2. COUNTER-MEMORIAL SUBMITTED BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[PRELIMINARY OBJECTION]

TABLE OF CONTENTS

Introductory

1. This Counter-Memorial is submitted to the Court in pursuance of an Order of the Court dated 18th May 1951 (*I.C.J. Reports 1951*, p. 11), the time specified in that Order for its delivery having been extended to 15th November 1951 by an Order of the Court dated 30th July 1951 (*I.C.J. Reports 1951*, p. 103), following a request of the Hellenic Government for an extension of the time-limit fixed for the filing of the Memorial, and to 15th February 1952 by Orders of the Court dated 9th November 1951 (*I.C.J. Reports 1951*, p. 113), and 16th January 1952 (*I.C.J. Reports 1952*, p. 7), at the request of the Government of the United Kingdom.

2. For the convenience of the Court the Government of the United Kingdom will first set out a summary of the contentions of the Hellenic Government and its own contentions in reply elaborated in this Counter-Memorial.

3. The Hellenic Government contends in its Memorial:

(a) that a contract, concluded on 17th July 1919 by M. Nicolas Eustache Ambatielos (hereinafter referred to as "the Claimant"), its national, with the Crown for the purchase by him from the Crown of nine ships then under construction, contained an oral provision, not included in the written agreement, that the ships were to be delivered by fixed dates;

(b) that six of the ships were delivered after these dates and two not delivered under the contract at all, and as a result the Claimant suffered serious financial losses, which prevented him from completing payment of the purchase price of the ships and compelled him to mortgage seven of the ships to the Crown as security for the balance ;

(c) that, when the Crown took proceedings under the mortgages against the Claimant in the Admiralty Division of the High Court of Justice in England in November 1922, it failed to call as witnesses *Major Bryan Laing and Sir Joseph Maclay*, who would have proved that delivery dates for the ships had been fixed ; that it also failed to produce to the Court letters exchanged between these two persons in July 1922, which would also have proved that delivery dates had been fixed ; and that the Crown was under a duty to produce these witnesses and letters ;

(d) that the Crown thereby caused a denial of justice to the Claimant and as a result obtained judgment against him and possession of the ships ;

(e) that the Court of Appeal caused a denial of justice to the Claimant by refusing him leave to call Major Laing and Sir Joseph Maclay and to produce the letters exchanged between them in proceedings by way of appeal from the Admiralty Court's decision ;

(f) that in the proceedings before the English Courts the Claimant was given worse treatment than would have been given to a United Kingdom national ;

(g) that the Crown has been unjustly enriched ;

(h) that the treatment accorded to the Claimant constituted a breach of paragraph 3 of Article XV of the Treaty of Commerce and Navigation concluded between Greece and the United Kingdom on 10th November 1886, and a breach of the general rules of international law ;

(i) that when it took up the case of its national in 1925 and subsequently claimed reparation for the treatment accorded to the Claimant, the United Kingdom Government refused reparation and this gave rise to a dispute ;

(j) that the United Kingdom is obliged, by a Declaration signed on 16th July 1926 by the two Governments, to submit this dispute to arbitration under the Protocol attached to the Treaty of 1886 and has refused to do so ;

(k) that the Declaration is part of the Treaty of 1926 and the International Court of Justice has jurisdiction under Article 29 of the Treaty of Commerce and Navigation concluded between Greece and the United Kingdom on 16th July 1926, to order that the dispute be determined by arbitration in accordance with the Protocol attached to the Treaty of 1886

or, alternatively, that the dispute should be decided by the Court itself.

4. The Government of the United Kingdom will reply to these contentions as follows :

(i) there were no dates fixed by the contract, by an oral provision or otherwise, for the delivery of the nine ships purchased by the Claimant (paragraphs 17 to 44 below) ;

(ii) the Claimant's losses cannot be attributed to any breach of the contract by the Crown ; seven of the ships were delivered to him in accordance with the contract and he was not entitled to delivery of the two remaining ships (paragraphs 45 to 54 below) ;

(iii) the Crown was under no duty to call Major Laing or Sir Joseph Maclay as witnesses in the Admiralty Court or to produce the letters exchanged between them in July 1922 ; the Claimant could have called them as witnesses himself but failed to do so ; further, all information which their letters could have disclosed was fully presented to the Court from other sources ; the letters did not prove the existence of any oral agreement for fixed dates of delivery and there is no reason to suppose that, if they had been called as witnesses, the evidence of Major Laing or Sir Joseph Maclay would have proved the existence of such an oral agreement (paragraphs 55 to 63 below) ;

(iv) the decision of Mr. Justice Hill in the Admiralty Court and that of the Court of Appeal were both just and in accordance with the rules of English law and practice ; in these proceedings the Claimant was given the same treatment as a United Kingdom national (paragraphs 64 to 76 below) ;

(v) the Claimant failed to exhaust his municipal remedies (paragraphs 77 to 79 below) ;

(vi) the treatment of the Claimant did not constitute a breach of Article XV, paragraph 3, of the Treaty of 1886 or of any general rule of international law (paragraphs 90 to 103 below) ;

(vii) the Hellenic Government is precluded by reason of delay from pursuing the claim (paragraphs 104 to 108 below) ;

(viii) the Court has no jurisdiction to order arbitration in this case or to decide it itself (paragraphs 6 to 16 below).

5. The Government of the United Kingdom raises, as a preliminary objection under Article 62 of the Rules of Court, its contention (viii)—that the Court has no jurisdiction in this case. The remaining contentions of the Government of the United Kingdom on the merits of the case are submitted without prejudice to the preliminary objection.

The United Kingdom Government submits that the Court has no jurisdiction to order arbitration in this case or to decide it itself

6. The grounds on which the Hellenic Government claims that the Court has jurisdiction in this case are stated as follows in paragraph 29 of the Memorial :

> "(4) The Court has jurisdiction in this case since it concerns a dispute within the meaning of the Treaties of 1886 and 1926 and because the United Kingdom Government has undertaken to refer such disputes either to a Commission of Arbitration or to the Court."

The treaties referred to are the Treaties of Commerce and Navigation of 10th November 1886 and of 16th July 1926, between the United Kingdom and Greece, which are to be found in Annexes N and Q respectively of the Memorial.

7. The following provisions apply to the settlement of disputes under the Treaties of 1886 and 1926 :

(a) A Protocol annexed to the Treaty of 1886 provides that

> "Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and that the result of such arbitration shall be binding on both Governments."

There are further provisions in the Protocol concerning the composition and procedure of the Commissions of Arbitration.

(b) The Treaty of 1886 was succeeded by the Treaty of 1926[1]. On the same day that the Treaty of 1926 was concluded, the two Governments signed the following Declaration :

> "It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of 10th November 1886 annexed to the said Treaty."

(c) Disputes under the Treaty of 1926 are governed by Article 29 of that Treaty, which reads as follows :

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[1] Notice of denunciation of the Treaty of 1886 was given by the Hellenic Government on 3rd March 1919, but the Treaty was renewed for successive periods up to 28th July 1926, from which date the two Governments agreed to regulate their commercial relations in accordance with the provisions of the new Treaty signed on 16th July 1926.

"The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.

The court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise."

8. Greece has not accepted the compulsory jurisdiction of the Court under Article 36 (2) of its Statute and therefore can invoke the jurisdiction of the Court only by reference to a special agreement or the provisions of a treaty under Article 36 (1). The Hellenic Government relies, in the present case, on Article 29 of the Treaty of 1926. The United Kingdom Government admits that the Treaty of 1926 is still in force, and Article 29 must now be read in the light of Article 37 of the Statute of the Court, which provides that :

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

The United Kingdom Government therefore agrees that any dispute arising between it and the Hellenic Government *as to the interpretation or application of any of the provisions of the Treaty of 1926* is referable by either Party to the Court. It denies, however, that any such dispute as to the interpretation or application of the provisions of this Treaty of 1926 exists in the present case.

9. The Hellenic Government, in its Memorial, makes no serious attempt to establish that a dispute exists as to the interpretation or application of any of the articles of the Treaty of 1926 which is referable to the Court under Article 29 of the Treaty. It is true that in paragraph 29 of the Memorial the Hellenic Government states as the first of the grounds on which it relies :

"(1) The Treaties of 1886 and 1926 oblige the United Kingdom to treat Greek nationals in accordance with the principles of international law and according to the most-favoured-nation clause",

and reference is made in paragraph 22 of the Memorial to Articles 3 and 4 of the Treaty of 1926 which provide for most-favoured-nation treatment in certain matters. However, nothing whatever is said to show, or indeed would it be possible to show, that most-favoured-nation treatment was not accorded to the Claimant or that the general principles of international law are incorporated into the Treaty. Moreover, the Treaty of 1926 was not concluded until after the events complained of by the Hellenic Government took place and therefore does not apply to this case.

10. Since the Hellenic Government is unable to show that a dispute exists regarding the application of any of the articles of the 1926 Treaty, it resorts to the following line of argument. It contends that the treatment accorded to the Claimant gave rise to a claim against the United Kingdom under Article XV of the Treaty of 1886 ; that, since the United Kingdom rejects this claim, it should be submitted to arbitration under the Protocol annexed to that Treaty and continued in force after the termination of the Treaty by the Declaration made on the date of signature of the Treaty of 1926 ; and finally that the refusal of the United Kingdom to go to arbitration raises a dispute as to the application of the Declaration which the Court has jurisdiction to decide under Article 29 of the Treaty of 1926.

11. In the submission of the United Kingdom Government, this reasoning must be rejected because :

(a) the Declaration does not form part of the Treaty of 1926 and Article 29 of the Treaty is therefore not applicable to it, and because

(b) the Declaration was only intended to apply to claims brought before the date of its signature (16th July 1926).

12. The contention in paragraph 11 *(a)* is supported on the following grounds :

(i) The Declaration refers to the Treaty as a separate instrument ; it is separately signed by the representatives of the contracting parties ; it is not mentioned in the Treaty and is not expressed to be an integral part of it ; it relates to the old Treaty of 1886 and kept alive the old Treaty for certain explicit purposes only.

(ii) The conclusion that the Declaration is not a part of the Treaty is supported by the treaty practice of the time. In the Greco-Turkish Agreement upon the property of their nationals, concluded on 21st June 1925 (*League of Nations Treaty Series*, Vol. LXVII, p. 11), there is an accompanying Declaration, which explains the relationship between the Protocols to the Agreement and certain earlier agreements ; it is expressed to be an integral part of the Agreement. The Greco-Italian Commercial Treaty of 14th November 1926 (*League of Nations Treaty Series*, Vol. LXIII, pp. 51-79, 83) is even more in point ; accompanying the Treaty is a Final Protocol and two Declarations. The Final Protocol is divided into two parts containing interpretations of articles in the principal Treaty, and begins with the statement that these are to form an integral part of the Treaty. The two Declarations which follow are separate but, significantly, one is expressed to be an integral part of the Treaty while the other is not so expressed and is identical in form and purpose with

the 1926 Anglo-Greek Declaration, since it reserved for decision by a Commission of Arbitration any claims based on an earlier Greco-Italian Treaty of 1889.

(iii) Further, it is well known, as was recognized by the Permanent Court in the case of Phosphates in Morocco (*Judgements, Orders and Advisory Opinions*, Series A/B, No. 74, p. 24) [1] that, in accepting the compulsory jurisdiction of the Court by declaration under the "optional clause", States have studiously avoided a revival of old disputes and sought to preclude the possibility of the submission to the Court of situations or facts dating from a period when the State, whose action was impugned, was not in a position to foresee the legal proceedings to which these facts and situations might give rise. Similarly, in interpreting Article 29 of the Treaty of 1926, it must be presumed that the intention of the parties was to confer jurisdiction upon the Court under Article 29 of the 1926 Treaty in respect only of disputes arising under that Treaty, that is to say, after its entry into force. The Declaration, which relates to claims and disputes arising under the old Treaty of 1886 and before the new Treaty, should not therefore be regarded as part of the Treaty of 1926 for the purpose of conferring jurisdiction on the Court under the Treaty of 1926.

13. The contention in paragraph 11 (*b*) above is supported on the following grounds :

(i) Records of the negotiations which led to the signature of the Declaration confirm that it was concerned only with claims actually brought before the date of the Declaration. The origin of the Declaration was that the United Kingdom Government asked the Hellenic Government for assurances firstly that the conclusion of the new Treaty of 1926 would not be regarded by the Hellenic Government as prejudicing the claim, already made, for exemption, in virtue of Article XIII of the old Treaty, of British subjects from a forced loan exacted by the Hellenic Government at the beginning of 1926, and secondly that, in the event of any differences of opinion between the two Governments on the validity of these claims, the matter should, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol annexed to the Treaty of 1886. The United

[1] "Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear : it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise."

Kingdom Government proposed that these assurances should be recorded in an exchange of notes at the time of the signature of the 1926 Treaty. In reply, the Hellenic Government offered to sign a joint declaration in the following terms :

> "It is well understood that as far that the new Treaty of Commerce between Great Britain and Greece does not cover anterior claims eventually deriving from the Anglo-Greek Commercial Treaty of 1886, any difference which might arise between our two Governments on the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of 10th November 1886, annexed to the said Treaty."

The United Kingdom Government replied by proposing the form of declaration which was,in fact, signed. In doing so, the British Foreign Secretary wrote to the Greek Minister in London as follows :

> "I now write to let you know that we have examined the text which you left with me for safeguarding British claims under the old Treaty of 1886 and that we have no objection to its substance. We have, however, slightly altered the wording to put it in a more legal form, and I now enclose a copy of the text thus revised."

The records of the negotiations therefore show that it was the intention of both sides that the Declaration should apply only to "anterior" claims, that is to say, claims which had been made under the Treaty of 1886 before the date of the Declaration (16th July 1926). No claim based on the Treaty of 1886 was made until 1939.

(ii) It is indeed true that the Hellenic Government intervened with the United Kingdom Foreign Office on behalf of the Claimant on 12th September 1925 (text of the note sent by the Greek Minister in London to the British Foreign Secretary is to be found in Greek Memorial, Annex R 1), but this intervention was not based upon the provisions of the 1886 Treaty either expressly, since Greece made no reference to Article XV or to any other provision of the Treaty, or indirectly, since the note and its supporting memorandum did not charge the English courts with error and did not complain of denial of freedom of access to the courts of justice. It was in fact an informal approach to His Majesty's Government for *ex gratia* relief. No further representations were made until 1933 (see Greek Memorial, Annex R 2), and the Treaty of 1886 was first referred to in a note from the Greek Minister to the British Foreign Secretary dated 21st November 1939 (see Greek Memorial, Annex R 6). It is clear then that Greece had made no claim, on behalf of its national, under the 1886 Treaty before that Treaty came to an end in July 1926.

14. In its Memorial, the Hellenic Government charges the United Kingdom with breaches of the general rules of international law and also with unjust enrichment at the expense of the Claimant : see, for instance, paragraphs 20 and 29 (2) and (3). Article XV of the Treaty of 1886 merely provides that the subjects of each Contracting Party in the dominions and possessions of the other Contracting Party shall have free access to the Courts of Justice for the protection and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects. There is no other provision in the Treaty of 1886 which can be (or indeed is) invoked in connection with these claims and therefore the Declaration of 1926 does not apply to them. The Treaty of 1926 cannot be invoked in respect of matters occurring before it came into force, and in any case there is no provision in the Treaty of 1926 on which a claim on either of these grounds can be founded.

15. It is convenient to deal here with the Hellenic Government's submission to the Court in paragraph 30 of the Memorial. The Court is apparently requested to adjudge and declare that the United Kingdom Government is under an obligation, as a Member of the United Nations, to agree to the reference of this dispute to the Court. Such a request comes strangely indeed from a government which has never yet seen fit to accept the optional clause. It is inadmissible for the reason that the jurisdiction of the Court depends on the consent of the respondent and only exists in so far as this consent has been given : see the Judgment in the Mavrommatis Palestine Concessions case (*Judgments, Orders and Advisory Opinions*, Series A, No. 2, p. 16).

16. To sum up, therefore, on the question of the Court's jurisdiction to entertain the Hellenic Government's application, the Government of the United Kingdom submits to the Court :

(1) that jurisdiction must be founded, if at all, on Article 29 of the Treaty of 1926, and that, for the reasons given in (2) and (3) below, Article 29 does not apply in the present case ;

(2) that, in so far as the Court is requested to order the United Kingdom to agree to the submission to arbitration of the Hellenic Government's claim under Article XV or any other article of the 1886 Treaty, the Court has no jurisdiction because the Treaty of 1886 is no longer in force and this claim does not come under the Declaration of 1926 and in any case Article 29 of the Treaty of 1926 does not apply to the Declaration ;

(3) that, in so far as the Court is requested to order the United Kingdom to agree to the submission to arbitration of a claim under the general principles of international law or on the ground of unjust enrichment, the Court has no jurisdiction because there is no instrument which gives jurisdiction in

respect of a claim on either of these grounds by Greece against the United Kingdom ;

(4) that, in so far as the Court is requested to adjudicate on the merits of the claim, it has no jurisdiction to do so because there is no instrument which gives it jurisdiction in respect of such a claim by Greece against the United Kingdom.

The United Kingdom Government submits that there were no dates fixed by the contract, by an oral provision or otherwise, for the delivery of the nine ships bought by the Claimant

17. The written contract of sale, entered into in London on 17th July 1919 between the Claimant and the Crown, is referred to in paragraph 1, and forms Annex A, of the Greek Memorial. The details and record of the nine ships, the subject-matter of the contract, are summarized in Annex 5 of this Counter-Memorial.

18. It will be convenient first to describe briefly the persons concerned in this contract. In 1919, the Ministry of Shipping was a department of His Majesty's Government in the United Kingdom. Its functions were taken over subsequently by the Mercantile Marine Department of the Board of Trade. There was in 1919 no titular Minister of Shipping, but the department was in charge of the Shipping Controller, who was at that time Sir Joseph Maclay. He left the Ministry before 1922 and died recently. The Directorate of Ship Purchases and Sales was a branch of the Ministry, in the charge of Sir John Esplen, Director, who was assisted by Major Bryan Laing as Assistant Director. Major Laing was, before his period of Government service which ended on 30th September 1920, a member of Laing and Company, shipbuilders. In the Directorate of Ship Purchases and Sales were also Mr. J. O'Byrne, finance officer, and Mr. H. F. Bamber, a marine engineer.

19. The purchase or sale of ships by the Shipping Controller on behalf of the Crown had always to be approved by the Shipping Control Committee, which was composed of the Shipping Controller, the Secretary of the Ministry, the Accountant-General of the Ministry and the Director of Purchases and Sales. Contracts of sale were concluded by the Shipping Controller on behalf of the Crown, and usually signed by the Secretary of the Ministry. It was Major Laing's duty to interview possible purchasers of Government-owned ships, whether completed or building, and to inform them of the specifications, positions, and price, of ships available for sale. He was further responsible for ensuring that before the sale of any ship was agreed the Shipping Control Committee had finally approved the price and general conditions of sale. Mr. O'Byrne was responsible for dealing with the financial side and for seeing that written contracts of sale, prepared by the legal branch of the Ministry,

were properly drawn up as regards their terms and conditions. Mr. Bamber was an expert adviser on the construction of ships.

20. The contract of sale of nine ships to the Claimant was concluded after about three weeks of negotiations, which were carried on partly by correspondence and partly by personal meetings at the Ministry. In these negotiations G. E. Ambatielos, a ship-broker, acted for the Claimant, his brother, who was throughout the period of negotiation in Paris, while Major Laing acted on behalf of and subject to the authority of the Shipping Controller. Mr. Bamber was also consulted in the negotiations and Mr. O'Byrne was concerned in the final stages. Mr. Law, of the firm of Fergusson and Law, marine engineers, was present at a meeting at the Ministry on 9th July shortly before the contract was concluded, and actually signed the written contract on 17th July 1919 on behalf of the Claimant.

21. The Hellenic Government contends that it was an essential term or condition of the contract of sale that the nine ships were to be delivered to the Claimant by fixed dates ; that this term or condition, which is admittedly not to be found in the written contract of 17th July 1919, was orally agreed between Major Laing on behalf of the Ministry and G. E. Ambatielos at some time in the first half of July 1919 and confirmed by Major Laing in conversation with the Claimant in Paris in August 1919 ; that the contractual dates for delivery of the ships were those contained in the Claimant's letter of 3rd July 1919 (Greek Memorial, Annex S 3, p. 114) ; and that the words "within the time agreed" in clause 7 of the written contract (see Greek Memorial, Annex A, p. 27) are to be construed by reference to this oral agreement for fixed dates for delivery. The Hellenic Government claims that these contentions are supported by the evidence referred to in paragraphs 3 and 4 of the Memorial, paragraphs 5 to 8 of Major Laing's Statutory Declaration of 19th January 1934 (Greek Memorial, Annex B, pp. 29 and 30), a letter from Major Laing to Sir Joseph Maclay dated 20th July 1922 (Greek Memorial, Annex E), and the testimony given at the trial in November 1922 by the Claimant, G. E. Ambatielos, and Mr. Law.

22. The United Kingdom Government denies that it was a term or condition of the contract of sale, or that there was any agreement either oral or in writing between the Shipping Controller and the Claimant, that the nine ships or any of them were to be delivered to the Claimant by fixed dates. The United Kingdom Government rests its denial upon the following grounds :

(a) there is no provision for delivery by fixed dates in the written contract of sale of 17th July 1919 (paragraph 23) ;

(b) the evidence does not establish that there was such an oral agreement between the Claimant and the Shipping Controller (paragraphs 24 to 40) ;

(c) the written contract of sale of 17th July 1919 is complete and self-consistent and does not call for explanation by reference to any oral agreement (paragraphs 41 to 43) ;

(d) it would have been an impossible business proposition for the Ministry of Shipping to promise fixed dates for delivery of ships then being built for it under shipbuilding contracts which themselves gave only approximate dates (paragraph 44).

23. *There is no provision for delivery by fixed dates in the written contract of sale of 17th July 1919.*—The consequences of this fact in English law will be considered below (paragraph 63). It is enough here to observe that G. E. Ambatielos made every effort, according to his own testimony at the trial, to get the Ministry to insert such a provision in the written contract of sale, but Major Laing refused to do so ; and that the Claimant finally authorized the conclusion of the contract on his behalf—after first repudiating the authority of his agents in London—without such a provision in it. He seeks to explain his acceptance of the written contract in these terms by pleading an oral agreement or understanding as to delivery dates.

24. *The evidence does not establish that there was such an oral agreement between the Claimant and the Shipping Controller.*—This is clear from the history of the negotiations leading up to the contract of 1919 as disclosed by the correspondence and by the testimony given at the trial before Mr. Justice Hill (paragraphs 25-30 below), from the conduct of the Parties after the conclusion of the contract (paragraphs 31-34), and from a comparison of statements made from time to time by Major Laing and the factual inaccuracy of his latter statements which prove their unreliability (paragraphs 35-39).

25. The negotiations commenced on or about 27th June 1919, when Major Laing informed G. E. Ambatielos that there were seven B type ships available for sale and then under construction in the Far East. He gave G. E. Ambatielos a buff slip of paper, prepared by Mr. Bamber, on which estimated delivery dates for these ships were set down. G. E. Ambatielos gave the list to his brother, the Claimant, who was in Paris and who, on 3rd July 1919, wrote a letter instructing G. E. Ambatielos to negotiate for the purchase of seven ships on the conditions set out in this letter (see Greek Memorial, p. 114, for the whole letter), part of which reads :

> "I hereby authorize you to buy for my account the seven B type boats now in course of construction at Hong Kong on the following terms and conditions ; delivery, two August-September,

two October-November, one in December and the remaining two not later than February 1920."

These dates were taken as regards the first five deliveries from the dates set out on the buff slip of paper (testimony of the Claimant at the trial, sixth day, p. 41 [1]) but, as regards the last two deliveries, the Claimant extended the time somewhat in order to offer the Ministry a margin (testimony of the Claimant at the trial, sixth day, pp. 2-3). It is these dates which the Claimant and G. E. Ambatielos, at the trial, alleged (contrary to what is now alleged in paragraph 3 of the Greek Memorial) to be the dates finally agreed with the Ministry (testimony at the trial, fifth day, p. 73, and sixth day, p. 41). The buff slip of paper was never produced at the trial or since, but mysteriously vanished, though the Claimant maintained that he still had it in his possession in March 1921 and showed it to Mr. O'Byrne (testimony of the Claimant at the trial, sixth day, p. 42). It is from the dates set out in the letter of 3rd July 1919 —the last day of each month being used—that the alleged due dates of delivery set out in the Claimant's memorandum attached to the note of 12th September 1925 from the Greek Minister in London to the British Foreign Secretary (see Greek Memorial, Annex R 1, at p. 67) are derived for six of the ships (B type). One of the seven ships first offered to the Claimant was sold to another buyer before the negotiations referred to above had really got under way, and the remaining three C type ships sold to the Claimant were, as will be seen later, brought into the sale after 3rd July 1919.

26. On 7th July 1919, G. E. Ambatielos wrote to the Claimant in the following terms to report the progress of the negotiations :

"The writer called at the Ministry of Shipping at an early hour this afternoon and had a very long conversation with Major Laing. As advised you in our telegram of this morning two of the seven boats B type actually under construction at Hong Kong have been sold. Mr. Markettos has bought the fourth delivery and paid £310,000, and a Belgian bought the third delivery and paid £315,000. As telegraphed you, we did all possible in our power to persuade Major Laing to put before the Committee your offer for the remaining five at £285,000 in accordance with your letter to us of the 3rd instant, but he absolutely declined and pointed out to us that they would turn it down. After careful consideration the writer has taken it upon his shoulders to increase the sum to £290,000 and must ask you to authorize accordingly. The writer has had lunch with a friend of his to-day and thoroughly

[1] A copy of the transcript of the note of the testimony of the Claimant and of Messrs. O'Byrne, Bamber, G. E. Ambatielos and Law, taken down at the trial by C. E. Barnett and Co., 23 and 24 Elden Chambers, 30 Fleet Street, E.C. 4, and C. C. Norman, Official Shorthand Writer of the Admiralty and Prize Courts in England, will be communicated to the Registrar in accordance with Article 43, paragraph 1, of the Rules of Court, for the use of the Court and of the Hellenic Government.

and fully discussed the position. As the Shipping Controller is absent, no definite decision can be taken, but we had a telephone message this afternoon from the Ministry and reading between the conversation we take it for granted that the offer would be most favourably considered by the Shipping Controller and accepted. Unfortunately Sir Joseph Maclay (the Shipping Controller) we are now told will not be in town before Thursday so shall have to wait till this.

P.S. Deliveries. We forgot to mention that deliveries of these boats will now be one in September-October; one or two in November-December and the remainder between January and February of next year."

This letter is of great importance for a number of reasons. First, the delivery dates mentioned differ from those laid down by the Claimant in his letter of 3rd July: instead of two in August-September, there is to be one in September-October; instead of two in October-November, there is to be one or two in November-December and instead of one in December 1919 and remaining two not later than February 1920, the remainder are to be between January and February 1920. G. E. Ambatielos gave a remarkable account at the trial of this postcript to his letter of 7th July when being cross-examined by Counsel for the Board of Trade, thus (testimony at the trial, fifth day, p. 67):

"Q. What do you mean by saying 'the deliveries of these boats will now be'.... ?

A. I was trying my utmost all along to persuade my brother to give me the largest possible margin with a view of getting the Ministry to insert these dates in the contract.

Q. Were you intending to convey to your brother that the Ministry had agreed to the dates you put in this postscript ?

A. No.

Q. Then what do you mean by saying 'Delivery of these boats will now be one September-October'.... What does that mean ?

A. That there was an attempt on my part to see if my brother would eventually be agreeable to these dates. I was trying to make the dates of all boats as long as possible.

Q. I do not care why you were doing it. Were you deceiving your brother into believing that the Ministry had agreed to these dates ?

A. They never agreed; they never proposed them.

Q. 'Deliveries will now be'.... What does that mean ?

A. That means that I was proposing to my brother these dates. I was trying to get my brother to agree to the longest possible dates....

Q. You were deceiving him; is that so, or is it not ?

A. That may be so."

The second point to notice in the letter of the 7th July is that G. E. Ambatielos, the writer, and the Claimant, as the reader, were *fully aware that Sir Joseph Maclay was Shipping Controller* and further that Major Laing had no authority to make or accept any final offers or take any definite decisions in his absence. Thirdly, the prices of B type ships building in the Far East charged to other foreign buyers at the time was far above that charged to the Claimant ; this fact will be discussed below (paragraph 47). Finally, it should be said that the sale of one of the B type ships to *Mr. Markettos, referred to in the letter, was not completed, and* the ship was brought into the sale to the Claimant.

27. But, to resume the narrative, Mr. Law of the firm of Fergusson and Law, marine engineers and advisers to the Claimant, had also been in touch with the Ministry and appears to have been acting under the authority of G. E. Ambatielos. After visiting the Claimant in Paris on 8th July 1919, Mr. Law made the following written offer to the Ministry on or about 10th July :

> "I am now in a position to offer you on behalf of Mr. N. E. Ambatielos of Paris for six remaining B type boats under construction at Hong Kong and the three C type boats under construction at Shanghai. Price for the nine steamers two and a quarter millions sterling. Deliveries two about September, two about October-November, two about November-December and the three remaining for next year but not later than April."

