

The Origin of the Indemnity Clubs in the U.K.

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(Written in compliance with the request of people of P. & I. clubs in the U.K. referring to my treatise in Japanese entitled "Transition of Ship Owners' Liability Laws and Change of P. & I. Clubs in the U.K.: Part II" contributed to Vol. 46, No. 2 of "Study of Non-Life Insurance", the quarterly organ of The Non-Life Insurance Institute of Japan, published in November 1984)

I. Preface

I had the opportunity to study in the U.K. for ten months from April 1982 as overseas research personnel of the Ministry of Education of Japan. One of the purposes of my visit to the U.K. was to collect necessary materials for further study of the historical development of P. & I. clubs there. To my regret, however, I could not collect sufficient materials because some of such materials were destroyed by fire or dispersed in consequence of air raid during the World War II.

In the course of studying the history of P. & I. clubs in the U.K., I found that, while a lot of materials regarding the formation of Protection clubs in the early days are still available, those regarding the formation of Indemnity clubs in the early days are rather limited and further that in almost all literatures published after the war in the U.K. it is explained that the first Indemnity club was formed in Newcastle in 1874 under the title of The Steamship Owners' Mutual Protection and Indemnity Association (now The North of England Protecting and Indemnity Association Ltd.), being prompted by the Westenhope case of 1870. The source of the above explanation seems to be "3. The Origin of the Indemnity Clubs" on the pages 5-6 of the booklet "The History and Development of Protecting and Indemnity Clubs" (1957), the report of Advanced Study Group No. 109 of The Insurance Institute of London (hereinafter referred to as the A.S.G. Report), as all other literatures were published after the A.S.G. Report.

It can, however, be said that the above Westenhope case is an obscure case, because not only it does not appear in any official or semi-official record such as Law Report Series but its particulars are different according to different literatures. Further, the A.S.G. Report does not refer to the fact that The Ship Owners' Mutual Protection Society formed in 1855 (now The Britannia Steam

Ship Insurance Association) was already covering Indemnity risks in 1865, five years earlier than the Westenhope case, as per their leaflet of 1866 kept by Tindall, Riley & Co. as quoted below.

The Ship Owners' Mutual Protection Society,
Established 1856.¹⁹

Ships may be entered at the rate of £15 per ton, to the extent of £10,000 each. Nearly 250 are now protected for upwards of £1,275,000.

Shipowners being personally liable by law for damages to the extent of £15 per ton, whatever may be the actual value of their Ships (even if lost), the Members of this Society bear amongst themselves rateably, each in proportion to the amount for which he is protected, such damages, as under, which individual Members may become legally liable to pay, in respect of protected Ships, *so far as the same could not have been covered by ordinary policies on such Ships for their full value*, with the usual collision clause therein, after taking into account the injury sustained by the protected Ships themselves.

The damages so protected against are

(1). where any loss of life or personal injury is caused to any person being carried in the protected Ship.

(2). Where any damage or loss is caused to any goods, merchandize, or other things whatsoever, on board any such Ship.

(3). Where any loss of life or personal injury is, by reason of the improper navigation of such Ship as aforesaid, caused to any person carried in any *other* Ship or Boat.

(4). Where any loss or damage is, by reason of the improper navigation of such Ship as aforesaid, caused to any other Ship or Boat, or to any goods, merchandize, or other things whatsoever, on board any other Ship or Boat.

Rules, and full particulars, may be obtained on application to the Managers,
PETER TINDALL, RILEY & CO.,

17, Gracechurch Street,
London.

July, 1866.²⁰

Anyway, based on the materials collected during my ten month stay in the U.K., I have written this treatise in compliance with people of P. & I. clubs in the U.K.

II. My questions about the explanation in the A.S.G. Report that the first Indemnity club was formed being prompted by the Westenhope case

Before leaving Japan for the U.K. in April 1982, I summarized my above questions in the following four points.

1. Was the Westenhope case litigated? If the answer is affirmative, what was the fact finding of the court?
2. According to the leaflet of 1870 of The Ship Owners' Mutual Protection Society, the Indemnity risks were already covered by them, irrespective of whether the shipowner's liability is tort liability or liability for breach of

(Note) 1. The Year of establishment of the above Society should correctly be not 1856 but 1855.

2. The contents of the cover stated in their leaflet of 1865 were also same as the above.

contract, as quoted below.

By the Merchant Shipping Acts 1854 and 1862, in cases where all or any of the following events occur, the Owners of the Ship in fault are answerable in damages to the extent of £8 or £15 for each ton of her registered tonnage, whatever her real value may be, and whether she be lost or not lost; and they are liable on *each* and every *separate* occasion, to the same extent, as if no other loss, injury, or damage had arisen: that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in *such* Ship;

(2.) Where any damage or loss is caused to any goods, merchandize, or other things whatsoever, on board any *such* Ship;

(3.) Where any loss of life or personal injury is, by reason of the improper navigation of *such* Ship as aforesaid, caused to any person carried in any *other* Ship or boat;

(4.) Where any loss or damage is, by reason of the improper navigation of *such* Ship as aforesaid, caused to any *other* Ship or boat, or to any goods, merchandize, or other things whatsoever, on board any *other* Ship or boat.

Ordinary insurances on the wrong-doing Ship would not extend to cover damages payable for loss of life, or personal injury, or damage or loss of *her own* cargo, and sometimes not any, and frequently not the whole loss or damage done to *other* Ships and their cargoes.

The Members of this Society bear amongst themselves, rateably, the damages that any individual Member may become legally liable to pay, upon the protected tonnage of his Ship to blame for loss of life, personal injury, loss of or damage to *her own* cargo, in cases 1, 2, 3; and, in case 4, so much of the loss or damage done by the protected Ship to any *other* Ship or her cargo, as shall exceed the full value of the protected Ship, and could not have been covered by a collision clause in an ordinary policy of insurance on the protected Ship for her value.

According, however, to the A.S.G. Report, a Protection Association in which the Westenhope was entered refused to reimburse the owner of the vessel on the grounds that the loss was not covered by the Hules. Among the Protection clubs operating at that time, were there those which covered the Indemnity risks and those which did not?

