It was clear from other evidence that in exercising the power of appointment in favour of J., R. did not intend to confer any benefit on him, but anticipated that he would use the appointed property for the benefit of her two sons. She had indicated her intention to this effect in a letter to J., portion of which read, " It is scarcely to be imagined that any question will arise that would possibly deprive your cousins " (the writer's children by W.) " of their just inheritance, and I have only exercised my power of appointment under your grandfather's will in case by any possibility any difficulty should arise and must in that event trust to your honour that reparation should be made."

Vaisey J. was satisfied that the appointment to J. was invalid as constituting a fraud on the power, even though, as he held, J. had not succeeded in assigning, by the 1919 deed, any interest he might take under an appointment since at the date of the deed such an interest was a mere expectancy. From the authorities the following propositions could be derived :

(i) that an intention to benefit a non object may vitiate whether the intention is successfully achieved or not ;
(ii) that it is not necessary to establish any bargain ;
(iii) that, if there were originally a corrupt intention, the onus is shifted and rests on those who seek to show it was abandoned.

It was clear that, in this case, R. had treated the settled legacy, not as property over which she had a mere power of appointment but as her own property to be dealt with as she wished irrespective of the limitations placed on the exercise of the power by the donor. She had exercised the power solely with the intent to benefit persons who were not objects of it. Indeed this case was all the more glaring in that the persons on whom the benefit was intended to be conferred were not merely negatively non objects but were " the very persons whom the donor of the power has positively and affirmatively pointed out as disqualified from becoming participants of his bounty."

W. J. ARCHER
R. G. de B. GRIFFITH.

TORT : CAUSATION—COMMON SENSE TEST.

Yorkshire Dale S. S. Coy. v. Minister of War Transport.[1]

By the terms of a charter-party responsibility for war risk was cast on the respondent and the question to be decided was whether the damage sustained by the Appellant was the result of a war-like operation or of the ordinary perils of the sea.

Briefly, the facts were as follows : A ship requisitioned by the Minister of War Transport was insured by the owners against marine risk. While sailing in convoy and admittedly engaged in a war-like operation—namely, the conveyance of war stores—the ship stranded. There was no improper or negligent navigation on the part of the ship, the stranding

1. [1942] A.C. 691.

being due to a variety of causes, including a deviation of course under naval orders to avoid an apprehended submarine attack, coupled with an unexpected set of the tide. The House of Lords held that the proximate cause of the stranding was a war-like operation.

The chief interest in this case lies in the test which was adopted unanimously by the House in arriving at the " choice of the real or efficient cause out of the whole complex of facts." It is submitted that the test that was adopted may have rendered obsolete much of the legal learning and confusion on this subject. No attempt was made to determine the question by applying the direct cause test which was adopted by the Court of Appeal in 1921,[2] where it was held that a tort-feasor is liable for all the direct consequences of his negligent act ; nor does it seem that such a test is capable of satisfactory application, where as here the court is not concerned with such a single act but the continuing war-like character of a voyage in convoy.

Neither did the House wrestle with the awkward question whether the unexpected tidal set had constituted a *novus actus interveniens* between some original act and the damage.

Nor yet did the House attempt to apply the older ' reasonable probability ' test by enquiring whether a reasonable man would have foreseen that those particular consequences would be likely to occur as the result the war-like character of the voyage.

The House agreed with the manner in which the Lord Chancellor approached the question of causation. In effect he sought directly to discover the ' proximate ' cause of the stranding, which is in accordance with that general maxim that the law looks to the proximate and not the remote cause. It is true that the ' proximity ' of the cause is insisted upon by the Marine Insurance Act 1906 and that the meaning of proximate causation in insurance law may be somewhat technical, but it is submitted that the approach which was adopted in the present case is not to be regarded as limited to cases of insurance. " It seems to me that there is no abstract proposition, the application of which will provide an answer in every case, except this : one has to ask oneself what was the effective and predominant cause of the accident, whatever the nature of the accident may be."[3]

Lord Wright held that ' proximate ' meant " not latest in point of time but predominant in efficiency," and considered that there was " necessarily involved a process of selection from amongst the co-operating causes to find what was the proximate cause."[4] It is the very principle adopted in making this selection which concerns us here.

The House unanimously agreed that each case must be considered broadly in the light of its own particular facts, that the refinements of metaphysics or of physical science have no proper place in arriving at the choice of the proximate cause, but that the choice is to be made as the man in the street would make it. The court must try to determine what a business or sea-faring man would take to be the cause without too microscopic an analysis. In other words, to quote directly Lord Wright :

2. *Polemis v. Furness, Withy & Co.*, [1921] 3 K.B 560.
3. Viscount Simon at p. 698.
4. at p. 706.

" This choice of the real or efficient cause from out of the whole complex of facts must be made by applying common sense standards."[5] Viscount Simon L.C. stated the principle thus :[6]. . " Most results are brought about by a combination of causes and a search for *the* cause involves a selection of the governing explanation in each case. The cause of the death of a human being may I suppose be scientifically stated to be the supply of insufficient oxygen to the brain but when a medical man certifies ' the cause of death ' he looks for the thing which has predominantly operated to bring death about. In such a case as the present it is this sort of practical test which has to be applied." Lord Macmillan with characteristic felicity of expression held similar views.

" No formula can be devised which will provide a universal touchstone for the infinite variety of circumstances which may arise. Each case must be judged in the light of its own facts and by resorting not to the refinements of the philosophical doctrine of causation but to the commonplace tests which the ordinary business men conversant with such matters would adopt."[7]

Dr. C. K. Allen[8] also apparently considers that this practical test is not to be regarded as limited to insurance cases, and he manifests his delight in claiming that " surely this decision will cut through the tangle of chains, nets, webs, and last chances to the Gordian knot itself." He contends further that it makes any application of the ' last clear chance ' doctrine in questions of contributory negligence completely unreal ; and it has been pointed out[9] that that same approach was adopted by the Divisional Court in that very year.

The House of Lords in the case of *Woods v. Duncan*[10] has applied tests laid down in the present case to an action for negligence. " We have to apply the common sense test indicated by this House in *Yorkshire Dale Steamship Coy. v. Minister of War Transport.*[11]

Denning J. has applied similar tests in recent pension cases.[12]

Thus it may be said that this case is important in that the House of Lords has emphasized the fact that causation is a common sense matter, that common sense tests should be applied to find *the* cause of the damage and that " real," " effective," " predominant " or " determining " (if adjectival support is felt necessary) should be preferred to " direct," " probable," " forseeable," " *causa causans* " and " *causa sine qua non.*"

Perhaps however this appeal to common sense may be a mixed blessing, since the sense called " common " is in fact possessed by so few.

E. M. GREENE
S. G. HOGG.
AND THE HONOURS CLASS IN WRONGS.

5. at p. 706.
6. at p. 698.
7. at p. 702.
8. (1943) L.Q.R., p. 6.
9. (1944) L.Q.R., p. 15. *Norwegian Shipping & Trade Mission v. Behanna*, (1943) 76 L.T. 91.
10. [1946] A.C., p. 401.
11. [1946] A.C., p. 401, per Simon L.C. at p. 421.
12. *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719 ; *W. v. Minister of Pensions*, [1946] 2 All E.R. 301 ; *X. v. Minister of Pensions*, [1947] 1 All E.R. 38.