Again new delivery dates are quoted in this offer. On 10th July, G. E. Ambatielos wrote to his brother :

> "We are glad to have to report that the Committee of Sales at the Ministry of Shipping decided to accept the offer that Mr. William Law has made on your behalf, but insisted that the price should be £2,275,000, and after obtaining Mr. Law's consent and authority the writer had to agree.... Deliveries, two in September-October, two in November-December probably three, and the rest between December and April."

Once again a different set of delivery dates is mentioned, these dates being on the face of them approximate, and once again these dates were invented by G. E. Ambatielos. It was put to him in cross-examination at the trial that the dates in this letter of 10th July were quite different from those in his letter of 7th July, and he agreed, then (testimony at the trial, fifth day, p. 71) :

> "Q. Why are you altering the dates mentioned [in the letter of 7th July] ? You are trying to deceive your brother ; why are you altering your method of deception ?
>
> A. I was trying to get him to extend the dates, the longer the better, with a view to inducing the Ministry to insert some dates or other in the contract, naturally subject to my brother's approval."

This is a clear admission particularly in the phrase "some dates or other" that at this time the Ministry had not agreed to insert any fixed dates for delivery in the contract, much less had it accepted any particular set of dates.

28. When the Claimant received the letter of 10th July, reporting what G. E. Ambatielos and Mr. Law had been doing, and particularly Mr. Law's offer to the Ministry, he reacted sharply, since that offer covered three C type steamers which he had not contemplated purchasing in his letter of instructions of 3rd July; further, a higher price had been agreed than that laid down in that letter and the delivery dates mentioned did not correspond. He sent a telegram to the Ministry repudiating Mr. Law's authority as agent to make the offer. However, he was prevailed upon to accept the position by G. E. Ambatielos, who said at the trial (testimony at the trial, fifth day, p. 72) that he "explained to him the circumstances". But what he did not explain at that time was the Ministry's attitude to fixed dates of delivery, thus (testimony at the trial, fifth day, p. 73):

> "Q. Did you ever tell your brother that the Ministry refused to put definite dates of delivery into the contract?
>
> A. Yes, I did.
>
> Q. Tell me when you first told him that?
>
> A. When I went to Paris.
>
> Q. When was that—before or after the signing of the contract?
>
> A. Oh, after."

As a result, it appears, of his brother's persuasion, the Claimant wrote the following letter to him on 14th July:

> "I am in receipt of your letter of the 10th instant and note contents. I beg to confirm my telegraphic reply of this afternoon as follows: 'Your letter 10th received. I authorize Law sign contract Ministry of Shipping £2,275,000 for six B type and three C type', which I now beg to confirm."

What then was the position when this authority to sign the contract of sale on behalf of the Claimant was received? In the first place, Mr. Law's offer of 10th July was accepted by the Ministry as the basis of the contract, though the final price was a matter of further discussion and agreement and the Ministry refused to include in the contract any reference to fixed delivery dates.

29. G. E. Ambatielos pressed Major Laing throughout the negotiations to include fixed delivery dates in the contract, but admits that Major Laing refused (testimony at the trial, fifth day, p. 20).

> "Q. Were you saying to Major Laing that you wanted to have these dates inserted in the contract?
>
> A. Yes, all along.

> Q. Did he say he did not want to have the dates inserted in the contract ?
>
> A. Yes, he did. He said, 'Well you know, red tape. The Ministry of Shipping, they are always like that you know....' But he further stated that a clause would be inserted in the contract which would give ample security in respect of the fixed dates of delivery."

At an earlier interview Major Laing is stated by G. E. Ambatielos to have told him that "it was a question of principle with the Ministry of Shipping that they would never put any dates in the contract" (testimony at the trial, fifth day, p. 60). It would clearly have been absurd for the Ministry to have refused to insert fixed dates in the contract, but to have agreed to the insertion of another clause having precisely the same effect. The truth is that G. E. Ambatielos knew very well that he had failed to get contractual dates of delivery for his brother.

30. The Claimant, who was in his own words "furious" to discover that there was no provision for delivery dates in the written contract, sought assurances from Major Laing direct. They met in Paris in August 1919 and, according to the Claimant, Major Laing told him that the words "within the time agreed" in clause 7 of the written contract of sale were to be understood as referring to the dates in the letter of 3rd July as regards the B type ships ; but the Claimant's explanation of how they could relate also to the C type ships, which were not offered for sale until after 3rd July, is so confused as to be unintelligible (see testimony at the trial, sixth day, pp. 3-5).

31. The history of the negotiations outlined above shows conclusively that the Ministry never agreed to make fixed dates of delivery part of the contract for the sale of the vessels. This is confirmed by the conduct of the parties after the conclusion of the contract. At no time during the months following the conclusion of the contract of sale of 17th July 1919 did the Claimant or his representatives suggest that there had been any agreement for fixed dates of delivery or that such agreement had been broken. In fact the letters exchanged between the Claimant's representatives and the Ministry of Shipping and the instructions sent by him to his agents in the Far East clearly demonstrate the contrary. There was correspondence between G. E. Ambatielos and Mr. Bamber of the Ministry relating to *War Miner/Cephalonia* and *War Trooper/Ambatielos* which begins with a request to Mr. Bamber to tell the Claimant's representatives when they might definitely expect delivery of them (Annex 4 (1)). Mr. Bamber replied on 9th September 1919 (Annex 4 (2)), saying :

> "It is difficult to estimate from this [viz., the fact that *War Miner/Cephalonia* was launched on 16th August 1919] when she will be delivered, but I have cabled to-day to Hong Kong asking when this steamer and also the *War Trooper* will be delivered."

The Claimant's representatives do not appear to have replied to or made any comment on this, and on 10th October 1919 Mr. Bamber was able to write further to them as follows (Annex 4 (3)) :

> "I am in receipt of a cable advice from Hong Kong as to the estimated delivery dates of these steamers as follows :
>
> *War Miner* will probably be completed end of October.
>
> *War Trooper* launching middle of October, and will be completed middle of November.
>
> Satisfactory progress is also being made with the *War Bugler* and *War Piper*."

32. Now the *War Miner/Cephalonia* and the *War Trooper/Ambatielos* are alleged in the Claimant's memorandum (see Greek Memorial, p. 67) to be due for delivery on 31st August 1919 and 30th September 1919, respectively, and the Claimant was during the autumn of that year making every effort, with the assistance of the Ministry of Shipping, to urge the shipbuilders to make speedy delivery of the ships he had purchased. It is inconceivable that, had there been contractual dates of delivery, the Claimant's representatives would not have alluded to it when they received this letter from Mr. Bamber of 10th October 1919, which indicated probable delivery dates at least several weeks after the alleged due dates. Instead, the Claimant's representatives replied on 11th October (Annex 4 (4)) :

> "We are much obliged for your esteemed favour of yesterday's date, giving us text of a cable received by you from Hong Kong regarding completion of the *War Miner* and *War Trooper*, also we note satisfactory progress is being made with the *War Bugler* and *War Piper*."

It was not till a letter of 31st October 1919 from the Claimant to Major Laing (Annex 4 (5)), that anything approaching a complaint of postponement of delivery of any of these ships was made. In this letter the Claimant said : "As you will recollect, at the time of the negotiations for the purchase of these boats, you intimated that this steamer *War Trooper/Ambatielos* would be delivered towards the end of October." The word "intimated" is significant. There is no suggestion here that the date of delivery was made part of the contract and still less that the vessel should have been delivered by 30th September or that the contract had been broken already. Indeed, the tone of the whole letter is inconsistent with the Complainant's present allegations of agreed delivery dates and breach of contract. If we continue reading the letter of 31st October 1919, we find an explanation of the telegram relating to the *War Trooper/Ambatielos* relied upon in paragraph 4 of the Greek Memorial. In the letter G. E. Ambatielos says that he has had word from Mr. Rossolymos, their Far Eastern Agent, of further delay in delivery, and that delivery is hoped for about 15th December 1919, and explains that this ship had been chartered with a very handsome

freight and that the Claimant's representatives had "agreed, what we thought at the time to be very ample, and fully covering us, 31st December", as cancelling date for the charter. In order that *War Trooper/Ambatielos* might not miss this charter, G. E. Ambatielos finally asks Major Laing to send a telegram to the builders urging them to deliver the ship "at the end of November at the very latest". The telegram referred to (see paragraph 4 of the Greek Memorial) was sent by the Ministry on the same day as G. E. Ambatielos's letter was written and is to be read in relation to it. It was sent in order to assist the Claimant and at his representative's request and not, as alleged by Major Laing in paragraph 7 of his Statutory Declaration (Greek Memorial, Annex B, p. 30), "because the Shipping Committee foresaw either cancellation of the contract or a claim made against them". The words in the telegram "not later than November" are clearly to be understood, in the light of G. E. Ambatielos's letter of 31st October, as the estimated or hoped-for date. It is important to observe that in the Claimant's own memorandum (Greek Memorial, Annex R 1, p. 67) the alleged due date of delivery of this ship is given as 30th September 1919, a difference of two months. Again, in his letter of 31st October, G. E. Ambatielos says: "As you will recollect, at the time of the negotiations for the purchase of these boats, you intimated that this steamer would be delivered towards the end of October." Could there be clearer demonstration that as regards at least the *War Trooper/Ambatielos* the suggestion that there was a fixed date of delivery under the contract of sale of 17th July 1919 is a complete fabrication? Paragraph 4 of the Greek Memorial relies on one date while the Claimant and his representatives in their contemporary letters allege *two* wholly different dates.

33. On 22nd December 1919, G. E. Ambatielos wrote to Mr. O'Byrne in the Ministry of Shipping in the following terms (Annex 4 (6)):

> "*Re War Bugler*, we confirm telephonic conversation, and as explained on the phone we do not hold you responsible for the detention of this boat in Hong Kong as you have nothing to do with the same whatever, in fact, you have done all humanly possible to accelerate delivery of this and all other steamers."

It may be pointed out here that further delays in delivery occurred early in 1920 owing to the Claimant's decision to convert certain of the ships—among them the *War Coronet/Keramis* and *War Tiara/Yannis*—to oil burning. He persisted in this policy even though it involved delay to *War Sceptre/Trialos*, which was not being so converted (see telegrams passing between his representatives set out at Annex 4 (7), (9) and (10)).

34. There is in fact not a single reference in the entire correspondence or in cables passing between the Claimant and his own agents

in the Far East suggesting that there were fixed dates of delivery of the ships or that the Ministry of Shipping was in any breach of contract in this respect. No such suggestion or complaint was made until March 1921. It is inconceivable that, if delivery dates had been agreed as part of the contract, no complaint should have been made until then. Indeed, the tone of the correspondence is in itself sufficient proof that no delivery dates were agreed (see, in addition to the letters quoted above, Annex 4 (11)).

35. It has now been shown that the negotiations leading up to the contract for the purchase of the ships, as disclosed by the correspondence and by the testimony at the trial before Mr. Justice Hill, and the correspondence after the conclusion of the contract do not support the Hellenic Government's contention that delivery dates were agreed as part of the contract. We shall now consider the statements made from time to time by Major Laing which are heavily relied on by the Hellenic Government to support its case. These statements are demonstrably inconsistent with each other, erroneous on points of fact and therefore unreliable.

36. In the first place, the picture he draws in paragraphs 2 and 3 of his Statutory Declaration of 19th January 1934 (see Greek Memorial, Annex B, pp. 28 and 29) of his own position and duties in the Ministry of Shipping is tendentious, false and vain. As has been pointed out in paragraphs 18 and 19 of this Counter-Memorial, he was subordinate to both Sir John Esplen and the Shipping Controller; he had no authority to conclude contracts or to settle important terms in them without reference to higher authorities. "It was my habit", he says (Greek Memorial, Annex B, p. 28), "to report the deal which I had made and the contract would be signed in that form embodying the terms which I alone had agreed with the purchasers." This is a false description of his powers and contradicts his own account of the negotiations for the sale of ships to the Claimant (see his letter to Sir Joseph Maclay of 20th July 1922, Greek Memorial, Annex E, on p. 32), where he describes how he put forward the proposition for their sale to the Shipping Controller and laid his deductions before the Shipping Committee. Further, Sir Joseph Maclay's letter of 12th July 1922 (see Greek Memorial, Annex E, on p. 32) does not, as Major Laing alleges in paragraph 8 of his Statutory Declaration (Greek Memorial, Annex B, on p. 30), confirm "the powers that I had for the disposal of his Majesty's ships"; on the contrary, it demonstrates that Major Laing, far from agreeing terms on his own with the purchasers, was in "constant touch" with the Shipping Controller.

37. In the second place, Major Laing is wholly wrong in paragraph 8 of his Statutory Declaration (Greek Memorial, Annex B, p. 30) where he states that he was subpœnaed to give evidence by the Crown and that this prevented his being approached by the

Claimant. The records of the Treasury Solicitor, who conducted the case for the Board of Trade, have been examined, and there is no entry of a fee paid for Major Laing's subpœna. Further, it is not, and was not in 1922, a rule of English law that the subpœna of a person as a witness by one party to litigation in the courts reserves that person to the party subpœnaing him.

38. Major Laing's Statutory Declaration also goes beyond his letter of 20th July 1922 to Sir Joseph Maclay, in that the letter does not state that there was any oral agreement with the Claimant or his representatives for fixed dates of delivery and is not inconsistent with a contrary view. Moreover, the Statutory Declaration is in conflict with the assurance given by Major Laing to Mr. O'Byrne before the completion of the contract (see testimony at the trial, third day, p. 58) :

> "Q. (to Mr. O'Byrne). Did he (Major Laing) tell you that the delivery of the steamers had been agreed—that both the manner and the time of delivery had been agreed ?
>
> A. No. I asked about the question of delivery, and he said only as and when they were already for delivery by the builders."

Major Laing's Statutory Declaration is also inconsistent with a statement (already referred to in the British Foreign Secretary's note of 7th November 1934 to the Greek Minister in London : see Greek Memorial, Annex S 4, at p. 117) made by him in 1922 to the Treasury Solicitor when he professed himself entirely unable to remember what he might have said or not have said to the Claimant.

39. In short, Major Laing's statements became increasingly unreliable as time passed, and his Statutory Declaration is wrong in points of fact and is in substance wholly inconsistent with his conduct and statements at the time of the negotiations and conclusion of the contract of sale. No other member of the Ministry is alleged to have given any undertaking as to fixed dates of delivery except Major Laing, and he was not called by the Claimant to give evidence of it at the trial, although the Claimant had every opportunity of calling him.

40. From all this it must be plain that there was no agreement reached as to fixed dates for delivery of the ships, and it was not a term of the contract of sale that the Shipping Controller should deliver them on fixed dates. The conduct of the parties is throughout the period from July 1919 to March 1921 wholly inconsistent with the view that either of them assumed or believed that there were dates of delivery fixed by the contract of sale. It was indeed precisely because there were no fixed dates of delivery, non-observance of which he could treat as a breach of contract, that the Claimant made his persistent efforts to press for early delivery.

41. *The written contract of sale of 17th July 1919 is complete and self-consistent and does not call for explanation by reference to any oral agreement.* The Hellenic Government insists that the words "within the time agreed" in clause 7 of the written contract refer to dates orally agreed (see, for example, Greek Memorial, Annex R 3, on p. 71). This is wrong for the following reasons.

42. Clause 3 of the written contract (see Greek Memorial, Annex A, on p. 26) provides that :

> "The steamers shall be deemed ready for delivery immediately after they have been accepted by the vendor from the contractors",

while the vendor was required by clause 2, as a precondition of payment by the purchaser of the balance of the purchase price, to give 72 hours' notice to the purchaser or his agent of the steamers' readiness for delivery, and to make delivery at the contractor's yard. Clause 6 provides that :

> "On payment of the balance of the purchase money as aforesaid, a legal bill of sale free from incumbrance for the whole of the shares in each of the steamers or the Builders' certificates for each of the steamers shall be handed to the purchaser at the vendor's expense...."

Clause 7 contains the words "within the time agreed" relied on by the Hellenic Government and provides :

> "If default be made by the vendor in the execution of legal bills of sale or in the delivery of the steamers in the manner and within the time agreed, the vendor shall return to the purchaser the deposit paid with interest at the rate of five pounds per cent per annum."

Finally, clause 9 reads :

> "If default be made by the contractors in the delivery of any of the steamers to the vendor, then the vendor may at his option either cancel this Agreement in respect of such steamer or steamers and return the deposit paid in respect thereof to the purchaser, or may substitute for the steamer or steamers hereby agreed to be purchased another steamer or steamers of the same type and expected to be ready at or about the same date, and this agreement shall apply *mutatis mutandis* to the purchase of the new steamer or steamers."

43. The contract provides in fact both for the manner and time of delivery of the ships. In particular the time for delivery of each ship is immediately upon acceptance of it by the vendor from the builder (clause 3 of the written contract), subject to 72 hours' notice of its readiness to the purchaser (clause 2). The contract explains itself, and it is unnecessary to have recourse to any oral agreement to elucidate or identify its terms. In any case the expression "within the time agreed" is inappropriate to the delivery of several ships

having, according to the Claimant, different dates for delivery ; for this the expression would have read "within the times agreed". The expression is appropriate to the time for delivery provided for in clauses 2 and 3 of the contract because the same condition is established in those clauses for all the ships ; but it could not be applied to a number of dates which were *ex hypothesi* different for each ship. There is the further point that the right of substitution, under clause 9 of the written contract, of "another steamer or steamers of the same type and expected to be ready at or about the same date" disposes of any argument that there were contractual dates of delivery. It is impossible to believe that, had the Claimant got contractual dates of delivery, as he alleges, he would have agreed to the substitution of vessels which were merely *expected* to be delivered *at or about* the same date.

44. *Finally, it would have been an impossible business proposition for the Ministry of Shipping to promise fixed dates for delivery to the Claimant when it was selling ships being built under shipbuilding contracts which themselves gave only approximate dates.* This is shown, for example, by the shipbuilding contract [1] with the Shanghai Dock and Engineering Co., which covered the *War Diadem/Panagis, War Tiara/Yannis* and *War Regalia/Mellon* all C type ships. Clause 2 of that contract provided :

> "The said three steamers shall be delivered by the builders afloat in Shanghai harbour, the first in about 10 months, the second in about 11 months, and the third in about 12 months after arrival in Shanghai of the necessary materials named in clause 12 hereof from the United Kingdom, unless the builders shall be delayed by any strike suspension of labour, etc...."

Clause 12 referred to provides :

> "This Agreement is based on delivery in Shanghai of the plates, shapes and bars required by the builders for the construction of the said three steamers at the following United Kingdom of United States of America Government prices...."

Again, the contract for *War Trooper/Ambatielos* provides in clause 2 that it

> "shall be delivered by the builders afloat in Hong Kong harbour as early as possible after delivery in Hong Kong of all necessary materials and auxiliaries".

The conditional dates of delivery and the exceptions clauses in these building contracts would have made it impossible for the Ministry to have offered guaranteed dates to the Claimant.

[1] Complete copies of this contract and of the contract for *War Trooper/Ambatielos* referred to below will be communicated to the Registrar in accordance with Article 43, paragraph 1, of the Rules of Court for the use of the Court and of the Hellenic Government.

The United Kingdom Government submits that the Claimant's losses cannot be attributed to any breach of the contract by the Crown : seven of the ships were delivered to him in accordance with the contract and he was not entitled to delivery of the two remaining ships ("War Regalia/Mellon" and "War Piper/ Stathis")

45. The Hellenic Government contends that the Claimant paid an exceptionally high price for the nine ships, the total amount of £2,275,000 being about £500,000 above the normal market price for the types of ships concerned ; that this sum of £500,000 represented the consideration for having fixed dates for delivery ; that, delivery of six of the ships being delayed, and two not being delivered at all, the Claimant suffered loss from this breach of contract by the Crown in that the ships were unable to earn the freights anticipated ; and that in the result he was unable to complete payment for the ships and was compelled to mortgage seven of them to the Crown in November 1920 as security for the balance of the purchase price. These contentions may be found principally in paragraphs 5, 6, and 20 of the Greek Memorial, in the Claimant's memorandum (Greek Memorial, Annex R 1, p. 67), and in the Hellenic Government's notes of 30th May 1934 and of 2nd January 1936 (Greek Memorial, Annexes R 4 and R 5).

46. The United Kingdom Government contends that the alleged financial losses of the Claimant cannot be attributed to any failure of consideration or breach of contract by the Crown ; and that, in particular, seven ships were delivered in accordance with the contract ; and that, for the reasons given in paragraph 68 below, the Claimant was not entitled to the delivery of the *War Piper/ Stathis* and *War Regalia/Mellon*.

47. It has already been shown (paragraphs 17 to 44) that there were no contractual delivery dates. Moreover, the contention is unfounded that the purchase price was increased by the sum of £500,000 in consideration of fixed delivery dates. The total purchase price of £2,275,000 for six B type and three C type ships worked out at £289,166 for each B type ship and £180,000 for each C type ship, and this conformed closely to prices for newly-built ships then prevailing in the Far East. For example, a B type ship, of the same series as those sold to the Claimant, was earlier in 1919 sold to a Belgian purchaser for £310,000 and another B type ship was accepted by a Greek purchaser for £315,000 (see G. E. Ambatielos's letter of 7th July 1919, paragraph 26 above). Again, as late as February 1920, the Claimant's agent in the Far East, Mr. Rossolymos, reported to him (telegram of 4th February 1920, Annex 4 (8)) that shipbuilders at Kowloon were prepared to take orders for two

or four more B type ships at £35 per ton deadweight, improved vessels but not converted to oil burning. As the deadweight tonnage of the B type ships was 8,250 tons, this price, £288,750, corresponds very closely to that, £288,166, paid by the Claimant (see Annex 5). It is plain therefore that, so far from being charged an exorbitant price, the Claimant was asked to pay a price which was not higher than contemporary prices for Far Eastern ships and that in fact he obtained a reduction of over £20,000 a vessel on each of the B type ships in view of the fact that he was purchasing six of them. The comparison which Major Laing draws in his letter of 20th July 1922 (Greek Memorial, Annex E) with British-built ships is misleading, since in buying ships built in Hong Kong and Shanghai, the Claimant was getting certain advantages ; first, he could more readily benefit (and did in fact benefit, on his trading with the *War Miner/Cephalonia* and *War Trooper/Ambatielos*) from the high freight rates then prevailing in the Far Eastern market not easily accessible to ships built elsewhere ; second, building conditions were more favourable to early completion in the Far Eastern yards, as Major Laing pointed out during the negotiations. But it was not a term of the contract of sale that any particular proportion of the purchase price represented the consideration for the Claimant's expectation of profit, much less was it a term of the contract that this profit was guaranteed or that the Crown was to insure the Claimant against trading losses on the ships.

48. The Claimant's financial difficulties, though they might have no doubt been eased by earlier use of some of the ships than he actually got—this, however, being not physically possible nor contractually required—were due to factors outside the control both of the Ministry and the Claimant. There was the slump in freights, a condition which any purchaser of ships in 1919 had to contemplate. Indeed, the Claimant himself foresaw the slump. He can hardly complain if he suffered by it. Further, the charter-parties on six of the ships which the Claimant arranged in 1920 were cancelled by the charterers—no doubt as a consequence of the slump—as G. E. Ambatielos says in a letter of 3rd February 1921 to the Ministry of Shipping (Annex 4 (17)) :

> "We had every reason to reckon that these charters would yield to the owner in a year's time a minimum net profit of £900,000. However, most unfortunately, we have had all these charter-parties one after another cancelled for no earthly reason or excuse whatever, and we are now suing the charterers for damages."

In the same letter G. E. Ambatielos attributes the Claimant's inability to pay the balance of the purchase price to the fact that banker's facilities, which had been arranged for this purpose, were unexpectedly withdrawn.

49. The Ministry of Shipping did all that it reasonably could to assist the Claimant in his difficulties and to help him minimize his

losses. The ships were all delivered within a reasonable time, four of them being delivered before the end of 1919, and the rate of delivery was due in no small part to the pressure exerted by the Ministry upon the builders. So in a letter of 22nd December 1919 (Annex 4 (6)), G. E. Ambatielos went so far as to tell Mr. O'Byrne that all that was humanly possible had been done on the Ministry's behalf to accelerate deliveries of the ships. By the end of March 1920 the first five ships, listed in Annex 5, had been completed and delivered to him. The sixth ship, namely, *War Coronet/Keramies*, was delivered to Mr. Rossolymos on 15th May 1920, and on 20th May 1920 application was made for the balance of the purchase-money in respect of that ship. *War Tiara/Yannis* was ready for delivery on 29th May 1920, and was later delivered to the Claimant. Further applications for payment of the outstanding balances on these two vessels and of amounts due for the alterations and other extras, ordered by the Claimant for the *War Coronet/Keramies*, were made in June without result, and it was then plain that the Claimant was in financial difficulties. However, though he had not paid the balance of the purchase-price on the two remaining ships *War Regalia/Mellon* and *War Piper/Stathis*, he had fixed both on valuable charter-parties, which could be cancelled by the charterer if the ships were not made available early. The Ministry of Shipping therefore agreed in July 1920 that the two ships should be allowed to undertake the voyages arranged, registered in the name of the Shipping Controller and under the management of the Royal Mail Steam Packet Company and Holt Corporation, so that the Claimant might have the financial benefit of the charter performance.

50. Between June and October 1920 the Claimant was seeking means of meeting his liabilities. After various proposals had been made, it was finally decided by the Shipping Controller that the best way to assist the Claimant and to protect public funds was to accept a mortgage, suggested by the Claimant, of the seven ships which had been delivered to him. The decision to accept the mortgages of the seven ships was sent to the Claimant's representatives in a letter of 8th October 1920 (Annex 4 (12)), which reads :

> "With reference to this Department's letter of 6th instant, I have to inform you that it has been decided that this Ministry will accept the security offered by you, viz., a mortgage of 7 vessels to be placed on the Greek Register, subject to the Greek Government confirming that there are no prior charges on these ships, and, after these mortgages have been duly registered, the remaining two ships *(War Regalia/Mellon* and *War Piper/Stathis)* will be handed over to you—these two vessels in due course also to be placed on the Greek Mortgage Register."

Mortgages and deeds of covenant were duly executed on 4th November 1920 (see Greek Memorial, Annex F).

51. In view of the allegations in paragraphs 6 and 7 of the Greek Memorial, it is necessary to explain the terms of the letter of 8th October 1920 set out above. These allegations are to the effect that there was an agreement between the Ministry and the Claimant for immediate delivery of the *Mellon* and *Stathis*, and that the possibility of registration at a Greek port had been provided for in the agreement only in the event of its being impossible to obtain a certificate from the Hellenic Government assuring priority to the mortgages of the other seven ships. At that time a Greek ship could not be registered under Greek law until she had proceeded to her home port, and a mortgage upon her could not be registered until the ship's register had been opened. It was, therefore, possible for the owner of a still unregistered Greek ship to grant a second or subsequent mortgage on her, to open the register in Greece upon the ship's arrival there, and register such second or subsequent mortgage, so as to give them priority over the first mortgage. The essential condition of delivery of the two remaining ships *Mellon* and *Stathis* was, therefore, that the mortgages of the other seven should be "duly registered" according to the requirements of Greek law so as to give priority. It was not enough that the Ministry of Shipping should obtain legally valid mortgages. The Claimant's representative accepted the conditions regarding the mortgages (see their letter of 8th October 1920, Annex 4 (13)) ; but later attempted to say that there had been an oral agreement for immediate delivery of the *Stathis* and *Mellon* to the Claimant before registry of the mortgages in Greece. This is wrong. The Ministry considered handing over the ships to him in order to assist him financially, even though the condition of registration of the seven ships had not been fulfilled, and it was willing, as a matter of grace, to accept in lieu of its legal rights a certificate from the Hellenic Government that the mortgages should be treated as if they were already on the register. At this point, however, the Claimant intimated that he might claim damages for the allegedly wrongful non-delivery of the *Stathis* and *Mellon ;* the Ministry replied that they could not consider the delivery of these two ships so long as he persisted in such a claim. Then, on 3rd February 1921 (Annex 4 (17)), the Claimant's brother, G. E. Ambatielos, wrote to the Shipping Controller asking that the Claimant be relieved from purchasing the *Stathis* and *Mellon* in face of the financial position of shipping at that time. No assertion or claim was made in respect of lateness of delivery or failure to deliver by dates certain. The proposal was rejected by the Ministry.

52. The Claimant's financial difficulties also led to the Ministry's taking over payment, under a guarantee it had given to the Claimant's brokers, of insurance premiums due on certain of the ships between January and October 1921. Further, the Claimant failed to pay the interest due (under clause 1 of the Deeds of

Covenant) on 1st February 1921, and in fact never paid any of the interest due. Nor did he pay the instalment of principal due on 4th May 1921, or any later instalments.

53. During 1921, certain of the ships were arrested because of non-payment of seamen's wages and other debts. In the case of the *Panagis*, the Board of Trade intervened and subsequently paid £600, being the master's claim for wages and disbursements.

54. While it is not necessary at the present time to go into the details of the alleged losses caused to the Claimant by the Ministry of Shipping, it may be said at once that the Ministry received in all over £300,000 less than the contract price for the nine ships, and that the United Kingdom Government wholly rejects the Claimant's claim in respect of loss and damage, which is exaggerated and unfounded.