3. The North of England Protecting Association formed in 1860 (now The North of England Protecting and Indemnity Association) already existed in Newcastle where the first Indemnity club was formed in 1874 as mentioned before. Did the above Association not cover the Indemnity risks at the time of the Westenhope case?
4. As mentioned before, in 1870 there was or were a Protection club or clubs, such as The Ship Owners' Mutual Protection Society, which covered the Indemnity risks as well as the Protection risks. Nevertheless, did any reason arise subsequently for necessitating the formation of Indemnity clubs separately from Protection clubs?

Anyway, as it is apparent that not only some underwriters in London covered since 1824 shipowners' liability for loss or damage caused to cargo on board their vessels, though to the limited extent but the above Society also

covered the above liability since 1865, the word "existing insurances" appearing on the 4th and 5th lines of page 6 of the A.S.G. Report seems more precisely to be "existing insurances available in Newcastle".

After having arrived in London in April 1982, I asked many people, including Mr. N. F. Ledwith, the advisor to Advanced Study Group No. 109, about the name of the Protection Association in which the Westenhope was entered, but to my regret I failed to ascertain the name.

Next, in the course of reading the minutes of the Committee of The Britannia Steam Ship Insurance Association, I found that all claims filed with them were recorded in the minutes, and through the kind intermediation of Mr. J. C. W. Riley, great-grandson of Mr. John Riley, the founder of the above Association, and a partner of Tindall, Riley & Co., I visited five clubs formed before 1870 and two clubs formed after 1870 as enumerated below,

- (1) The Britannia Steam Ship Insurance Association (est. in 1855)
- (2) The West of England Steam Ship Owners' Protection and Indemnity Association (est. in 1855 and started business in 1856)
- (3) The North of England Protecting and Indemnity Association (est. in 1860)
- (4) The London Steam-Ship Owners' Mutual Insurance Association (est. in 1866)
- (5) The United Kingdom Mutual Steam Ship Assurance Association (est. in 1869 as a Mutual Hull Club and formed Protection Club in 1871)
- (6) The Sunderland Steamship Protecting and Indemnity Association (est. in 1879)
- (7) The Newcastle Protection and Indemnity Association (est. in 1886)

and could peruse not so many old minutes which are still kept of the Committee of the Associations (1) to (5) above, but I could not find out therein any record of the Westenhope case of 1870 and also of the Emily case of 1876 referred to on page 7 of the A.S.G. Report etc., as a case which contributed to the subsequent development of the Indemnity clubs.

In the 15th (1961) and subsequent editions of "Arnould on the Law of Marine Insurance and Average", it is stated that "the case (the Westenhope case) was evidently litigated but the editors have been unable to trace a report of it", and in a paper for the P. & I. seminar held in Budapest, Hungary in 1981 by the Association stated in (2) above, it was stated that the Westenhope case had been heard at the House of Lords as quoted below.

When P. & I. Clubs began in 1854,³⁾ they provided a very limited cover which did not include insurance against liability for loss of or damage to cargo while on board. The reason was simply because until 1870 the insurers of the cargo did not seek redress from the shipowner for cargo loss or damage. But in that year the House of Lords decided that shipowners were liable for the cargo risk in certain circumstances. At that time Clubs were simply called "Protection

(Note) 3. The starting year of P. & I. Clubs should correctly be not 1854 but 1855.

Clubs". But when this new liability arose, the first Club to provide cover for its Members against this risk, decided to call itself a "Protection and Indemnity Club", just to distinguish the wider cover it provided from the more limited cover still provided by the other Clubs. Of course, it was not long before the other Clubs extended their cover too to cover cargo loss or damage, so they all became "Protection and Indemnity" Clubs. Once that stage was reached this new title was firmly established but at the same time the need for it disappeared.

It is strange to me that, in spite of the above descriptions, we cannot find any record of litigation of the *Westenhope* case. As this case is an obscure case as such, the common opinion that this case was the motive for foundation of Indemnity clubs seems to me not much persuasive.

III. The *Westenhope* case and the "tobacco" case

While it is the common opinion that the motive for foundation of Indemnity clubs was the *Westenhope* case, Mr. J. Stanley Todd is the only person who had a different opinion that it was the "tobacco" case of 1874. I wish to fully explain two opinions as below.

1. Study of the *Westenhope* case

(1) The *Westenhope* case referred to in various literatures

First of all, in order to make clear the differences among various literatures in respect of the description of the *Westenhope* case, the relevant parts of these literatures are quoted as below.

(a) The A.S.G. Report (1957), pp. 5-6

Apart from Contract or Statute, the liability of a Shipowner to the cargo is that of a Common Carrier, but for the greater part of the nineteenth century cargo claims were not a serious burden; Cargo Underwriters had not begun to exercise their rights of subrogation freely, and Bills of Lading did not contain the elaborate Exceptions Clauses which later developed.

In 1870, however, a ship called the *Westenhope* was lost off the South African Coast. This ship had on board a quantity of cargo which had been carried past Port Elizabeth and was intended to be discharged on the return journey to Cape Town. The Shipowners were compelled to pay for the value of the lost cargo, the Court holding that they could not rely on the Bill of Lading exceptions in respect of such a deviation. The *Westenhope* was entered in a Protecting Association, but the Directors refused to reimburse the Shipowners on the grounds that the loss was not covered by the Rules, although a small *ex gratia* payment was eventually made.

Mr. J. Stanley Mitcalfe, who was at this time Underwriter of the Northern Maritime Insurance Co. Ltd., wrote to various shipping papers calling attention to the serious liabilities to which Shipowners were subjected, and in respect of which they were not covered by existing insurances. Following this, certain Shipowners called on Mr. Mitcalfe and asked him to form a Mutual Indemnity Association to cover cargo claims and, as a result, the Steamship Owners Mutual Protection and *Indemnity* Association was formed at Newcastle in 1874, with Mr. Henry Nelson as first Chairman. This Association was later amalgamated with the North of England Protecting Association to form the North of England Protecting and Indemnity Association.

The membership and work of the Indemnity Association grew rapidly as the liabilities of Shipowners to Cargo Owners became more apparent, and in the meantime some of the Protection Clubs took steps to cover Indemnity Risks.

