are not called on to support by evidence of its honourable and clearly comprehended character the transaction as regards their legacies. In their case they thought that it is enough that the will should be read over to the testator, and that he should be of sound mind and capable of understanding it. But they considered that there was a further burden resting on those who take for their own benefit after having been instrumental in framing or obtaining the will. For they have thrown on them the burden of proving the righteousness of the transaction. This they considered that the husband had not done in the present case, and in the light of the principle so laid down they reviewed the evidence and decided against the will.

No doubt a principle such as that relied on by the majority of the learned judges in the Supreme Court of Canada is one which is very readily applied in cases of gifts *inter vivos*. But, as Lord Penzance pointed out in *Parfitt* v. *Lawless* (2 P. & D. 462), it is otherwise in cases of wills—When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger who is in a confidential position, the Courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will, which merely regulates succession after death, is very different from a gift *inter vivos*, which strips the donor of his property during his lifetime. And the Courts have in consequence never given to the principle to which the learned judges refer the sweeping application which they have made of it in the present case. There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done.

As was said in the House of Lords when *Boyse* v. *Rossborough* (6 H.L.C. 2) was decided, in order to set aside the will of a person of sound mind it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence in order to render a will void must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard.

It is also important in the connection to bear in mind what was laid down by Sir James Hannen in *Wingrove* v. *Wingrove* (11 Prob. Div. 81), and quoted with approval by Lord Macnaghten in delivering the judgment of this board in *Baudains* v. *Richardson* (1906 A.C. 169), that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.

Their Lordships are of opinion that the majority in the Supreme Court did not sufficiently bear in mind what is the true principle in considering the evidence in the present case. They appear to have applied another principle which was not relevant in the inquiry, and to have thrown a burden of proof on the appellant which was not one which he was called upon to sustain. Their Lordships agree with the course taken and the conclusions come to as the result in the judgment of the Court of King's Bench. They think that the judgment under appeal must be reversed, and that the respondent must bear the costs here and in the Courts below of an action which was misconceived. They will humbly advise His Majesty accordingly.

Appeal sustained with costs.

Counsel for the Appellant — Cinq-Mars K.C. (of the Canadian Bar) — Geoffrey Laurence. Agents — Blake & Redden, Solicitors.

Counsel for the Respondent—Surveyor, K.C.—Hauteare (both of the Canadian Bar). Agents — Laurence Jones & Company, Solicitors.

HOUSE OF LORDS.

Thursday, November 20, 1919.

(Before the Lord Chancellor (Lord Birkenhead) Lords Haldane, Dunedin, and Buckmaster.)

STOOMVAART MAATSCHAPPIJ SOPHIE H. *v.* MERCHANTS' MARINE INSURANCE COMPANY LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract — Ship — Insurance (Marine) — Policy—Construction—War Risks—Loss of Ship by Drifting Mines.

A ship was lost owing to encountering mines supposed to have broken loose from Russian minefields protecting the Finnish coast. Under insurance policies the ship was covered against marine risks and damage from explosions, but the insurers were exempt in the case of "capture, seizure, detention, and all other consequences of hostilities

(piracy, riots, civil commotions, and barratry excepted)." In an action on the policies the appellants contended that the ship was lost by marine and not war risks, and that the clause warranted free from capture, &c., referred to hostile acts which amounted to taking possession of the ship insured and did not include consequences of hostilities which were not *ejusdem generis* with capture, seizure, and detention, such as the destruction of the ship by drifting mines. *Held* that the loss of the vessel was the direct consequence of hostilities, and the respondents were not liable therefor under the policies.

Decision of the Court of Appeal *affirmed.*

The facts are fully stated by the Lord Chancellor.

LORD CHANCELLOR (BIRKENHEAD)—This appeal is from a judgment of the Court of Appeal dated the 23rd October 1918 affirming a judgment of Bailhache, J., of the 1st May of the same year, by which he dismissed a claim for total loss made by the appellants, the owners of the Dutch steamship "Alice H.," against the respondents as insurers of the ship and freight. The question to be determined by your Lordships is whether the respondents are liable under the contract of insurance for the loss of the ship and freight.

