in this case the vessel was not derelict, as opposed to the case which he decided and which in his opinion should be dealt with "as if it had been abandoned at the antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at *Sunderland"*. In other words, if the ship had been abandoned to the world at large.

[785] There is specific mention of the Act, as we will see below that other statutes go after the ship- or cargo-owner at the time of the damage, not at the time of the claim.
[786] Law Rep. 8 Q. B. 10.

The Lords' majority was very clear in that abandonment to the world at large discontinues any liabilities under the HDPA 1847. The writer would like to note that the case could potentially be distinguished in terms of the main point discussed, namely the Act of God causing the loss. Except that, firstly, along with the Act of God, it was of great importance that the master and crew did not remain on the vessel when the damage was done and, secondly, that the following case law agreed with the principle derived thereforom and established the above findings. The only exceptions were cases, where the shipowner and the ship's master and crew showed negligence, or otherwise, fault in the damage done. In such occasions, abandonment did not excuse the shipowner and did not detach the liability for the damage.

Starting with the general rule, we find *The Hermiony*[787] of the Irish Free State Supreme Court. The facts are fairly familiar: the ship, after being struck by an enemy's mine, sunk in the Waterford harbour and the Commissioners had to incur certain expenses, which they claimed from her owners. The owners abandoned the vessel to the insurers, who notified the harbour authorities of the fact and also of that they were also abandoning and disclaiming any interest in the vessel and repudiated any liability arising therefrom. The same was repeated by the managers of the vessel.

The relevant act here was not the Harbours Docks and Piers Act 1847, but another, specifically targeted at the Waterford harbour, called Pier and Harbour Orders Confirmation Act 1904, which confirmed the Waterford Harbour Order 1904. The applicable sections were similar.[788] Mr. Justice Fitzgibbon placed emphasis on the duties imposed on the owners of the wreck. While on this subject, he cited *The Edith*[789], where it was stated that if a vessel is sunk in the harbour without any default on the part of the owner of that vessel, at common law he would not be responsible. The liability in such a case of clearing the harbour of the obstruction caused by the sunken vessel would be thrown on the owners of the harbour, who owe a duty to the public of having it reasonably safe for navigation. This makes perfect sense and is in accordance to modern maritime law, as is evident from the salvage cases *The MV*

[787] *Shipsey v British & South American Steam Navigation Company (The Hermione)* [1934] 54 Ll. L. Per. 188.
[788] i.e.: "the Commissioners may recover from such owner the expense if the Commissioners think fit of lighting and buoying such wreck or obstruction and of removing dispersing or destroying such wreck or obstruction by means of explosives or by such other means or method as the Commissioners may consider expedient".
[789] (1883) L.R. 11 Ch. (Ir.) 270; Also see *The Ella* [1915] P. 111, per Sir Samuel Evens, at 119.

Mbashi[790] and *The Gregerso*[791], which dealt with the matter of what is *ultra vires* and the port authorities' limits of statutory obligations. The judge also mentioned *The Crystal*[792] as he was in agreement with the fact that there is no breach of any duty imposed by law for which the owner of the sunken vessel can be held liable after he has abandoned the wreck, and especially where the port authority has taken possession thereof.[793]

The case law in support of the discontinuation of liabilities after abandonment to the world at large does not end here. The writer will not proceed to a needless repetition of the above, but will only briefly go through some few additional case law. Our next stop is another House of Lords case, *The Mostyn.*[794], where it was found that the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents. Again, the literal meaning of s.74, HDPA 1847, was not adopted but was interpreted as subject to qualification, per the *River Wear v Adamson* case, above. The court, here, adopted Lord Cairn's *ratio decidendi* and wished to take it a step further in suggesting that even if there was human agency, there would be no liability created provided that there was no breach of duty at common law, per Lord O'Hogan's view. It was concluded that, in cases where the vessel is out of the owner's control, e.g. where the vessel is derelict, no liability continues to exist.

Accordingly, we could say that, if just by causing a ship to become derelict would excuse its owner from having the burden of any potential damages cast upon him, then abandonment to the world at large should be more than enough to bring the same favourable result.