- (b) William R. A. Birch Reynardson, *The History and Development of P & I Insurance: The British Scene*, *Tulane Law Review*, 43/3 (April 1969), pp. 467-468

We must now pass to consider Indemnity cover. Until the second half of the nineteenth century, cargo claims were not a serious burden for the shipowner. But in 1870, a ship called the *Westenhope* was lost off the South African coast. The ship was loaded with cargo for Cape Town but she had proceeded direct for Port Elizabeth, it being the intention to discharge the cargo on the return journey to Cape Town. The shipowners were compelled to pay for the value of the cargo which was lost; the Court held that they could not rely on the bill of lading exceptions in respect of such deviation. The *Westenhope* was entered in a Protection Association, but the Directors refused to reimburse the shipowners on the grounds that the loss was not covered by the Rules.

It was in these circumstances that Mr. Stanley Mitcalfe, who was then the Underwriter of the Northern Maritime Insurance Co. Ltd., wrote to various shipping papers calling attention to this type of liability in respect of which shipowners were not covered by existing insurances. In the result, Mr. Mitcalfe was asked to form a Mutual Indemnity Association to cover cargo claims; in 1874, the Steamship Owners Mutual Protection and Indemnity Association was founded in Newcastle. This Association was later amalgamated with the North of England Protection Association to form the North of England Protection and Indemnity Association. At about this time a ship called the *Emily* was lost by stranding and cargo owners recovered from the ship on the ground that the loss of the cargo was not caused by a peril of the sea but by negligent navigation which was not excused by any exception in the bill of lading. As underwriters became more active in exercising their rights of subrogation, so the need for indemnity cover was recognised and as a result the Members of the Protection Associations accordingly formed Indemnity Classes to meet this need.

- (c) N. Singh and R. Colinvaux, *Shipowners*, London 1967, pp. 216-217

Indemnity cover. It was not until 1874 that steps were taken to cover owners' liability to cargo. Until this time cargo underwriters were generally prepared, despite the very limited exceptions clause then usual in bills of lading, to bear losses themselves without exercising their rights of subrogation. However, in 1870 the *Westenhope*, a Newcastle-owned vessel, was lost off the Cape of Good Hope. She had some cargo on board intended for discharge at Port Elizabeth, which had been carried on with the intention that it be discharged on the return journey from Cape Town. The owners were forced to pay the cargo underwriters, since, there having been a deviation from the contract of carriage, they could no longer rely on the bill of lading exceptions. The protecting Club, in which the vessel was entered, refused to extend their rules to cover the owners for this loss, although a small voluntary payment was eventually made. The implications of this case caused considerable agitation in the north of England, and, in 1874, the Steamship Owners' Mutual Protection and Indemnity Association was formed, with J. Stanley Mitcalfe, at the time underwriter of the Northern Maritime Insurance Co. Ltd., as its first secretary.

At about this time, it was also established that the bill of lading exception of

“perils of the sea” would not protect owners against claims from cargo underwriters when the cause of the loss was the negligent navigation of the vessel. As underwriters became more active in exercising their rights of subrogation, so the need for indemnity cover was realised, and the members of the protecting associations accordingly formed Indemnity Classes to meet this need.

(d) The London Steam-Ship Owners' Mutual Insurance Association Limited—Annual Report 1966—Centenary Year, p. 43

Cargo

Shipowners next became seriously concerned regarding their liability in respect of cargo. In 1870 a ship named the *Westerhope* was lost with her cargo off the Cape of Good Hope. The cargo should have been discharged at Port Elizabeth, but had been carried past there with the intention of discharging it on the return voyage from Cape Town. The Court decided that as the ship had deviated the owners were not protected by the contract of carriage and thus were liable for the value of the cargo.

Another ship, the *Emily*, was lost by stranding and the cargo owners recovered from the ship on the ground that this was not a loss by “peril of the sea” but was caused by negligent navigation and that this was not excused by any exception in the bill of lading. Another owner also became liable for loss of cargo by negligent navigation when his vessel was lost at Tynemouth.

With these possible liabilities to cargo because of deviation or negligent navigation hanging over their heads, the shipowners in the North of England Protection Association added the Indemnity Class in 1874, and other Protection Clubs also added this Class. Pressure through the Indemnity Clubs soon secured a general inclusion in contracts of carriage of a clause excepting shipowners from liability for loss or damage by negligent navigation, it being recognised that this was a risk which should fall on the shoulders of all parties to a maritime adventure. Steps were also taken to define the liberty to deviate; though it must be admitted that deviation clauses have been the subject of many disputes with cargo interests over the years, and, therefore a profitable field of litigation for maritime lawyers.

(e) The North of England Protecting and Indemnity Association Limited—Centenary 1860–1960, pp. 6–7

There is more information available as to the circumstances of the formation of the Indemnity Class II.

In the early part of the nineteenth century, cargo claims were, generally speaking, not a very serious liability for shipowners, and cargo underwriters were certainly not so “keen” as they became in later days. In particular, what had been called the “shipowners’ nightmare” (deviation) had not made them lose much sleep, and it was thought that “perils of the seas” in a simple form of Bill of Lading covered a multitude of sins.

However, in 1870, a vessel called the *Westerhope* was lost off the Cape of Good Hope. She had on board some cargo which had been carried past Port Elizabeth and which it was intended to discharge on the return journey to Cape Town. The shipowners were compelled to pay for the value of the cargo as it was held that they were not covered by the Bill of Lading exceptions. The owners applied to their mutual association for reimbursement, but the directors while making a small *ex gratia* payment, said that this loss was not covered by the rules.

Furthermore, about this time, a small vessel called the *Scotia* was lost with her

cargo behind the pier at Tynemouth through negligent navigation. The owner of one parcel of goods recovered their value from the shipowner who had pleaded that the incident was covered by the exception "perils of the seas."

Mr. J. Stanley Mitcalfe, seeing the possible liabilities of Shipowners in respect of cargo claims, wrote a series of letters to the shipping papers under the *nom de plume* of "Kernel," stressing the dangers of the position.

The position in relation to these cargo claims was keenly debated on Tyneside, and eventually Mr. Henry Nelson and Mr. George Bell called on Mr. Mitcalfe and asked him to form a new Mutual Association to cover cargo claims.

He set to work, and with the assistance of Mr. Henry Nelson and other shipowners, the "Steamship owners' Mutual Protection & Indemnity Association" was formed in 1874.

- (f) Arnould on the Law of Marine Insurance and Average, the 15th (1961) and subsequent editions, para. 130

The purpose of indemnity clubs was to indemnify shipowners against their liability for loss of or damage to cargo, which began to assume serious proportions after the case of *The Westenhope* in 1870. The first indemnity club was formed in 1874.