The United Kingdom Government submits that the Crown was under no duty to call Major Laing or Sir Joseph Maclay in the Admiralty Court or to produce the letters exchanged between them in July 1922 ; the Claimant could have called them as witnesses himself but failed to do so ; further, all information bearing on the conclusion of the contract which their letters could have disclosed was fully presented to the Court from other sources ; the letters did not prove the existence of any oral agreement for fixed dates of delivery, and there is no reason to suppose that, if they had been called as witnesses, the evidence of Major Laing or Sir Joseph Maclay would have proved the existence of such an oral agreement

55. The Hellenic Government contends that, when the Board of Trade sued the Claimant in 1922 in the Admiralty Division of the High Court of Justice, it failed to call as witnesses Major Laing and Sir Joseph Maclay, who could have proved the oral agreement for fixed dates of delivery ; that it failed also to disclose letters (Greek Memorial, Annex E) exchanged between these two persons in July 1922 which were also evidence of this oral agreement ; and that, as a result of this breach of duty by the Crown, the facts of the case were not so laid before the Court of first instance as to enable it to arrive at a proper and fair decision. These contentions are to be found in paragraphs 9 and 12 to 17 of the Greek Memorial.

56. The United Kingdom Government rejects these contentions as wholly unfounded in law and misconceived on the facts. The Crown had no duty as alleged, and in any event the Court was not misled by the absence of the witnesses or the letters.

57. The steps leading up to the proceedings in the High Court described in paragraph 58 below were as follows. Between April and

October 1921, negotiations took place between Sir Ernest Glover, acting for the Board of Trade, which had taken over the functions of the Ministry of Shipping, and the Claimant and his representatives, for a general settlement, but none was reached. In June 1921 the Claimant sought to refer to arbitration, under clause 12 of the sale contract, a number of matters ; but the Board of Trade did not, as its letter of 29th June 1921 (Greek Memorial, Annex J) shows, accept that there was any dispute under the contract of sale calling for arbitration, although it named Mr. W. N. Raeburn, K.C., as one who would act as arbitrator for the Board in case of need. But in the same letter the Board told the Claimant that they were starting proceedings against him, under the mortgages of November 1920, in the Admiralty Division of the High Court of Justice in England. Thus there was no "change of attitude" as suggested in paragraph 8 of the Greek Memorial ; nor was the right to commence proceedings under the mortgages in any way "created" by the drawing out of the negotiations.

58. The Board of Trade, acting on behalf of the Crown as mortgagee, brought three actions *in rem* for valuation and sale of the *Ambatielos*, *Cephalonia* and *Panagis* and an action *in personam* against the Claimant for recovery of principal and interest, and other sums, in respect of the *Nicolis* also due under the mortgage deeds and deeds of covenant of November 1920. The Claimant, defendant in these actions, claimed damages for late delivery of six ships and non-delivery of two ships, the *Mellon* and *Stathis*, under the contract of 17th July 1919. He also claimed damages on the ground that the ships delivered were not according to contract, but were of less value because of defects and omissions. He enjoyed every right available to a litigant in the English courts, and even some privileges. He was represented before and at the trial by counsel of the first rank, namely, Mr. A. D. Bateson, K.C., Mr. W. A. Jowitt, K.C., and Mr. G. P. Langton, of whom two later became High Court Judges and one Lord Chancellor. He was given leave to defend the actions, even though he had allowed time to run on until, under the rules of court, he could have been refused leave to do so. The trial itself, in November 1922, lasted no less than eight days, in which he had every opportunity to produce evidence and to establish his case. He called Mr. Bamber, a Board of Trade official, to give testimony on his behalf.

59. There was no breach of any rule of English law or practice by the Crown in not calling Major Laing or Sir Joseph Maclay as witnesses at the trial before Mr. Justice Hill. The Crown was, like any other litigant in the courts, free to call such witnesses as it considered necessary to prove its case. It was under no duty to call either Major Laing or Sir Joseph Maclay and the Claimant was free and able to call them (see paragraph 37 above). There was no question of surprise, since the Crown opened its case for some four

days of the hearing, and, as it did not call them, the Claimant had ample opportunity to decide whether to call them himself. He could, if necessary, have asked for an adjournment of the trial.

60. Further, there was no breach of any rule of English law or practice by the Crown in not producing to the Court the letters exchanged in July 1922 between Lord Maclay and Major Laing. The Crown never claimed privilege of State from disclosure of these letters as alleged by the Claimant in his memorandum attached to the Greek Minister's note to the British Foreign Secretary of 12th September 1925 (Greek Memorial, Annex R 1), nor could the Crown have done so, had the Claimant sought an order for production of the letters. The Claimant did not trouble to seek any such order, although he was aware of the existence of the letters (see his affidavit at Annex 3). However, had the Claimant sought such an order, it would have been open to the Crown to show, what was in fact the case, that these letters were called into existence by the Treasury Solicitor for the preparation of the Crown's case in the proceedings pending against the Claimant. Sir Joseph Maclay and Major Laing were no longer in the Government service at this time, and therefore the Treasury Solicitor invited Sir Joseph Maclay to put certain questions to Major Laing, which he did in his letter of 12th July 1922 (see Greek Memorial, Annex E). Now it is an indisputable rule of evidence in English law—and a just and reasonable one—that a litigant shall not be required to disclose documents called into existence by his legal advisers either for advice or for the conduct of his case. So *Phipson on Evidence* (8th edition, 1942) says at page 188 : "A client (whether party or stranger) cannot be compelled, and a legal adviser (whether barrister, solicitor, the clerk or intermediate agent of either, or an interpreter) will not be allowed without the express consent of his client, to disclose oral or documentary communications passing between them in professional confidence", and, on page 193, English court decisions are cited to show that the same rule applies to oral or documentary information from third persons, which has been called into existence by a solicitor for the purposes of litigation. No demand was made for the production of these letters of July 1922 either before or at the trial, but, had such a demand been made, no reason appears why the Crown should not, like any other litigant, have taken advantage of this rule. In short, the Crown was in no sense in breach of any duty in respect of these letters.

61. It follows from the above that, if the Claimant's case was prejudiced by the fact that neither Major Laing nor Sir Joseph Maclay testified at the trial, it was his fault alone. He and his legal advisers were fully aware of Sir Joseph Maclay's position, as can be seen from G. E. Ambatielos' letter of 7th July 1919 (see paragraph 26 above). Further, he and his legal advisers knew well that Major Laing was a material witness to the existence of the alleged oral

agreement, as is shown by their efforts to obtain from him a statement of the evidence he would give if the Claimant chose to call him (Greek Memorial, Annex P, paragraph 9 ; Annex R 3, top of p. 73 ; Annex R 4, paragraph 9, pp. 80-81). The Hellenic Government admits (Greek Memorial, p. 81) that it was procedurally possible for the Claimant to have called Major Laing (see paragraph 37 above) : and the suggestion (Greek Memorial, Annex R 3, p. 73 top, and Annex R 5, p. 89 bottom) that an attempt to subpœna him failed is unproven and absurd, since he was present at the trial and had been in touch with the Claimant before the trial (see Claimant's affidavit, Annex 3). The obvious inference to be drawn from the Claimant's failure to call Major Laing is that drawn by Lord Justice Bankes in the Court of Appeal (Annex 2) : namely, the Claimant and his legal advisers were far from certain what Major Laing would say, and had in fact no reason whatever for supposing that the evidence of Sir Joseph Maclay would be favourable to them. They could have called them, but, being uncertain what they would say, thought it wiser not to.

62. Even if the letters of July 1922 had been before the Court they would have added nothing material to what the Court had already been told. With one exception, there is no material information in Major Laing's letter of 10th July 1922 which was not specifically mentioned in the letters exchanged in May 1921 between Major Laing and the Claimant, which were before the Court (for full texts, see Greek Memorial, Annex S 3, pp. 114 and 115). The exception is the reference to the sum of £500,000, alleged by the Claimant to be a part of the purchase price (the accuracy of this statement as a correct assessment of the position from a business point of view has been disproved in paragraph 47 above) ; however, this was mentioned by the Claimant in his testimony before the Court. In the course of his judgment (Annex 1, p. 187), Mr. Justice Hill made the following observation about the letters of May 1921 :

> "The letters in May 1921 do not help the defendant. Major Laing had ceased to be on the staff of the Ministry on 30th September 1920 and was not the plaintiff's agent to make admissions. But in any case, the assurance stated to have been given by Major Laing was not that the dates were contractual, but that he was satisfied that the dates mentioned in the defendant's letter of 3rd July 1919 could be relied on. It all points to the expression by Major Laing of an expectation of delivery within certain months. But that is a very different thing from a contract that they shall be so delivered."

These observations would be equally applicable to the letters of July 1922. For even if it be assumed that Major Laing's statements in his letter of 20th July 1922 constitute an accurate account of what passed between him and the Claimant, there is nothing to show that Major Laing had, on behalf of the Shipping Controller, given a

definite undertaking for fixed dates of delivery of the ships. There is, indeed, nothing in the letter of 20th July 1922, which is inconsistent with the general contention of the Crown that the Claimant was informed of the dates on which it was anticipated that delivery would be given, but that no agreement was made that the ships would in fact be delivered by those dates. It is impossible therefore to believe that the production of the letters at the trial could have made any difference to the result, and in any case the Claimant could have called Major Laing in person.

63. At this point it is relevant to note the position, under the English rules of evidence, of the Claimant's attempt to prove that the written contract of sale of 17th July 1919 must be read in the light of the alleged oral agreement for fixed dates of delivery of the ships. The contract itself contains no provision as to fixed dates of delivery; moreover, it has been shown already (paragraphs 41 to 43) that the words "within the time agreed" in clause 7 of the contract refer to clauses 2 and 3, and further are inappropriate to describe dates of delivery, and that the time agreed for delivery was the time when the vessels were completed by the builders. The contract then does not call for any addition or elucidation in this respect. Therefore, under the English rules, evidence of an oral agreement imparting fixed dates of delivery was strictly inadmissible. Thus in *Phipson on Evidence* (8th edition, 1942) we find that: "Where a contract, not required by law to be in writing, purports to be contained in a document which the Court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at the time of executing the document, if it be not inconsistent with the documentary terms" (p. 567). But this is an exception to the general rule that "When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from, the terms of the document" (p. 564). The present case did not fall within the exception because the alleged oral agreement was plainly inconsistent with the terms of the written contract as construed by the Court. The Crown made formal objection at the trial to the inadmissibility of evidence to prove the alleged oral agreement, and Mr. Justice Hill, as a matter of form, upheld this objection. But what is important is that in fact the Crown did not press this objection at the trial but gave the Claimant the opportunity of assembling and presenting to the Court evidence of an oral agreement; further, Mr. Justice Hill gave careful attention to this evidence, though ruling that it was strictly inadmissible, and devoted a substantial part of his judgment to it. In short, the Claimant, far from being denied justice in this matter, was given an opportunity to prove the alleged oral agreement which the judge

would have been fully justified under English law in refusing to him. This hardly suggests a "procedure so deficient as to exclude all reasonable hope of fair decisions" (see Greek Memorial, Annex R 5, at p. 91).

The United Kingdom Government submits that the decision of Mr. Justice Hill in the Admiralty Court and that of the Court of Appeal were both just and in accordance with the rules of English law and practice ; in these proceedings the Claimant was given the same treatment as a United Kingdom national

64. In a long, careful and detailed judgment running to seventeen pages, which was delivered on 15th January 1923, Mr. Justice Hill dealt first with the Claimant's claim for damages for late delivery of the ships (Annex 1, at p. 185). He held that evidence of a verbal agreement outside the written contract of sale of 17th July 1919 was inadmissible as contradicting the written contract, pointing out that the written contract provided both for the manner and for the time of delivery of each steamer : in particular, each steamer was to be delivered immediately after it had been accepted by the vendor from the contractor, the buyer having 72 hours' notice of readiness for delivery within which to take delivery.

65. Legally, this could have been the end of the Claimant's case on late delivery. Nevertheless, Mr. Justice Hill reviewed, and gave his opinion on, the evidence for an oral agreement, as though it had been admissible (Annex 1 at p. 186). He found it most improbable that the Shipping Controller should agree to fixed dates of delivery to the Claimant without any clause of exception, when the contracts under which the ships were built for the Crown gave delivery times depending on conditions and contained wide exception clauses. He observed that G. E. Ambatielos had done all he could to induce the Shipping Controller's representatives to insert fixed times in the written contract, but they had refused ; that Major Laing had no authority to settle finally the terms of sale and, if he had given any oral promise as to fixed delivery dates, it was not upon such terms that the contract was finally agreed ; and that, while Major Laing had given no evidence, the evidence of Mr. Law was too indefinite, while that of G. E. Ambatielos was unreliable : "on his own admission, he was deceiving the defendant. I think that in the box he was trying to deceive me." But, the learned judge continued, even if the evidence of an oral agreement for fixed delivery dates were admissible and the oral agreement had been proved, he found it impossible to say what the agreed fixed dates were : "Were they the estimated months put on a buff slip by Mr. Bamber, or the dates mentioned in the defendant's letter of 3rd July 1919, or the date 'delivery by March' in a pencilled note of Major Laing's on

that letter, or the dates mentioned in the postscript to G. E. Ambatielos' letter of 7th July 1919, or the dates mentioned in his letter of 10th July ?" In short, there could have been no agreement, since the letters showed that G. E. Ambatielos and Major Laing were never *ad idem* as to the months of delivery. Further, the account of the conversation between the Claimant and Major Laing in Paris in August 1919 and the letters exchanged between them in May 1921 all go to show that Major Laing was expressing an expectation only as to delivery dates ; the telegram of 31st October 1919 could not be used to found a contract not otherwise proved.

66. In addition, Mr. Justice Hill found that the conduct of the Claimant and G. E. Ambatielos (Annex 1, p. 188) was wholly inconsistent with the view that the Shipping Controller was under a binding contract as to fixed dates of delivery. Though the alleged breach by late delivery began, according to the Claimant's case, in August 1919, the Claimant made no suggestion of it at all until March 1921 and no suggestion in writing until April 1921. In August and October 1920, when the total amount still owed by the Claimant on the purchase price of the ships was agreed, no suggestion was made that the Claimant had any counter-claim. Mr. Justice Hill concludes :

> "It is foolish to suppose that the defendant had claims for late delivery running into many hundreds of thousands of pounds and kept silent about them if they had any foundation in law. It is true that there are many complaints by the defendant as to delay, and requests to the Ministry to hurry on the builders. But that is quite consistent with the expectation of deliveries within certain times. It does not prove a contractual obligation. Had there been a contract, the letters would have been very different. I find there was no contract to deliver at times certain."

67. This part of the judgment shows, first, that the rules as to the admissibility of evidence were liberally interpreted in the Claimant's favour so that his case for there having been an oral agreement was argued and considered ; second, that all the evidence that was calculated to prove the oral agreement for fixed dates of delivery was put before Mr. Justice Hill. In particular, the substance of Major Laing's letter of 20th July 1922 (Greek Memorial, Annex E) was in effect placed before Mr. Justice Hill (see paragraph 62 above), and the alleged increase by approximately £500,000 in the purchase price and the alleged inducement to the Claimant to buy the ships were brought before Mr. Justice Hill by the Claimant and by G. E. Ambatielos, were put to Mr. O'Byrne in cross-examination (testimony at the trial, third day, p. 64) and fully argued by Mr. Bateson, the Claimant's leading Counsel (transcript of the trial, fourth day, pp. 60-73). In addition, Mr. Justice Hill disposed of Major Laing's alleged promises and *a fortiori* of any evidence of them produced subsequent to the trial by saying (Annex 1, on p. 187) :

> "If, in the course of the preceding negotiations, any promises were made by Major Laing as to delivery at fixed times, it was not upon such terms that the contract was finally agreed."

68. In the next part of his judgment, Mr. Justice Hill dealt (Annex 1, pp. 188-190) with the defendant's claim for damages by reason that the ships delivered were not according to contract, but of less value because of defects and omissions. He then comes to the claim for damages for the non-delivery of the *War Piper/Stathis* and *War Regalia/Mellon*, which is an issue raised in the Greek Memorial (paragraphs 6 and 7). The learned judge points out that, so far as the claim for non-delivery of these two ships rests upon the allegation that there was a contract to deliver on fixed dates, it fails for the reasons already given ; and that, so far as it rests on the contract of sale of 17th July 1919, it fails because the Claimant was never ready and willing to pay the balance of the sale price against delivery (Annex 1, p. 191). The learned judge then reviews the history of the case up to the agreement for the mortgage of the ships in October 1920 (Annex 1, p. 191), and finds that the letters of 8th October 1920 (for text see Annex 4 (12) and (13)) "state the terms verbally offered to and accepted by Mr. G. E. Ambatielos. The letters confirm that agreement" (Annex 1, p. 192). They made it clear, in the view of Mr. Justice Hill, that

> "the condition of delivery of the *Mellon* and *Stathis* without cash payment was (1) a mortgage of the other seven ships ; (2) the registration of the other seven ships in Greece ; (3) an assurance by the Greek Government that there were no prior charges on them ; and (4) the registration in the Greek Register of the mortgages. There was a further stipulation that in due course the *Mellon* and *Stathis* should also be mortgaged, for that must be the meaning of the words 'placed in the Greek Mortgage Register'."

The deeds of covenant concluded on 4th November 1920 were not inconsistent with the continuance of this bargain. The Shipping Controller could not now refuse delivery of the *Stathis* and *Mellon* solely because of default in payment of the purchase price, but he could do so under the bargain of 8th October 1920. "When therefore", continues Mr. Justice Hill (Annex 1, p. 193), "as soon as the mortgages were executed, the defendant demanded delivery of the *Mellon* and *Stathis*, the Shipping Controller was fully justified in his reply of 8th November 1920 ; 'The two ships will only be transferred after the other seven vessels have been duly registered at Argostoli and the mortgages placed on the Greek register.' " (See Annex 4 (14), (15) and (16).)

69. In the remainder of the judgment, Mr. Justice Hill dealt with the Crown's claims (Annex 1, pp. 194-201), and it is sufficient here to note his finding (Annex 1, p. 200) that the defendant was "in default in a very large amount at the date of the writs".

70. The United Kingdom Government contends that this judgment was sound and just ; that it dealt faithfully with all that there was to be said in the Claimant's favour, and that it was in full accord with the evidence.

71. The Claimant, having given notice of appeal from Mr. Justice Hill's judgment, applied to the Court of Appeal on 5th March 1923 for leave to call Major Laing and Sir Joseph Maclay as witnesses at the hearing of the appeal and supported his application by the affidavit referred to above (paragraph 60). The Court of Appeal rejected this application (see Annex 2), and the Hellenic Government contends in paragraphs 17 to 19 of the Memorial that, in doing so, it committed a denial of justice ; that it deviated from its normal practice on applications to call new evidence on appeal ; and that it was prejudiced against the Claimant as a foreigner. The United Kingdom Government considers this contention false and scandalous.

72. There is some confusion in paragraph 17 of the Greek Memorial about the application to the Court of Appeal. The Claimant applied to call two witnesses, not as the Greek Memorial suggests to have the letters produced which were exchanged between them in July 1922. It is, of course, true that had Major Laing and Sir Joseph Maclay been called on the hearing of the appeal, they could have given evidence about these letters ; but the substance of the application—and so regarded by the Court of Appeal itself—was to bring these two individuals to testify orally before the Court of Appeal about their rôles in the July 1919 transaction.

73. It can be seen from the judgments of the superior courts of England that three conditions must be satisfied before fresh evidence is admitted upon the hearing of an appeal against judgment in the court of first instance. On the general principle, Lord Chancellor Chelmsford said in *Shedden* v. *Patrick* (1869), Law Reports, Scotch and Divorce Appeals, House of Lords, Volume 1, page 470 :

> "It is an invariable rule in all the courts .... that if evidence which either was in the possession of the parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

The three conditions are : first, the evidence must be new ; second, it must be of such importance that it would very probably have influenced the decision of the Court (per Scrutton L. J. in *Rex* v. *Copestake* (1927), Law Reports, King's Bench Division, Vol. 1, at p. 477) ; third (the general principle), the new evidence must be such that the party seeking to have it admitted could not by reasonable diligence have produced the evidence before (*Nash* v. *Rochford*

Rural Council (1917), Law Reports, King's Bench Division, Vol. 1, p. 384, and *Shedden* v. *Patrick* referred to above).

74. The decisions cited by the Hellenic Government in paragraph 18 of its Memorial conform to this rule. Thus in *re Neath Harbour Smelting and Rolling Works* (1885), Times Law Reports, Volume 2, page 94, it is true that the Court declared itself to be not wholly convinced by the applicant's explanation of his alleged want of diligence in bringing forward the new evidence at the trial ; but the first and second conditions of the rule were fully satisfied and the Court therefore gave him the benefit of the doubt on the third. In H.M.S. *Hawke* (1913), Law Reports, Probate Division, page 214, all three conditions were satisfied, Lord Justice Vaughan Williams emphasizing at page 239 that the search for new evidence after trial was *not* undertaken by the applicants only after they had "taken their chance of winning their case independently of any search for wreckage" and failed. Similarly, in *Nicholson* v. *Inverforth* (*Times* newspaper, 18th October 1935), the three conditions were present. The report of *Sinanide* v. *La Maison Kosmeo* (1928), 139 Law Times Reports, page 365, does not throw any light on the reasons for which the Court of Appeal admitted evidence not produced at the trial, it being stated simply that new evidence was admitted, but there is no reason to suppose that the Court of Appeal departed from its usual practice.

75. In the present case, *none* of the three conditions were satisfied. *First*, the evidence to be found in Major Laing's letter of 20th July 1922 to Sir Joseph Maclay was not new, for its substance (as has been shown in paragraph 62 above) was brought repeatedly to the attention of Mr. Justice Hill during the trial both in evidence and in argument. *Secondly*, even if Major Laing had testified that he had given an oral undertaking on delivery dates, it would have simply contradicted the evidence of Mr. Bamber and Mr. O'Byrne and have been "oath against oath", to use the words adopted by Lord Chancellor Loreburn in *Brown* v. *Dean* (1910), Law Reports, Appeal Cases, page 373, where he points out that it is not enough that the new witness shall merely contradict the evidence given by witnesses at the trial ; the new evidence must be such that it would probably have influenced the court. *Thirdly*, the Claimant could without difficulty have called both Major Laing and Sir Joseph Maclay at the trial if necessary by subpœna (see paragraph 37 above). The Hellenic Government has even acknowledged that there was no procedural or other bar to their being called (Greek Memorial, Annex R 4, paragraph 9). The Claimant decided not to call them, nor is there any proof that he ever tried, and he cannot blame the Court of Appeal for his own error of judgment. Lord Justice Bankes described the position very clearly, suggesting that the Claimant and his legal advisers had reasoned as follows :

> "We had reason to suppose that Major Laing was a favourable witness, but we were not quite certain: he would not tell us exactly what his evidence was going to be and therefore we did not like to risk calling him. But after the trial and after the case has been decided, we have been told that if we called him he might have given evidence in our favour."

He then said:

> "It is quite plain that this Court would never allow such an application to succeed, because there would be no end to litigation."

The Court of Appeal arrived at the same conclusion as regards Sir Joseph Maclay.

76. In this judgment the Court of Appeal adhered strictly to the rules of English law and to its own practice in regard to the admission of evidence; and there is no trace of prejudice against the Claimant as a foreigner.

The United Kingdom Government submits that the Claimant failed to exhaust his municipal remedies

77. The Claimant did not attempt to appeal to the House of Lords against the decision of the Court of Appeal upon his application to call Major Laing and Sir Joseph Maclay as witnesses on the hearing of his appeal; and he abandoned his main appeal which he had lodged against the decision of Mr. Justice Hill. The Hellenic Government has stated, but in no way demonstrated, that these appeals were not efficacious means of obtaining redress for the Claimant if the decisions complained of were wrong (Greek Memorial, Annex R 5, p. 93).

78. As regards the decision of the Court of Appeal refusing to admit new witnesses, no reason appears why the Claimant should not have appealed against it to the highest court, the House of Lords. The Appellate Jurisdiction Act, 1876, Section 3, provides:

> "Subject as in this Act mentioned, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following, that is to say (1) of Her Majesty's Courts of Appeal in England...."

This right is not qualified in the Act itself. Further, it was not necessary in such a case in 1923 to obtain leave for appeal to the House of Lords, nor was this decision of the Court of Appeal in the class of decisions by that Court declared to be final by statute. If the allegations of the Hellenic Government were true that the Court of Appeal was prejudiced against the Claimant as a foreigner and decided contrary to its normal practice regarding the calling of new evidence on appeal, there is no doubt that the Claimant had an effective right of appeal to the House of Lords.

79. The Claimant also had an effective right of appeal against Mr. Justice Hill's decision if, as alleged in paragraph 9 of the Greek Memorial, he found against the weight of all the evidence which was before him. All appeals to the Court of Appeal are by way of rehearing, and the Court of Appeal would have been free to draw such inferences of fact from the extensive documentary and oral evidence in the case as it thought fit. The compelling inference to be drawn from the fact that the Claimant abandoned his appeal, and from the argument now advanced by the Hellenic Government (Greek Memorial, paragraph 10) that appeal was useless without the evidence excluded by the Court of Appeal, is that they had found Mr. Justice Hill's judgment unimpeachable upon the evidence before him. Despite the unsupported allegation that his judgment was "against all the evidence", the failure to pursue the appeal is a tacit admission that he was right upon such matters as the non-delivery of the *War Piper/Stathis* and *War Regalia/Mellon* as well as on the non-existence of any oral agreement for fixed delivery dates. Further, it has been shown (paragraph 62 above) that all material evidence was before him. The Claimant's financial difficulties and his own view of whether an appeal would be efficacious do not affect the fact that he did not pursue his remedies to the end in the English courts.

Review of the diplomatic correspondence

80. Before proceeding to examine the merits of the Hellenic Government's application from the point of view of international law, it is pertinent to observe that the statement of the Hellenic Government's case in the Memorial is the culmination of a lengthy course of diplomatic correspondence extending intermittently over a period of twenty-six years. At every stage of that correspondence complete answers have been furnished to the contentions put forward by the Hellenic Government, which has constantly shifted its ground and with the passage of years has become increasingly free with its complaints of irregularity and injustice, always putting forward new grievances, in an effort to force a decision in the Claimant's favour.

81. The Hellenic Government first took up the case in 1925, when the Greek Minister in London sent to the British Foreign Secretary a memorandum which had been received from the Claimant (Annex R 1 to the Greek Memorial). In this memorandum the Claimant recognized that "the final judgment of a British court, unappealed against, closes the transaction from a legal point of view". It asked for a reconsideration of the case and relief on moral grounds. It argued that the Laing-Maclay letters of July 1922 (Greek Memorial, Annex E) proved the validity of the contention that delivery dates had been agreed as part of the contract for the purchase of the

ships and that, if the Crown had not relied on a technical privilege to withhold evidence or if the Claimant had been permitted to produce the letters on appeal, he could have appealed against the Admiralty Court's decision with every prospect of success. He made no complaint of denial of justice contrary to international law, and no charge against any official of the United Kingdom Government or of prejudice on the part of the English courts. In reply, the Foreign Office pointed out that a similar memorandum had been submitted earlier in the year by the Claimant to the President of the Board of Trade, who, after a full and careful review, had found that there was no justification, either on legal or on moral grounds, for granting any relief on the lines desired (Annex S 1 to the Greek Memorial).

82. It was not until after the elapse of more than seven years that the Hellenic Government took up the case again. On 7th February 1933, the Greek Minister addressed a further note to the Foreign Secretary (Annex R 2 to the Greek Memorial). This note put forward no new facts, but, claiming that the dispute was of an international order, invited the United Kingdom to refer it to the Permanent Court of International Justice or any other international arbitral tribunal which might be agreed. The Foreign Office replied in a note of 29th May 1933 to the Greek Legation (Annex S 2 to the Greek Memorial) that the dispute arose from an ordinary commercial contract and that it had accordingly been settled by the competent tribunals in England to whose jurisdiction the Claimant had submitted ; that no question of an international claim arose, unless the Hellenic Government contended that the decisions of the English courts constituted a denial of justice, which it had not done ; that in any case a claim on this ground would be barred because the Claimant had not exhausted the facilities for appeal provided by English law ; and that for these reasons the United Kingdom Government was unable to agree that the matter should be submitted to international arbitration.

83. On 3rd August 1933, the Greek Minister addressed yet another note (Annex R 3 to the Greek Memorial) to the Foreign Secretary. This note argued that the Laing-Maclay letters established beyond doubt that delivery dates had been agreed ; that local remedies had been exhausted within the meaning of international law (though it was admitted that he had not proceeded with his appeal because he was financially unable to do so) ; and that those who conducted the case before the English courts on behalf of the Crown had, by withholding the Laing-Maclay letters of July 1922, deliberately presented a case "which was known to be or which there was strong ground for thinking to be untrue", and had thereby caused a miscarriage of justice and deprived the Claimant of a fair trial before the English courts—miscarriage of justice through the conduct of the Crown's case by the Treasury Solicitor and Attorney-General

was the charge now made. The note concluded by inviting the United Kingdom Government to reconsider the case and, if it still entertained doubts as to the validity of the claim, to submit the matter to arbitration. The considerations put forward in this note were fully dealt with in the Foreign Secretary's reply of 28th December 1933 (Annex S 3 to the Greek Memorial). Paragraphs 7-13 of the Foreign Secretary's note answered the contention that delivery dates had been agreed and demonstrated that the Laing-Maclay letters contained no evidence which was not before the Court, thereby repudiating the new accusations of dishonesty on the part of the officers of the Crown and the suggestion that the non-disclosure of the letters had caused a miscarriage of justice or deprived the Claimant of a fair trial. The note also reminded the Hellenic Government that the Claimant could himself have called Major Laing and Sir Joseph Maclay as witnesses at the trial without the slightest difficulty if he had wished to do so (paragraph 14). On the question of the exhaustion of local remedies, it was pointed out that they had clearly not been exhausted, since the Claimant had abandoned his appeal and the fact that he had been financially unable to prosecute his appeal was immaterial in considering whether he had exhausted his remedies (paragraph 18). The note concluded that there was no justification for the Hellenic Government's proposal that these matters should, more than ten years after they occurred, be reopened and made the subject of international arbitration.