The above general is not without exceptions. But the only ones found are in relation to damage caused by the negligence of the shipowner, or his agents. This

[790] [2002] 2 Lloyd's Rep. 602.
[791] [1973] Q.B. 274; [1971] 1 Lloyd's Rep. 220.
[792] [1894] A.C. 508.
[793] Also see: *Brown v Mallet*, 5 C.B. 599; *Barraclough v Brown* (1895) 1 Com. Cas. 262; *Earl of Eglinton v Norman* 3 Asp. 471; and *White v Crisp* (1855) 10 Ex. 312.
[794] *Great Western Railway Company Appellants v Owners Of S.S. Mostyn Respondents, The Mostyn* [1928] A.C. 57.

result was reached in the case *Dee Conservancy Board v McConnell*[795], where a ketch sank, owing to owners' negligence, in the River Dee, and obstructed the navigation of the river and its approaches. After sinking and before the expenses in removing her were done, the defendants abandoned the ship.

Scrutton L.J., at p.163, showed he was not in favour of the shipowners. It was found that at Common law the owners would be liable for the damage, which they negligently caused. Abandonment was not to assist them with divesting these liabilities. It seems that the judge was, either not in favour of the right to throw something away, a.k.a. abandon to the world at large, or he was in favour of the continuing survival of liabilities even after abandonment to the world at large. But, most importantly, he was definitely not in favour of abolishing one's liability, where one was the direct cause of the damage done and, more so, where one had been negligent. Using *The Mostyn,* Scrutton LJ further supported his understanding that where a ship causing damage to dock works is at the time under the control of the owner's servants, the owner is under a statutory liability for the damage so caused even though his servants have not been guilty of negligence, but that he is not liable where no one was on board when the ship caused the damage, although he insisted on following the Common law. This is something that the judges in the *Arrow Shipping* case, above, did not wish to do, in their majority, but rather to respect the will of the legislators and adhere to the statute.

The judge did mention several cases, which offered that a ship abandoned is to divest any liabilities from its owner[796], but the judge insisted that this was not the correct way of implementing the law and that a common law liability for negligence cannot be wiped out by abandoning that which has caused the damage.

It seems that the judge in this instance did not actually disagree with the above case law, but rather distinguished this case from the others. It is interesting that he did not follow the other judges' example when it came to choosing between the statute and the Common law, but, on the other hand, the facts of this case were also different. The fact that here the ship was at fault in terms of negligently causing the damage, whereas in the other cases there was no negligence proven, was the turning point.

[795] [1928] 2 KB 159.
[796] E.g., see: *The Crystal* [1894] A.C. 508; *The Ella* [1915] P. 111; *The Solway Prince* 31 Times L.R. 56; *The Utopia* [1893] A.C. 492; *The Snark* [1899] P. 74, 80; and *The Douglas* (1888) 7 P.D. 151.

So, we could equally distinguish this case from the above authorities and say that it contributes no negative results to what has been shown above to be consistent divesting of liabilities in cases of abandonment to the world at large.

Another case also in support of the continuing liabilities is *Hapag-Lloyd A.G., Stork Amsterdam M.V. and Fitzgerald v Texaco and Texaco Panama*[797], which comes from the other side of the Atlantic (i.e. the US Court of Appeals Second Circuit). There, the steam tanker *Texaco Caribbean*, a Panamanian vessel collided with the motor vessel Paracas, a Peruvian vessel, in the Strait of Dover, and sank and where the motor vessel Brandenburg owned by the first plaintiffs and laden with cargo owned by the second plaintiffs, struck the wreckage of *Texaco Caribbean* and was damaged. Per the judge, R. Anderson, under general maritime law as applied by the Courts in England, the duty of an owner ceases as soon as he notifies a governmental agency of the wrecking of his vessel and requests that the government, or its agency, take action to locate and mark the wreck.

The judge, went over the basic case law on the matter, such as The Douglas and The Utopia[798], and concluded that abandonment would normally divest the owner of his liabilities. But, the judge also made a differentiation with the authorities provided. He held that, although it may be possible to argue that mere notice to the port authority constituted transfer of control, sufficient to relieve the owner of liability, the explicit rationale for the rule was that "it would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority", which would obviously assume that mere notice is not enough and that an owner is only relieved of responsibility after public authority has taken action to take over the marking, lighting, buoying, etc., of the wreck. In addition, judge Andeson, found it to be very dangerous if shipowners were so lightly excused of their liabilities, especially where they had been negligent[799]. For these reasons, the judge did not allow for the shipowner to be excused of his burdens.

