PREFACE

RATIONALE AND OBJECTIVES

A few years ago, the present author attended a talk in Exeter by Lindsey Davis, creator of the brilliant Falco and Flavia series of Imperial Roman mysteries. A member of the audience asked the question that most of those present were pondering: do you know what is going to happen when you first sit down to write? Her emphatic response was that as she proceeds her characters take on lives of their own and decide their fates for themselves. The present work, although not (at least intentionally) one of fiction, adopts the same approach as Ms Davis and doubtless many other writers.

It had become obvious from teaching marine insurance for many years that the codification of the earlier law – some 2,500 judicial decisions – by the Marine Insurance Act 1906 had been a qualified success when measured against its own objectives. Although the codification project was worthy, lengthy and painstaking, its attempts to combine the conflicting ends of certainty and flexibility inevitably led to some extent both to uncertainty and inflexibility. To this day it remains necessary in many situations to lift the statutory veil draped over the case law to uncover the relevant common law principles, and on occasion to discount parts of the Act that do not reflect what had gone before.

The initial intention of the author was to compare the old cases with the 1906 legislation and to produce a definitive analysis of how and where the 1906 Act operated as a less than perfect statement of the law. The trigger for this effort was the sequence of earthquakes in Christchurch, New Zealand in September 2010, and February and June 2011. The 750,000 or so insurance claims generated by them gave rise to a multitude of complex issues, but two were of particular resonance. First, if property was damaged by an earthquake but not repaired, and then damaged again, giving rise to a total of losses in excess of the limits of the policy for any one peril, how many times did the policy respond? Secondly, if a policyholder, rather than awaiting an insurance recovery, sold the damaged building and assigned the insurance claim, did the receipt of the purchase moneys extinguish the seller's loss and thereby render the assignment worthless? These issues are, over a decade later, not fully resolved, but were the subject of marine decisions in the nineteenth century. The 1906 Act made something of a mess of the first, and completely disregarded the second. The author's need to go further was established.

Undertaking a study of the history of marine insurance law was a most inviting challenge. The common law, unlike its civil law counterpart, rests upon the interpretation of decided cases and, for legal purists, the older the better, apart from the older judgments that stray into Medieval French and Latin. The common law has developed piecemeal, adding new layers to an ever-expanding structure in an evolving commercial and scientific environment. The common lawyer is required to explain not just what the law does, but how and why it reached that position by tracing developments from the earliest decisions, analysing Parliamentary

interventions and considering the impact of superimposed market operations. Many lawyers will admit to being frustrated historians, the more commercially minded having chosen their path by appreciating that clients can be charged outrageous sums for sharp advice but not for historical dissertations. ‘Pure’ history aside, legal history is a powerful and popular academic discipline. It was no real surprise that when the US Supreme Court was in July 2020 asked to rule on whether the then US President’s tax returns could be released by a subpoena served on his accountants,¹ the outcome turned upon the Supreme Court’s own ruling in 1807 on the prosecution of disgraced ex-Vice-President Aaron Burr² perhaps now best known as the arch-villain duellist in the musical immortalising the life of Alexander Hamilton.

The task in hand having been established, it rapidly became apparent that the law was divisible into quite distinct eras. Until 1815 there was scarcely a decided marine insurance case that had not involved loss at the hands of enemies. England had an impressive array of protagonists, most importantly the Dutch Republic, Spain, the American colonies and then, after independence, the US itself. The perennial pervasive protagonist was France, a nation with which England had been at war – with the occasional pause for breath and replenishment – for around 850 years preceding the final fall of Napoleon. This was the context in which the giants of the common law, notably Lord Mansfield, Lord Ellenborough and Buller J, framed the law of marine insurance. It was also a period in which the insurance market was dominated by individual underwriters trading under the umbrella of Lloyd’s Coffee House and adopting practices which remain the underpinning of very many insurance disputes.

Thereafter, although there were threats to British shipping from the wars of others, the expansion of trade in general and the British Empire in particular saw the focus shifting to perils of the sea rather than perils on the sea. Along with this contextual change, the early part of the nineteenth century saw a progressive shift from sail to steam, later from wood to iron, and also the development of faster communications. After 1825 corporate marine insurers came onto the scene. The post-war issues were necessarily different, exacerbated by new market wordings and practices. All of that aside, bigger, faster and more resilient vessels were capable of inflicting as well as suffering loss, and the law of collision – both with other vessels and with docks and harbours – developed apace.