84. In his next approach, in a note of 30th May 1934 (Annex R 4 to the Greek Memorial), the Greek Minister relied on the statutory declaration (Greek Memorial, Annex B) which had been obtained by the Hellenic Government's solicitors in London from Major Laing and which was claimed to support the contention that delivery dates had been agreed. At the same time, the charges of dishonesty on the part of the officers of the Crown were substantially withdrawn and the Minister's note admitted that as a matter of "technical legal procedure" Major Laing could have been called as a witness at the trial but excused the Claimant's failure to call him on the ground that he did not know what Major Laing's testimony would be. The Hellenic Government offered to have the question whether local remedies had been exhausted referred to arbitration as a preliminary issue. The British Foreign Secretary replied fully in a note of 7th November 1934 (Annex S 4 to the Greek Memorial). In paragraphs 7-12 of his reply, he drew attention to a number of inaccuracies in Major Laing's latest statement as reported in the Greek Minister's note, which showed how little reliance could be placed on any of it. In particular, the Foreign Secretary mentioned that thirteen years previously Major Laing had given a definite denial that he had assured or guaranteed delivery dates (paragraph 9). The United Kingdom Government

maintained its refusal to go to arbitration on the ground that there was no justification for the Hellenic Government taking up the case which had been finally disposed of by the English courts.

85. A year passed before the Greek Minister made further representations in a note of 2nd January 1936 (Annex R 5 to the Greek Memorial). In this note, it was emphasized that the Hellenic Government did not regard the responsibility of the United Kingdom Government as arising from the action of its courts but from the action or oversight of the officials or agents of the United Kingdom Government in not laying all the information in their possession before the Court and, in particular, in failing to produce the Laing-Maclay letters on July 1922. The note also argued that the rule regarding exhaustion of local remedies did not bar the Hellenic Government from taking up the claim. The rule, it was contended, only required M. Ambatielos to exhaust such remedies as were efficacious and adequate (on this point see paragraph 100 below): there was no possibility of appeal against the decision of the Court of Appeal refusing leave to call new witnesses on appeal, and this decision rendered an appeal against Mr. Justice Hill's decision inefficacious. The Hellenic Government again pressed the United Kingdom Government to agree to arbitration. The United Kingdom Government's reply was contained in a note of 1st July 1936 (see Annex S 5 to the Greek Memorial).

86. The Hellenic Government then dropped the case until 1939, but in November of that year *for the first time* charged that the withholding of documents from the Court and the refusal of leave to produce new evidence on appeal constituted a violation of Article XV, paragraph 3, of the Treaty of 1886 and claimed arbitration under the Protocol attached to that Treaty (Annex R 6 to the Greek Memorial). The British Foreign Secretary replied on 26th December 1939 that the United Kingdom Government was unable to accept this belated suggestion and could find no foundation for the contention that it could be called upon to agree to arbitration under the Protocol (Annex S 6 to the Greek Memorial).

87. The Greek Minister repeated the Hellenic Government's request for arbitration under the Protocol and Treaty of 1886 in a note of 6th August 1940 (Annex R 7 to the Greek Memorial), and the request was again rejected by the United Kingdom Government (Annex S 7 to the Greek Memorial).

88. There the matter rested during the war, but in 1949 the Hellenic Government again reverted to the case, and this time declared its intention, failing agreement by the United Kingdom Government to go to arbitration in accordance with the Protocol of 1886 and the Declaration of 1926, of invoking Article 29 of the Treaty of 1926.

89. It will be observed that no allegation of breach of the Treaty of 1886 was made until more than sixteen years after the proceedings in the English courts which are the subject of the Hellenic Government's complaint.

The United Kingdom Government submits that the treatment of the Claimant did not constitute a breach of Article XV, paragraph 3, of the Treaty of 1886 or of any general rule of international law

90. The Hellenic Government bases its present application to the Court on Article XV, paragraph 3, of the Treaty of 1886. This reads as follows :

> "The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the courts of justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects...."

The Hellenic Government maintains, if its Memorial is correctly understood, that this provision guarantees to the alien not only equality of treatment with nationals before the courts, but also a standard of justice complying in all respects with the requirements of international law. It is contended on behalf of the Claimant that he has not received justice in accordance with Article XV, paragraph 3, as thus interpreted. In particular, the treatment accorded to him fell short of the standard of justice required by the Treaty because :

(1) the Board of Trade and the Court of Appeal were prejudiced against him as a foreigner (an entirely new allegation) ;

(2) material evidence was withheld from Mr. Justice Hill, who gave the judgment against the Claimant in the first instance ;

(3) the Claimant was prevented from producing this evidence both before Mr. Justice Hill and on appeal.

91. The Hellenic Government's contentions of fact have already been dealt with, and it has also been shown that both the conduct of the proceedings on behalf of the Crown before the English courts on behalf of the Crown and the decisions of the English courts were in conformity with English law and practice. It is now proposed to examine the international law aspects of this case and to show that the Hellenic Government has in reality no case to take up under Article XV of the Treaty of 1886 or for that matter under the general principles of international law.

92. It is the submission of the United Kingdom Government that the language of paragraph 3 of Article XV does not justify the broad interpretation apparently put upon it by the Hellenic Government.

The provision in question, in fact, does no more than guarantee that the subjects of each Contracting Party shall have the same freedom of access to the courts of the other Contracting Party as the nationals of that other Contracting Party.

93. The reasoning by which the Hellenic Government claims that paragraph 3 of Article XV requires a standard of justice complying with the general principles of international law is clearly at fault. The United Kingdom Government does not, of course, deny that Greek nationals are entitled to treatment in the United Kingdom fully according to the requirements of international law, and it has no doubt, indeed, that the Claimant received such treatment, as will be shown below, but it does deny that Article XV guarantees such treatment.

94. The Hellenic Government's argument on this point is set out as follows in paragraphs 14 and 15 of the Memorial :

> "This provision guarantees an absolute equality of treatment to the nationals of each State appearing before the courts of justice of the other, whether as plaintiff or as defendant. In allowing freedom of access to these courts, each State does so without limitation. In the first place, it is obvious that the foreigner must enjoy the same rights and privileges as the native subject. But there is more to it than that : it is not enough that the foreigner should enjoy freedom of access to the courts of justice, it is also necessary that the justice administered should comply with international law....
>
> 15. The principles recognized by Article 15 of the Treaty of 1886 are indeed no more than a particular application of a much more general principle to which the Parties have adhered : the right of free communication. This implies certain minimum essential rights, in particular, freedom of defence. If the right of free communication is granted, the laws giving effect to it contribute the means of the domestic application of an international duty. Consequently, any restrictions imposed upon the rights of a defendant, even if applicable to the nationals of the country concerned, are not necessarily binding on a foreigner. For a State which undertakes to grant the right of free communication undertakes to create for the benefit of the nationals of the co-contracting State a legal status which complies with international law. In other words, it is obliged not only to assimilate the position of the foreigner to that of nationals with regard to the administration of justice, but also, and primarily, to guarantee for the foreigner a type of justice which will comply with the needs of universal commerce."

The fallacy in this argument is to be found in the second sentence : "In allowing freedom of access to these courts, each State does so without limitation." It is perfectly clear that Article XV, paragraph 3, does contemplate certain limitations on the right of free access to the courts, namely, those which apply to nationals of the State

concerned. What it prohibits is "*other* conditions, restrictions or taxes" which do not apply to nationals. In other words, the paragraph grants no more and no less than national treatment. Indeed, it is obvious that in the general interest and in the interest of the proper administration of justice access to any courts—whether they be national courts or the Court of International Justice itself—must be subject to a number of conditions and restrictions. There is not a legal system in which such limitations do not exist, and it is surprising to meet with the argument that either the Treaty of 1886 or the general principles of international law preclude them.

95. The arbitrator in Van Bokkelen's case (Moore's *Historical Digest of the International Arbitrations to which the United States has been a Party*, p. 1842) had to interpret a similar clause to paragraph 3 of Article XV, and he defined its proper limitations as follows :

> "It would seem clear that the guarantee to the citizens of contracting States of 'free access to the tribunals of justice in all cases to which they may be a party on the same terms which are granted by the laws and usage of the country to native citizens', means that they shall be entitled to the exercise of all the processes of the courts of the respective countries, whether they concern rights or remedies. And the extent to which these processes of the courts may be invoked is expressed in language equally free from doubt : 'On the same terms which are granted by the laws and usage of the country to native citizens.' "

In the view of the United Kingdom Government, the meaning which the arbitrator attributed to the clause which he was called upon to interpret accords exactly with the language and intention of Article XV, paragraph 3, of the Treaty of 1886.

96. There is no doubt, as has been shown in paragraphs above, that the Claimant did receive the "national" treatment required by the Treaty of 1886 in the proceedings before the English courts. He was subject in these proceedings to no conditions or restrictions which would not have applied equally to a British subject, and any suggestion that the law, or the Crown, or the courts discriminated against him as a foreigner is utterly without foundation. It is noteworthy that no such suggestion appears in the diplomatic correspondence preceding the application to the Court and was not advanced by the Hellenic Government until the present proceedings, nearly thirty years after the events complained of.

97. Although the United Kingdom Government submits that the above considerations are sufficient to defeat the merits of the Hellenic Government's case based on the Treaties of 1886 and 1926, it wishes for the sake of its good name to reply to the allegations that the treatment accorded to the Claimant fell short of the standard of justice required by international law.

98. A denial of justice such as would give rise to a claim for damages under international law was defined thus by the Claims Commission between the United States and Mexico in the Neer case (*Opinions of Commissioners*, 1927, p. 71 ; also in *International Law through the Cases*, by L. C. Green, p. 627) :

> "It is immaterial whether the expression 'denial of justice' be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only ; for in the latter case a reasoning, identical to that which—under the name of 'denial of justice'—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible .... to hold that the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the case of Cotesworth and Powell (Moore's *Historial Digest of the International Arbitrations to which the United States has been a Party*, p. 2083) it was said :

> "Nations are responsible to those of strangers .... 1st, for denials of justice ; and 2nd, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of complainant, made according to the established form of procedure, or when undue or inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous."

In the Salem case in 1932 (*Department of State Arbitrations*, Series No. 4 (6), p. 65), the Arbitrator put it as follows :

> "International law has from the beginning conceived under the notion of 'denial of justice' forming a basis of political claims only exorbitant cases of judicial injustice. Absolute denial of justice ; inexcusable delay of proceedings ; obvious discrimination of foreigners against natives ; palpable and malicious inequity of a judgment—these are the cases which, one after another, have been included in the notion of 'denial of justice'."

The Preparatory Committee of the Conference for the Codification of International Law held at The Hague in 1930 formulated the following definitions :

> "A State is responsible for damages suffered by a foreigner as the result of the fact that :
>
> 1. He is refused access to the courts to defend his rights.

2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State.

3. There has been unconscionable delay on the part of the courts.

4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State." (Basis of Discussion No. 5.)

"A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice." (Basis of Discussion No. 6.)

99. From these dicta it is clear that to constitute a denial of justice in international law, there must be something in the nature of a palpable injustice and that a mere error of judgment is not enough. There certainly can be no denial of justice if the authorities of a State act in accordance with local law and practice and such law and practice is in itself just and reasonable. Furthermore, there can be no denial of justice involving the responsibility of the State concerned unless all effective rights of appeal have been exhausted. In the Ziat case (*Réclamations britanniques dans la zone espagnole du Maroc*, p. 187), it was stated :

"It is a recognized principle of international law, at least in countries where foreigners are subject to territorial jurisdiction, that a claim of an international kind presented upon the basis of an allegation of denial of justice is only receivable if the different courts of the competent local jurisdiction have been exhausted."

Many other decisions can be quoted to the same effect.

100. In the present case there can be no question of a denial of justice in the above sense giving rise to a possible claim under international law. In the first place the Claimant failed to exhaust his effective rights of appeal. It has been shown (paragraph 78 above) that if, as the Hellenic Government maintains, the Court of Appeal in refusing him leave to call additional witnesses on appeal was prejudiced against him as a foreigner and its decision was contrary to its practice in other cases, there must have been a prospect of the House of Lords overruling its decision and therefore there was an effective right of appeal to that tribunal. Also, the Claimant abandoned his appeal against the decision of Mr. Justice Hill and it has been shown (paragraph 79 above) that the refusal of the Court of Appeal to permit the production of two new witnesses on appeal did not render the right of appeal ineffective unless it is admitted that but for the absence of the evidence of these two persons Mr. Justice Hill's judgment was in no way open to challenge.

101. But even if it were shown that the Claimant had exhausted his local remedies, there would still be no possible justification for a claim by the Hellenic Government on the ground of denial of justice. There is no evidence whatever of "palpable injustice". It has been shown in paragraphs 62 and 67 that all material evidence was put before Mr. Justice Hill, and the Laing-Maclay letters of July 1922 added nothing to the contentions of the Parties in the proceedings before him. Secondly, the Claimant knew of the existence of the letters before the trial and he made no application for their discovery (see his affidavit, Annex 3). Thirdly, it was open to the Claimant, if he had wished to do so, to call Major Laing and Sir Joseph Maclay as witnesses on his own behalf before Mr. Justice Hill (see paragraph 37 above). Finally, the conduct of the proceedings by the officers of the Crown and by the English courts was entirely in accordance with local law and practice (see paragraphs 55 to 76) and there was nothing in the rules applied which made them unjust or unreasonable so as to be obnoxious to international law. It is the view of the United Kingdom Government that Mr. Justice Hill's judgment was in accordance with the weight of the evidence : even if he had made an error, which it is clear that he did not, there is no reason whatever to believe—nor indeed is it suggested by the Hellenic Government—that he was incompetent or that his judgment was dishonest or that he was activated by any feeling of ill-will towards the Claimant. In fact, the Claimant's case failed solely on its merits, after a careful trial, in which he had ample legal assistance and a fair opportunity to establish his rights. The United Kingdom Government invites the Court to read Mr. Justice Hill's judgment and feels sure that if it does so it will agree with the above assessment of it.

102. The United Kingdom Government therefore submits that the Hellenic Government had no case to take up on behalf of the Claimant. As was said in the Cotesworth and Powell case referred to above :

> "It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects, that the Government of the foreigner can intervene."

103. In paragraph 20 of its Memorial, the Hellenic Government says that the United Kingdom was unjustly enriched at the expense of the Claimant to the extent of £500,000 said to have been paid by him in consideration for fixed dates of delivery of the ships and that the delayed delivery of the ships constituted a failure of consideration. The United Kingdom Government submits that the doctrine of unjust enrichment has no application in the present case either under international law or under the English law of contract. It has already been shown that in any case there was no under-

taking for fixed dates of delivery, and there was no appropriation of £500,000 or any part of the purchase price as payment for that undertaking. Further, as far as concerns English law, the Claimant's remedy was that which he in fact pursued in the English courts, a claim for damages for breach of contract, and not a claim for money had and received (unjust enrichment) as suggested in the Greek Memorial. While in so far as this contention of the Hellenic Government rests upon general principles of law, or upon international law, the United Kingdom Government submits that it is completely unfounded.

The United Kingdom Government submits that the Hellenic Government is precluded by reason of delay from pursuing the claim

104. In the submission of the United Kingdom Government, the above considerations show that there was no justification whatever for the Hellenic Government taking up this claim. Not only is it evident that the Claimant had a fair trial before competent and honest judges who faithfully applied just and reasonable rules of law and practice, but a careful examination of all the evidence amply supports their decisions. In making this submission, however, the United Kingdom Government asks the Court to consider one further—but nevertheless important—aspect of the case.

105. Even if there had been more justification in the Hellenic Government's claim, it has been guilty of such delays in pursuing the matter, that the United Kingdom Government should not at this stage be required to submit the case to arbitration.

106. In paragraph 5 of his note of 7th November 1934 to the Greek Minister (Annex S 4 of the Greek Memorial), the British Foreign Secretary said :

> "Although the events in this case took place between the years 1919 and 1922, it was not until more than ten years later that the Greek Government took any steps resembling the presentation of a claim against His Majesty's Government. While the material now at the disposal of His Majesty's Government is sufficient to enable them to deal with the contentions raised in your note so far as they contain anything new, two results of this delay are that the records in their possession are less complete than they would have been if the matter had been raised within a reasonable time after the events in question, and that some of the persons possessing first-hand knowledge of the facts are no longer alive. Such results are in such circumstances inevitable, and it is because this is so that international law and practice regard avoidable delay in presenting claims as constituting a bar to their successful presentation."

107. It was not until five years later, in his note of 21st November 1939, that the Greek Minister first presented on behalf of the

Hellenic Government a claim of breach of the Treaty of 1886, and it was not until the present application, nearly thirty years after the events complained of, that charges of prejudice were levelled against those who conducted the proceedings before the English courts on behalf of the Crown and against the English Court of Appeal. There can have been no possible justification for any of these delays, apart, of course, from the war.

108. Not only must such delays inevitably raise the greatest doubts in the minds of any fair-minded person as to the *bona fides* of the claim, but the Government of the United Kingdom submits that its position as defendant has obviously been so prejudiced thereby that it would be unconscionable to permit the Hellenic Government to pursue the matter further. As the umpire in the Gentini case said (*Venezuelan Arbitrations*, 1903, Ralston's *Reports*, p. 720) :

> "The principle of prescription finds its foundation in the highest equity—the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore, if he has lost, having only his own negligence to accuse."

The Commissioner in the Williams case (Moore's *Historical Digest of International Arbitrations to which the United States has been a Party*, p. 4195) said :

> "The causeless withholding of a claim against a State until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defence essentially curtailed, is in effect an impairment of the right to defend. The public law in such cases, where the facts constituting the claim are disputed and disputable, presumes a defence."

Conclusions of the United Kingdom Government

The United Kingdom Government accordingly submits that the Court should hold and declare :

As regards jurisdiction :

I.—(i) **that,** for the reasons given in paragraphs 8, 10 to 13 and 15 above, the Court has no jurisdiction

(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other article of the Treaty of 1886, or

(b) itself to decide on the merits of such a claim ;

(ii) **that,** for the reasons given in paragraphs 8, 14 and 15 above, the Court has no jurisdiction

(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government for denial of justice based on the general principles of international law or for unjust enrichment, or

(b) itself to decide upon the merits of such a claim.

As regards the merits :

II. (If the Court should reject the United Kingdom's contentions with regard to jurisdiction) **that,** for the reasons given in paragraphs 104 to 108 above, the Hellenic Government is precluded by lapse of time from submitting any claim based on the Treaty of 1886 or for denial of justice under international law or for unjust enrichment.

III. (If, contrary to the contentions of the United Kingdom Government in I (i) and II above, the Court should hold that it has jurisdiction to order arbitration of a claim by the Hellenic Government based on the Treaty of 1886 and that the Hellenic Government is not precluded by lapse of time from submitting any such claim) **that** the Court should, as proposed by the Hellenic Government in paragraph 30 (4) of its Memorial, substitute itself for the Commission of Arbitration provided for in the Protocol annexed to the Treaty of 1886 and itself decide the issues, which would thus fall to be arbitrated, in the same manner as the Commission of Arbitration would have to do if the Court should order arbitration.

IV. (If, in accordance with III above, the Court should decide to substitute itself for the arbitral tribunal) **that,** for the reasons given in paragraphs 14 and 90 to 97 above, no claim has been established under Article XV of the Treaty of 1886 or under any other provision of that Treaty.

V. **That,** for the reasons given in paragraphs 9, 14 and 104 to 108 above, no claim can be based on the Treaty of 1926.

VI. (If the Court should hold, contrary to the submissions in I (ii) and II above, that it has jurisdiction to entertain a claim not based on the Treaty of 1886, or, contrary to the submission in V, that a claim can be based on the Treaty of 1926) **that** no claim has been established

by the Hellenic Government under the Treaty of 1926 or on the basis of on a denial of justice or of any other wrongful act entailing the responsibility of the United Kingdom Government under international law, either

(a) in connection with the conduct of officers and of counsel for the Crown, in conducting proceedings before the English courts, for the reasons given in paragraphs 55 to 63 and 98 to 102 above, or

(b) in connection with the decisions of the English courts, for the reasons given in paragraphs 64 to 76 and 98 to 102 above, or

as an alternative to *(a)* and *(b)*,

(c) because no binding agreement to deliver the ships by fixed dates was concluded, for the reasons given in paragraphs 17 to 44 above, and

(d) because no damages were suffered by the Claimant from illegal or wrongful acts of any person for whose conduct the Crown is responsible, for the reasons given in paragraphs 45 to 54 and 103 above.

(Signed) VINCENT EVANS,
Agent for the Government of the
United Kingdom.

4th February 1952.

ANNEXES

LIST OF ANNEXES

Annex 1

JUDGMENT OF MR. JUSTICE HILL

Royal Courts of Justice.
Monday, 15th January 1923.

IN THE HIGH COURT OF JUSTICE.
PROBATE, DIVORCE AND ADMIRALTY DIVISION,
ADMIRALTY.

Before :

Mr. JUSTICE HILL

The Ambatielos—*1921. Folio 653.*
The Board of Trade on behalf of His Majesty v. *Owners of s.s.* Ambatielos.

The Cephalonia—*1921. Folio 645.*
The Board of Trade on behalf of His Majesty v. *Owners of s.s.* Cephalonia.

The Panagis—*1921. Folio 478.*
The Board of Trade on behalf of His Majesty v. *Owners of s.s.* Panagis.

The Nicolis—*1921. Folio 754.*
The Board of Trade (Successors to the Shipping Controller) on behalf of His Majesty v. *Nicolas Eustace Ambatielos.*

(Transcript of the shorthand notes of Messrs. C. E. Barnett & Co., 30 Fleet Street, London, E.C. 4, and of C. C. Norman, official shorthand writer to the Admiralty & Prize Court, 30 Fleet Street, London, E.C. 4.)

The RT. HON. SIR ERNEST POLLOCK, K.C., M.P., MR. W. N. RAEBURN, K.C., and MR. L. F. C. DARBY (instructed by the Treasury Solicitor) appeared for the Plaintiffs.

MR. A. D. BATESON, K.C., MR. W. A. JOWITT, K.C., M.P., and MR. G. P. LANGTON (instructed by Messrs. W. A. Crump & Son) appeared for the Defendants.

JUDGMENT

Mr. JUSTICE HILL : In these four actions the plaintiffs are the Board of Trade, on behalf of His Majesty, suing as successors to the Shipping Controller. The defendant is Mr. N. E. Ambatielos, the owner of the four ships. He is and was at all material times of Greek nationality. The plaintiffs sue as mortgagees of each of the ships under mortgages which are in the Merchant Shipping Act form for mortgages to secure account current and accompanying deeds of covenant all dated 4th November 1920. The actions in respect of the *Ambatielos*, the *Cephalonia* and the *Panagis* are *in rem ;* the action in respect of the *Nicolis* is *in personam.*

The writ in the *Ambatielos* was issued on 15th October 1921, and the ship was arrested on the same day. The writ in the *Cephalonia* was

issued on 7th October 1921, and the ship was arrested on the same day. The writ in the *Panagis* was issued on 30th June 1921. She was already under arrest in a Master's action at that time. A caveat was entered on 1st July 1921, and the ship was arrested on 15th October 1921. The writ in the *Nicolis* was issued on 24th November 1921. The claim in the writs was for the instalments due under the mortgage and for possession. In the cases of the *Ambatielos*, the *Cephalonia* and the *Panagis*, judgment went by default on 21st December 1921, but on the following day the defendant obtained leave to enter an appearance. The judgment by default had ordered possession to be given to the plaintiffs, and possession was taken under it. On 26th January 1922, an application to set aside the judgments of 21st December 1921 was by consent adjourned to the trial.

To the plaintiffs' claim as mortgagees the defendant desired to raise matters which in part were defences but in part were in the nature of counter-claims. The plaintiffs, as representing the Crown, while unable to consent to a formal counter-claim, agreed that all the questions between the parties should be raised upon the pleadings and tried in the action. This accounts for the form of the pleadings. Put shortly, the plaintiffs assert that there have been breaches of the mortgage agreements entitling them to judgment for the whole amount due by the defendants and a reference. In the cases of the ships under arrest, they also ask for appraisement and sale. In the statement of claim they asked for possession but at the trial they asked for appraisement and sale.

The breaches relied on by the plaintiffs are : *(a)* failure to pay instalment of principal sum ; *(b)* failure to pay interest (this was added by amendment at the trial) ; *(c)* failure to pay insurance premiums ; *(d)* failure to release from arrest one of the ships, the *Panagis*. The defendant in substance denies these breaches and says that upon a true view of the account there was no default. He further sets up various breaches by the plaintiffs of the contract of sale under which he bought these and other vessels from the Shipping Controller and of other agreements between the parties, including the deeds of covenant accompanying the mortgages of these and other vessels.

In 1919 there were in course of construction in shipbuilding yards at Hong Kong and Shanghai a number of steamships of standard types. They were being built under contracts between the Shipping Controller and the building firms which had been entered into in 1917 and 1918. On 17th July 1919, a contract in writing was entered into between the Shipping Controller and the defendant for the sale to the defendant of nine of these steamships, six of type B and three of type C. They are described in the schedule to the contract under their Yard numbers and British names. They were subsequently given Greek names. The complete list is as follows : *War Bugler*, No. 180 ; *Nicolis ; War Miner*, No. 177 ; *Cephalonia ; War Coronet*, No. 181 ; *Keramies ; War Trooper*, No. 564 ; *Ambatielos ; War Piper*, No. 565 ; *Stathis ; War Sceptre*, No. 570 ; *Trialos ; War Diadem*, No. 1505 ; *Panagis ; War Tiara*, No. 1506 ; *Yannis ; War Regalia*, No. 1507 ; *Mellon*. Of these, the *Panagis*, *Yannis* and *Mellon* were of type C. The rest were of type B. The contract price of the B type was £289,166 13s. 4*d*., and of the C type £180,000. The total price was £2,275,000. The 10 per cent deposit called for by the contract of sale was duly paid. The *Nicolis*, *Cephalonia*, *Ambatielos*, *Trialos* and *Panagis* were delivered and paid for. The *Keramies* and

Yannis were delivered and not paid for except that some payments on account of the *Keramies* were made. The *Mellon* and *Stathis* were neither delivered nor paid for. The *Nicolis, Cephalonia, Keramies, Ambatielos, Trialos, Panagis* and *Yannis* were severally mortgaged by the defendant to the Shipping Controller on 4th November 1920. The *Yannis* was sold by the defendant in February 1921. The defendant complains that, in breach of contract between him and the Shipping Controller (1) the *Nicolis, Cephalonia, Keramies, Ambatielos, Trialos* and *Yannis* were delivered late; (2) the *Nicolis, Cephalonia, Keramies, Ambatielos, Trialos, Panagis* and *Yannis* were not according to contract by reason of defects and omissions; (3) the *Mellon* and *Stathis* were not delivered at all. By reason of these breaches, he alleges damages exceeding 2 million. These claims appear in paragraphs 3 to 9 of the defence, and as to the *Mellon* and *Stathis* also in paragraphs 10 to 12, though the case was put at the trial in a somewhat different form from paragraphs 10 to 12. A further claim in paragraph 13 was abandoned—there was nothing in it—and a defence in the plaintiffs' claim in paragraph 14 was also wisely abandoned. Paragraphs 1 and 2 are denials of the plaintiffs' allegations.