The facts relating to the loss of the ship may be stated quite shortly. On the 18th August 1914 she left Petrograd on a voyage to Helsingfors. At 1 a.m. on the 20th August, after she had reached a spot in the Gulf of Finland about thirty miles to the southward of Hango Fiord, she struck three mines in succession. The mines exploded and caused such damage to the vessel that she sank. The mines were either fixed mines which had been placed by the Russians near Hango for defensive purposes, and had broken adrift to the spot where they were struck by the ship, or, on an alternative view, they may have been German mines. The respondents had effected insurances upon the hull and freight of the "Alice H." under two policies of marine insurance dated the 30th January 1914, for £1500 for twelve months commencing on that date. The policies were identical in their terms. The documents purporting to contain these terms consisted of an ordinary English policy, which throughout the case was referred to as document 1, to which, however, were attached two other documents, one headed "Blom & Van Der Aa, Insurance Brokers, Amsterdam," which is referred to throughout the cases as document 2, and the third was spoken of as document 3, containing certain clauses printed in red. Document 2, which is neither signed nor filled in in the vacant spaces, contains a clause printed in red in the following terms—"This insurance is exclusively subject to the English laws, and more particularly to the English marine insurance laws of 1906, and is effected on the conditions of the English Lloyd's policy as if it had been subscribed on such policy, and more particularly on the conditions of the attached clauses No. (   ) and all the stipulations on the printed text of the policy or in the 'Deposited Rotterdam Exchange Conditions' that are not in conformity with the conditions and customs of the Lloyd's policy are herewith declared void." It is only necessary to add upon this part of the case that the "Deposited Rotterdam Exchange Conditions" were not produced in the Court below, and so far as appears from the evidence which was presented in that Court they never were made part of the contract.

Now in document No. 1 the "warranted free of capture" clause had originally found a place; it was in these terms—"Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of riot, civil commotion, hostilities or warlike operations, whether before or after declaration of war." It was, however, struck out, and the erasure was initialled on behalf of the respondents. The policy therefore had a contract which, confined to document 1, was an insurance covering both marine and war risks. Document 3, if it formed part of the contract, contained however a clause, unnumbered, which dealt with the matter; it is in these terms—"Warranted free from capture, seizure, and detention, and all other consequences of hostilities (piracy, riots, civil commotion and barratry excepted)." The first question therefore that arises for decision in this case is what document or documents constitute the contract between the parties? If the contract is limited to document No. 1, there is no answer to the plaintiffs' claim. If, on the other hand, the contract on the true construction of it is expressed in the three documents (documents 1, 2, and 3) other considerations will arise for decision.

I am clearly of opinion that in this matter it is necessary to look for the terms of the contract to all three documents in order to produce a composite contract, and I am encouraged in this view by the demeanour of the plaintiffs throughout the whole of this litigation. When I examine the pleadings I find that the defendants in their points of defence clearly indicated that they looked to the three documents as containing the contract. Whether or not the formal laws of pleading as it is practised now in the Commercial Court would have been content with a simple joinder of issue upon a defence so indicated, I do not pause to inquire, because I am of opinion that had the plaintiffs at that stage of the litigation intended to contend that document 1, and document 1 alone, contained the contract, they would have thought it prudent to express such a contention explicitly on the pleadings. And when I pass on to consider what took place before the trial judge, I am much confirmed in my view that it was not then the important part of the plaintiffs' case which it has become to-day to contend that the contract was contained in document 1. Had this been the contention of plaintiffs in the Court of first instance, it

would have been their principal contention, for the reason that if document 1, and document 1 alone, was the record of their contract they had a complete answer to the defence which it was attempted to make. I do not find in the record of the proceedings which I have read, nor do I find in the terms of the judgment of the learned Judge, the slightest indication that this contention was seriously pressed upon him by the plaintiffs in their case. I am of opinion from the internal evidence that it was the intention of both parties to express their intention in all three documents.