Once it was appreciated that the development of legal principles could not be analysed context-free, the question became, how much context was appropriate. The countless books on the history of the period covered by this book, primarily 1756 to 1906, are replete with references to unidentified (or incorrectly named or dated) legislation and court decisions, but with few exceptions it is apparent that these items had been imperfectly traced or read. Online legal databases have made those tasks immeasurably more straightforward, and judicial rulings in particular – based as they are on detailed contemporary factual evidence – throw much light on how and when events actually occurred. Much of this material deserves the oxygen of publicity, and it the author’s fervent hope that some of the content of this work will identify sources too often glossed over by non-lawyers but which are crucial to the understanding of events. If nothing else, future historians of the period have been provided with sufficient material to

1 *Trump v Vance* 591 US 1242 (2020).

2 *United States v Burr* 15 F Cas 30 (1707).

avoid generalities such as ‘Parliament legislated in 1823’ or ‘in a court case in 1799’, even if they disagree with the present author’s interpretations of those matters.

Choosing the best form of exposition was a struggle. One possibility would have been to look at the development of particular legal doctrines in the entire period on a thematic, chapter by chapter, basis. That would have involved some repetition between chapters, but also would have resembled a textbook written in 1906. It was a close call, but it was decided instead to divide the text into eras, characterised by external events to which the insurance market had to respond: origins; total war; comparative peace; neutrality in the wars of others; the move to free trade; and the development of empire. This structure also makes some repetition inevitable insofar as early principles held good from era to era, and there is regrettably less than full consistency in allocating straddling cases or events to one or other time zone, but the author’s rationale is that the eras are with hindsight for the most part quite distinct and that it is preferable to view the development of the law as a whole sequentially. The chapters on Slavery and Empire do not adhere to this pattern, but splitting the exposition would in those cases have made little sense.

Where to start? Although events ranging from the internationally momentous to the nationally mundane take place constantly, for the purposes of historical study it is possible every so often to identify – generally with hindsight – a year in which a conjunction of occurrences justifies its elevation to pivotal. That year is 1756. Important as they are, we are not here concerned with the death of Wagner, the birth of Mozart or – other than in passing – the Black Hole of Calcutta. Equally insignificant are the numerous decisions of the English courts in that year, although a perusal of them does provide a flavour of the law as it stood in relation to matters covered by this work. Thus, accumulators of trivia can store for use the facts: the Royal Exchange Insurance Co, the only company chartered by the Crown to offer fire insurance on property, suffered a theft of two leather buckets, at a time when insurance against theft was unknown;³ the adage that a sailor has a woman in every port has some basis in reality;⁴ the representatives of deceased mariners had some difficulty in proving the existence and contents of their wills⁵ or enforcing claims for arrears of wages;⁶ and the particular fraud of insuring the life of an individual who had died earlier is not just a modern phenomenon.⁷ Pub quiz enthusiasts might also like to know that one John Clarke could run four miles in just over 21 minutes⁸ and that brewing was in the eighteenth century a profession that could be entered only by serving an apprenticeship.⁹

For our purposes the key matters are these: the opening salvos in the Seven Years War, engulfing many European nations and all continents over whose territory those nations claimed some

3 *Royal Exchange Insurance Co v Vaughan* (1756) 1 Keny 320. Such policies were issued from about 1885 onwards.

4 *Masters v Stone and Poole* (1756) 2 Lee 339.

5 *Hay v Mollo* (1756) 2 Lee 273.

6 *Le Briton v Le Quesne* (1756) 2 Lee 261.

7 *Cleeve v Gascoigne* (1756) Amb 323.

8 *Lynall v Longbottom* (1756) 2 Wils KB 36. Various games, and wagering on them, was at the time banned under an Act passed in 1711, a throwback to a prohibition on games introduced under Henry VIII designed to ensure that archers practised their archery rather than engaging in futile pastimes. Clarke himself was not involved in the wager and the court in any event thought that racing against the clock or for fun not a prohibited ‘foot-race’ even if others chose to bet on his prowess.