It will be convenient to deal first with the defendant's claim for damages and then to deal with the plaintiffs claim and matters of account which arise in respect of it, and the defendant's contentions as to default in payment of principal and interest, the appropriation of the price received on the sale of the *Yannis*, insurance, and the arrest of the *Panagis*. First, I will deal with the defendant's claim for damages for late delivery of the ships. The defendant's allegation in paragraph 4 of the defence is that at the time of the contract of 17th July 1919, there was a verbal agreement that the ships should be delivered on dates certain, and that this verbal agreement was subsequently confirmed by letters between the defendant and Major Laing of 2nd and 11th May 1921. As Major Laing had ceased to be on the staff of the Ministry of Shipping long before May 1921, these letters cannot be relied on as evidencing an agreement in writing. The defendant was therefore compelled to rely upon a verbal agreement and to contend that it was admissible as explaining the terms of the written agreement. The negotiations for the sale were conducted partly by correspondence and partly by interviews between Mr. G. E. Ambatielos, as agent for the defendant, and Major Laing, who held the post of Chief Assistant to Sir John Esplen, head of the Sales Branch of the Ministry of Shipping. At the final interview on 17th July 1919, when the contract was signed on behalf of the defendant, there were present, besides Mr. G. E. Ambatielos and Major Laing, Mr. O'Byrne of the Ministry of Shipping, whose duties included those of seeing that contracts were properly drafted and getting them executed, and Mr. Law of the firm of Fergusson & Law, who was brought into the matter by Mr. G. E. Ambatielos and the defendant to sign on behalf of the defendant, apparently because Mr. G. E. Ambatielos wanted to conceal from some other broker the fact that Mr. G. E. Ambatielos was to get the broker's commission, as, in fact, he did. The defendant's case is that Mr. G. E. Ambatielos and Major Laing, both before and at the interview of 17th July 1919, verbally agreed upon fixed months of delivery. It is contended that evidence of such agreement is admissible to explain the reference in the written contract to the "time agreed", and that the whole contract is to be

found, not in the writing alone; but in the writing coupled with the verbal agreement. In my judgment, the evidence is inadmissible as contradicting the written contract. By clause 1, the vendor agrees to sell, and the purchaser to purchase the steamers now being built. By clause 2, the price is to be paid in part by a deposit, and the balance in cash in exchange for bill of sale or builders' certificate within 72 hours of written notice of readiness for delivery, such delivery to be given at the contractor's yard. By clause 3, the steamers are to be deemed to be ready for delivery immediately after they have been accepted by the vendor from the contractors. By clause 6, on payment against bill of sale or builder's certificate, the steamers are to be at the expense and risk of the purchaser. Clause 7 provides for default. As regards the vendor, it is provided: "If default be made by the vendor in the execution of legal bills of sale, or in the delivery of the steamers in the manner and within the time agreed", the vendor shall return the deposit with interest. Clause 9 provides for the event of default in delivery of a steamer by the contractor to the vendor, and gives the vendor the right either to cancel in respect of such steamer, or to substitute another steamer "of the same type and expected to be ready at or about the same date". The defendant's contention is that the words "within the time agreed", and "at or about the same date", can only be explained by reference to an agreement outside the written words, and so let in evidence as to a verbal agreement. I do not accept that contention. The agreement is somewhat loosely drafted, but, in my opinion, it does provide both for the manner and for the time of delivery of each steamer. As to manner, delivery is to be made by delivery of bills of sale or builder's certificates, the ship being then at the contractor's yard. As to time, each steamer is to be delivered immediately after it has been accepted by the vendor from the contractor, the buyer having 72 hours from notice of readiness for delivery within which to take delivery. If the contractor fails to deliver a steamer, the vendor may substitute another steamer of the same type, provided it is one expected to be ready at or about the same date as the date at which the steamer defaulted was expected to be ready. That is my view of the contract. There is nothing extraordinary in such a contract. The ships were being built under contracts which did not give fixed dates, but the times depending upon conditions, and each building contract contained a wide exception clause. It is far from improbable that the Shipping Controller should undertake to deliver as and when delivery was made by the builders. It is most improbable that he should agree to fixed dates without any clause of exception at all.

Assuming that evidence is admissible, it is clear from the evidence that Mr. G. E. Ambatielos did all he could to induce the Shipping Controller's representatives to insert fixed times in the written contract, and that this was definitely and absolutely refused. I have not had the advantage of hearing any evidence from Major Laing, but I have heard Mr. O'Byrne and Mr. G. E. Ambatielos and Mr. Law as to what took place at the interview at which Mr. Law signed the contract. For many reasons, I distrust the evidence of Mr. G. E. Ambatielos. In July 1919, on his own admission, he was deceiving the defendant. I think that in the box he was trying to deceive me. Mr. Law's recollection is not sufficiently definite, and cannot be relied on. I accept the evidence of Mr. O'Byrne. It was made quite clear that the Shipping Controller

refused to contract for delivery at fixed times, and at that interview no undertaking as to fixed times was given either by Mr. O'Byrne or by Major Laing. None was at any time given by Mr. O'Byrne. If, in the course of the preceding negotiations, any promises were made by Major Laing as to delivery at fixed times, it was not upon such terms that the contract was finally agreed. In fact, Major Laing had no authority to finally agree the terms of the sale. That was for the Committee composed of the Shipping Controller, Sir John Esplen, the Accountant-General, and the Secretary of the Ministry. Mr. G. E. Ambatielos, and through him the defendant, if he read Mr. G. E. Ambatielos's letters, knew that Major Laing had not final authority, and so did Mr. Law. (See letters in the correspondence, p. 9, 7th July 1919 ; p. 17, 9th July 1919 ; p. 26, 10th July 1919 ; and as to Mr. Law, p. 19, 9th July 1919.)

If I am wrong in all this, I should still find it impossible to say what the fixed dates agreed were. Mr. G. E. Ambatielos said that, at the final interview on 17th July 1919, they were agreed as in the defendant's letter of 3rd July 1919 for the "B" type steamers, and as December, January and February, for the "C" type. I do not believe Mr. G. E. Ambatielos's evidence as to that interview. Apart from that evidence, it is impossible to say what the fixed dates were to be. Were they the estimated months put on a buff slip by Mr. Bamber, or the dates mentioned in the defendant's letter of 3rd July (p. 7), or the date, "delivery by March", mentioned in Major Laing's pencil note on the letter of 3rd July, or the dates mentioned in the postscript to Mr. G. E. Ambatielos's letter of 17th July (p. 9), or the dates mentioned in Mr. G. E. Ambatielos's letter of 10th July (p. 26), on receipt of which the defendant on 14th July wrote to Mr. G. E. Ambatielos authorizing Mr. Law to sign the contracts ? If he surmounted all other difficulties, the defendant would fail to prove that Mr. G. E. Ambatielos and Major Laing were ever *ad idem* as to the months of delivery. The case is not carried further by the defendant's evidence of his interview with Major Laing in Paris in August 1919. That evidence is very curious. The defendant says that not only did Major Laing assure him that the times had been agreed, but also promised that if the defendant did not make the expected profit on the working of the ships, the Shipping Controller would share with the defendant the loss measured by the difference between the expected profit and the profit made. This is so fantastic a thing for Major Laing to have said at that time that the defendant's memory must be at fault, and I cannot rely on it as to what was said at that interview. If, as the defendant says, Major Laing enlarged upon the facilities for prompt work enjoyed by the builders, good weather, abundance of labour and absence of strikes, that would be in keeping if Major Laing was expressing an expectation as to deliveries, but out of place if the Shipping Controller had bound himself to contract dates. The letters in May 1921 (pp. 961 and 972) do not help the defendant. Major Laing had ceased to be on the staff of the Ministry on 30th September 1920, and was not the plaintiff's agent to make admissions. But, in any case, the assurance stated to have been given by Major Laing was not that the dates were contractual, but that he was satisfied that the dates mentioned in the defendant's letter of 3rd July 1919 could be relied on. It all points to the expression by Major Laing of an expectation, it may be a confident expectation of delivery within certain months. But that is a very different thing from a contract that they shall be so delivered. The

defendant further relies on a cable at page 240*a*, signed by Miss M. J. Straker. It was one of several cables sent at the request of Mr. G. E. Ambatielos, urging the builders to expedition. I cannot upon it find a contract which is not otherwise proved. Further, the conduct of the defendant and Mr. G. E. Ambatielos is wholly inconsistent with the view that the Shipping Controller was under a binding contract to deliver at fixed times. The first delivery of the seven ships was made in October 1919, and the last on 1st June 1920. The breach by late delivery, according to the defendant's case, began in August 1919. There is in writing no suggestion that the vendor was in breach or that the defendant had any claim for damages in respect of the delivery of the seven ships until 20th April 1921 (p. 917). This was after the defendant had begun to get into difficulties in regard to payment made under the mortgage covenants. The general statement then made was not followed up, and no further claim was made until the defence was delivered. There was, I find, no verbal suggestion of any breach or claim in regard to delivery of the seven ships until March 1921, when Mr. O'Byrne saw the defendant in Paris in reference to the defendant's difficulties under the mortgage covenants. I do not believe Mr. G. E. Ambatielos when he says he protested and reserved the defendant's rights throughout the period over which deliveries were being given. In June 1920, when the defendant first asked for a loan, there was no suggestion of any breach by the Shipping Controller, or of any claim against him. In August 1920, when the defendant was trying to arrange with the Shipping Controller a credit on guarantee of Cox and Co. (p. 669, 670 and 671), the total amount owing by the defendant was agreed at a figure representing the outstanding price of the ships not yet fully paid for, and no suggestion was made that the defendant had any claim. In October 1920, the credit was arranged on mortgage and no suggestion of any claim was made. On the contrary, Mr. G. E. Ambatielos (p. 688) thanks the Ministry for "all the facilities which you have been good enough to grant us". It is foolish to suppose that the defendant had claims for late delivery running into many hundreds of thousands of pounds and kept silent about them if they had any foundation in law. It is true that there are many complaints by the defendant as to delay, and requests to the Ministry to hurry on the builders. But that is quite consistent with the expectation of deliveries within certain times. It does not prove a contractual obligation. Had there been a contract, the letters would have been very different. I find that there was no contract to deliver by times certain.

The defendant, in the alternative, says that the contract was to deliver within reasonable time. If that was the contract, there is no evidence at all that each of the seven ships was not delivered within reasonable time. I find against the defendant's claim for damages for late delivery of the steamships other than the *Mellon* and the *Stathis*. There are further matters to be considered in regard to those two steamers, and I will deal with them later on.

Secondly, I come to the defendant's claim for damages by reason that the same seven ships were not according to contract, but of less value because of defects and omissions. Paragraph 8 of the defence alleges that the Shipping Controller failed to deliver the steamships in due and proper condition as laid down by the terms of the contract, and that the defendant has become liable to pay, and has paid large sums in order

to bring them to the standard necessary to obtain the highest class at Lloyd's. In the particulars the claim is amplified, and claims are made in respect of sums expended or necessary to be expended in order to bring the steamers up to specification standard, including Lloyd's, Board of Trade and Factory Act requirements, and for renewals of defective workmanship and material. There are also claims in respect of extras wrongly included as such. At the hearing, the defendant's contention was that the ships were to be according to specification, and to comply with Lloyd's requirements so as to be class 100 A 1 ; and he said that they were in many respects not according to specification, and in many respects did not comply with Lloyd's requirements, and that in other respects the workmanship or material was defective. In making this case, the defendant was met by two difficulties : (1) his contentions were inconsistent with the terms of the contract of 17th July 1919 ; (2) he was unable to prove what the terms of the specifications were. By clause 1 the vendor sold and the purchaser bought the steamers now being built by the contractors under the yard numbers specified in the schedule. By clause 4, "the purchaser or any person appointed by him and approved by the vendor shall have access to the premises of the contractors .... and all proper facilities with a view to making inspections. The purchaser shall have no power of rejecting work or material, but may make representations in respect thereof to the vendor, who shall thereupon decide whether the same is or is not in accordance with the terms of the contract between the vendor and the contractors, and shall approve or reject the same accordingly." By clause 5, "All classification, anchor and chain certificates relating to the steamers shall be handed to the purchaser on delivery of the steamer, and also copies of the type specifications and plans. All the spare gear, boats, and outfit provided for in the specifications of the steamers and engines, and delivered by the contractors to the vendor, shall be delivered to the purchaser on delivery of the steamers." By clause 6, the steamers with their spare gear and outfit, "shall be taken with all faults and errors of description without any allowance or abatement".

The effect of these provisions seems to me to be as follows : (1) The defendant was entitled to have delivered to him on completion the ships "now being built" by the named contractors under the specified yard numbers ; (2) he was entitled by his representative to inspect and to make representations during construction as to work and materials, but the decision whether the contractor was fulfilling his contract with the Shipping Controller rested with the representatives of the Shipping Controller ; (3) on completion the defendant was to take the ship with all faults and errors of description without any allowance or abatement ; (4) the defendant was entitled to have delivered to him all the spare gear, boats and outfit which were provided for in the specifications of the steamers and engines and were delivered by the contractor to the Shipping Controller, and was to take them with all faults and errors of description without any allowance or abatement ; (5) the defendant was entitled to have handed to him on delivery all classification, anchor and chain certificates relating to the steamers and also the type specifications and plans. To ascertain what classification certificates are referred to, it is necessary to refer to the type specifications, and it is found to be 100 A 1 at Lloyd's. Now it is clear (1) that the defendant appointed his representative, Mr. Rossolymos, who inspected and who made such

representations as he thought fit; (2) that the ships delivered to the defendant were the ships "now being built" specified in the schedule; (3) that the defendant took delivery of them; (4) that all spare gear, boats and outfit delivered by the contractors to the Shipping Controller were delivered to the defendant; (5) that all classification, anchor and chain certificates were handed to the defendant; and that except in the case of the *Yannis*, the certificates were for 100 A 1 at Lloyd's. The ships were being built under survey not only of representatives of the Shipping Controller but also of Lloyd's surveyors, and, except the *Yannis*, were all classed 100 A 1 at Lloyd's. The *Yannis* was classed 100 A only, because there was some deficiency in anchor or cable equipment. The plaintiffs admit that allowance must be made in regard to that item. The above conditions having been fulfilled, the defendant took the ships and their spare gear and outfit with all faults and errors of description, but assuming that the defendant is entitled, after taking delivery, to complain that the ships were not according to the builders' specifications, he failed to prove the terms of the specifications. Books were produced containing prints of specifications for B and C ships respectively. But it was proved that many alterations had been made in the specifications so printed. This was known to Mr. G. E. Ambatielos. (See as to B ships pp. 99 and 100 of the correspondence, and as to C ships p. 129 and the letter therein referred to, which is on p. 120 *a*; see also p. 685.) Mr. Rossolymos obtained copies of the specifications at Hongkong and Shanghai and was shown a number of letters modifying the specifications. He said he handed the copies he received to the ships' officers. They were not forthcoming at the trial. It is therefore impossible to say whether the matters complained of were or were not in accordance with the specifications. It is well to add the following observations: (1) Mr. Rossolymos gave formal certificates of compliance with the specifications in the case of the *Panagis*, *Trialos*, *Keramies* and *Yannis*. On 14th June 1920 (p. 563), after all the ships were completed, Mr. G. E. Ambatielos wrote: "We understand from our engineer" (that is Mr. Rossolymos) "who is out at Hongkong that the boats are tip-top in every respect and much superior to any pre-war vessel." Of course, in this part of the judgment I am dealing with only the seven ships. (2) It is not inconsistent with the views I have expressed, as appears from the correspondence, that the defendant from time to time complained of defects which he says manifested themselves in the ships, or that the Shipping Controller took up some of these matters with the builders. The Shipping Controller's contracts with the builders contained a six months' clause as to defects workmanship and materials; and the Shipping Controller may well have been ready to enforce it for the defendant's benefit. If the defendant really had a claim against the Shipping Controller running into the very large sums mentioned in the particulars, it is most remarkable that nothing was heard of a claim of that magnitude until after the defendant began to get into difficulties under the mortgage covenants, and that the indebtedness of the defendant was agreed in October-November 1920 without any reference at all to any such claim.

As to the defendant's claim that the builders charged as extra items which were not extra, there is the same difficulty arising from failure to prove the terms of the specification. But, over and above this, whatever extras were ordered were ordered by the defendant and were paid for

by the Shipping Controller as agent for the defendant. If the builders charged as extra things which were not extra, that was no breach of any contract between the Shipping Controller and the defendant. The defendant's remedy was against the builder. The defendant in the correspondence recognizes this : see, for instance, the letter of 23rd June 1920, on page 580. I find against the defendant's claim for defects and omissions in the seven ships delivered, except as to the small matter in regard to the *Yannis* already referred to. For reasons to be presently stated, this question does not arise in regard to the *Mellon* and *Stathis*.

I now come to my third head, which is the defendant's claim for damages for non-delivery of the *Mellon* and *Stathis*. It is not easy to discover from the defence and the particulars thereunder what case as to these ships the defendant desired to plead. At the hearing, the contention was made clear. So far as the defendant's case rests upon the allegation that there was a contract to deliver at times certain, it fails for the reasons already given in reference to the other seven ships. So far as it rests upon the contract of 17th July 1919, taken by itself it fails, because the defendant never was ready and willing to pay the balance of the sale price against delivery. But the main case was based upon the transactions between the parties in October-November 1920 and is indicated by paragraphs 10 to 12 of the defence. Those paragraphs allege a verbal agreement that, in consideration of the immediate delivery of the *Mellon* and *Stathis*, the defendant would execute the mortgages of the other ships. The defendant's case at the trial was that, upon the execution of the mortgages of the seven other ships, he became entitled to delivery of the *Mellon* and *Stathis*. He contended that there was a bargain to that effect, or, if there was no bargain, then the deeds of covenant, by giving time for payment, modified the term as to cash against delivery in the contract of 17th July 1919. The plaintiffs agreed that there was a bargain, but said that the agreed condition upon which delivery was to be given of the *Mellon* and *Stathis* was that the security should be a perfected security, mortgages duly registered of ships duly registered as Greek ships, and that that condition never was fulfilled.

To understand the transaction of October-November 1920, it is necessary to go somewhat further back. The *Keramies* had been delivered to the defendant on 15th May 1920 (p. 506). The *Yannis* had been delivered to the defendant on 31st May 1920 (p. 538). The defendant had not paid the whole of the balance of the purchase price due against either of these deliveries. He had paid something in respect of the *Keramies* but nothing in respect of the *Yannis*. The *Mellon* was ready for delivery by the builders in June 1920, and the *Stathis* in July 1920. The defendant was unable to pay the balances on either. In anticipation of delivery, the defendant had arranged charter parties from the Far East to Europe at profitable rates for the *Mellon* and *Stathis*. The Shipping Controller was willing to assist him in the matter of the charter parties, and it was arranged that the Shipping Controller should take delivery of the *Mellon* and the *Stathis* from the builders and register them in the name of His Majesty, and that the ships should perform the charter party voyages for the defendant's benefit and at his risk and expense and that the defendant should be permitted to take delivery against payment at a later date. As appears from a document at page 504, the defendant undertook to insure and to be responsible for all expenses attaching to or attending the *Mellon* from 16th June 1920. I was informed that the

terms as to the *Stathis* were similar. The Shipping Controller took delivery from the builders of the *Mellon* on 14th July 1920, and of the *Stathis* on 5th August 1920. The charter party voyages were performed. The ships arrived in the United Kingdom some time in October or early November. The defendant made preparations for an outward charter party voyage, bunkering the ships at Cardiff. Meantime, the defendant had been trying to raise money. In June he applied to the Shipping Controller and was refused it. He then tried to get Cox & Co. to guarantee to the Shipping Controller the outstanding purchase money of the four ships. By October this attempt failed. He then again applied to the Shipping Controller to be allowed credit, and the Shipping Controller was now ready to assist provided he was fully secured. The amount owing on the *Keramies* and *Yannis*, including some extras together with the amount which would be payable against delivery of the *Mellon* and *Stathis* and which ought to have been paid as soon as they were ready for delivery, was roughly about £800,000, of which rather more than half represented the balance of the purchase price of the *Mellon* and *Stathis*. (For details of this, see page 2 of the plaintiff's account No. 5, which was put in.)

The correspondence as to the credit begins at pages 688 and 689. The facts mainly appear from the letters. Where Mr. O'Byrne and Mr. G. E. Ambatielos are in conflict, I accept Mr. O'Byrne's evidence. On 8th October 1920, Mr. O'Byrne stated the Shipping Controller's terms (p. 691) : "The Ministry will accept the security offered by you, viz., a mortgage of seven vessels to be placed on the Greek Register, subject to the Greek Government confirming that there are no prior charges on these ships, and, after these mortgages have been duly registered, the remaining two ships will be handed over to you—these two vessels in due course also to be placed on the Greek Mortgage Register." Mr. G. E. Ambatielos replied : "We note with satisfaction that your good Ministry have definitely decided now to allow the balance due for the completion of the purchase of the four vessels still unpaid by taking a mortgage. As the *Mellon* and *Stathis* will very shortly be ready to be delivered to us after completion of their present voyage, we will feel greatly indebted to you if you will push forward with all possible speed the necessary documents." Mr. O'Byrne said that his letter stated the terms verbally offered to and accepted by Mr. G. E. Ambatielos. The letters confirm that agreement. They make it clear that the condition of delivery of the *Mellon* and *Stathis* without cash payment was (1) a mortgage of the other seven ships ; (2) the registration of the other seven ships in Greece ; (3) an assurance by the Greek Government that there were no prior charges on them ; and (4) the registration in the Greek Register of the mortgages. There was the further stipulation that in due course the *Mellon* and *Stathis* should also be mortgaged, for that must be the meaning of the words "placed in the Greek Mortgage Register". Counsel for the plaintiffs said they did not rely upon this further stipulation and it may be that it was waived by the Shipping Controller, though it is not clear that it was. But be that as it may, there was no waiver of the stipulation as to the registration of the mortgages of the seven ships.

Such was the position when the defendant executed the mortgages and accompanying deeds of covenant of each of the seven steamers. Each of the seven was mortgaged by a separate mortgage with a separate

deed of covenant. Each deed recites that the mortgage is to secure payment of the balance of purchase price of the *Keramies*, *Yannis*, *Mellon* and *Stathis*, and of any sum due or to become due on any account whatsoever. There is no further mention of the *Mellon* and *Stathis*. Payment by instalments of the mortgage debt is provided for, and by clause 13 as the debt is reduced the mortgaged ships are to be successively released. Clause 7 provides that upon the request of the Shipping Controller and subject and without prejudice to the provisions of any then existing charter party, the mortgagor will cause the mortgaged steamer to proceed to her declared port of registration and also cause to be registered there the mortgage and deed of covenant. By accepting these mortgages and deeds of covenant, the Shipping Controller gave time for the payment of the purchase price of the *Mellon* and *Stathis*. He could not now say "I will not deliver the *Mellon* and *Stathis* except against cash". But he did not thereby waive his right under the bargain made in October in pursuance of which the mortgages were executed, nor are the deeds inconsistent with the continuance of the bargain. It is true that clause 7 *(a)* of the deed of covenant requires the owner to register the ship and mortgage only upon request of the Shipping Controller and without prejudice to existing charter parties. But that is not inconsistent with the bargain that the *Mellon* and *Stathis* would be delivered only after the seven mortgages had been registered. When, therefore, as soon as the mortgages were executed, the defendant demanded delivery of the *Mellon* and *Stathis*, the Shipping Controller was fully justified in his reply of 8th November 1920 (p. 734) : "The two ships will only be transferred after the other seven vessels have been duly registered at Argostoli, and the mortgagees placed on the Greek register." (Argostoli was mentioned because that was the port named by the defendant as the intended port of register of his ships.) The Shipping Controller was equally correct in his view of the Greek law when, on 10th November 1920 (p. 739), he said : "These mortgages can only be registered after the ships have been registered at Argostoli." The Shipping Controller was, however, still willing to assist the defendant and would have been prepared to accept, in lieu of registration, a certificate of the Greek Government, which appears on page 778 *a*, but, unfortunately, the defendant, through his solicitors, on 4th December threatened a claim for damages for delay in delivery of the *Mellon* and *Stathis* and declined to withdraw it (see p. 772 and 781) ; and the Shipping Controller thereupon stood upon his legal rights and refused to make any concession. In my judgment, the Shipping Controller was within his legal rights, and there was no breach by him of the bargain as to the delivery of the *Mellon* and *Stathis*.

After the dispute arose in November, the Shipping Controller and the defendant continued to treat the *Mellon* and *Stathis* as still governed by the contract of sale as modified. They were in conflict as to what the modification was, but neither treated the contract as determined. I need not refer in detail to the letters which show this. They are to be found in Volume 3 of the correspondence. The two ships remained at Cardiff. The defendant continued to recognize his liability to insure and to pay expenses in connection with them. The Shipping Controller was willing that if the defendant so desired they should be employed for the defendant's benefit. (See letter of 20th December 1920, p. 782.) In February the defendant asked the Shipping Controller to release him from having

the two ships. The Shipping Controller declined. (See pp. 823-837.) When matters came to a head in connection with the mortgaged ships, the Board of Trade, on 6th May 1921 (p. 966), gave notice of intention to take possession of the *Mellon* and *Stathis* in view of the continuing breach of the sale contract, and on 1st June 1921 possession of the *Mellon* and *Stathis* was formally taken over by the Shipping Controller. (See the evidence of Sir E. Glover.) Negotiations without prejudice then ensued and were continued up to September, but no agreement was reached, and the position as regards the *Mellon* and *Stathis* remained as it was until the trial, when the plaintiffs said the sale of the *Mellon* and *Stathis* must be considered as cancelled and the defendant did not controvert that position. I find against the defendant's claim for damages for non-delivery of the *Mellon* and *Stathis*.

I have said nothing about paragraph 13 of the defence because it was withdrawn, nor about an item in the particulars of over £51,000 difference in deadweight, which has no relation to any allegation of the defence, and about which nothing was said at the trial, nor about several mysterious items on page 10 of the particulars, about which nothing was said. An item in the defendant's particulars as to insurances will be dealt with hereafter. I might, however, add here, to get rid of it, that the defendant did not prove that the plaintiffs were unreasonable or in breach in refusing to permit the *Mellon* and *Stathis* to be placed on the mud at Cardiff. This, I believe, disposes of all the defendant's claims for damages.

I now turn to the plaintiff's claim, and the question whether the defendant was in default under the mortgage agreements. The first matter to be decided is the date with reference to which the question of default is to be determined. In my judgment, it is in each of these cases the date of the writ. The defendant contended that it was 6th May 1921, when the Board of Trade (see p. 966) gave notice to the defendant that they had directed Messrs. Glover, as their agents, to take possession of the *Keramies*, the *Trialos*, the *Nicolis*, the *Ambatielos*, the *Cephalonia* and the *Panagis*. It is clear from the evidence of Sir E. Glover that possession was not taken at that time. Application was made to the Masters of the ships to hand over possession, and that was refused. The defendant continued in possession and the Shipping Controller proceeded by way of legal action to seek orders for possession. The *Ambatielos* was arrested in the present suit under writ and warrant of 15th October 1921. The *Cephalonia* was arrested in the present suit under writ and warrant of 7th October 1921. The *Panagis* was arrested in the present suit under writ of 30th June 1921, claiming possession, and under warrant of 15th October 1921. The *Nicolis* was on 6th May at Palermo and was under arrest at the suit of other creditors. Sir E. Glover stated that the ship was arrested at Palermo at the suit of the present plaintiffs on 8th June 1921. The writ *in personam* in this Court was issued on 24th November 1921. The plaintiffs cannot be treated as mortgagees in possession at any material time, and I am not therefore concerned with any questions which might arise if the plaintiffs had become mortgagees in possession. The question I have to consider is whether the defendant was in default at the date of the several writs in the actions in this Court. The position at this time in regard to the other three mortgaged ships was as follows: The *Yannis* had been sold by the defendant. The *Keramies* was at Dunkirk, laid up, and various creditors had claims

against her, and one of them, the broker, M. Duchateau, was holding up the ship's register. No further steps were taken by the Shipping Controller.

The *Trialos* was at Bremerhaven, where there were a number of claims against her. On 1st June 1922, the plaintiffs recovered judgment in the German courts and under it obtained possession. The facts as to these ships do not affect my finding that the time at which the defendant's default is to be determined is the date of the writs in the present action. Of course, the results of the judgment in the *Trialos* may have to be considered in taking the account in the present action.

I propose to deal with the alleged breaches in the following order: (1) insurance; (2) interest; (3) instalment of principal sum; (4) arrest of the *Panagis*. By the terms of each of the deeds of covenant, a breach of any one deed was a breach of all. This is provided for by clause 8 *(p)*.

Insurance: In pursuance of the bargain of July 1920, by which the defendant undertook to insure the *Mellon* and *Stathis* "until such time as delivery is actually taken by the purchaser" (p. 604), and in pursuance of the covenant in the deeds of covenants relating to the seven mortgaged ships, the defendant, through Sir William Garthwaite, insured all the nine ships. At the material time, the marine risks were covered by twelve months policies from 29th October 1920; the war risks by insurances expiring at various dates. The premiums on the marine policies were payable by quarterly instalments on 29th October 1920, 29th January, 29th April, and 29th July 1921. The defendant duly paid the first quarter's instalment. He made no further payment. He had given Sir William Garthwaite a bill for the second quarter's instalment. It was renewed under guarantee by the Shipping Controller, but was not met; and on 8th April 1921 the Shipping Controller paid the second instalment. The defendant had also given a bill for the third instalment. He was unable to meet it, and on 3rd May 1921 (p. 962), so informed the Shipping Controller, and said: "Will you please, therefore, arrange to remit Sir William Garthwaite the amount of the premiums due as before?" The Shipping Controller, on 17th May 1921, paid the three instalments. Upon the defendant's failure to pay, all these payments had to be made by the Shipping Controller, or the policies would have been cancelled. The second quarter's payment made by the Shipping Controller also included a small amount for renewal of the war risk insurance on the *Trialos*, and was reduced by a small credit for a P.A. on the *Mellon*. The three quarters' payment made by the Shipping Controller also included a small amount for the renewal of the war risk insurance on the *Keramies*. The four quarters' payment was in respect of eight ships only, the *Yannis* having been sold, and the policies on her cancelled. It was not disputed that the total payments by the Shipping Controller amounted to the figures proved by the plaintiffs, namely, £43,696 4*s*. This amount was ultimately subject to some credits for cancelling returns on the *Yannis*, and a P.A. claim on the *Yannis* amounting altogether to £2,887 13*s*. 4*d*. (see plaintiffs' document No. 6), and at the end of the twelve months, namely, on 29th October 1921, substantial laid up returns became payable when adjusted. But the sums which the defendant ought to have paid between January and July amounted to £43,696 4*s*., and at the date of the writs in the present action, the Shipping Controller was under advance in respect of insurances the sum of £43,696 4*s*, less £2,887 13*s*. 4*d*., making a balance of £40,808 10*s*. 8*d*. That is a statement

subject to this qualification that, at the date of the writ in respect of the *Panagis*, the sum would be rather less, because the July instalment is not included ; but I will deal with the figures in detail presently. The defendant contended that the Shipping Controller ought to have accepted substitued insurances, which would have effected a large saving in premiums. He put this at over £10,000, or, according to one statement which was put in, at over £14,000. Mr. Bateson, for the defendant, said that his points on this were as follows : (1) the Shipping Controller ought to have permitted the all-risk policies to be cancelled, and port risk policies substituted ; (2) he ought to have permitted the war risk policies to be cancelled on some of the ships ; (3) he ought to have permitted the ships to be insured on a lower valuation. The deeds of covenant provided by clause 2 for insurances "against all risks, including war risks, at her full declared value, at least in the sum of (so many pounds) by policies, certificates, and entries, subject to the approval of the Controller, both as to the underwriters, and as to the risks, terms, and extent of the insurances". The figure filled in in respect of the "B" type vessels was £185,000, and in respect of the "C" type vessels, £120,000. As to the defendant's third contention, the Shipping Controller was entitled to insurance for those amounts on those values, and, if it be a question of what was unreasonable, was not unreasonable in refusing to assent to smaller amounts. As to the defendant's second contention, the Shipping Controller was entitled to war risk insurances, and it was not unreasonable to insist on them. So far as I can see from the correspondence, the defendant never asked that the war risk insurances should be cancelled. His only requests were that the war risk insurances of the *Trialos* and the *Keramies* should not be renewed while they were in port. (See p. 867 and 973.)