I pause here to observe that I agree entirely with the observations made by the co-judges in the courts below as to the extreme slovenliness of forming contracts so casually and in such scattered terms in important commercial matters. What really happened here, however, may, I think, be conjectured with reasonabe certainty. The original form suggested for the contract is contained in the Lloyd's policy. Additions are then made to it as the result of suggestions coming from abroad, and these suggestions, as I understand the history of the matter, are accepted, and so a document very inconvenient to construe comes into existence.

When it is once decided that the contract is to be found not in a single document but in all three, other considerations are advanced on behalf of the appellants here. It is said in the first place that if the red clauses, that is to say the provisions of document 3, form part of the contract, nevertheless the respondents are liable under their policy, because the damages here were not the direct consequence of hostilities. That argument is based upon the assumption, which may or may not be well founded, that these mines had floated for a very considerable distance before the moment of contact with the vessel. I am unable to assent to this argument, and, indeed, it involved Mr Schwabe in what appeared to me to be the absurdity of contending that if a torpedo which was launched by a vessel destroyed the vessel at which it was launched that would be the result of hostilities, but if it missed that vessel and a few moments later struck another vessel and sank it that would not be the result of hostilities. I cannot take this view. These mines were placed there for hostile purposes; they were placed there, in other words, to carry out some purpose which was to contribute to the progress of the war. They lost their moorings, as in human experience frequently happens to mines, and so having lost them came into contact with this vessel. I have no doubt that such a contact, with its fatal consequences to the vessel, was a direct result of hostitities within the meaning of that clause.

But it was then contended by the appellants that in any event the words "all other consequences of hostilities" are to be construed as being *ejusdem generis* with the words which precede, "capture, seizure, and detention," and so construed it is contended that the sinking of this vessel by contact with floating mines cannot be described as being a consequence of hostilities. Here again I am unable to accept the view that is put forward by the appellants. What we have to ask ourselves in this case as in all these cases is, Do generic words precede the words the effect of which is in controversy? Can a genus, in other words, be evolved from the terms "capture, seizure, and detention." I think it can. The genus here is a category more or less complete of various disadvantages and risks following upon a state of war. The words "capture, seizure, and detention" are in any case suggestive of, certainly consistent with, a state of hostilities, and when those words are followed by the expression "all other consequences of hostilities" the matter seems to me to be perfectly plain, "capture, seizure, and detention and all other consequences of hostilities."

I therefore arrive without difficulty at the conclusion that just as capture, seizure, and detention are consequences or may be consequences of hostilities, and were evidently contemplated by the parties to this contract as being consequences of hostilities, those words "other consequences of hostilities" are to be construed and ought to be construed so as to include the casualty which has happened in this case.

I am of opinion, therefore, that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD HALDANE—I have arrived at the same conclusion as your Lordship on the Woolsack. I do not propose to add anything upon the first two questions with which your Lordship dealt, namely, the question what documents constituted the contract, and the question whether what happened was a direct cause of loss in such a fashion as to come within the terms of the policy of insurance. But I wish to add a few words upon the construction of the exception in the warranty clause.

The words are very short—"Warranted free from capture, seizure, and detention, and all other consequences of hostilities (piracy, riots, civil commotions and barratry excepted)." Now, in accordance with well-known principles of construction, the rule of *ejusdem generis* is applied in cases where an intention is to be collected that that rule should apply. One judges of that intention from the words, and it yields to any expression which seems to exclude it, but the rule is broadly this—that where you have an enumeration which is obviously an enumeration of species falling within a genus, the general words following upon the enumeration are held not to exclude the genus, but to cover only further species which belong to that genus. The rule, as I have said, may yield to intention, but it is the rule which is *prima facie* applied in the construction of such documents.