9 *Raynard v Chase* (1756) 1 Burr 2.

degree of sovereignty; the adoption by the British Government of the naval 'Rule of 1756', asserting rights of seizure and capture over neutral ships, a move destined to have profound implications for Anglo-American relations in the next century; the birth of Aaron Burr, the most notorious and intriguing of all US Vice-Presidents, quite a claim considering some of the more recent incumbents; the appointment on 8 November of Lord Mansfield, a Scot, to the post of Chief Justice of England, thereby paving the way for the development of commercial law principles which to a large part remain untouched; and the publication by William Blackstone of his classic four volume *Laws of England*. Those various events, taken together, constitute a significant part of the foundation for what was destined to become the formative 100-year period for the bloody creation in 1783, and even bloodier ultimate confirmation in 1865, of the American Republic and for the development of international maritime law in general and marine insurance in particular. In order to explore the post-1756 events that feature in the present work, it is necessary to sketch out how things lay in this fateful year. That is the function of the early part of this book. Successive chapters trace in parallel the most important developments in marine insurance law that we now take for granted, alongside the political and economic context reflected by the law.

A NOTE ON TERMINOLOGY

These islands encompass four distinct nations, England, Wales, Scotland and Ireland. England and Wales are a single legal jurisdiction, and to avoid tedious repetition in this work are together referred to as 'England', a name based on the invasion of the Angles and Saxons in the first millennium. The word 'Britain', originally used by the Romans in the century Before the Common Era, fell into disuse with those invaders. England and Wales constituted a single nation, and Scotland was a separate country in its own right. The term 'Great Britain' was adopted to describe England, Wales and Scotland following the unification of the Crowns of the nations when James VI of Scotland became James I of England in 1603. In this book, which mainly covers the period from 1756 to 1906, the term 'Britain' is to be understood as referring to England, Scotland and Wales, although where there is discussion of earlier times then the reference will be to England without a separate mention of Wales. The term 'United Kingdom' dates from the Act of Union 1707, which created a single kingdom of England, Scotland and Wales. Ireland joined the United Kingdom in 1801, although the Republic of Eire achieved independence in 1921 and the United Kingdom thus now consists of Great Britain and Northern Ireland.

There are, at various points, references to the British flag on British vessels. The current flag, in use since 1801 and a combination of the flags of England, Scotland and Wales, is generally referred to as the 'Union Jack'. There remains a dispute as to whether it is historically correct to confine that term to the naval flag – referred to as the Jack in early naval documents – or whether it is more accurate to use the term 'Union Flag' for non-maritime purposes.¹⁰ However, as this book is concerned with naval matters, the Union Jack is accurate usage either way.

10 See the discussion by the Flag Institute, <https://www.flaginstitute.org/wp/british-flags/the-union-jack-or-the-union-flag/>

A NOTE ON SOURCES

This is a book about the law, albeit the law in its historical context. The author is concerned principally with British, American and European history, and with the development of the economy and sea trade, insofar as key events explain the marine market. There is an abundance of superb literature on every event, organisation and economic trend referred to in the present work and there are entire texts on individuals who, by the skill of dedicated researchers, have been rescued from the obscurity of walk-on parts. The reader will therefore appreciate that it has been possible to cite by way of sources only a tiny percentage of the available literature. The factual material is well-known in the public domain and can be taken as read, and works have been referred to only where they add significant insights. By way of background, the author has relied heavily on the multiple volumes constituting the *Oxford History of England* and the *Cambridge Modern History*.

Numerous individuals have assisted in the preparation of this work. Ian Enright, Ozlem Gurses, Sophie Hudson, Kate Lewins, Lucy Merkin and Jadranka Petrovic all read parts of the text and made valuable comments on structure and content. Matthew Freeman, Frankie Ryu, Meixian Song, Ayca Ucar and Meredith Yang all assisted with research on various points. Ellie Saunders prepared the tables of cases and statutes, a job just as complex as some of the writing of the text.

This book is dedicated to: my wife Barbara; to daughters Ellie, Lucy and Sophie; and to grandchildren Isabelle, Elodie, Thomas, Naomi and Lara.

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