As to the defendant's first and main contention, assuming that the Shipping Controller could not refuse to permit a port risk to be substituted for an all-risk policy when it was reasonable—(I do not decide it)—the evidence fell far short of showing that the Shipping Controller acted unreasonably, or indeed, that he acted contrary to the defendant's wishes. The suggestion was first made to the Shipping Controller by telephone on 29th January 1921, a Saturday, and was in reference only to the *Keramies*, the *Panagis*, the *Stathis*, and the *Mellon*. The suggestion was that all-risk policies should be cancelled, and port risk policies substituted. It was a proposal that the Shipping Controller was clearly entitled to take time to consider. On 2nd February 1921 (p. 813), he expressed himself as willing to agree, "provided the underwriters will return the *pro rata* daily premium". On the same day (p. 814), Mr. G. E. Ambatielos writes that he told the Shipping Controller yesterday that the defendant intended to lay up the vessels and take out a port risk policy, and (p. 815) Sir William Garthwaite advised that port risk policies would be a better cover than the existing policies during the vessels' lying up, "on the assumption, of course, that the underwriters will cancel the existing policies with a full return of premium". The Shipping Controller (p. 817) thereupon authorized the cancellation on the four ships named, "subject, of course, to the proviso that the underwriters will return the *pro rata* daily returns". On 3rd February (p. 824), Sir William Garthwaite informed the Shipping Controller that it was impossible to arrange *pro rata* daily returns, and that he had telegraphed the defendant. The underwriters, on 2nd February 1921, had issued a notice

that they would cancel on the following terms: (1) returns would be paid only on a monthly premium basis, and not on a daily premium basis, and (2) only 90 per cent of the unused premiums would be returned. On 5th February 1921 (p. 825), the Shipping Controller wrote Mr. G. E. Ambatielos: "Your broker informs me that he has telegraphic advices that your brother is not agreeable to the underwriters' decision. Consequently, these four policies have not yet been cancelled." There the matter rested. The defendant's figures of a saving are based on what would have been the returns if the policies had been cancelled before 2nd February. Clearly, the Shipping Controller was not called upon to accept the proposal before that date. On the basis of the underwriters' terms of 2nd February, there would, as it turned out, have been a small saving. But the defendant himself did not ask for cancellation on those terms, and, even if he had done so, I do not think that the Shipping Controller would have acted unreasonably in preferring to maintain the existing policies. Apart from all this, it was very doubtful whether it would have been wise to seek to upset the existing insurance on Greek ships at a time when Greek ships were already being received with some hesitation in the insurance market. I find against the defendant's complaint in regard to the insurances.

I will deal hereafter with the defendant's contention that the Shipping Controller was not in advance in regard to the £43,696 4*s*. for premiums, because he had the moneys in hand on another account. But, apart from that contention, it is apparent that in not paying the premiums as they fell due, the defendant was breaking the covenant as to insurance in the deeds of covenants. By clause 2, the defendant undertakes to insure and keep insured, and pay all premiums. By clause 3, on default, the Shipping Controller was entitled to insure. By clause 4, the defendant undertook to repay on demand every sum disbursed by the Shipping Controller on that account. There was, therefore, a direct covenant in regard to each of the seven mortgaged ships. By the bargain of July 1920, as to the *Mellon* and *Stathis*, the defendant undertook to insure and keep insured the *Mellon* and *Stathis*. The defendant's breach of that understanding was not a breach of the deeds of covenant; but when the defendant asked the Shipping Controller to pay the premiums, and the Shipping Controller did so, the money so paid became part of the defendant's debt on account current and repayable on demand; and the failure to repay it was a breach of covenant.

Interest: By clause 1 of the deeds of covenant, interest was payable as from 1st August 1920, and payable half-yearly on 1st February and 1st August. On 1st February 1921, the Shipping Controller (p. 809) applied for payment of the first half-yearly sum, £35,497 4*s*. 1*d*. The defendant (p. 814) replied, not questioning the amount, and hoping to send a substantial amount on account in a few days. On 10th March 1921 (p. 881), the Shipping Controller again applied for payment. The defendant (p. 809) replied that he was unable to pay. Admittedly, nothing was paid. Nothing was paid in respect of the further sum due on 1st August 1921. As shown by a statement marked "Y" put in evidence by the defendant, it was contended that the interest payable must be reduced by eliminating from the principal sum bearing interest, so much of it as represented the amount owing in respect of the *Mellon* and *Stathis*. That contention is unsound. Neither on 2nd February nor on 2nd August 1921 had the sale of the *Mellon* and *Stathis* been cancelled.

The contract of sale was still running, and the account current open between the parties still included the balance of purchase money for which the defendant was still indebted, and interest was payable on the whole account. Whatever results in the final taking of the account may follow from the ultimate cancellation of the sale, they cannot affect the question whether in 1921, at the date of the issue of the writs in these actions, the defendant was in default.

Instalment of principal sum : By clause 7 *(f)*, the defendant undertakes to reduce the amount owing by at least £75,000 each six months. "The amount owing" must mean the principal sum, for interest was payable the 1st February and the 1st August, and all other sums except principal and interest are payable on demand. (See clause 1.) The defendant was therefore bound to pay off £75,000 of the principal debt by 4th May 1921. He paid £25,000 on 8th November 1920. He paid nothing further. The defendant contends that the difference was more than satisfied by the receipt by the Shipping Controller of part of the proceeds of sale of the *Yannis*. The plaintiffs contend that the obligation to pay £75,000 half-yearly, and the obligation to secure to the Shipping Controller payment of the proceeds of sale of any of the mortgaged ships were cumulative, and that the receipt of proceeds of sale did not affect the obligation to pay £75,000. I think the plaintiffs are right. The payment contemplated by clause 7 *(f)* and clause 13 is a payment which leaves all the ships under mortgage until, as the amount is reduced, the ships are successively released as provided by clause 13 ; the contemplated payment is not one which, while reducing the debt, at the same time diminishes the security by withdrawing a ship before its turn for release comes. As the plaintiffs pointed out, if the defendant's contention were sound, then if the sale of one of the other ships had produced £150,000, the *Panagis* would also have had to be released under clause 13, and two ships would pass out of the security, though the debt was reduced by £150,000 only.

But in case it should be held elsewhere that the defendant's contention is right, it is well to examine the facts as to the *Yannis*. Clause 7 *(b)* forbids the sale without the Shipping Controller's consent, but provides (I here quote the clause in the *Yannis* deed) that the mortgagee shall be at liberty to sell the said steamship on giving four days' written notice to the Controller, provided that the purchase money is made payable to the Controller and provided that the same or the sum of £120,000, whichever shall be the larger, is paid over to the Controller in respect of such sale to be applied in reduction of the amount due to the Controller .... and such sale shall not constitute a breach of this subclause". Clause 8 *(f)* enumerates among the conditions of forfeiture : "If the said steamship be sold and the net proceeds of sale or the sum of £120,000, whichever shall be the larger, be not paid to the Controller as aforesaid." Early in 1921, the defendant, through Messrs. Dodwell & Co., contracted to sell the *Yannis* to the Indo-China Steam Navigation Co. In making the contract, the defendant paid very little attention to the provisions of clause 7 *(b)*. The contract did not make the purchase money payable to the Controller. The sum was £127,500, and, according to a letter of Mr. G. E. Ambatielos of 9th February 1921 (p. 830), a commission of £2,500 was due to Dodwell, "making the net price to owner £125,000". He says that there would be a further commission to himself. He adds that a deposit of £38,250 had been made in the joint

names of buyer and seller at the Commercial Bank of Scotland. The Shipping Controller called attention to clause 7 *(b)* and demanded that the balance of the purchase money should be paid to the Commodore at Hong Kong on his behalf, and that the bank should be told that the £38,250 was to be handed over to the Shipping Controller on completion of the sale. (See pp. 828 and 841.) Ultimately, by refusing to release the mortgage until he was paid, the Shipping Controller secured payment to himself of £89,250. He received that sum on 9th May 1921. It was available for him on 7th May 1921, that is after the date on which the £75,000, instalment of principal sum, ought to have been paid under clause 7 *(f)*. As to the balance of £38,250, the defendant claimed that he was entitled to receive £15,000 of it to cover expenses of sending the ship from the United Kingdom to China, the place of delivery under the sale contract. He offered to release the difference of £23,250. (See p. 911, letter of 13th May 1921.) The Shipping Controller refused to consider the question of the expenses until after the had received the whole of the £38,250. (See p. 956, letter of 29th May 1921.) As appears by page 968, on 9th May 1921 the defendant instructed the bank not to release any part of the £38,250. The Shipping Controller has never received any part of it. It still lies with the bank. The defendant at the trial said the plaintiffs could have had the £23,250 at any time. But he did not pay it or cause it to be released to the plaintiffs. In my opinion, the only amount the Shipping Controller can be considered to have had in hand was the £89,250 received on 9th May 1921. If the defendant's contention were right that the £50,000 still due on the 4th May instalment of the principal sum must be taken to have been satisfied out of that sum of £89,250, it would follow that not only had the defendant's obligation to pay £75,000 by 4th May been performed, but further that the Shipping Controller had received £39,250 beyond the payment due on 4th May. The defendant seeks to appropriate that £39,250 to the moneys owing by him for insurance or interest. I am not at all sure that the words in clause 7 *(b)* "to be applied in reduction of the amount due" do not mean "applied to reduction of the principal sum". Had it been necessary, I should have had to decide that question, but it is not necessary, as will presently appear. Before I leave the *Yannis*, it is well to point out that the defendant's obligation under clause 7 *(b)* was to repay the purchase money or £120,000, whichever be the larger, and under clause 8 *(f)* the net proceeds of sale or the sum of £120,000, whichever be the larger. It matters not whether the defendant was or was not entitled to deduct the £15,000 for expenses. He was bound to pay at least £120,000, and his failure to do so was in itself a breach of covenant.

There is a further contention of the defendant which arises on his statement marked Y. On the one hand, he proposes to treat certain insurance premiums paid by him on the *Mellon* and *Stathis* as having been paid on the Shipping Controller's account. On the other hand, he suggests (though it was not argued) that the Shipping Controller must be considered as having in hand the following items : Deposit on *Mellon* and *Stathis* alleged to amount to £48,916 ; extras on *Mellon* and *Stathis* alleged to amount to £39,822 ; bunkers and stores on *Mellon* and *Stathis* alleged to amount to £14,306. I say "alleged" in these instances because I have not investigated the figures, but that is the amount which the defendant puts them at. As I have already pointed out in dealing with the item of interest, the contracts relating to the *Mellon* and *Stathis*

both on 6th May and at the date of the writ were still running. The insurance premiums were paid by the defendant in pursuance of his liability under the bargain of July 1920. Whatever the effect of the ultimate cancellation of the sale upon the deposit on the one hand and a possible claim for damages by the Shipping Controller on the other, in 1921 the sale had not been cancelled, and, even assuming that the Shipping Controller ever became liable to return the deposit, he was not so liable in 1921. I am not suggesting that he ever became so liable. But the question whether he did or not has no bearing on the question whether the defendant was in default. As to the extras ordered and paid for by the defendant, it is impossible to see how they should ever become a debt due by the Shipping Controller to the defendant. If the sale was cancelled after the defendant had spent this money on the ships, it would be the defendant's misfortune, but the loss would lie where it fell. As to bunkers and stores on board the *Mellon* and *Stathis* when possession was taken by the Shipping Controller, this matter was not explained. There may have been coals and stores on board belonging to the defendant, but for all I know they may be still on board ; at any rate, there is nothing to show that the Shipping Controller became accountable for them at any date material to the question whether the defendant was in default.

I am now in a position to gather up the results of my findings as to insurance, interest and principal sum. They show that the defendant was in default in a very large amount at the date of the writs. At the date of the writs in the *Ambatielos*, *Cephalonia* and *Nicolis*, the position was as follows : the defendant ought to have paid instalments of principal due 4th May, £75,000 ; interest due 1st February, £35,497 4*s*. 1*d*. ; amounts paid by the Shipping Controller for premiums January, April, July, less returns received by the Shipping Controller, £40,808 10*s*. 8*d*. ; totalling £151,305 14*s*. 9*d*., and to this sum must be added the interest due 2nd August. I have not the precise figure, but it was much more than the amount due on 1st February. I suppose the bank rate in the meantime had risen. The defendant had paid on 8th November 1920, £25,000. Assuming him to be entitled to have brought into the account the £89,250 received by the Shipping Controller from the sale of the *Yannis*, he had paid £114,250. Assuming him to be further entitled to have brought into the account £23,250, part of the *Yannis* deposits, he had paid £137,500. Whichever way you look at it, he is greatly in default. At the date of the writ in the *Panagis*, the position was the same, except that the fourth instalment of insurance premiums had not become due and the returns had not been received. Because the insurance premiums and because the interest would have to be disallowed there would still be a considerable deficiency. Even if the defendant was right in saying that default must be judged as on 6th May 1920, he would still be in default. The defendant ought to have paid instalment of principal, £75,000, interest due 1st February, £35,497 4*s*. 1*d*., on the second quarter's instalment of insurance premiums paid by the Shipping Controller, £15,155 19*s*., third quarter £14,864 12*s*. 6*d*., making a total of £140,517, 15*s*. 7*d*. The third quarter's premiums must be brought into the account, for, though the Shipping Controller did not actually pay Sir William Garthwaite till after 6th May, he had already, at the defendant's request, become liable to pay. That being the account on the one side, on the other the defendant had paid, on 8th November 1920,

£25,000. Assuming him to be entitled to have brought into the account the £89,250 (which in fact was not received till after 6th May), he had paid £114,250. Assuming him to be further entitled to have brought into the account the £23,250, he had paid £137,500. Even then, though the balance is not very large, he is still in default, that is taking his own assumptions at the highest, but, as I have said, I am against him on all of them.

That leaves one other item to be dealt with, which is the arrest of the *Panagis*. By the deeds of covenant, one of the conditions of forfeiture was clause 8 (C) : "If the steamship shall be arrested .... and shall not be freed from arrest within 21 days from the date of such arrest." The *Panagis* was arrested on 6th June 1921, under writ of 3rd June 1921, at the suit of the Master for wages and disbursements. She had not been released at the date of the writs in the present action. There is on the file of the Court a consent to release on 23rd December 1921. There was here a clear breach of each of the deeds of covenant, but it was in a special way a breach of the deed of covenant relating to the *Panagis*. The writ in the *Panagis* was issued on 30th June 1921, when that breach had become completed by the expiry of the three weeks.

The plaintiffs have made out their case in each of the four actions. In each there must be judgment for the plaintiffs and an order of reference. In the cases of the *Ambatielos*, the *Cephalonia* and the *Panagis*, there must be an order for appraisement and sale, and in the case of the *Nicolis* a declaration that the plaintiffs are entitled to take possession and sell. At the sale by the Marshall both parties must have leave to bid or tender. The Marshall will have liberty to sell by private treaty if so advised, but will keep the defendant informed of what he proposes to do. There will, of course, be liberty to apply in reference to any proposed sale. The plaintiffs will have the costs of the actions.

Sir ERNEST POLLOCK : There is a sum of £38,250 which is lying in the Commercial Bank of Scotland. I think there is no reason now for that continuing to remain where it is. The effect of Your Lordship's judgment is to entitle us to the release of that sum.

Mr. Justice HILL : Is it in your name ? It was originally paid in joint names ?

Sir ERNEST POLLOCK : I think it is in joint names.

Mr. W. A. JOWITT : Yes.

Mr. Justice HILL : But it was originally in the joint names of Mr. Ambatielos and the Indo-China Navigation Co. It was not in your name at all. I doubt if it is in your name.

Mr. W. A. JOWITT : It is not in their name.

Sir ERNEST POLLOCK : I think my friend is right ; it is in the name of the Indo-China Co.

Mr. Justice HILL : You have got your judgment. You can garnishee it. You can attach it in some way. Mr. Jowitt will keep it there and you can stop it going out.

Mr. W. A. JOWITT : I do not suppose we can take it out if we want to. It is in joint names.

Mr. Justice HILL : I do not think I can make an order about it.

Sir ERNEST POLLOCK : I only wanted to refer to it.

Mr. W. A. JOWITT : I dare say the parties can settle that quite easily. It is not really before Your Lordship at all.

Mr. Justice HILL : No, it is not. It is obvious that they must settle it because it is so easy for the plaintiff to take steps to stop it going out.

Mr. W. A. JOWITT : May I just mention one difficulty which is in my mind, as I do not want to be under a misapprehension. I do not know whether there will be any taking of an account in this case.

Mr. Justice HILL : I have ordered a reference, and that is taking an account.

Mr. W. A. JOWITT : Would Your Lordship direct that in the taking of that reference the *Mellon* and the *Stathis* are now to be disregarded ?

Mr. Justice HILL : No, I cannot do that wholly. Nice questions might arise as to how long the interest on the *Mellon* and *Stathis* ran, and about the cost of insurance of the *Mellon* and *Stathis* and the deposit on the *Mellon* and *Stathis*. They are all questions of account. I have had to decide some of them in order to give my judgment, but I have carefully not decided others of them, for instance, what is the effect of the deposit. It is part of the mortgage account. It is now agreed, except for consequential questions, the sale of the *Mellon* and *Stathis* is gone, but it has left a contract. It is like an ordinary case where there is a repudiation which is accepted, but for certain consequences the contract must subsist. There is the effect on the deposit in damages, and so on.

Mr. W. A. JOWITT : There is only one other point I should like to mention, and that is with regard to the part of Your Lordship's order that directs the sale.

Mr. Justice HILL : That was discussed last time. I was only stating what was arranged last time. I am very anxious that more ships should not be sold than is necessary. I am quite sure that the plaintiffs will not desire that more ships should be sold than necessary. They have all along been anxious to get the cash otherwise than by the sale of the ships.

Mr. W. A. JOWITT : Sir Ernest, who I know always desires to meet me on any point, will perhaps meet me on this. As to the part of Your Lordship's order directing a sale, of course that might become, except for agreement between us, immediately or shortly operative. With regard to that part of the order, my clients might like an opportunity of considering their position, and I do not know whether Your Lordship would say, on such terms as Your Lordship thinks proper, that so far as the order directs a sale there might be a stay. With regard to the balance and the reference that will occupy some time probably and come before Your Lordship again, so with regard to that I do not think I need ask for a stay.

Sir ERNEST POLLOCK : I am always very anxious to meet my learned friend and in a matter of this difficulty I would, but I really think that in the interests of all parties I cannot agree to anything like a stay. Your Lordship remembers how peculiar the position is. It is really not in the interests of either party that there should be a stay. The vessels are all laid up and have been for a long time.

Mr. Justice HILL : The expenses are very heavy ?

Sir ERNEST POLLOCK : Yes ; and they are going on. The position of the plaintiffs in this case is that under the order that Your Lordship has made, a sale could only be undertaken, and indeed, would only be undertaken, in the interests of those who are concerned if it was really advantageous ; and that means advantageous to both sides, because there would be a responsibility upon those who exercised the power of sale to justify their action. Both sides are interested that we should not increase those expenses, which have already run up to a very great amount. I carefully watched and listened to that part of Your Lordship's order which seemed to me to reserve all proper rights to the defendant. There are liabilities on the part of the plaintiffs if they exercise the power of sale ; but there is a liability on all parties to abate the expenses, so as to save further expense as far as possible. In all I am saying, I am speaking as much in favour of the interests of the defendant as of the plaintiffs ; but I ask Your Lordship not to impose a term which might result in further liability to whoever ultimately has to pay for it. That is the reason why I ask Your Lordship not to alter the order which you have made.

Mr. Justice HILL : Even under this order that the Marshall is to act at once, it will be some little time before there can be a sale. If by that time you have given notice of appeal, possibly different considerations might arise. Your time for appeal will be out long before the Marshall can bring about a sale.

Mr. JOWITT : My clients might undertake, if so advised, to give their notice of appeal promptly ; but, frankly, in a difficult and complicated case of this sort, one wants to consider the position very carefully.

Mr. Justice HILL : Certainly.

Mr. JOWITT : I am not indicating for a moment that we shall appeal ; but we want to consider the position. Assuming before the sale takes place notice of appeal has been lodged, I am merely suggesting, on such terms as Your Lordship considers proper, that it would be right we should be granted a stay. After all, we have paid large sums of money in respect of these ships, and the ships are in the hands of the Ministry.

Mr. Justice HILL : Apart from those things—though you made reduce the debt by half by eliminating the *Mellon* and the *Stathis*—it is not quite that, as there still would be the difficult question about interest—they will want £400,000 or £500,000 on any showing, and you will not get £400,000 or £500,000 from these ships.

Sir ERNEST POLLOCK : That is it. My friend will have the opportunity of considering the position. If he decides to take the case to another court, and if the occasion arises when we are going to sell ; if he thinks the matter of a stay in that particular case ought to be brought before Your Lordship, I suggest he should reserve his opportunity for asking for a stay till that occasion, when, if Your Lordship thought we were acting improperly, unwisely, or imprudently, then Your Lordship could say on certain terms you would, with regard to that particular sale, if it is undertaken, order a stay. Really, to make a stay at the present time is very possibly to deprive us of the exercise of advantages which might inure in favour of my learned friends just as much as the plaintiffs, if the judgment was in any way varied. I hope, therefore, Your Lordship

will not make anything like an order now of stay, but leave my learned friend, as he has got liberty to apply, if he should think proper, to apply upon the facts of the case as and when occasion for such application may arise.

Mr. JOWITT : So long as the position is quite clear.

Mr. Justice HILL : I specially added that you have liberty to apply with reference to any proposed sale.

Sir ERNEST POLLOCK : I am quite content with that.

Mr. Justice HILL : The Marshall will keep both parties informed of any steps he is proposing to take.

Mr. JOWITT : Then my rights as to a stay and the terms on which I may get it are quite unprejudiced ?

Sir ERNEST POLLOCK : Quite unprejudiced. My friend will be quite free to come to Your Lordship at any time pending the appeal.

Mr. JOWITT : If Your Lordship pleases.

Mr. RAEBURN : There is one other matter which I should like to mention. My recollection is not very fresh about this, but when the matter came before Your Lordship and the order was made which resulted in the trial that we had last term, there were two other motions for judgment and sale on the part of persons who said that they had supplied to this ship necessaries. One plaintiff was a firm called Antippa, Frères. The other plaintiff was a Mr. Ambatielos, a brother, I think, of the defendant. These motions were ordered to stand over, as the Board of Trade intervened, pending the hearing of this trial.

Mr. Justice HILL : I think these other actions are standing over pending this decision.

Mr. RAEBURN : That is so. I do not know what the position may be about them, but it struck me they might have to be the subject of some further application to Your Lordship.

Mr. Justice HILL : The plaintiffs will have to bring them on, or you will have to move to dismiss them.

Mr. RAEBURN : Yes. I thought it better to mention the matter.

Mr. Justice HILL : I am not dealing with that. I am only giving you, as mortagees, judgment.

Mr. RAEBURN : Quite so.

Mr. Justice HILL : It will not affect anybody else.

Mr. RAEBURN : Those are actions in which possibly something may have to be done in view of the order for sale of the ships, because there is no judgment in either of those two actions. In fact, the vessels have not been used since last January. That can be mentioned to Your Lordship at some other time ?

Mr. Justice HILL : Yes. You will have to get those other plaintiffs here.

Mr. RAEBURN : Yes.

Mr. Justice HILL : If the ships are arrested in their action, I have none the less power to order a sale in your action. There is nothing to prevent my doing that.

Mr. RAEBURN : If Your Lordship pleases.

I hereby certify the foregoing to be a true and faithful transcript of the judgment herein.

(Signed) C. H. NORMAN,
For C. E. BARNETT & Co.

Annex 2

JUDGMENT OF THE COURT OF APPEAL

Royal Courts of Justice.
Monday, 5th March 1923.

IN THE SUPREME COURT OF JUDICATURE,
COURT OF APPEAL,
ADMIRALTY

Between

The owners of the S.S. Ambatielos

APPELLANTS
(DEFENDANTS)

and

The Board of Trade on behalf of His Majesty

RESPONDENTS
(PLAINTIFFS)

Ambatielos

Before :

LORD JUSTICE BANKES

AND

LORD JUSTICE SCRUTTON

(From the shorthand notes of Cherer & Co., 2 New Court, Carey Street, W.C. 2.)

JUDGMENT

Lord Justice BANKES : I do not think this application ought to be granted. The rule upon which this kind of application is granted is well established and I need not repeat it ; it is referred to in a case to which Sir Ernest Pollock referred of *Nash* v. *Rochford Rural District Council* (1917, 1 King's Bench, p. 384), and summarized, it may be stated thus, I think : That a person who has lost his action in the court below will

not be allowed to come to this court and ask to make a new case in the Appeal Court by calling fresh evidence which was or might have been obtained by the use of reasonable diligence by him in time for the first trial.

Now the facts here are these : That the defendant here sought to make out that the real contract between himself and the Ministry of Shipping was that these steamers were to be delivered by a fixed date and his case was that a verbal agreement to that effect had been made between his brother, as I understand it, and Major Laing representing the Ministry, and it is now sought to obtain leave to call Major Laing to give fresh evidence upon the hearing of this appeal. The facts as disclosed by the affidavits are that the defendant was in communication with Major Laing before the trial and he ascertained from Major Laing the existence of certain confidential letters which had passed between him and Sir Joseph Maclay. Major Laing read Mr. Ambatielos the contents of the said letters but refused to show him the letters or give him copies thereof. Now the affidavit there only refers to the conversation between the defendant and Major Laing, there is no reference to these letters, but it would be strange, I think, if one came to the conclusion that the conversation was confined to that particular point and had no reference to what had passed between Major Laing and the defendant's brother. However, it is sufficiently stated in the affidavit to satisfy me that the defendant was in communication with Major Laing and had reason to suppose that there were in existence these documents which very likely might assist his case.

Now the trial proceeded and Major Laing was in court we are told the whole of the time, and, of course, if he had been favourable to the Ministry of Shipping case he would have been called in support of their case, but he was not and he was not called by the defendant. In substance it seems to me that the defendant's case now as put before us was this : we had reason to suppose that Major Laing was a favourable witness but we were not quite certain : he would not tell us exactly what his evidence was going to be, and, therefore, we did not like to risk calling him, but after the trial, and after the case has been decided, we have been told that if we had called him he might have given evidence in our favour. If that is a fair summary of the defendant's application, and it seems to me to be so, it is quite plain that this Court would never allow such an application to succeed, because there would be no end to litigation if a defendant or a plaintiff who was in doubt as to whether he would or would not call a witness but who knew of the existence of the witness, who was aware of the materiality of his evidence, who had reason to think that possibly his evidence would be in their favour, but was not sure, was allowed to come here, and say I am sure it is in my favour and I had better have called it, and I want leave to adduce his evidence. In my opinion, the court would not accede to such an application, and it ought not to be acceded to here.

Lord Justice SCRUTTON : I agree that to grant this application would be to depart from the settled principle upon which the Court deals with the admission of further evidence after a case has once been tried. One of the principal rules which this Court adopts is that it will not give leave to adduce further evidence which might have been adduced with reasonable care at the trial of the action.

Now in this case there being a contract in writing for the purchase of ships for some £2,000,000 containing nothing about an agreed date of delivery in the sense of mentioning the date, the purchaser desires to set up an oral agreement made by a subordinate of the Ministry of Shipping fixing certain dates for delivery. He knows whom he is going to allege made the agreement, he is in communication with the person before the case comes on. The affidavits are studiously silent as to when exactly he was in communication with him ; they are studiously silent as to when Mr. Ambatielos communicated what he heard to his legal advisers, but Mr. Ambatielos knew before the case came on that Major Laing could say something. I dare say that learned counsel appearing for Mr. Ambatielos considered very carefully whether or not he should risk it, and having given careful consideration to the matter they determined not to risk calling Major Laing, and they were beaten. After the trial they hear something which leads them to believe that they were too cautious and they apply that they may now call Major Laing. In my view it would be contrary to the settled principles of this Court to allow a man who has considered the situation and taken his chance, to have another try when he finds the chance has gone against him, and that is what, in my view, the present defendants are doing in this case. I agree, therefore, that the appeal should be dismissed.