As will be noticed in the above literatures, there are the discrepancies as stated below among the descriptions of the Westenhope case and these literatures do not make clear the Westenhope case but on the contrary cause confusion to the reader.

- (i) In (d) and (e) above, the name of vessel is not the Westenhope but the Westerhope.
- (ii) In (b) above, the destination of the cargo is not Port Elizabeth but Cape Town.
- (iii) In (a), (b) and (e) above, it is stated that the cargo was intended to be discharged on the return journey *to* Cape Town, while, in (c) and (d) above, it is stated that it was intended to be discharged on the return journey *from* Cape Town. It appears, therefore, from (c) and (d) above that the vessel proceeded for Cape Town and Port Elizabeth not from the Atlantic Ocean but from the Indian Ocean. Anyway, it is interesting to find the description "a Newcastle-owned vessel" in (c) above.

(2) Records of the Westenhope case in the Lloyd's List

When I was wishing to confirm at least that the Westenhope case was not a legendary case but a real case, Mr. T. G. Coghlin, a partner of Thomas R. Miller & Son (managers of The United Kingdom Mutual Steam Ship Assurance Association), kindly suggested me that the details of the case might possibly be found in the Lloyd's List, as it is stated, in the literatures (1) (a) and (b) above that after the Westenhope case, Mr. Mitcalfe, the founder of the first Indemnity club, contributed (under the pen name of "Kernel") to various shipping papers a warning in respect of the Indemnity risks. He also kindly confirmed on my behalf that the series of such old Lloyd's List are kept in the Guildhall Library.

Fortunately I could find out there the descriptions of the Westenhope case in the series of Lloyd's List dated November 5, 1870 to April 10, 1871. The relevant parts therein are quoted as below.

(a) dated November 5, 1870

Westenhope (SS) Mackay (Cape Town)
 Nov. 5 Ply $\frac{8}{8}$ do $\frac{8}{6}$ Ply $\frac{9}{6}$ Dec. 12 $\frac{16}{C. Vds. 13}$ Cvos. 20
 Cld. 22

(The dates are omitted thereafter)

London Custom's Entries
 Cleared Outwards, Nov. 4
 Cape Town, Algoa Bay & Natal—
 Westenhope (S.S.)....Mackay....B750LD....Payne
 Plymouth....arrived
 7 Westenhope (S), Mackay London
 for Cape Good Hope
 Gravesend....sailed
 5 Westenhope (S)
 Cape Good Hope
 Plymouth....arrived
 7 Westenhope (S), Mackay
 Cape Good Hope
 ST. Vincent, C. V.....arrived
 Nov. 19 Westenhope (S) Plymouth for the Cape of Good Hope
 ST. Vincent C. V.....sailed
 22 Westenhope (S), Mackay
 Cape Good Hope
 Table Bay arrived
 Dec. 18 Westenhope (S), Mackay London
 Algoa Bay arrived
 Dec. 26 Westenhope (S), Mackay Table Bay

(b) dated February 20, 1871

It is reported that the Norseman (S), from the Cape of Good Hope, has arrived at Madeira, and that she brings intelligence of the loss, off Algoa Bay, of the Westenhope (S).

[The Westenhope (S) arrived at Algoa Bay, 26th Dec. from London and Table Bay.]

The crew and passengers of the Westenhope (S) were saved.

(c) dated February 21, 1871

Plymouth, 20th Feb.—The Westenhope (S) was totally wrecked on Bird island, 31st Dec., in leaving Algoa Bay, for Natal.

(d) dated February 22, 1871

Port Elizabeth 14th Jan.—The Westenhope (S) had on board, at the time of the wreck, a portion of the cargo loaded at London for this port.

(e) dated April 10, 1871

Cape Town, 4th Mar.—Advices from Riversdale, dated 1st Mar., state that a cask of, Cape brandy, marked J. N. Jeffrey, Edinburgh had washed ashore, a few days previously, at Buffelshoek.

Advices from Port Beaufort, dated 1st Mar., state that two casks of Cape sherry,

Marked E. C.—S, one cask pontac marked WD—BS, and one case cigars, damaged, had been washed ashore, since the 20th Feb., near Sebastian bay.

Advices from Mossel bay state that two hhds. of Cape brandy, one marked WDB, No. 38, for Australia, apparently a long time in the water, had washed up at the mouth of Gouritz river. The above cargo is supposed to come from the wreck of the Westenhope (S).

Bredasdorp, 2nd Mar.—During the past few weeks violent SE winds have prevailed. A great deal of wreck is now washing up on the coast, amongst it a case, marked 'Westenhope', containing a sewing machine, broken in pieces, some casks of wine, and a cask of Cape brandy, marked R. D.

From the above descriptions I could confirm that the vessel "Westenhope" really existed (the name of "Westerhope" could not be found) and further that she with Mr. Mackay as the captain left London and arrived at Port Elizabeth (Algoa Bay) via St. Vincent and Cape Town and after having left Algoa Bay for Natal (the main port there is Durban), she was totally wrecked on Bird Island off east of Algoa Bay (not off the Cape of Good Hope as stated in the literatures (1) (c), (d) and (e) above), with a portion of cargo which was loaded at London for Port Elizabeth but still remained on board.

These facts coincide on the whole with the description in the A.S.G. Report and this case was apparently a deviation case.

(3) Shipowner's liability for loss of or damage to cargo after deviation

In the U.K. the shipowner's liabilities under the common law as a common carrier were very strict at that time, and

- (a) he was required, in principle, to safely carry the entrusted cargo and deliver it to the consignee in sound condition,
- (b) he was liable, in principle, for loss of or damage to cargo under his custody, and
- (c) though he was exempted from such liability in case of the loss or damage caused by act of God, King's enemies, defect in the cargo or its package or general average sacrifice, even in such cases as the above he was still liable if he did not exercise due diligence to prevent or minimize the loss or damage, or the loss or damage occurred after deviation or due to the vessel's unseaworthiness at the time of sailing or the vessel's uncargoworthiness.

In order to escape from such strict liabilities, shipowners included exception clauses in their bills of lading, but in the exception clauses of around the year 1870 only the dangers of the seas (or the perils of the seas), in addition to exceptions under the common law, were included.