[797] [1976] Vol. 1 Lloyd's Rep. 565; [1975] A.M.C. 1267.
[798] Supra.
[799] E.g., see: *Berwind-White Coal Mining Co. v Pitney*, [1951] A.M.C. 638, 644; 187 F.2d 665, 669 (2 Cir. 1951); and *Morania Barge No. 140 Inc. v M. & J. Tracy, Inc.* [1963] A.M.C. 678, 681; 312 F.2d 78, 83 (2 Cir., 1962).

In conclusion, we find that abandonment to the world at large can alleviate any burdens of liability from the owner of a property causing damage to a harbour or port. This owner, though, will most probably be held liable, where he, or his agents, has been negligent in causing the casualty and would, therefore, be held accountable under the Common law. So, abandonment to world at large is not a panacea and would not prove helpful in all cases, but will rather function under certain qualifications. Nevertheless, even with restrictions, it has the potential to place the owner of an onerous property in a much better position than without this right.

It is repeated that, in cases of abandonment to the underwriter (i.e. cession of the property through the MIA 1906, s.62, 63(1) and 79(1)), the same rights and burdens will be granted and imposed irrespective of whether it is the assured or the insurer, who is in charge of the subject matter abandoned.

5.3.5.5 *Salvors' liabilities*

After looking at the rights of the ship- or cargo-owners, their potential insurers and any port authorities involved, we can spend a small part of this research in having a quick look into the liabilities of any salvors taking over a property abandoned to the world at large.

According to the Merchant Shipping Act 1995, s.236, conveniently titled "Duties of finder of wreck", if any party finds or takes possession of a wreck in UK waters, or finds one and brings it within such waters, then, if he is the owner, he must give notice to the receiver stating that he has found or taken possession thereof, or if he is not the owner, he must give notice to the receiver that he has found or taken possession of it and, either hold it to the receiver's order or deliver it to the receiver. Failure of this obligation, without reasonable excuse, will incur liability on summary conviction, a fine and, if he is not the owner of the wreck, he may also forfeit any claim to salvage and be liable to pay twice the value of the wreck to the owner, or to the person entitled to the wreck. The same applies to cargo wrecks.

Finally, it is presented that MSA 1995, s.246, states that parties trying to interfere with or loot a wreck or impede rescue attempts, without authority seek to export British wrecks, with a penalty of a five-year prison term. Accordingly, a ship's master has the power to forcibly repel anyone attempting to do so, including any cases of "active wrecks", that is to say recent wrecks so occasioned by piracy.

5.3.6 *Conclusion*

As a conclusion to all the above, it is synoptically presented that it has been satisfactorily proven that there exists a right to abandon to the world at large, inchoate in any owner of a ship or cargo at sea, in equivalence of the Common law right of divesting abandonment. This right, when exercised, divests the party so abandoning from all rights of ownership, possession and liabilities *ex nunc*, i.e. from the time of abandonment onwards.

In terms of statutes targeted at specific types of damage and liabilities, such as the Harbours, Docks and Piers Act 1847 and any other local statute operating thereunder, the ship- and cargo-owners are still excused, so long as there is no negligence proved on their part for the damage done.

Whether the subject abandoned would become a *res nullius*, it is stated in the negative in relation to abandonment to the underwriters in the form of a cession of all rights and interest in the subject matter so abandoned, whereas it is stated in the positive if the property is abandoned to the world at large, as proven through operation of case law, marine insurance law theory and the MIA 1906.

Chapter 6

Conclusion

The present work has come to its end, though the research on this topic is potentially without end. In the above chapters, it has become evident that the rules of

constructive total losses and abandonment are not perfectly clear in how they are formed and, most importantly, in their construction by contemporary case law. The intentions of the man who established the foundations of modern marine insurance law, Sir Mackenzie Chalmers, may have been pure and with a vision of a better and clearer legal regime, but the old ways (i.e. pre-MIA 1906 rules), due to their dynamic, momentum and the idiosyncratic nature of the Common Law to not easily yield to change, seem to have prevailed.