Sir ERNEST POLLOCK : I ask for costs ?

Lord Justice BANKES : Yes.

Sir ERNEST POLLOCK : If Your Lordship pleases.

Annex 3

AFFIDAVIT BY Mr. N. E. AMBATIELOS, READ IN THE COURT OF APPEAL ON 5th MARCH 1923

Before the trial of this action, I had a conversation with Major Laing concerning matters in question in this action. In the course of the conversation, Major Laing mentioned the existence of certain confidential letters which had passed between him and Sir Joseph Maclay. Mr. Laing read me a part of the contents of the letters, but refused to show me the letters or to give me copies thereof. On or about 5th February 1923, after judgment had been given in this action, copy letters were furnished to me by Major Laing without any reservation as to their use. If the letters now supplied to me by Major Laing are the same as those referred to in our conversation before the trial, I did not receive from the extracts read to me or from the conversation which I held with Major Laing a correct impression as to the meaning of the letters. In particular, I did not understand that they confirmed my case as to the delivery of the vessels on dates certain.

Annex 4 (1)

LETTER OF 5th SEPTEMBER 1919 FROM G. E. AMBATIELOS TO H. F. BAMBER

GEA/EMP.

H. F. Bamber, Esq.,
Room 136,
Ministry of Shipping,
St. James's Park, S.W. 1.

46, St. Mary Axe,
London, E.C. 3,
5th September 1919.

Sir,

Re *Steamers Building at Hong Kong*

We thank you for your esteemed favour of the 4th inst., and for the information contained therein.

S.S. War Miner.—Can you please obtain and pass to us the information as to when this boat has actually been launched, and when we may definitely rely upon delivery.

S.S. War Trooper.—We note that this boat has been completely plated, and seeing that the engines and boilers are progressing satisfactorily, we will thank you if you will be good enough to inform us when we may definitely expect delivery of her.

Thanking you in anticipation, etc.

(Signed) G. E. AMBATIELOS.

Annex 4 (2)

LETTER OF 9th SEPTEMBER 1919 FROM H. F. BAMBER TO G. E. AMBATIELOS

Room 137.
9th September 1919.

Sir,

Re *Steamers Building at Hong Kong*

With reference to your letter of the 5th instant, the s.s. *War Miner* was launched on the 16th August last.

It is difficult to estimate from this when she will be delivered, but I have cabled to-day to Hong Kong, asking when this steamer and also the *War Trooper* will be delivered.

I am, etc.

(Signed) H. F. BAMBER,
Director of Ship Purchase.

G. E. Ambatielos, Esq.,
46, St. Mary Axe,
London, E.C. 3.

Annex 4 (3)

LETTER OF 10th OCTOBER 1919 FROM H. F. BAMBER TO G. E. AMBATIELOS

Room 136.
10th October 1919.

Sir,

Steamers Building at Hong Kong

I am in receipt of a cable advice from Hong Kong as to the estimated delivery dates of these steamers as follows :

War Miner will probably be completed end of October.

War Trooper launching middle of October, and will be completed middle of November.

Satisfactory progress is also being made with the *War Bugler* and *War Piper*.

I am, etc.

(Signed) H. F. BAMBER,
Director of Ship Purchase.

G. E. Ambatielos, Esq.,
46, St. Mary Axe,
London, E.C. 3.

Annex 4 (4)

LETTER OF 11th OCTOBER 1919 FROM G. E. AMBATIELOS TO MINISTRY OF SHIPPING

Ministry of Shipping,
Room 136,
Lake Buildings,
St. James's Park, S.W. 1.

46, St. Mary Axe,
London, E.C. 3,
11th October 1919.

Dear Sir,

Steamers Building at Hong Kong

We are much obliged for your esteemed favour of yesterday's date giving us text of a cable received by you from Hong Kong regarding completion of the *War Miner* and *War Trooper*, also we note satisfactory progress is being made with the *War Bugler* and *War Piper*.

Thanking you again, etc.

Per pro. G. E. Ambatielos,
(Signed) H. TITTENSOR,
Manager.

Annex 4 (5)

LETTER OF 31st OCTOBER 1919 FROM N. E. AMBATIELOS TO MAJOR BRYAN LAING

Major Bryan Laing,
Ministry of Shipping,
St. James's Park, S.W. 1

46 St. Mary Axe,
London, E.C. 3,
31st October 1919.

Sir,

S.S. *War Trooper* renamed *Ambatielos*

Pray excuse us for troubling you again in connection with the delivery of this steamer, but as same is being continually put back, we can only look to your good self for assistance, as we know the large amount of influence you exercise on the builders.

As you will recollect, at the time of the negotiations for the purchase of these boats, you intimated that this steamer would be delivered towards the end of October.

When our consulting engineer, Mr. J. D. Rossolymos, arrived at Hong Kong, he wired us on the 4th of this month that we were to obtain delivery on 25th November.

Although this naturally disappointed us, we still entertained hopes of getting this steamer earlier.

However, yesterday evening, much to our surprise and annoyance, we received another cablegram from Mr. Rossolymos, in which he now states that he *hopes* to obtain delivery of this steamer about 15th December.

As you are aware, we have chartered her with a very handsome freight, and have agreed, what we thought at the time to be very ample, and fully covering us, the 31st December, as cancelling.

As things stand now, it is almost impossible for the steamer to catch her cancelling date, which will mean a very substantial financial loss to Mr. N. E. Ambatielos, as freights have since greatly declined.

We will consider it, therefore, a favour if you will oblige us and despatch a very strongly worded telegram to the builders, urging upon them that they must do all humanly possible, with a view to giving us delivery at the end of November at the very latest.

Please accept our very best thanks in anticipation.

We remain, etc.

(Signed) N. E. AMBATIELOS.

Annex 4 (6)

LETTER OF 22nd DECEMBER 1919 FROM G. E. AMBATIELOS TO J. O'BYRNE

Ref. : DSP/1.
J. O'Byrne, Esq., M.B.E.,
Room 24,
Ministry of Shipping,
St. James's Park, S.W. 1.

46 St. Mary Axe,
London, E.C. 3,
22nd December 1919.

Sir,

Re *Purchase of nine vessels*

We have to thank you for your esteemed favour of even date and we are very grateful to your goodself for the prompt attention you gave, and despatched telegraphic orders to the builders of these boats in Shanghai and Hong Kong that they are to deliver same immediately on completion to John Rossolymos and that the expenses incurred for any extras for modification will be paid by your good Ministry and will be recovered from us here.

Re *War Bugler*. We confirm telephonic conversation, and as explained on the 'phone we do not hold you responsible for the detention of this boat in Hong Kong as you have nothing to do with same whatever, in fact you have done all humanly possible to accelerate delivery of this and all other steamers.

Our protest made referred in our former letter of even date to you was only against the builders, which kindly note.

We are, etc.

(Signed) G. E. AMBATIELOS.

Annex 4 (7)

CABLE OF 22nd JANUARY 1920 FROM AMBATIELOS TO ROSSOLYMOS

Rossolymos,
care Dodwell,
Hong Kong,

London, 22nd January 1920.

Two your telegram two also your telegram not numbered dated 17th January received do your utmost to reduce extra lowest possible minimum also fitting oil burning sets and telegraph definitely which steamers will be able to burn liquid fuel when delivered to us from Hong Kong and Shanghai telegraph also when two small boats will be definitely launched and delivered do not detain *Trialos* for fitting liquid fuel but remaining two large and two small steamers must be fitted burn liquid fuel get from all builders full complete plans in duplicate also builders certificates in duplicate you must send one of each these documents by registered post to us and other with each ship. *(Signed)* AMBATIELOS.

Annex 4 (8)

EXTRACT FROM CABLE FROM J. D. ROSSOLYMOS TO G. E. AMBATIELOS DATED 4th FEBRUARY 1920

G. E. Ambatielos,
London. Hong Kong, 4th February 1920.

Kowloon builders prepared to take orders for 2 or 4 boats similar *Piper* most improved steamer(s) without liquid fuel for £35 per ton deadweight regardless fluctuation(s) of exchange prepared place keel April delivery(ies) 10 months 12 months after would 22/January accept order(s) within fortnight from to-day Ambatielos extra(s) 44,000-71 dollars *Stathis* 29,500 all approved by me *Panagis* about 22,000 dollars (not) yet approved *stop Patrikios Romantzas* arrived. *(Signed)* J. D. ROSSOLYMOS.

Annex 4 (9)

CABLE OF 1st MARCH 1920 FROM AMBATIELOS TO ROSSOLYMOS

Cable to Rossolymos
care Dodwell, Hong Kong. 1st March 1920.

10 your telegram is received 13 received *Keramies Yannis* must burn liquid fuel even if it will (would) delay steamer *Trialos* we confirm our (my) telegram (of) 7 we have guaranteed 7,800 tons deadweight with 460,000 grain cubic capacity instruct captain place disposal of charterers dispute has arisen here over *Panagis* Shanghai bunkers hence telegraph exact amount *stop* Received from Ministry accounts extra *Nicolis* amount(s) to 60,000 dollars all this work could have been done here for half this amount we must draw attention extras remaining steamers you must only do absolutely necessary modifications charges very unreasonable and out of proportion telegraph regarding exact delivery of *Keramies Yannis* have booked liquid fuel last four steamers at Tarakan Hong Kong and Shanghai keep suppliers informed steamers' positions. *(Signed)* AMBATIELOS.

Annex 4 (10)

CABLE OF 14th APRIL 1920 FROM G. E. AMBATIELOS TO ROSSOLYMOS

Rossolymos,
Hong Kong. London, 14th April 1920.

No. 16. All your telegrams including 24 received you can appoint second engineer as chief engineer this position only temporary we might

keep him if we are satisfied *Yannis* we are treating to fix from Java Laydays not to commence before 1st June therefore take good care this steamer is properly and well finished in every respect and do not hurry delivery we are very anxious that all steamers must be well finished therefore telegraph when *Yannis, Keramies Stathis* will be definitely delivered telegraph if you have settled the dispute regarding extras *Merakies* you must not give way do not sign accounts Ministry cannot demand immediate delivery but can give guarantee through West England repeat try to get extras and expenses down to lowest possible minimum they are absolutely unbearable freights rapidly declining remaining vessels very much smaller profit on homeward trip keep suppliers crude oil Shanghai and Terakan informed of expected readiness three remaining steamers and when supplies will be required. *(Signed)* G. E. AMBATIELOS.

Annex 4 (II)

LETTER OF 22nd MAY 1920 FROM G. E. AMBATIELOS TO MAJOR LAING

G. E. Ambatielos.

Villa *Mon Repos*,
35, High Road,
Streatham.

London, S.W., Saturday, 22nd May 1920.

My dear Major Laing,

I am leaving to-morrow for Paris where I hope to find a telegram from you *re* Taw Shipyard—I have received from Mr. Westacott plan and prospectus which I will submit to my brother, but only your wire will influence him to take an interest into this business, which I am sure will give good results. Please also follow up your telegram with a letter, giving me as many particulars as you can and your own opinion.

Yesterday we had a letter from Mr. O'Byrne informing us that the *War Coronet* had been delivered. This really surprised me, as Rossolymos' latest advices were to the effect that she would not be delivered before the end of this month at the earliest. As I told you, I was negotiating a loan for service £150,000 to enable us to complete the purchase, but there are so many formalities to go through, and not anticipating delivery so soon to tell you the truth I did not bother the Bank. However, everything will be completed when I return, so that payment will be made in a few days. I shall be obliged if you explain matters to Mr. O'Byrne, as he is a very worrying nature and he has always been so good and kind to me, that I can assure you, it really hurts me to think that he may worry about my affairs—I am also writing to him a few lines.

I hope to be back by Thursday.

With my best regards, etc.

(Signed) G. E. AMBATIELOS.

Annex 4 (12)

LETTER OF 8th OCTOBER 1920 FROM J. O'BYRNE TO G. E. AMBATIELOS

D.S.P./1/72907/18 (Pt. 423).

Room 24.
8th October 1920.

Sir,

With reference to this Department's letter of 6th instant, I have to inform you that it has been decided that this Ministry will accept the security offered by you, viz. : a mortgage of 7 vessels to be placed on the Greek Register, subject to the Greek Government confirming that there are no prior charges on these ships, and after these mortgages have been duly registered, the remaining two ships will be handed over to you—these two vessels in due course also to be placed on the Greek Mortgage Register.

I am, Sir, etc.

(Signed) J. O'BYRNE,
For Director of Ship Purchase.

G. E. Ambatielos, Esq.,
46, St. Mary Axe,
E.C. 3.

Annex 4 (13)

LETTER OF 8th OCTOBER 1920 FROM G. E. AMBATIELOS TO J. O'BYRNE

J. O'Byrne, M.B.E.,
Ministry of Shipping,
Room 24,
St. James's Park, S.W. 1.

46, St. Mary Axe,
London, E.C. 3,
8th October 1920.

Sir,

Re *Mr. N. E. Ambatielos of Paris*

We are much obliged for your esteemed favour of the 8th instant, in which we note with satisfaction that your good Ministry have definitely decided now to allow the balance due for the completion of the purchase of the four vessels still unpaid, by taking a mortgage.

As the s.s. *Mellon* and s.s. *Stathis* will very shortly be ready to be delivered to us after completion of their present voyage, we will feel greatly indebted to you if you will push forward with all possible speed the necessary documents, and remain, dear Sir, with our best thanks once more.

Yours respectfully,

(Signed) G. E. AMBATIELOS.

Annex 4 (14)

LETTER OF 8th NOVEMBER 1920 FROM J. O'BYRNE TO G. E. AMBATIELOS

D.S.P./1/72907/18, Pt. 423. Room 24.
8th November 1920.

Sir,

I have to acknowledge receipt of your letters dated 4th and 6th inst., the first dated of which only reached me at midday to-day.

Regarding the s.s. *Stathis* and *Mellon*, I have to point out that (as previously stated to you) these two ships will only be transferred to the ownership of Mr. N. E. Ambatielos, after the other seven vessels have been duly registered at Argotoli, Cephalonia, and the mortgagees placed on the Greek Register, and therefore your assumption that these two ships would be handed over to you before they proceed to America is erroneous.

I am, Sir, etc.

(Signed) J. O'BYRNE,
For Director of Ship Purchase.

G. E. Ambatielos,
46 St. Mary Axe, E.C. 3.

Letter read over to Mr. Lewis who quite agreed to its despatch.
J. O'B.

Annex 4 (15)

LETTER OF 9th NOVEMBER 1920 FROM G. E. AMBATIELOS TO J. O'BYRNE

J. O'Byrne, Esq., M.B.E.,
Room 24, Ministry of Shipping,
St. James's Park, S.W. 1.

46 St. Mary Axe,
London, E.C. 3,
9th November 1920.

Sir,

S.S. *Stathis*—S.S. *Mellon*

We have to acknowledge receipt of your favour of 8th inst., contents of which we must say have really astonished us.

We are afraid that the competent gentleman at the Ministry must be working under a thorough and entire misunderstanding with regard to the transfer of the above two vessels.

The conditions imposed to us for the transfer of these two vessels to the ownership of Mr. N. E. Ambatielos and under the Greek flag was and is that before such transfer can take place the mortgages on the seven steamers which we have given your good Ministry as security for the money due, should be completed.

This is exactly what has been verbally arranged, and if further evidence is required it can be found in addition to our letters of 4th and 6th inst.

(the letter of 6th inst. was airposted by our Senior from Paris), also in our letter of 28th October. Further the deeds of covenants are quite clear on this subject.

Therefore it appears to us that a misunderstanding exists from your end, and now that the mortgage has been duly filed with the Greek Consul here will feel obliged if you will see that the matters are put in their proper and right place and that the s.s. *Stathis* and s.s. *Mellon* are delivered to us under the Greek flag as arranged.

As explained, both of these steamers will be ready to sail by the end of this week.

Thanking you in anticipation for your prompt attention, etc.

(Signed) G. E. AMBATIELOS.

Annex 4 (16)

LETTER OF 10th NOVEMBER 1920 FROM DIRECTOR OF SHIP PURCHASE TO G. E. AMBATIELOS

(D.S.P./1/72907/18, Pt. 432.) Room 24.

Sir, 10th November 1920.

S.S. *Stathis* and *Mellon*

I am in receipt of your letter dated 9th instant and have to inform you that the competent gentleman at this Ministry is not under a misunderstanding with regard to the transfer of the two above vessels. I would refer you to this Department's letter dated 8th October last, wherein you were informed that these two vessels would be handed over to you after a mortgage of the seven vessels had been placed on the Greek Register, subject to the Greek Government confirming that there were no prior charges on these ships, and that after these mortgages had been duly registered, the remaining two vessels would be handed over to you. These two vessels also in due course to be placed on the Greek Mortgages Register.

If there has been any confusion, it has not been on the side of this Ministry, and I can only assume that it must be due to a misunderstanding on your part, and I have to repudiate that there has been any verbal arrangement to hand over the two above-named ships on the signing of the seven deeds of covenant for the seven deeds of mortgage. The terms of this Department's letter of 8th October last cannot be varied, i.e. after the seven vessels have been registered at Argostoli, Cephalonia, and the mortgages duly entered, the remaining two ships will be transferred to the ownership of Mr. N. E. Ambatielos after being placed on the Greek Mortgage Register.

I am, Sir, etc.

For Director of Ship Purchase.

G. E. Ambatielos, Esq.,
46 St. Mary Axe, E.C. 3.

Annex 4 (17)

LETTER OF 3rd FEBRUARY 1921 FROM G. E. AMBATIELOS TO THE SHIPPING CONTROLLER

(Important.)
The Shipping Controller,

Ministry of Shipping,
St. James's Park, S.W. 1.

46 St. Mary Axe,
London, E.C. 3,
3rd February 1921.

Sir,

Re *N. E. Ambatielos of Paris*

Whilst apologizing for troubling you with this letter, we ask for your indulgence while we place clearly before you the position we find ourselves in *re* the above, in the hope that you may give it sympathetic and favourable consideration.

In 1919, we bought 11 steamers from the Ministry involving a sum—including extras—of over £3 million sterling.

From the very fact that this transaction involved, as it did, the cash provision of £2,200,000—and left only a relatively small balance of £800,000—to be found, we ask you to believe that it was entered upon only after most careful calculations based on business experience, and was not hastily or rashly undertaken.

Our bankers, both verbally and in writing, informed us that we could rely upon certain advances which would fully cover our requirements to complete this transaction, and we implicitly relied upon this assurance. Much to our dismay, however, when the time came for this accommodation to be provided, they refused to grant us a loan on the grounds that things had considerably changed, that they had in the meantime advanced considerable sums of money to assist shipping, and that they were obliged to meet demands from other customers, not connected with shipping.

We immediately brought the matter to the knowledge of the competent gentleman at the Ministry, but still continued our efforts to procure a loan through other bankers, namely, Messrs. Cox & Co., with whom we negotiated over a long period, but unfortunately they also turned the business down. These efforts were known to Mr. J. O'Byrne, who, we must admit, has all along done his utmost to assist us in trying to meet the situation that has arisen.

We chartered the following vessels, as under, with first-class American and English firms:

S.S. *Nicolis*, chartered 30th April 1920, at the rate of $21.50 per ton, for as many consecutive voyages as steamer can make up to 30th June 1921, from Hampton Roads to West Italy.

S.S. *Panagis*, chartered on 29th April 1920, for as many consecutive voyages as steamer can perform up to 1st April 1921, from Hampton Roads to French Atlantic, at the rate of $20 per ton.

S.S. *Ambatielos*, chartered 22nd April 1920, at the rate of $21.50 per ton, for six consecutive voyages from Hampton Roads to West Italy.

S.S. *Cephalonia*, chartered 29th May 1920, at the rate of $19.50 per ton, for as many voyages as steamer can perform up to 31st July 1921, from Hampton Roads to West Italy.

S.S. *Keramies*, chartered 25th March 1920, for six consecutive voyages, from Calcutta to Alexandria, at the rate of 120/- per ton.

S.S. *Trialos*, chartered 28th April 1920, for as many consecutive voyages as steamer can perform up to 1st April 1921, from Hampton Roads to Antwerp or Rotterdam, at the rate of $19.

We had every reason to reckon that these charters would yield to the owner in a year's time a minimum net profit of £900,000. However, most unfortunately, we have had all these charter-parties, one after another, cancelled, for no earthly reason or excuse whatever, and we are now suing the charterers for damages.

Shipping, as you are well aware, Sir, is going through a most abnormal crisis, but it is to be hoped that things cannot possibly remain as they are, because business at large, and trade in general, is thereby paralyzed and almost at a standstill. Nevertheless, one must face the actual fact that ships can no longer pay their expenses and are being rapidly laid up.

All this has been worrying us more than it is possible for you to realize, and notwithstanding the fact that we have spared no efforts to make satisfactory arrangements with a view to meeting our obligations, we can see no immediate prospect of doing so.

As above stated, Sir, this very considerable transaction was not entered upon in the spirit of speculation. Had that been so, we would certainly not deserve, or appeal for, any indulgence. It was a thoroughly well thought out business proposition, in which personal property was sunk of over £2 million sterling, and for which, we respectfully submit, no normal foresight could have anticipated any such difficulties as have arisen.

How can we possibly deal with the present situation effectively and satisfactorily unless we receive some indulgence at your hands ?

Having regard to the *impasse* we are faced with, we would ask you to consider whether you could release us from purchasing at least the s.s. *Stathis* and the s.s. *Mellon*. In that event, together with the proceeds of a ship we have just sold, the outstanding balance would be reduced to proportions that we could handle and thus save ourselves from utter ruin.

We beg to offer you, Sir, etc.

(Signed) G. E. AMBATIELOS.

Annex 5

THE NINE SHIPS

A.—Ships paid for

Names[1]	*Type*	*Tonnage Deadweight*	*Contract price* £	*s*	*d*	*Place of building*	*Remarks*
(War Diadem) Panagis	C	5,150	180,000	0	0	Shanghai	Paid for. Delivered to M. Ambatielos on 9th December 1919. No complaint of late delivery in respect of this ship. Mortgaged to the Crown on 4th November 1920. Subject of Admiralty action in November 1922.
(War Miner) Cephalonia	B	8,250	289,166	13	4	Hong Kong	Paid for. Delivered to M. Ambatielos on 27th October 1919. Late delivery alleged. Mortgaged to Crown on 4th November 1920. Subject of Admiralty action in November 1922.
(War Trooper) Ambatielos	B	8,250	289,166	13	4	Hong Kong	Paid for. Delivered to M. Ambatielos on 15th December 1919. Late delivery alleged. Mortgaged to Crown on 4th November 1920. Subject of Admiralty action in November 1922.
(War Bugler) Nicholas or *Nicolis*	B	8,250	289,166	13	4	Hong Kong	Paid for. Delivered to M. Ambatielos on 19th December 1919. Late delivery alleged. Mortgaged to Crown on 4th November 1920. Subject of Admiralty action in November 1922.

[1] The name in brackets is the original name under which the ship was sold by the Crown. The other name is that under which the ship was operated by or on behalf of the Claimant.

Names	*Type*	*Tonnage Deadweight*	*Contract price* £	*s*	*d*	*Place of building*	*Remarks*
(War Sceptre) Trialos	B	8,250	289,166	13	4	Hong Kong	Paid for. Delivered to M. Ambatielos on 3rd March 1920. Late delivery alleged. Mortgaged to the Crown on 4th November 1920. Board of Trade took possession as mortgagees on 21st July 1922.
B.—Ships having balance of purchase price unpaid.							
(War Coronet) Keramies	B	8,250	289,166	13	4	Hong Kong	Delivered to M. Ambatielos on 16th May 1920. Late delivery alleged. Mortgaged to the Crown on 4th November 1920.
(War Tiara) Yannis	C	5,150	180,000	0	0	Shanghai	Delivered to M. Ambatielos on 1st June 1920. Late delivery alleged. Mortgaged to the Crown on 4th November 1920. Sold by M. Ambatielos in February 1921, and part of proceeds paid to Ministry of Shipping.
(War Piper) Stathis	B	8,250	289,166	13	4	Hong Kong	Not delivered to M. Ambatielos under the contract, but traded under his charter party, with Royal Mail Steam Packet Co. as managers and Shipping Controller as registered owner.
(War Regalia) Mellon	C	5,150	180,000	0	0	Shanghai	Not delivered to M. Ambatielos under the contract, but traded under his charter party with Alfred Holt & Co. as managers and Shipping Controller as registered owner.
Total purchase price			2,275,000	0	0		

3. OBSERVATIONS ET CONCLUSIONS DU GOUVERNEMENT HELLÉNIQUE

RELATIVEMENT A L'EXCEPTION D'INCOMPÉTENCE FORMULÉE PAR LE GOUVERNEMENT BRITANNIQUE

1. Les présentes observations et conclusions sont soumises à la Cour internationale de Justice en exécution de l'ordonnance du 14 février 1952.

2. *Objet du différend.* — La demande introduite par le Gouvernement hellénique tend à obtenir du Royaume-Uni réparation du dommage causé à un ressortissant hellénique par les autorités britanniques tant administratives que judiciaires en violation des obligations internationales du Royaume-Uni.

3. *Base juridique de la demande.* — En présentant cette réclamation le Gouvernement hellénique s'est prévalu avant tout d'une disposition expresse du Traité de commerce et de navigation intervenu entre le Royaume-Uni et la Grèce le 10 novembre 1886, disposition reproduite presque dans les mêmes termes dans le Traité de commerce et de navigation signé entre les mêmes parties le 16 juillet 1926 :

Article XV, paragraphe 3, du Traité de 1886

Les sujets de chacune des Parties contractantes dans les domaines et possessions de l'autre auront libre accès aux tribunaux pour la poursuite et la défense de leurs droits sans autres conditions restrictives ou taxes que celles qu'elles imposent à leurs sujets.

Article 12 du Traité de 1926

Les deux Parties contractantes conviennent de prendre les mesures les plus appropriées par voie de leur législation nationale et de leur administration à la fois pour prévenir une application arbitraire ou injuste de leurs lois et règlements en ce qui concerne les droits de douane et autres droits similaires et pour assurer des recours administratifs, judiciaires ou d'arbitrage à ceux qui ont été victimes de pareils abus. Le mode de procédure sera réglé par les deux Parties contractantes dans leurs territoires respectifs.

Le Gouvernement hellénique s'est prévalu aussi de certaines stipulations expresses communes aux deux traités garantissant aux ressortissants des parties la liberté de communication et le traitement de la nation la plus favorisée :

Traité de 1886

Article I

Il y aura entre les dominions et possessions *des deux Parties contractantes liberté réciproque de commerce et de navigation. Les sujets de chacune des deux Parties auront liberté de venir librement avec leurs navires et cargaisons dans toutes places, ports et* rivières des dominions et possessions *de l'autre auxquels ses propres ressortissants ont accès ou peuvent être autorisés de l'avoir et jouiront respectivement des mêmes droits, privilèges, libertés, faveurs, immunités et exemptions en matière de commerce et de navigation que ceux qui sont ou peuvent être accordés aux nationaux.*

Article X

Les Parties contractantes conviennent qu'en toute matière relative au commerce et à la navigation, tout *privilège, faveur ou immunité quelconque que l'une d'entre elles a actuellement accordés ou pourra accorder ultérieurement aux sujets ou citoyens de quelqu'autre* État *seront étendus immédiatement et inconditionnellement par elle aux sujets et citoyens de l'autre* Partie contractante ; *leur intention étant que le commerce et la navigation de chaque nation soient traités, à tous égards, par l'autre sur le pied de la nation la plus favorisée.*

Article XII

Les sujets de chaque Partie contractante qui se conformeront aux lois du pays ne seront pas sujets *en ce qui concerne leurs personnes* ou *biens,* ou en ce qui concerne leurs passeports ni *en*

Traité de 1926

Article I

Il y aura entre les territoires *des deux Parties contractantes liberté réciproque de commerce et de navigation. Les sujets* ou citoyens *de chacune des deux Parties auront liberté de venir librement avec leurs navires et cargaisons dans toutes places et ports de l'autre auxquels ses propres ressortissants ont accès ou peuvent être autorisés de l'avoir et jouiront des mêmes droits, privilèges, libertés, faveurs, immunités et exemptions en matière de commerce et de navigation que ceux qui sont ou peuvent être accordés aux nationaux.*

Article 4

Les deux Parties contractantes conviennent qu'en toute matière relative au commerce, à la navigation, à l'industrie et à l'exercice de professions ou occupations, *tout privilège, faveur ou immunité que l'une d'entre elles a actuellement accordés ou pourra accorder ultérieurement,* aux navires, *sujets ou citoyens de quelque autre* nation étrangère *seront étendus immédiatement et inconditionnellement* sans requête ni compensation, aux navires, *sujets ou citoyens de l'autre, leur intention étant que le commerce, la navigation et* l'industrie *de chaque nation soient traités à tous égards par l'autre sur le pied de la nation la plus favorisée.*

Article 3

Les sujets ou citoyens de chaque Partie contractante se trouvant sur le territoire de l'autre jouiront, *en ce qui concerne leurs personnes, leurs biens,* droits et intérêts, *et en ce qui concerne leur*

ce qui concerne leur commerce ou industrie à des taxes générales ou locales, ou *à des impôts ou à des obligations* de quelque nature qu'elles soient, autres ou plus lourdes que celles qui sont ou peuvent être imposées aux nationaux.

commerce, industrie, profession, occupation ou en toute autre matière de toute façon du même traitement et de la même protection légale que les sujets ou citoyens de cette Partie ou de la nation la plus favorisée pour autant qu'il s'agisse de *taxes,* contributions, droits de douane, *impôts,* redevances équivalant aux taxes et autres charges similaires.