In the Westenhope case, as a deviation occurred in respect of the cargo carried past Port Elizabeth and the loss of cargo occurred after deviation, if it was litigated, the cargo owner would have asserted that the shipowner could no longer rely on the bill of lading exceptions, while the shipowner might have argued that he was not liable for the cargo loss because the proximate cause for the loss was a peril of the seas, though the loss occurred after deviation.

(4) Historical authenticity of the Westenhope case

In so far as the descriptions of the Westenhope case in the Lloyd's List are concerned, the details of the cause of accident, the contents of the cover of the Protection Association in which she was entered and whether the case was litigated or not are not made clear and there is no record of the warning allegedly given by Mr. J. S. Mitcalfe in respect of Indemnity risks as mentioned in (2) above.

By the way, it is stated on page 7 of the A.S.G. Report that in 1876 the owner of the Emily had to pay for cargo lost in a stranding due to negligence, on a finding that negligence was not a peril of the seas, but I could not trace this case in the Lloyd's List. Anyway, it is interesting that the Emily case is very much similar to the Scotia case of around 1870 referred to in *The North of England Protecting and Indemnity Association Ltd.—Centenary 1860–1960* (see (1) (e) above).

Similar Judgments to those in the Emily and Scotia cases were already given in *Lloyd v. General Iron Screw Colliers Co.* case in 1864 (3 H. & C. 284; 22 M.L.C. 340) and *Grill v. General Iron Screw Colliers Co.* case in 1868 (L. R.1C. P.600; L. R.3C. P.476; 22M. L. C.340). It seems, therefore, that, assuming that the Emily and Scotia cases were really litigated, the judgments given in these cases might merely be confirmation of those given in the previous two cases and further that the Emily and Scotia cases might, as the local cases, again remind the Shipowners in and around Newcastle of the necessity of formation of an Indemnity club.

Setting aside the Emily and Scotia cases, when I started to study the Westenhope case, I left some doubt as to the historical authenticity of this case. In view, however, of the descriptions in the Lloyd's List as quoted before and also of the shipowners' liability laws in force at that time, I have come to believe that there is a strong probability of this case having been litigated as stated in the A.S.G. Report, etc.⁴⁾

2. Study of the "tobacco" case

Mr. J. Stanley Todd, nephew of Mr. J. Stanley Mitcalfe, was working for a shipping company in North Shields when the Westenhope case occurred in 1870. Being invited by Mr. J. S. Mitcalfe, he joined The Steamship Owners' Mutual Protection and Indemnity Association in 1875, the next year of the

(Note) 4. Though it is not clear where the sources of the A.S.G. Report are kept, when "*The North of England Protecting and Indemnity Association Ltd.—Centenary 1860–1960*" was subsequently compiled, Mr. W. Stanley Mitcalfe, son of Mr. J. Stanley Mitcalfe, the founder of the first Indemnity club, i.e. The Steamship Owners' Mutual Protection and Indemnity Association, gave assistance in collecting materials and, therefore, the materials at his hand might most probably be the sources of all literatures. Incidentally, it is not clear how the editors of "*Arnould on the Law of Marine Insurance and Average*" could confirm the litigation of the Westenhope case and I wonder if any record of oral judgement of this case at a court not of record is still kept in a certain law firm. Anyway, I presume that the court was not the House of Lords as stated in a paper for the P. & I. seminar held in Budapest in 1981 by the West of England Steam Ship Owners' Protection and Indemnity Association referred to before but a certain inferior court.

establishment of the above Association and continued to be in charge of the Indemnity Club still after the Association was amalgamated with the North of England Protecting Association. He was finally General Manager of The North of England Protecting and Indemnity Association.

In his "Memories", Gateshead on Tyne 1947, pp. 15-16, he wrote as follows:

One cannot properly pass over this subject without a word as to the establishment of this Indemnity Association. The following is the story of its evolution.

About this period of 1874 a local Shipowner found himself threatened with a very serious claim by the owners of a quantity of tobacco, being cargo carried by his steamer. Shortly, it may be said that this claim was, fortunately, withdrawn later.

Now it must be remembered, in this connection, that the forms of Bill of Lading commonly in use in those early days were of the simplest possible nature, in so far as nothing more protective of the Shipowner than the usual words exempting him from liability for the "Act of God, perils of the seas and other waters, etc.," was provided.

To continue this item of history, one morning a very well-known and important Shipowner on the Quayside at Newcastle summoned a few of his Shipowner friends to his office, drew their attention to the "tobacco" case above mentioned, and told them that the "possibilities" of this case had got so strongly on his mind the previous night that he had hardly been able to sleep at all for worry at the thought of what *might* happen to him financially, and to other Shipowners, when their vessels were thousands of miles away beyond their control; he, in fact, said we go to bed to sleep with the comfortable feeling that all is right, but may wake up to find ourselves ruined by some action or blunder on the part of members of our crews.

This truism so startled the other Shipowners that they decided that, as they could not get cover against this sort of risk to the full extent of a possible liability, their only alternative was to at once establish a club to be run by British Shipowners on the mutual basis for their own complete indemnity.

In these circumstances these gentlemen turned to Mr. Mitcalfe, who at that time was the Underwriter and Director of the Northern Maritime Insurance Co., in Maritime Buildings on the Quayside. They invited him to undertake the formation of a Mutual Association in fulfilment of their desires.

Mr. Mitcalfe at once complied, and, under legal assistance, formed the Association, which was the first of its kind in the world.

The "tobacco" case is more obscure than the Westenhope case, as I have been unable to find out any other material regarding this case than the above "Memories". Nevertheless, I wish to attach importance to his opinion, because he was most closely connected with The Steamship Owners' Mutual Protection and Indemnity Association as mentioned above.

After all, it seems that the motive of establishment of Indemnity clubs was not the Westenhope case only but the accumulation of various cases above mentioned.

IV. Effects of the Westenhope case, etc. on the establishment of The Steamship Owners' Mutual Protection and Indemnity Association

As mentioned before, in the latter half of the 19th century, the judgment that negligence was not a peril of the seas was given in *Lloyd v. General Iron Screw Colliers Co.* case and *Grill v. General Iron Screw Colliers Co.* case, and the judgment that the shipowner could not rely on the bill of lading exception of the perils of the seas in case of the accident which occurred after deviation was given in the Westenhope case. These judgments made gradually clear the shipowners' liability for cargo owners.