It is the sincere belief of the writer that the questions posed were comprehensibly, methodically and fully answered and the relevant matters resolved. This is so, since the aim of this whole exercise was the in depth research into and the final solution of the issues scarring the constructive total loss cases and the mechanisms of abandonment.

What remains to be done is a synoptical overview, under a final recapitulation and commentary on this work. Starting with the basis of law, we encounter the rule that the law should always be simple and comprehensible. However, it is often seen that this is not the case; more so when, even if a rule is simple, it becomes intricate due to certain situations' complexity and the market's influence. One such example is the rules governing the notice of abandonment.

A major issue with the notice is that, once offered, it does not expire until withdrawn by the insured. For this reason, the insurer can accept it and elect to take over the abandoned asset at any point in the future. Moreover, the acceptance can be effected both expressly and by conduct. These being very fact-sensitive situations, it is always of great importance for both parties to be very clear in showing their intentions even in terms of silent actions. Otherwise, an unwanted position could be established and disputes would, more often than not, arise.

The binding power of conduct has been the subject of objections by most parties that find themselves in a difficult situation by its operation. For example, insurers, after a casualty, will often assist the insured with the necessary salvage operations, repairs, towage or similar actions. But these acts bear an inherent implication of ownership or at least possession of the subject matter. Therefore, they include a danger that they will be construed as holding the insurers to have accepted the insured's notice and even agreed to take over the abandoned property. In those

cases, this has been criticized by the insurers. Nevertheless, is it not fair to say that, as per other aspects of the law, where explicit and clear acts are needed, so, here too, the involved parties need to behave in the same way? Under the same prism, it is, again, both parties that should be held to act clearly when dealing with abandonment and constructive total loss situations; the insured needs to be unambiguous when offering to abandon the subject matter insured and, equally, the insurer has to be patent when responding to the offer. In practical terms, such behaviour is even more necessary when considering that most maritime constructive total losses often reach a value of thousands, or even millions, of dollars.

Moving to the next part of the abandonment process, we note that even more issues arise. Preliminarily, it is interesting to note that the MIA 1906 has only been treated as a simple summary of the case law before its introduction. Because of this, the new elements are mostly overlooked as they are viewed with a pre-1906 mentality and construed in accordance with what was the law before their time. Sir Mackenzie Chalmers did make a synthesis of the existing case law, but also took a step further. One of the aspects of marine insurance law, which he wanted to clarify and also improve was the parties' rights in constructive total loss cases and, specifically, the workings of abandonment and the insurer's take over of the subject matter insured Through laborious research in the 17th-21st century case law on the matter, the writer found that the pre-MIA 1906 law on the insurer's take over became more unclear the closer time moved towards the 1900s. However, the MIA 1906 offered a good and clear legal system. This, though, became complicated again, mostly due to the market's misunderstanding of the rules, an adherence to the pre-MIA rules and the lack of a judicial decision that would re-clarify the legal position.

From the above, we have today a system, which resembles more the 19th century law. In that time, the transfer of property from the insured to the insurer was (under varying conditions) automatic upon the service of the notice of abandonment. The MIA 1906 grants the insurer the option to accept the notice of abandonment, recognizing the situation and accepting to indemnify the insured, and also gives him the right to choose whether to take over the severely damaged property. This right of election is given twice; upon acceptance of the notice and upon payment for the loss. The current law seems to distort the right to choose and merge it with the response to

the notice into the following simple statement: if the insurer accepts the notice of abandonment he wants and chooses to take over.

This is not only against the Act's sections, but also causes intricate problems in how the market operates. In the above chapters the situation was brought back to its efficacious simplicity. The insurer can accept the notice and then independently choose whether to take over the subject matter's remains. There is no need to reject the notice from the start, nor virtually treat the situation as if a writ had been issued by agreement between the parties, then proceed to indemnification under a rejected notice and finally remain uncertain over the property's position because of a time-wise unlimited right of take over.

The notion of automatic transfer of property is just a remnant of the past and should be abolished from modern law and shipping market through an unambiguous *ratio decidendi*. The judge to accomplish this will have in his arsenal the support of the Act's rules, equity law and contract law, among others. The benefits to be derived therefrom will be legal consistency, coherency of rules, functionality, certainty and flexibility. The sections of the MIA will operate better on their own, such as s.62 (including subsections 4 and 6), and in synergy with other sections, e.g. ss.63(1) and 79(1), while both parties involved will clearly know what their rights, obligations and liabilities are at each given time. Overcomplicated cases such as the *Dornoch* case will no longer be seen.

