to debentures issued in New Zealand would be to attribute to the Victorian Legislature an intention to legislate in regard to matters lying outside its territorial jurisdiction, because the land charged under the debenture is in New Zealand. Although the principal and interest were payable in Victoria, they were payable under a New Zealand and not a Victorian contract and, furthermore, their Lordships held that to change the amount of the debt would be to affect the security on the land, which is extra-territorial so far as Victoria is concerned and must be governed by *lex situs*. The extent of the security is defined by the debt, and the debt and the security are fixed by the New Zealand statute, so that to accede to the Council's contention would be to treat a New Zealand Act as varied in regard to a New Zealand contract by Acts of the Victorian Legislature.

The conclusion from this decision is that a clear and unmistakable intention must be expressed by the parties to a contract affecting immovables in the sphere of private international law to displace the strong claim of *lex situs* as the proper law of the transaction.[3]

J. SHATIN, B.COM.

3. (It is difficult to reconcile this decision with the *Adelaide case* [1934] A.C. 122, and it is criticized in *Brit., etc., Trust Corp. v. N. Brunswick Rly.* [1937] 4 All. E.R., p. 516. where *lex loci solutionis* is favoured as the list of the mode and measure of payment. —Editor.)

CONTINUING NEGLIGENCE AND THE RULE IN *DAVIES v. MANN*

The Eurymedon [1938] 1. All. E.R. 122.

THE facts in this case, as found by Bucknell J. as trial judge, were as follows: The *Corstar,* displaying satisfactory anchor lights, was at anchor in the Long Reach of the Thames. Owing to a lack of good seamanship in anchoring the ship, the wind and tide turned her so that she lay athwart the fairway in a very unusual and unexpected position, and so as to form an obstruction to vessels passing up and down the river. Further her anchor watch was incompetent and did not realize that the ship was lying athwart the fairway nor make any attempt to have her position corrected.

The *Eurymedon* was proceeding upstream at about 6 a.m. when her lookout observed the *Corstar's* anchor lights but, not expecting a vessel to be lying in such a position, failed to recognize them as such and confused them with the numerous shore lights. Shortly afterwards the hull of the *Corstar* became visible to those on the *Eurymedon,* but too late to prevent a collision between the vessels.

The learned trial judge found that the *Eurymedon* on first seeing the *Corstar's* riding lights, which was in time to avoid the collision, should have realized the possibility of a ship being ahead and was guilty of negligence in not slackening speed immediately. The *Corstar* was also negligent in lying in the position she did. She had failed to take ordinary precautions to avoid the risk of a collision which her conduct, in fact, made possible. The principle of *Cayzer*

v. Carron[1] did not apply. The negligence of the *Corstar* contributed to the accident and both ships were equally to blame.

In the Court of Appeal it was alleged that the *Eurymedon* should have known of the *Corstar's* position and that she had the last opportunity of avoiding the accident. For the *Eurymedon* it was contended that the negligence of the *Corstar* was a continuing negligence, that it induced the mistake of the *Eurymedon* and that, in law, the last opportunity lay with her. The Court of Appeal upheld the finding of the trial judge.

Scott L.J. decided the case, in the main, on the facts, holding that both vessels were guilty of a continuing negligence which lasted until the moment of impact. As soon as the *Eurymedon* began to navigate the Reach the *Corstar's* "disregard of the obligation of good seamanship became the breach of a positive duty to her." Similarly the *Eurymedon's* negligence began when those on board ought to have realized that the lights they saw were those of a ship riding at anchor and took no action to alter their course. He lays it down as his opinion:

> "the broad feature which results from the cases (based on *Davies v. Mann*[2]) is . . . . that the final question is one of fact, to be decided by a tribunal of fact with due regard to the circumstances of the case. . . . Much of the litigation which has taken place on this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of the responsibility in the legal sense."[3]

In illustration of this precept he discusses the doctrine of continuing negligence[4] of which he takes the case of *British Columbia Rly. Co. Ltd. v. Loach*[5] as an example, and points out the danger of regarding a culminating act of negligence as the "cause" of an accident.

Slesses L.J. rejects the contention that the wholly unexpected position of the *Corstar* contributed to the mistake of the *Eurymedon*. He finds the *Corstar* guilty of negligence continuing up to the time of the collision by an unusual and, it is suggested, questionable application of *Loach's* case.

An extension of the "self-created incapacity" rule to include what may be termed the "passive" as well as the "active" participant in a collision seems to be justified neither by authority nor convenience. Rather it appears to exclude the application of the *Davies v. Mann* rule completely by denying to a plaintiff who has negligently assumed a position of helpless peril (to use the phrase of the American Restatement) the opportunity of pleading that the accident need not have occurred had the other party acted with reasonable care. Fortunately, neither of the other judges supported this line of reasoning, which, it may be noted, is expressly negatived by current opinion in the United States.[6]

In the remaining judgment Greer L.J. was at one with Scott L.J.