As at that time the separation between shipowners and cargo owners or that between shipping business and overseas trade business made a remarkable progress, it is presumed that, unlike in the age when the cargo had been carried by the cargo owners' own vessels, their claim consciousness against shipowners was much enhanced and also there were increasing number of cases where the underwriters who indemnified cargo owners for loss of or damage to cargoes exercised their right of subrogation against liable shipowners.

In order to cope with the above situations, shipowners took two kinds of countermeasure to protect themselves, that is, by way of insurance and insertion of exception clauses in their bills of lading. I now wish to trace the above facts as below.

According to the A.S.G. Report, the Protection Association in which the Westenhope was entered refused to indemnify the shipowner on the grounds that the loss was not covered by the Rules.

At the time of the Westenhope case, there were in London the following two clubs, i.e. (a) The Ship Owners' Mutual Protection Society which covered the Indemnity risks since at latest 1865 as stated in I. before and (b) The London Steam-Ship Owners' Mutual Insurance Association established in 1866 and in Devon (c) The West of England Steam Ship Owners' Protection Association established in 1855 and moved to London in 1873. Though the old records of the two Associations (b) and (c) above are not available, the contents of their cover were presumably almost same as those of the Society (a) above. Therefore, should the Westenhope have been entered in either one of the above two clubs in London or the above club in Devon, there must have been no problem. From this presumption and in view of the fact that the only club which existed out of London and Devon at that time was The North of England Protecting Association in Newcastle, it seems most reasonable to presume that the Westenhope was entered in the above Association in Newcastle, though Mr. Alec Murray, Managing Director of The North of England Protecting and Indemnity Association Ltd. denied my above presumption.

Further, as regards this problem the following two conjectures may be possible. One of them is the case where the Westenhope was entered in a club which, unlike the clubs then existing in London and Devon, did not ad-

ditionally cover shipowner's liability for breach of contract, such as deviation, and the other is the case where she was entered in a Mutual Hull Club, but most probably she was entered in a club which did not cover the Indemnity risks at all or did cover only a part of Indemnity risks, i.e. shipowners' liability for cargo owners due to improper navigation (tort liability) as seen in the Rules of Protection clubs adopted after the Westenhope case.

As a matter of fact, not only by the 1874 Rules of The United Kingdom Mutual Steam-Ship Protecting Association (see Appendix I for an example), the first Articles of Association of 1879 of The Sunderland Steamship Protecting Association and the 1880 Rules of The London Steam-Ship Owners' Mutual Insurance Association, but also in the leaflet of 1881 of The Britannia Steam Ship Insurance Association (former The Ship Owners' Mutual Protection Society) (see Appendix II), the cover of shipowner's liability for loss of or damage to cargo was limited to that due to the vessel's improper navigation only, and this means that further elaboration of bill of lading exceptions was made after the Westenhope case of 1870.

Notwithstanding the fact as mentioned before that until at latest 1870 the Protection clubs in London and Devon provided broad cover of Indemnity risks, i.e. not only tort liability but also liability for breach of contract, such as deviation, why was it necessary for shipowners in Newcastle to establish an independent Indemnity club?

In this connection, the following view which I could hear from Mr. J. G. Finn, Managing Director of The Sunderland Steamship Protecting and Indemnity Association is much suggestive. He told me that comparing with shipowners in London who were mainly owners of ocean-going vessels, those in Newcastle who were mainly owners of colliers carrying coal to London bore less risks and on the other hand made less profit, and in order to get them to join a club, it was necessary to keep the calls charged by it as low as possible.

Surely, in Newcastle where the shipowners were mainly owners of coastal vessels, such as colliers and vessels engaged in navigation on the Baltic Sea, if a club there had covered comprehensively both Protection and Indemnity risks as The Ship Owners' Mutual Protection Society in London did, it might have been difficult for shipowners in Newcastle to join the club because of high calls. It seems, therefore, that in order to lighten the shipowners' burden of calls, a Protection club and an Indemnity club were separated from each other in Newcastle so that the shipowners there might join either one or both of these clubs at their own discretion.

In other words, there were such special circumstances as mentioned above in the background of establishment in Newcastle of the first Indemnity club, The Steamship Owners' Mutual Protection and Indemnity Association, and the Westenhope case and subsequent similar cases which occurred under the above special circumstances must have prompted the establishment of the above club.

V. Conclusion

From the above study my view will be concluded as below

Even after entering the latter half of the 19th century, the shipowners' liability for cargo owners was not necessarily made clear, and the then shipowners still thought that if the perils of the seas were excepted in their bills of lading, they would not be liable for any loss of or damage to cargo proximately caused by a peril of the seas, irrespective of whether there was any breach of contract on the shipowner's side (such as deviation), crew's negligence or any other remote cause. Since 1860, however, the suits for damages instituted by cargo owners or for subrogation claims instituted by cargo underwriters against shipowners increased in number, and with the shipowners' liability for cargo owners having become more apparent by many judgments, shipowners were compelled to take countermeasures to protect themselves.

In London the Protection clubs took the method of covering comprehensively the Indemnity risks also from the start. On the other hand, in Newcastle it seems that in order to keep the calls as low as possible in view of the fact that the shipowners there were mainly owners of not so risky and not so profitable colliers, the Protection clubs did not cover the Indemnity risks at all or did cover only a part of them (most probably only tort liability such as due to improper navigation), leaving the liability for breach of contract such as deviation not covered. For the purpose of covering the Indemnity risks comprehensively and, on the other hand, of alleviating the shipowners' burden of calls, The Steamship Owners' Mutual Protection and Indemnity Association was established in Newcastle in 1874 in order to enable shipowners to enter their vessels in either one or both of the Protection club (see note below)⁵⁾ and the Indemnity club of the above Association at their choice. In this connection, the endeavor exerted by Mr. J. Stanley Mitcalfe for establishment of the above Association cannot be overlooked.

(Note) 5. From the circular letter of November 10, 1885 as quoted below of The Newcastle Steam-Ship Indemnity Association, which was a Mutual Hull Club though the word "Indemnity" was used in their title and is the predecessor of the present The Newcastle Protection and Indemnity Association, sent to shipowners on the occasion of extending their business to cover Protection and Indemnity risks also,

"On 20th February next I propose constituting under the Articles of this Association a new Class III, in two Sections: (a) Protection. (b) Defence.

Section A.—Protection.—Covering the risks of the ordinary Protecting Clubs.