Now applying the rule to the extent to which I think it can be legitimately applied —that is to say, to the extent to which it can be applied consistently with the expressions made by the parties, I think the true reading of them is this—The exception

extends first of all to capture, seizure, and detention due to hostilities, and then, under a second set of words, all other consequences due to hostilities that are *ejusdem generis* in the sense that the assured are thereby deprived of the ship, but excepting from such consequences those that are in the nature of "piracy, riots, civil commotions, and barratry." I think that to that extent and in that fashion—and to that extent and in that fashion alone so far as my mind is concerned—the application of the rule can be made in such a way as to apply the principle of *ejusdem generis* in the only fashion in which it can be legitimately applied in considering the clause we have before us.

LORD DUNEDIN—I concur. I do not think it necessary to add anything except a single word on the last point which the noble and learned Viscount has spoken of.

After all, you have got to find a genus in order to have the application of the rule of *ejusdem generis*, and the choice here must be either that the genus is hostilities in general and the consequences thereof, or is simply that one form of the consequences of hostilities where a ship is taken and remains intact. It seems to me that the whole common-sense view of the situation points to the first, and accordingly the other words which come after it cannot have the rule of *ejusdem generis* applied to them in the restricted manner in which alone they would be of any use.

LORD BUCKMASTER—This is an action upon a policy of insurance, and the first question that arises for consideration is, what is the evidence of the contract upon which the action is brought?

In ordinary circumstances a policy in the form of one of many documents which have been laid before your Lordships would be sufficient for that purpose, but here the appellants (who were the plaintiffs in the suit) laid before the learned Judge who tried this case no fewer than five documents which were all fastened together. They do not appear to have accompanied this tender of evidence by any protest against the consideration of anything except the one document which is admittedly the foundation of the whole proceedings, nor could they have done so, because by common consent one of the documents attached to it is a document which must be regarded for the purpose of considering what the contract is.

The only question that remains is whether the other documents have to be considered too. I must admit that except for the special circumstances in which this case stands I should have found it difficult to have accepted the view that all three documents together formed the contract, because the last document but one is notice given by a mortgagee that apparently was issued after the contract was signed, and on the top of that is again fastened a most material document which limits the character of the trading in the Baltic, where the vessel was making its voyage. But the thing which convinced me that all these documents must be regarded together is the fact that they were received by the plaintiffs without protest and produced by them as the evidence of their case.

All therefore that remains for consideration is whether when all the documents are considered together the plaintiffs are entitled to say that the policy has covered the risk. Even this is not easy to determine, because the documents are confused and contradictory. It must, however, be accepted that from the general words which cover the loss there is an exception, and that exception is to be found in the red note which warrants that the policy is to be outside the "capture, seizure, and detention and all other consequences of hostilities (piracy, riots, civil commotions ,and barratry excepted)." Mr Schwabe contends that in that clause you have to consider the words "all other consequences" as *ejusdem generis* with "capture, seizure, and detention," and that as the loss was due to the complete destruction of the vessel by sinking by mines the exception does not take his case outside the present words.

The discussion of the question of *ejusdem generis* is very liable to be more diffuse than profitable. Roughly speaking, it merely means this, that where in at least two cases illustrations are given of particular instances, and those are followed by general words, if you can from the instances mentioned obtain a general characteristic that will cover the general words, the general words do not extend beyond those characteristics, but if you find in the general words themselves again further exceptions which showed that the general words must be regarded as having a wider ambit than would be covered by the special characteristics, then the doctrine of *ejusdem generis* does not apply. In fact the whole question is purely one of construction, and the artificial rule is due to the assumption that if special instances are named and followed with general words the draftsman would not have taken the trouble to give the special instances if the general words were intended to have a wide and general ambit.

In the present case I agree with what has been said by the noble and learned Lord on the Woolsack as to the effect of this clause. If this vessel had been crippled by a mine she would have been detained, and when she was sunk by a mine it is difficult to see why she is not to be regarded as within the general words "all other consequences of hostilities."

Appeal dismissed.

Counsel for the Appellants—Schwabe, K.C.—Robertson Dunlop, K.C. Agents—Russell & Arnholz, Solicitors.

Counsel for the Respondents—Wright, K.C.—Stuart Bevan, K.C. Agents—Waltons & Company, Solicitors.