Le moment n'est pas venu d'examiner de façon approfondie les divers traités conclus par le Royaume-Uni dont, par application des dispositions relatives à la clause de la nation la plus favorisée, la Grèce est fondée à réclamer le bénéfice. Bornons-nous à signaler qu'un traité avec l'Espagne datant de 1667 et toujours en vigueur prévoit l'application aux ressortissants des parties, du « common right », tandis que d'autres font un devoir aux gouvernements de se conformer à l'équité et à la justice, d'agir avec amour et amitié (Traités avec le Danemark de 1660 et 1670, avec la Suède de 1654 et 1661).

Enfin le Gouvernement hellénique entend se réclamer des règles de droit des gens relatives au traitement des étrangers, notamment des principes généraux du droit relatifs au déni de justice, parce qu'il lui paraît évident qu'au moment où le Royaume-Uni et la Grèce convenaient des faveurs et privilèges particuliers dont jouiront les ressortissants de chacune des parties se trouvant sur le territoire de l'autre, il n'était pas entré dans leur intention de renoncer — à supposer qu'elles auraient pu le faire valablement — au bénéfice du traitement minimum prescrit par le droit des gens général.

4. *Base de la compétence de la Cour*

La compétence de la Cour internationale de Justice fonctionnant comme instance arbitrale résulte essentiellement, suivant le Gouvernement hellénique, de l'article 29 du Traité du 16 juillet 1926, dont la portée est précisée par la Déclaration signée le même jour par les représentants des parties.

Subsidiairement, et en vue de l'hypothèse où, contrairement aux conclusions du Gouvernement hellénique, la Cour estimerait ne pouvoir connaître de la demande de réparation, le Gouvernement hellénique s'appuie non seulement sur la Déclaration de 1926 inséparable du traité, mais encore sur les articles 1, paragraphe 1, 2 et 36, paragraphe 3, de la Charte des Nations Unies pour demander à la Cour d'ordonner au Gouvernement britannique de se prêter à la procédure arbitrale prévue au Protocole annexé au Traité de 1886.

5. *Rappel des textes relatifs à la compétence*

La compréhension de la discussion relative à la compétence sera sans doute facilitée si nous reproduisons encore une fois en traduction française les trois textes qui gouvernent la matière :

Article 29 du Traité de 1926

« Les deux Parties contractantes sont d'accord en principe que tout différend qui peut s'élever entre elles quant à la juste interprétation ou l'application d'une quelconque des stipulations du présent traité sera, à la requête de l'une des Parties contractantes, soumis à l'arbitrage.

La cour d'arbitrage à laquelle les différends seront soumis sera la Cour permanente de Justice internationale, à moins que, par une convention particulière, les deux Parties n'en décident autrement. »

Protocole annexé au Traité de 1886

« Au moment de procéder, ce jour, à la signature du Traité de commerce et de navigation entre la Grande-Bretagne et la Grèce, les plénipotentiaires des deux Hautes Parties contractantes ont déclaré ce qui suit :

Toutes questions qui peuvent s'élever sur l'interprétation ou l'exécution du présent traité, ou les conséquences de toute violation de ce traité seront soumises, quand les moyens de les régler directement par accord amiable seront épuisés, à la décision de commissions d'arbitrage, et le résultat de cet arbitrage sera obligatoire pour les deux gouvernements.

Les membres de ces commissions seront choisis par les deux gouvernements d'un commun accord ; à défaut, chacune des Parties nommera un arbitre ou un égal nombre d'arbitres, et les arbitres ainsi nommés choisiront un surarbitre.

La procédure d'arbitrage devra dans chaque cas être déterminée par les Parties contractantes : à défaut, la commission d'arbitrage sera en droit de la déterminer elle-même d'avance.

Les plénipotentiaires soussignés ont consenti que ce protocole sera soumis aux deux Hautes Parties contractantes en même temps que le traité, et que, lorsqu'il sera ratifié, les accords contenus au protocole seront également considérés comme approuvés, sans nécessité d'une ratification expresse ultérieure. En foi de quoi.... »

Déclaration annexée au Traité de 1926

« Il est bien entendu que le Traité de commerce et de navigation entre la Grande-Bretagne et la Grèce en date d'aujourd'hui ne porte pas préjudice aux réclamations faites au nom de particuliers, qui sont basées sur les dispositions du Traité de commerce anglo-grec de 1886, et que tous différends qui peuvent s'élever entre nos deux gouvernements, quant à la validité de ces réclamations, doivent, à la demande de l'un des gouvernements, être soumis à l'arbitrage, conformément aux dispositions du Protocole du 10 novembre 1886 annexé audit traité. »

6. *Champ d'application de la compétence de la Cour résultant de l'article 29 du Traite de 1926*

Deux observations dominent à l'avis du Gouvernement hellénique l'interprétation qu'il y a lieu de donner en espèce à l'article 29

du Traité de 1926. L'une c'est que le Traité de 1926 n'est que pour partie créateur d'engagements nouveaux de la part des parties ; ainsi qu'il a été indiqué déjà, certaines de ses dispositions ont été reprises presque littéralement du Traité de 1886 ; certaines de ses dispositions peuvent également être considérées comme une simple formulation des règles du droit des gens préexistantes. Dans cette double mesure le Traité de 1926 est confirmatif, déclaratif et non créateur du droit devant régler le traitement des ressortissants de chacune des parties se trouvant sur le territoire de l'autre partie.

Une question s'élevant sur l'interprétation ou l'exécution du nouveau traité peut donc se rapporter aussi et simultanément à l'ancien Traité de 1886 ou aux principes généraux du droit ; cette circonstance ne suffit pas, suivant le texte de l'article 29, à faire échapper le différend à la compétence de la Cour.

La deuxième observation est la suivante : il n'y a pas de différence essentielle entre les procédures de règlement des différends prévues dans les Traités de 1886 et de 1926. Dans l'un et l'autre, il s'agit d'arbitrage. La seule innovation c'est que le Traité de 1926 prévoit comme instance arbitrale, au lieu de la commission d'arbitrage prévue au Traité de 1886, la Cour permanente de Justice internationale, dont la Cour internationale de Justice a pris la succession.

Cette deuxième observation conduit à la conclusion qu'en l'absence de disposition contraire, la procédure arbitrale devant la Cour doit s'appliquer de plein droit à tout différend non encore engagé devant une commission arbitrale, même si le différend a une origine antérieure au 28 juillet 1926 — date indiquée comme celle de la mise en vigueur du nouveau traité (contre-mémoire, p. 133, note 1). Peu importe que le différend porte sur l'interprétation ou l'application de règles inscrites expressément ou tacitement dans le Traité de 1886 du moment que ces règles se retrouvent aussi dans le Traité de 1926.

7. *Champ d'application de la procédure des commissions arbitrales après la mise en vigueur du Traité de 1926*

C'est la Déclaration du 16 juillet 1926 qui nous fournit la clé de la solution de ce problème.

Cette fois, sont visées non pas les « *questions* qui peuvent s'élever au sujet de l'interprétation ou de l'application du traité », mais les « réclamations basées sur les dispositions du Traité de 1886 ». Et la Déclaration décide que tous différends qui peuvent s'élever quant à la validité de ces réclamations doivent, à la demande de l'un des gouvernements, être soumis à l'arbitrage, type 1886.

L'hypothèse prévue ici est celle de réclamations s'appuyant exclusivement sur les dispositions du Traité de 1886 dans le cas où elles ne peuvent s'appuyer sur le Traité de 1926 parce que ces dispositions ne s'y retrouvent pas. En l'absence de la Déclaration, pareils litiges seraient demeurés sans solution, car il n'eût plus été possible, après l'expiration du Traité de 1886, de s'appuyer sur le Protocole

qui l'accompagnait et qui avait expiré avec lui pour provoquer la constitution d'une commission arbitrale en vue du règlement d'un différend basé exclusivement sur la méconnaissance de ce traité. D'autre part, un différend exclusivement basé sur le Traité de 1886 sortait nécessairement aussi du champ d'application de l'arbitrage de la Cour permanente de Justice internationale prévu à l'article 29 du Traité de 1926.

C'est donc à bon droit que le contre-mémoire relate sous le paragraphe 12 (1) que l'objet de la Déclaration est de « maintenir le vieux traité en vie seulement à certaines fins précises », — mais le contre-mémoire s'est trompé dans la détermination de ces « fins précises ».

8. *Réfutation de l'objection tirée du fait que la Déclaration de 1926 est extérieure au traité*

Le Gouvernement britannique fait valoir que la Déclaration se réfère au traité comme à un « instrument séparé », qu'elle serait signée séparément, non mentionnée dans le traité, non indiquée comme en formant « partie intégrante » et qu'elle se rapporterait au Traité de 1886.

A quoi il peut être répondu tout d'abord que sans doute le Gouvernement hellénique croit trouver dans la Déclaration une confirmation de son interprétation de l'article 29 du Traité de 1926 mais que cette dernière disposition se suffit à elle-même en sorte que, si même la Cour consentait à ignorer la Déclaration, encore l'article 29 du Traité de 1926 lui offrirait une base suffisante pour se déclarer compétente dans le présent litige. Mais ceci dit, le Gouvernement hellénique ne croit pas un instant que la Cour, placée devant la nécessité d'interpréter l'article 29 du Traité de 1926, puisse se refuser à prendre en considération les indications que l'on peut tirer d'une Déclaration commune des parties signée par elles le même jour que le traité, et par laquelle, quelle que soit la qualification juridique que l'on donne au document, elles ont assurément entendu se lier.

Et sans doute est-il vrai que la Déclaration vise très directement le Traité de 1886 et la procédure prévue dans le Protocole qui l'accompagne, mais elle se rapporte non moins certainement aussi au Traité de 1926. Ne commence-t-elle pas par les mots : « Il est bien entendu que le Traité de commerce et de navigation entre la Grande-Bretagne et la Grèce en date d'aujourd'hui ne porte pas préjudice.... », ce qui est la formule habituelle d'introduction des réserves interprétatives.

Quant aux observations accessoires relatives à la forme de la Déclaration, nous sommes surpris de l'importance que paraît y vouloir attacher le Gouvernement britannique. Que le Protocole et la Déclaration accompagnant ces traités aient ou n'aient pas contenu de mention expresse qu'ils en formaient partie intégrante, rien ne justifie la signification que le Gouvernement britannique attache à la présence ou à l'omission de cette mention. Nous ne pouvons que

renvoyer à cet égard au tableau tracé par M. Basdevant, précisément en 1926, de l'arbitraire et de la confusion de termes régnant à cet égard dans la pratique internationale (BASDEVANT, *La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités :* Recueil des Cours de l'Académie de Droit international, 1926, vol. 15, pp. 632 et s.). (Voir aussi MCNAIR, *The Law of Treaties*, 1928, pp. 3 et s.)

Ajoutons en dernier lieu que suivant les informations du Gouvernement hellénique la Déclaration est matériellement partie intégrante du Traité de 1926 au point que les parties ont donné la même signature au Traité de 1926 et à la Déclaration [1]. Il est presque superflu dès lors de rencontrer l'argumentation que le Gouvernement britannique a prétendu baser sur deux exemples de traités conclus tous deux par le Gouvernement hellénique, tous deux légèrement postérieurs à la Déclaration litigieuse. Examinés de près, les deux exemples n'infirment du reste en rien la manière de voir exposée plus haut.

Le premier traité cité est un accord gréco-turc qui est à vrai dire non du 21 juin 1925, comme indiqué dans le contre-mémoire, mais du 1er décembre 1926 et a paru non au volume LXVII mais au volume LXVIII, page 11, du *Recueil des Traités* de la S. d. N. Il a pour objet l'application de certaines dispositions du Traité de Lausanne de 1923 et de la Déclaration n° IX annexée à ce traité et comprend, outre un Protocole final fixant des modalités de mise en vigueur du traité, une Déclaration relative à des « Actes » du 21 juin 1925 qui n'avaient pas été soumis à ratification et que la Déclaration abroge pour partie, confirme pour une autre partie. On comprend très bien le souci qu'ont les deux gouvernements le 1er décembre 1926 de donner une validité juridique certaine à la partie conservée des Actes du 21 juin 1925 en l'intégrant fictivement dans l'accord de 1926. On comprend moins l'argument que prétend en tirer le Gouvernement britannique.

De même, le Traité de commerce gréco-italien du 14 novembre 1926 (vol. LXIII du *Recueil des Traités*, pp. 51-83) se trouve accompagné d'un Protocole final interprétatif, de deux Déclarations, d'un deuxième Protocole et de deux échanges de lettres. Et il est exact que, tandis que le Protocole final et l'une des Déclarations sont mentionnés comme partie intégrante du traité de commerce signé ce jour, il n'en va pas de même de la deuxième Déclaration, du deuxième Protocole et des deux échanges de lettres. Encore une fois la chose s'explique aisément : le Protocole final est nettement et exclusivement interprétatif du traité (et du tarif à l'entrée en Grèce y annexé) ; de même une des deux Déclarations s'applique directement et exclusivement à la clause de la nation la plus favorisée, dont il soumet l'application à une condition supplémentaire

[1] *Note :* C'est donc à tort que, dans l'annexe au mémoire, les signatures figurent seulement au bas du traité, alors que dans les documents officiels elles figurent au bas du traité et aussi au bas de la déclaration.

de réciprocité au cas où elle serait invoquée relativement au cabotage. D'autre part, le Protocole et les lettres ont une portée purement politique et morale sans valeur juridique — il s'agit d'une promesse de prise en considération des vœux de l'une ou l'autre des parties en ce qui concerne les soies et laines artificielles d'Italie, les tabacs et les vins helléniques ; leur intégration dans le Traité de 1926 ne se concevrait pas.

Quant à la deuxième Déclaration, qui est la copie presque textuelle de la Déclaration accompagnant le Traité gréco-britannique de 1926, l'omission de toute mention formelle d'intégration pourra s'expliquer par l'hésitation à intégrer au nouveau traité ce qui se rapporte également à un traité plus ancien.

9. *Réfutation de l'objection tirée du fait que toute acceptation de compétence obligatoire, telle celle résultant de l'article 29 du Traité de 1926, serait nécessairement dépourvue de force rétroactive*

Le contre-mémoire objecte à l'invocation de la Déclaration qu'elle conduirait à permettre une application rétroactive de la compétence obligatoire, ce qui serait contraire à la pratique internationale telle qu'elle résulte de l'arrêt de la Cour permanente de Justice internationale dans l'affaire des *Phosphates du Maroc* (Arrêt A/B n° 74, p. 24). Cependant, la consultation de cette décision conduit à des conclusions opposées. Car s'il est vrai que, comme la Cour le souligne, la plupart des États adhérant à la clause facultative ont pris soin de limiter la compétence de la Cour aux différends naissant après la ratification de la présente Déclaration au sujet de situations ou de faits postérieurs à la ratification, le souci qu'ils ont pris de formuler cette exclusion confirme qu'à défaut de pareille limitation l'attribution de compétence se serait étendue à l'ensemble des différends ayant l'un des objets énumérés à l'article 38 du Statut quelle que soit la date des faits dénoncés.

Le Gouvernement britannique perd au surplus de vue qu'en l'espèce il ne s'agissait pas pour les parties du Traité de 1926 d'inaugurer une procédure de contrôle international alors qu'antérieurement elles n'auraient eu aucun compte à rendre à personne. Au contraire, ainsi qu'il a été dit plus haut, le principe de l'arbitrage avait été admis par les parties depuis quarante ans et il ne s'agissait plus que de l'adapter à l'institution récente de la juridiction internationale nouvelle. Les considérations développées à cet endroit du contre-mémoire par le Gouvernement britannique sont donc dépourvues de toute pertinence.

10. *Réfutation de l'objection tirée du fait que la Déclaration s'appliquerait seulement à des réclamations formulées avant le 16 juillet 1926*

L'argument britannique est à double fin : il tend à démontrer que, quelque interprétation qu'on donne à la Déclaration de 1926, ni les commissions arbitrales ni la Cour ne seraient compétentes

pour connaître de réclamations formulées après le 16 juillet 1926 au sujet de faits antérieurs.

Mais il saute aux yeux que la Déclaration ne permet aucunement pareille interprétation, que bien au contraire elle l'interdit car elle vise expressément « les différends qui peuvent s'élever » ou qui « pourront s'élever », « *which may arise* », et non « *which have arisen* », en sorte que l'on peut dire que le texte vise exclusivement les différends futurs que le contre-mémoire prétend exclure de ses prévisions.

Et il est naturel qu'il en ait été ainsi : car il n'y avait à la date du 16 juillet 1926 aucune réclamation formulée par l'une des parties relativement au Traité de 1886 et si un différend avait été pendant devant des commissions arbitrales, il n'eût fallu aucune Déclaration pour que cette procédure continuât.

Il convient d'ajouter que l'interprétation proposée dans le contre-mémoire aurait cette signification assurément extraordinaire de créer entre les différends relevant des commissions arbitrales — parce que relatifs aux réclamations formulées avant le 16 juillet 1926 — et les différends relevant de la Cour — parce que relatifs aux réclamations formulées après le 16 juillet 1926 et concernant des situations ou des faits postérieurs à cette date — un vacuum, c'est-à-dire une catégorie de différends échappant à tout mode de règlement pacifique obligatoire. Ce seraient les différends nés de réclamations formulées après le 16 juillet 1926, mais portant sur des situations ou des faits antérieurs à cette date. Et cela alors que manifestement les négociateurs gréco-britanniques ne pouvaient pas savoir lorsqu'ils signaient la Déclaration si leurs compatriotes n'avaient pas eu à se plaindre d'actes fautifs — dommageables dans les mois précédant cette signature.

Le Gouvernement britannique prétend, il est vrai, trouver une confirmation de sa manière de voir dans les travaux préparatoires de la Déclaration.

Le Gouvernement hellénique pourrait exprimer quelque surprise à voir des représentants britanniques proposer à la Cour de recourir à des travaux préparatoires pour l'interprétation d'un document dont le texte est clair. Cependant le Gouvernement hellénique se garde de s'opposer à l'invocation de circonstances qui corroborent pleinement sa manière de voir : car il semble bien qu'à la date du 16 juillet 1926 il y avait une négociation en cours au sujet de l'exemption de l'emprunt forcé à laquelle, sur la base du Traité de 1886, les sujets britanniques avaient droit, mais il n'y avait pas de réclamation britannique à cet égard, aucun d'eux n'ayant été astreint à payer, et il ne s'agissait pas dès lors d'un « différend », lequel n'a donc pu être prévu qu'à titre d'éventualité future [1].

Mais les faits rappelés par le Gouvernement britannique présentent cet autre intérêt essentiel de démontrer que ce dont les deux

[1] *Note :* Voir en ce sens la lettre du Foreign Office du 22 juin 1926 ci-annexée.

gouvernements se préoccupaient à l'époque, c'était des différends *exclusivement* relatifs au Traité de 1886. En effet, la clause du Traité de 1886 (article XIII) portant exemption de tout emprunt forcé a disparu du Traité de 1926. Le Gouvernement britannique est préoccupé du fait que si ses ressortissants n'obtiennent pas satisfaction il faudra bien que, prenant fait et cause pour eux, il puisse porter le différend devant une commission arbitrale. Mais il faut pour cela une Déclaration.

En eût-il été autrement, il résulte de la rédaction proposée par le Gouvernement hellénique, citée par le contre-mémoire (par. 13) et sur la substance de laquelle le Gouvernement britannique se déclare d'accord, que l'on eût eu recours à la procédure arbitrale de la Cour permanente. Car lorsque le Gouvernement hellénique propose de dire :

> « it is well understood that *as for that* [lisez : in so far as] the new treaty of commerce between Great Britain and Greece does not cover anterior claims *eventually* deriving from the Treaty of 1886, any difference *which might arise....* »,

il vise par « anterior claims » les réclamations non encore formulées qui s'élèveraient sur des faits dérivant du Traité de 1886, mais il admet implicitement que, dans une certaine mesure, ces différends seront couverts par le nouveau traité de commerce, c'est-à-dire dans la mesure où les dispositions du Traité de 1886 se retrouvent dans celui de 1926.

11. *Application au présent différend de l'interprétation donnée à l'article 29 du Traité de 1926*

Elle ne présente aucune difficulté. Ainsi que le Gouvernement hellénique l'a montré au paragraphe 3 du présent document, les dispositions du Traité de 1886 sur lesquelles se base directement ou indirectement la demande hellénique ont été maintenues dans le Traité de 1926, et de même on doit supposer que celui-ci, comme celui-là, conserve aux ressortissants réciproques le bénéfice des principes du droit des gens général relatifs au déni de justice qui se trouvent également invoqués dans le mémoire. Dès lors, pour employer les termes utilisés par le Gouvernement hellénique dans son *projet* de Déclaration, le Traité de 1926 « couvre » le présent différend et il y a lieu de faire application de l'article 29 qui prévoit l'arbitrage de la Cour permanente de Justice internationale, dont la Cour internationale de Justice a pris la succession aux termes de l'article 37 de son Statut.

12. *Interprétation de l'article 29 du Traité de 1926 et interprétation de la Déclaration de 1926 proposées par le Gouvernement hellénique à titre subsidiaire*

A titre subsidiaire et par unique souci d'être complet, le Gouvernement hellénique désire rencontrer une autre interprétation de

l'article 29 du Traité de 1926 ainsi que de la Déclaration, que permettent à première vue les termes de ces documents, bien que, pour les raisons indiquées ci-dessus, l'interprétation proposée à titre principal doive lui être préférée.

Dans ce système l'article 29 aurait bien eu lui-même la portée que le Gouvernement hellénique lui a attribuée, ou pourrait même se voir attribuer un champ d'application embrassant tous les différends relatifs au traitement des ressortissants, mais il serait affecté gravement dans son application par la Déclaration du même jour pour les différends se rapportant à l'application du Traité de 1886, que les règles invoquées aient ou non été maintenues en 1926. Pour tous ces différends la Déclaration dérogerait au principe de compétence obligatoire de la Cour, en permettant à chaque partie contractante de marquer sa préférence pour la procédure des commissions arbitrales prévues au Traité de 1886.

13. *Application au présent différend de l'interprétation proposée à titre subsidiaire*

Normalement cette interprétation subsidiaire doit conduire à la même conclusion qu'en l'espèce le différend relève de la compétence obligatoire de la Cour internationale de Justice ; car non seulement le Gouvernement britannique n'a pas exercé son option en faveur de la compétence des commissions arbitrales, mais il a expressément repoussé la proposition en ce sens que lui adressait le ministre de Grèce à Londres (annexe R 6 du mémoire) le 21 novembre 1939. Tout au plus la Cour pourrait-elle estimer opportun, dans l'hypothèse où elle admettrait l'interprétation subsidiaire, de fixer au Royaume-Uni un délai très court à l'issue duquel il serait présumé, sans manifestation contraire de sa part, avoir renoncé à la constitution d'une commission arbitrale. Car on ne peut supposer que le droit d'option puisse se transformer en une faculté de délibérer indéfiniment et d'ajourner indéfiniment le règlement d'un différend.

14. *Interprétation plus subsidiaire de l'article 29 du Traité de 1926 ainsi que de la Déclaration de 1926*

Pour être complet le Gouvernement hellénique désire examiner aussi l'hypothèse où la Cour, adoptant en grande partie les interprétations défendues dans le contre-mémoire, estimerait que la compétence obligatoire prévue à l'article 29 du Traité de 1926, ne s'applique qu'aux différends relatifs à des réclamations basées *exclusivement* sur le Traité de 1926 et que, pour les réclamations nées de situations antérieures et qui donc ne peuvent pas être basées exclusivement sur ce traité, seul le Protocole de 1886 peut recevoir application.

15. *Application au présent différend de l'interprétation plus subsidiaire*

Dans le système d'interprétation exposé au paragraphe précédent, la Cour ne pourrait plus sans doute connaître du fond du différend

mais du moins celui-ci devrait-il être porté devant une commission arbitrale ainsi que la Grèce l'a proposé.

Si dans une affaire récente (affaire de l'Anglo-Iranian Oil Co., p. 23 de la Requête) le Gouvernement britannique a pu considérer qu'il y avait déni de justice de la part du Gouvernement iranien à se refuser de se conformer à la clause compromissoire de la Convention du 29 avril 1933, combien plus certain encore apparaîtrait le caractère international du déni de justice du Gouvernement britannique s'il persistait dans son refus de donner exécution au Protocole de 1886.

Sans doute, le Gouvernement britannique ne se fait-il pas faute d'indiquer que le Gouvernement hellénique ne peut se réclamer d'aucun engagement général par lequel il aurait, à charge de réciprocité, conféré compétence à la Cour pour connaître de toute violation de traité, et qu'en l'absence de pareil engagement la Cour n'a pas cette compétence. Mais s'il est vrai qu'en général les violations de traité échappent au contrôle de la Cour si les parties ne lui ont pas attribué compétence à cet égard, le Gouvernement hellénique est d'avis qu'il en va autrement dans le cas où un certain mode de règlement arbitral a été accepté par les parties auquel l'une d'elles prétend ensuite se dérober. Car il est dans la vocation de la Cour de se montrer la gardienne du principe accepté par les Nations Unies de régler leurs différends par des moyens pacifiques de telle manière que .... la justice ne soit pas mise en danger (art. 2 de la Charte).

En l'espèce, la compétence de la Cour pour statuer sur l'étendue de l'engagement arbitral de 1886 s'imposerait d'autant plus inévitablement que, même si la Cour admettait l'interprétation plus subsidiaire exposée au paragraphe précédent, ce ne pourrait être qu'après avoir vérifié de près la frontière entre les champs d'application de l'une et l'autre procédures dites arbitrales.

16. *Application au présent différend de l'intégralité des interprétations juridiques proposées par le Gouvernement britannique*

Le Gouvernement britannique ne s'est pas borné dans son contre-mémoire à considérer que les différends visés dans la Déclaration de 1926 échappaient totalement à la compétence obligatoire de la Cour ; il a considéré, nous l'avons vu, que, suivant la Déclaration, ils ne devaient être soumis à la procédure des commissions arbitrales qu'à condition que les réclamations aient été formulées antérieurement à la Déclaration.

Quelque étonnante que lui ait paru cette interprétation, le Gouvernement hellénique tient à souligner que, même dans cette hypothèse, le présent différend n'échapperait pas à la procédure arbitrale. Car s'il est vrai que ce n'est qu'après 1926 que le Gouvernement hellénique a élevé une véritable protestation contre le traitement infligé par les autorités britanniques à M. Ambatielos, il avait, dès

le 12 septembre 1925, marqué la volonté d'exercer en faveur de son ressortissant son droit de protection, ce qui suffit à donner date au différend.

17. PAR CES MOTIFS, le Gouvernement hellénique demande qu'il plaise à la Cour de rejeter l'exception d'incompétence présentée par le Gouvernement britannique et, statuant sur les demandes relatives à la compétence, formulées dans la requête introductive d'instance et qui sont précisées ci-après, de bien vouloir :

1. *en ordre principal* dire pour droit que le Gouvernement du Royaume-Uni est tenu d'accepter la soumission à la Cour internationale de Justice siégeant comme cour arbitrale du différend entre ce gouvernement et le Gouvernement hellénique, et en conséquence fixer aux Parties les délais pour le dépôt de la réplique et de la contre-réplique visant le fond du différend ;
2. *en ordre subsidiaire* autoriser le Gouvernement britannique à notifier dans le délai d'un mois au Gouvernement hellénique sa préférence éventuelle pour la soumission du différend à la décision d'une commission arbitrale comme prévu dans le Protocole de 1886, étant entendu que, faute par le Gouvernement britannique d'avoir exercé cette option dans le délai prescrit, la procédure au fond sera reprise devant la Cour, dont le Président, sur simple requête du Gouvernement hellénique, fixera les délais pour le dépôt de la réplique et de la contre-réplique ;
3. *en ordre plus subsidiaire* renvoyer les Parties à la procédure de la Commission arbitrale prévue par le Protocole de 1886 ;
4. *en ordre tout à fait subsidiaire* et pour le cas où la Cour estimerait ne pouvoir se prononcer sur sa compétence avant d'avoir recueilli de plus amples explications sur le fond, faisant application de l'article 62 de son Règlement, joindre l'incident au fond.

Le 4 avril 1952.

(Signé) N. G. LÉLY,
Ministre de Grèce,
Agent du Gouvernement hellénique
près la Cour internationale de Justice.

Annexe

LETTRE DU 22 JUIN 1926 DU FOREIGN OFFICE AU MINISTRE DE GRÈCE A LONDRES

Foreign Office
22 June 1926.

The Greek Minister.

Sir,

Before proceeding to the signature of the commercial treaty between Greece and this country, I would ask for an assurance that the conclusion of the treaty will not be regarded by your Government as prejudicing the claims of British subjects for compensation or relief on the ground that the recent Greek loan is contrary to Article 13 of the Anglo-Greek Commercial Treaty of 1886, and for a further assurance that in the event of any difference of opinion between our two Governments with reference to the validity of these claims, the matter shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.

(Signed) M. LAMPSON,
For the Secretary of State.