" B.—Defence.—Embracing all the risks taken by the two mutual Indemnity Associations now in existence.

All or any portion of the gross tonnage of a Steamer may be entered in either one or both Sections, Contribution to each Section being kept distinct."

it is presumed that the then Protection clubs covered not only the protection risks but a part of Indemnity risks also.

Incidentally, in the above letter the word "Defence" was used in place of "Indemnity" and the "two mutual Indemnity Associations" referred to in the above letter seem to be The Steamship Owners' Mutual Protection and Indemnity Association and The Liverpool and London Steam Ship Protection and Indemnity Association (est. in 1881).

It should be added here that the time when the first P. & I. club was established coincided with the time when shipowners started to include various new exception clauses in their bills of lading and Protection clubs also began to recommend shipowners to do so. The above is apparent from the facts that (a) there was hardly any movement for establishing Indemnity clubs since The Steamship Owners' Mutual Protection and Indemnity Association was established in 1874 until main Protection clubs established Indemnity clubs in 1886 and (b) while The Ship Owners' Mutual Protection Society covered not only Shipowners' tort liability but their liability for breach of contract also for cargo owners until at latest 1870, the shipowners' liability for cargo owners covered by them in 1881 was limited to tort liability only.

It is said that the development of the bill of lading exceptions reached the peak in around 1880, and it was natural that there arose a strong movement from cargo owners' side against such situations as it was cynically said that "The shipowners' only obligation is to receive freight". In view of such movement, many international conferences were held since 1882 to restrict the bill of lading exceptions, and in the U.S. the Federal Supreme Court declared invalidity of bill of lading exceptions in a case of 1889 and the Harter Act was enacted after all in 1893. Long-standing dispute on the bill of lading exceptions in the U.K. continued until 1924 when the Carriage of Goods by Sea Act was enacted, and shipowners established Indemnity clubs in all Protection clubs to mutually cover their liabilities for cargo owners which were not allowed to be excepted in their bills of lading (see Appendix III).

VI. Before closing

As mentioned before, old records available of establishment of Indemnity clubs in the early age are not sufficient, comparing with those of Protection clubs, and it is strange to me that, in spite of Mr. J. S. Mitcalfe and his nephew, Mr. J. S. Todd having worked at the same time for The Steamship Owners' Mutual Protection and Indemnity Association established in 1874, there is a marked discrepancy between the materials which were most probably produced by the former and the contents of the "Memories" written by the latter.

In the course of writing this treatise, I have recalled that the old opinion that Protection clubs were established by shipowners to mutually cover the remaining one-fourth of collision damages which was not cover by the 3/4 Collision Clause of hull policy has been overthrown by the A.S.G. Report. I have also found the description as per the Appendix IV in the minutes of the Committee of The Britannia Steam Ship Insurance Association, made in 1930, the 75th anniversary of the establishment of the above Association, in which it is explicitly stated that Protection clubs were established to cover shipowners' liabilities imposed by Lord Campbell's Act (or the Fatal Accidents Act 1846) and the Merchant Shipping Act 1854. I sincerely hope that similar records of old Indemnity clubs to the above will be found someday and somewhere in future.

Appendix I

Extract from the 1874 RULES of
The United Kingdom Mutual Steam-Ship Protecting Association
1874

2.— That the liabilities against which Members are protected and indemnified shall be as follows: —

A.-For Loss of Life or Personal Injury caused to any person in or on board, or attempting to get on board, or near any Member's Steamer entered in this Association.

B.-For Loss of Life or Personal Injury which, by the improper navigation of any such Steamer as aforesaid, or other negligent act, may be caused to any person on board any other ship or boat.

C.-For any Loss or Damage which, by reason of the collision of such Steamer as aforesaid with any other ship or boat, may be caused to such other ship or boat, or to any goods, merchandise, or other things whatsoever, on board such other ship or boat to the extent of the one-fourth part of such Loss or Damage, and of the costs and expenses incidental thereto, not covered by the usual Lloyd's Policy, with collision clause attached.

D.-For Loss or Damage which, by the improper navigation of any Steamer entered in this Association as aforesaid, may be caused to any goods or merchandise, or to any piers, jetties, or other movable or fixed things whatsoever, whether on board such Steamer or not.

E.-For Costs or Charges of raising or removing the wreck of any Steamer entered in this Association; the value of all stores and materials which have been saved, and also the value of the wreck itself, if any, shall first be deducted from such costs, and the balance or proportion of such costs shall be paid by this Association, always provided such costs are not paid by the ordinary underwriters, or recoverable under an ordinary policy.

That of claims for Losses or Damage as above, the amount due from this Association shall be in the proportion which the tonnage entered bears to the gross tonnage of the Steamer, such tonnage to be stated by the Member on entry.

Provided always that the aggregate amount payable by this Association in respect of any number of claims arising from any one occurrence shall not exceed the sum of £15 per ton on the number of tons entered in this Association on the Steamer making such claims.

Appendix II

Established 1871.

Incorporated 1876.

THE BRITANNIA

Steam Ship Insurance Association, Limited.

Class 1.—Hull and Machinery Risks. Class 2.—Freight Risks.

Class 3.—Protection—Ownership Risks.

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Class 1.—Hull and Machinery Risks.—The Members of this Club mutually insure each others' Iron Steam Ships, from the date of their entry until noon of the 20th February then next, and afterwards from year to year unless notice

be given to the contrary, against all risks usually covered by marine policies on *Hull and Machinery*, including Perils of the Seas, War risk, Fire, Pirates, Barratry, and three-fourths of damage done by Collision; at all times and in all places, with liberty to tow and to be towed.

All Steamers contribute to losses in the same proportion, but those engaged in the North American, Baltic, and White Sea Trades, during the *winter* months, pay additional contributions according to an equitable scale.

Particular average is allowed on the Hull and Machinery respectively, as if separately insured, when required by the Assured.

Returns are made Steamers remaining in port in the United Kingdom, or in Continental ports between Hamburg and Bordeaux inclusive, for fifteen days or more, as well as to those detained for thirty days or upwards in a Foreign port under average repairs.