Moving deeper into the matter and specifically to the parties' rights and obligations, we note that there is here, too, a need for clarification. Under any circumstances, it was established in this work's chapters that the abandoned property remains in the insured's hands, unless and until the insurer exercises his right to take over under s.63(1) or s.79(1). If the notice is rejected, the insurer misses the s.63(1) right, but retains that of s.79(1). After acceptance of the notice of abandonment, the subject matter insured is still under the insured's ownership and possession, while the insured enjoys the full set of rights deriving therefrom and may freely dispose of the subject matter as he sees fit. This freedom, though, is not unlimited, as, when he is indemnified by the insurer, any profit made by disposing of the insured asset will be owed back to the insurer. Should the insurer exercise his right to elect for a take over, this will be effected after payment for the loss and trace retrospectively back to the

time of the casualty. Another restriction of the above freedom is that, if the insurer has chosen to take over, the ship or cargo is still in the insured's hands, but are burdened by an equitable lien that will reverse any sale to a third party. This secures the insurer's position and rights during the abandonment process and after payment, as he will then become a proper owner of the property after the equitable lien becomes an equitable right, even if the insured asset is a ship and the insured portion is less than $1/64^{th}$ of the object's value.

Of what the parties should take careful note is the fact that a sale to a *bona fide* purchaser will not be reversed (though any proceeds will still go to the insurer after payment) and that conduct is still very important, both for the insured, who, for example, could inadvertently withdraw the notice of abandonment, and for the insurer, who could unintentionally elect to take over. Another matter is that the insurer's take over of the subject matter's remains operates from the time of the loss, meaning that he should be careful of how he treats the subject matter until payment and of what liabilities have or could have been incurred since the casualty, as they will burden him; e.g. liens, salvage or wreck removal claims, or damage claims.

Finally, the last topic to be discussed was the very interesting and innovative matter of *res nullius* properties through abandonment. The archetypical theory that an insured object may become no one's property through abandonment as described under marine insurance law is effortlessly defeated. Nevertheless, another type of abandonment can lead to such results. This is abandonment to the world at large. As proven, statutes, case law and legal theory can support this hypothesis and not only form a logical, but a well operating system of rules. This is a right under the common law in general and not intrinsic to marine insurance. It is the equivalent of "throwing something away". This causes an abandonment in the juristic sense, i.e. severance of all legal ties with the abandoned object including ownership, possession, management and control thereover, and is to be distinguished from any other type of abandonment, such as that under marine insurance law, physical abandonment by the master and crew merely causing the property to become derelict, or even abandonment in the colloquial sense meaning ceasing of the search for a lost object. The discontinuation of the above connections with the abandoned object lead to the equal termination of any and all liabilities that are incurred after the abandonment to the world at large. It is shocking to even consider that such a right is in existence, but if looked upon with

an unbiased mind, the evidence gathered and analysed above smoothly leads to this very conclusion. What remains to be done in relation to this theory is to only test it, though almost no party would risk it and, consequently, the courts of the 20th and 21st century have not even come close to dealing with the matter.

These were considered to be the most significant of matters relating to constructive total loss cases and abandonment, which should, hopefully, now be put to rest. The extensive search of all the relevant case law from the 18th century onwards, the critical analysis of the most basic of tools, the Marine Insurance Act 1906, and the elaborative examination of the marine insurance law theories were the weapons of choice that assisted with successfully escaping the legal maze of this part of the law.

The above are offered in theory, of course, as all researchers do and ought to know that the practice is governed by its own non-utopian and imperfect rules, which can go so far as to defy what is the law and its correct utilisation. Hopefully, this thesis will prove to be a guiding apparatus for an improved understanding and an optimum operating marine insurance law and marine insurance market.

READER'S NOTES

Dear reader,

one of the fundamental purposes for writing the above was to give a fresh perspective to the law and insert new ideas in marine insurance; thus, it would be the writer's sincerest pleasure for you to take notes on any of the above matters and discuss your thoughts, views and suggestions thereon.