1. [1884] IX App. Cas. 879.
2. (1842) 10 M. & W. 546.
3. [1938] 1. All. E.R. at 131.
4. *Ibid.* at 132-3.
5. [1916] 1. A.C. 719.
6. Restatement—*Torts*, Vol. II, § 479.

in deciding on the facts. He states what he considers to be the law involved in the principle of *Davies v. Mann* in the form of five propositions—

> "(i) If one of the parties to a common law action actually knows from observation the negligence of the other party he is solely to blame if he fails to exercise reasonable care toward the negligent plaintiff.
>
> "(ii) Rule (i) applies also where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it and could, by exercising reasonable care, have avoided causing damage to the other negligent party.
>
> "(iii) The above rules apply in admiralty with regard to collisions between two ships as they apply where the question arises in a common law action.
>
> "(iv) If however the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or sea, each party is to blame for the damage which is the result of the continued negligence of both."[7]

Of these four rules the Lord Justice remarks that they "have been established beyond question by a long line of cases." But he adds a fifth rule which he considers a necessary corollary to rule (iv) and on which, with that rule, he basis his decision. He points out that though there was previously no case directly on this rule it is implicitly involved in at least four decisions.[8] This new proposition is—

> "(v) If the negligent act of one party is such as to cause the other party to make a negligent mistage which he would not otherwise have made then both are equally to blame."[9]

This is one of the few attempts made by English judges to summarize a branch of the law and from both the standing of the author and the precision of the statement it should be of value not only in exposition but also in application of the law involved. But as a comprehensive statement its authority must be somewhat weakened by the remarks of Scott L.J. when he says—

> "Greer L.J. has stated in the form of five rules the gist of the law applicable for the solution of cases like the present. The propositions do not, as I understand them, purport to be a codification of the branch of the law involved in *Davies v. Mann* and the innumerable cases which have either followed or distinguished it, but only to state shortly those aspects of that branch of the law which are germane to the present controversy. With the first four I agree, but the fifth rule can, in my view, be regarded as only a statement of the logical results of the facts in the present case. As a general rule it would, I think, need some elaboration or qualification."[10]

As has been indicated above, Slesses L.J. implicitly rejects the fifth rule *in toto*. Despite this criticism, however, it is suggested that these rules will not be referred to infrequently in future.

Two other points may be noted. It is obvious from all the judgments that the hopes of some writers that the bogeys of "continuing negligence" and "self-created incapacity" would soon be laid or at least confined within strict limits are not to be realized, and that

7. [1938] 1. All. E.R. at 126.
8. *Dowell v. General Steam Navigation Co.* (1855) 5 E. and B. 195. *Admiralty Commissioners v. S.S. Volute* [1922] 1. A.C. 129 at 139. *British Columbia Electric Rly. Co. Ltd. v. Loach* [1916] 1. A.C. 719. *Swadling v. Cooper* [1931] A.C. 1.
9. [1938] 1. All E.R. at 126.
10. *ibid.* at 131.

these uncertain spectres must continue to trouble English law for years to come. The remarks of Slesses L.J.[11] put the authority of *Loach's* case beyond doubt but the extent of the doctrine involved is far from clear. Similarly, none of the judges have any hesitation in applying the wide rule of continuing negligence but little direct guidance is to be found for prescribing its exact limits. However, it is suggested that the following principle is in accordance with the views of all the judgments, *viz.*: Any breach of a duty of care which can be shown to be a factor directly contributing to damage suffered by a person to whom the duty is owed is negligence and responsibility for it will be deemed to continue up to the moment when the damage occurs when it may provide foundation either for the action of negligence or for the defence of contributory negligence unless it can be shown that the person alleging the breach has also been responsible for some act or omission so culpable that, as a matter of fact, it is the real factor in causing the damage and can be said to supersede or exculpate the alleged negligence.

E. N. BERGERE.

11. *ibid.* at 129.

FRUSTRATION

Aerial Advertising Company v. Batchelor's Peas [1938] 2 All. E.R. 788

IN this case the plaintiff entered into a contract for reward to advertise the defendant's goods by flying over various towns trailing a large streamer bearing the words "Eat Batchelor's Peas." Schedules of times and places were agreed, but since exact compliance with these obviously depended on climatic conditions, it was agreed that the pilot should telephone the defendant each day to get its approval of what he proposed to do, and send a report of what he had done. This he did until November 10, 1937. He did not telephone on November 11, but made a flight over the crowded main square of Salford during the two minutes' silence, to the disgust and indignation of thousands of people assembled. As a result letters and telephone calls poured in upon the hapless defendant, vigorously denouncing its conduct and announcing that its goods would be boycotted; and though it hastily inserted apologies in the local newspapers, the plaintiff alleged that the widespread public feeling and highly damaging press publicity had caused serious injury to its business, its goodwill, and the reputation of its dried peas. The plaintiff sued the defendant for £170/7/11 in respect of part of the advertising done under the contract, and the defendant counterclaimed for damages for breach and for a declaration that it was no longer bound by the contract.

The plaintiff contended that the contract could still be performed in some months' time when the incident was forgotten, and in a different locality—in Wales, or the South of England. The defendant protested that all it wished to do was to undo the harm which had been done, to dissociate its name altogether for the future