Averages are adjusted by Professional Average Staters, in most respects according to the usage at Lloyd's, but repairs to the ironwork of the Hull are allowed *in full* during the first *six years*; after that period a deduction of *one-sixth*, and after ten years a deduction of *one-third* is made. The cost of repairs to Machinery (Boilers excepted,) is allowed *in full* until it is *three years* old; after three years a deduction of *one-sixth*, and after six years a deduction of *one-third*, is made. Other repairs, except scraping, painting or coating, are allowed *in full* during the first year.

Crew's wages and provisions are allowed in certain cases where Steamers are detained in port for the purpose of average repairs.

*Missing Steamers* are dealt with as if lost on the day they were last heard of.

Claims are settled weekly by the Committee, and Calls are made upon the Members every alternate month. Settlements on account are made to meet payments for Repairs, &c., if the Club's proportion of such payments amount to ten per cent. or more of the sum insured under the policy.

The Committee have power to release any Member, on the loss, sale, or withdrawal of his Steamer, from all further liability, on terms to be mutually agreed upon.

Class 2.—Freight Risks.—To be commenced on the 20th February, 1882, for the mutual insurance of the Freights of Steamers for time as above.

Class 3.—Protection.—Ownership Risks.—This Club is for the mutual protection of *Steam Ship Owners* against Liabilities arising out of any of the following events, viz.:—

- A.—Loss of life or personal injury caused by the protected Steamer to any person in or near the said Steamer, or in any other Ship or boat, or elsewhere; also salvage of life.
- B.—Loss or damage caused by the improper navigation of the protected Steamer to any goods, merchandize or other things whatsoever, whether on board such Steamer or elsewhere, except as named in the next clause.
- C.—Loss or damage caused by the improper navigation of the protected Steamer to any other Ship or her cargo, to the extent of the *one-fourth* thereof not covered by the usual collision clause in an ordinary policy of insurance on the protected Steamer for her full value.
- D.—Damage done to Docks, Piers, Jetties, Structures, Harbours, Buoys, or Submarine Cables; and also the compulsory removal of the Wreck of any protected Steamer from navigable rivers or waters: in these and certain other cases in which the Shipowners' liability is *not limited* by the Merchant Shipping Acts, and also in cases of damage done coming under the operation of *Foreign Laws* which provide no statutory limitation of liability, the Members of this Club are protected to the extent of

£30 per ton.

Returns are allowed to Steamers laid up, for thirty consecutive days or more, in any port of the United Kingdom, or on the Continent of Europe between Hamburg and Bordeaux inclusive.

*For further particulars see Club Rules, which, with forms of proposal and other information, may be obtained on application to the Managers,*

TINDALL, RILEY & Co.,  
Marine Insurance Brokers.

17, Gracechurch Street, E.C.,  
London, June, 1881.

### Appendix III

When The Steamship Owners' Mutual Protection and Indemnity Association was amalgamated with The North of England Protecting Association, Mr. J. S. Mitcalfe was appointed as the liquidator of the Indemnity Club and he stated as below in his last report of closing the liquidation in 1891.

(Extract from The North of England Protecting and Indemnity Association Ltd.—Centenary 1860–1960, pp. 7–8)

The Steam-Ship Owners' Mutual Protection & Indemnity Association was commenced in 1874, with a comparatively small capital. Its advantages were soon appreciated, and the capital increased by "leaps and bounds," until at one time it amounted to nearly £26,000,000. For many years we had the field to ourselves, but, in course of time other Associations were formed on the same lines and there are now six or seven similar Associations. This is not to be regretted so long as they can all work together for the general good, and it is for shipowners to say whether these Associations shall simply become mediums for the payment of claims, or they should continue to attack abuses wherever found, and thus endeavour to place the business of shipowning on a firm and satisfactory basis.

"In the former case, it is probable that underwriters may offer to cover these risks at a fixed premium, but this means perpetuating all the evils that now exist, instead of tracing them to their source, and endeavouring to eradicate them; and as it is frequently impossible to terminate actions in foreign courts for five, eight, or even ten years, it may be somewhat difficult to find the underwriters when the final result is known, and a large amount has to be paid. An Association formed for the sole purpose of increasing its capital as rapidly as possible could be managed without trouble or annoyance.

"I have, on behalf of the Members of the Association endeavoured to act up to our motto, *nemo me impune lacessit*, and have been supported throughout by the Directors, who, so long as we alone represented this branch of the carrying trade, willingly took up as a test case, any question connected with loss of or damage to cargo, when the law on the subject was uncertain or unknown. Uniformity of practice, particularly in foreign courts, has thus been increased, but if shipowners wish to hold the ground they have gained, something further must be done in the way of joint action, as one Association cannot afford to fight for the interest of all. I trust that the Shipping Federation Limited will now take in hand the work which the Association so long endeavoured to carry out in connection with questions affecting the interests of Shipowners generally.

### Appendix IV

(Extract from the minutes of the Committee of The Britannia Steam Ship Insurance Association dated May 21, 1930) (as original)

The Chairman read a letter from Sir Ernest W. Glover, Bart. in which he expressed his regret at being unable to attend the meeting, at which he had wished to offer his congratulations to the Managers and to the Britannia Club on the 75th anniversary of the founding of the Club. The Chairman then referred to the circumstances in which the first Protection club was formed.

He mentioned that Mr. John Riley, appreciating the need by shipowners for some form of protection against the liabilities in excess of the value of the vessel which had been imposed by Lord Campbell's Act and by the Merchant Shipping Act 1854, conceived the idea of forming an entirely original type of Mutual Club.

This Club came into operation on 1st May 1855, the day on which the Merchant Shipping Act of 1854 came into force. It was managed by Messrs. Peter Tindall, Riley & Co. and was called "The Ship Owners' Mutual Protection Society". Steamships and sailing ships were entered together in it, but they were subsequently separated and Class 3 of the Britannia Steam Ship Insurance Association Ltd. was formed in order to cover the steamships which had until then been covered in the Ship Owners' Mutual Protection Society.

A similar special class was formed in the London Mutual Marine Insurance Association Ltd., also managed by Messrs. Tindall, Riley & Co. for the sailing vessels. The Chairman said that it was a source of satisfaction to know that the Protection Club founded by Messrs. Peter Tindall, Riley & Co. was the first of its kind in the world and that it was still flourishing-incidentally in the same offices as those in which it was founded 75 years ago.

(signed by Ernest W. Glover)

21 May 1930  
Tindall, Riley & Co.

[Takatada Imaizumi, Professor of  
Commerce, Yokohama National  
University]