THE SCOTTISH MARINE INSURANCE COMPANY OF GLASGOW . } APPELLANTS.

JAMES TURNER . . . . RESPONDENT(*a*).

1853.
15th and 17th February, and 3rd March.

Upon a policy for freight the insurers cannot be held responsible where the freight has been actually earned.

Where ship and freight are separately insured, any arrangement between the insurers of the ship and the owners, to the prejudice of the insurers of the freight, should be watched with jealousy.

Definition of the obligation upon a policy for freight.

Where a vessel has received injuries entitling the owner to treat her as totally lost, and where he consequently abandons her to the underwriters on ship, they are entitled to all freight afterwards earned.

An owner *insured* is not bound to repair the ship, if she be so damaged that a prudent owner, *uninsured*, would not repair her.

On abandonment, the owner becomes trustee for the underwriters on ship and is bound to assign.

But how far the abandonment operates itself as an assignment, regard being had to the Registry acts,—*Quære.*

Immaterial whether the ship is lost a short time after the inception of the risk, or a short time before the completion of the voyage.

A verdict is to be taken in conjunction with the admissions of the parties—which admissions even the jury cannot gainsay.

Comments by Lord Truro on the decision of the House in the preceding case—namely, *Stewart* v. *Greenock Marine Insurance Company*—reported *suprà*, p. 328.

THE owners of the ship *Laurel* (as appears by the report of the preceding case (*b*)) having been compelled to surrender the freight received by them from the consignees of the cargo, were advised to institute the present action in the Court of Session against the insurers of the freight—the present Appellants—alleging that as the underwriters on ship had been found entitled to the freight, it must be considered as lost to the assured, and consequently recoverable under the policy.

The Court below gave judgment in favour of the owners, which occasioned this appeal.

Sir *Frederick Thesiger* and Mr. *Willes,* for the Appellants.

Sir *Fitzroy Kelly* and Mr. Sergeant *Byles* (Mr. *Burnie* with them), for the Respondents.

The argument is exhausted by the following opinions.

The LORD CHANCELLOR (*c*) :

My Lords, I have given very anxious attention to the able and well-reasoned opinions of the learned Judges in the Court below, but I am unable to assent to them;

(*a*) Reported Sec. Ser. vol. 13, pp. 652-989.
(*b*) *Suprà*, p. 328.
(*c*) Lord Cranworth.

for I apprehend they rest on an unsound foundation. I am of opinion that, *as between the parties in this cause,* it cannot be said that the ship was totally lost during her voyage. That she was not in fact lost is certain; for she arrived at Liverpool, was there brought into dock, her cargo safely delivered to the consignees, and the freight paid to the owners. But how then, it is asked, are these facts consistent with the verdict of the jury in the previous action against the underwriters on ship? The answer, my Lords, is that the verdict in that case was altogether *res inter alios.* When it is said that, as between the owners and the underwriters on ship, there had been a total loss, all that is meant is that the circumstances of the case were such as to give the owners the same rights against the insurers of the ship as if there had actually been a total loss.

My Lords, when the cargo was delivered, and the freight paid, the owners, if they had thought it for their interest, might have retained the damaged ship, and come on her insurers for the cost of reparation. In such a case there could have been no possible claim against the underwriters on freight.

The learned Judges in the Court of Session seem to doubt whether the contract of the underwriters on freight *was* performed, and whether the sums paid to the owners by the consignees on the delivery of the cargo were not to be regarded as in the nature of salvage rather than of freight; paid indeed to the owners, but paid to them only as agents of the underwriters on ship. I do not think there is any ground for this doubt. The sums paid to the owners by the consignees were due for freight and for nothing else; and if payment had been withheld, there cannot be a question but that an action could have been maintained by the owners for payment of the freight immediately

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on delivery of the cargo. None but the owners could have maintained that action, and they could maintain it only by virtue of their original contract of affreightment.

What the underwriters on freight undertook was that the voyage should be so performed as that the owners should be able to deliver the cargo, and so be in a condition to assert their title to freight. This contract the underwriters on freight have undoubtedly performed.

It is true that the Court of Session first, and this House afterwards, decided that the sums paid for freight were paid to the owners not for their own benefit, but for the use and behoof of the underwriters on ship; and it was strongly contended at your Lordships' bar that the contract into which the underwriters on freight entered with the owners was that the voyage should be so performed as to entitle the owners to recover the freight for their own use, and not merely as agents or trustees for others. By the decision it has been determined that, under the circumstances, the freight was due not to the owners but to the underwriters on ship; and so it was urged in the present case that the contract of the underwriters on freight was not performed. But this reasoning rests on a fallacy. The underwriters on freight engaged that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. Nor was she so prevented; for, in spite of those perils, she arrived in port under the conduct of the owners, and they obtained payment of her freight. The right of the underwriters on ship to claim that freight arose, not from perils of the sea, but from the election made by the owners, *after the freight had been earned*, to treat the ship as wholly lost on the 11th of August.

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My Lords, where a ship has received such injuries as entitle the owner to treat her as totally lost, and where the owner consequently abandons her to the underwriters,—they come in as assignees; and so are entitled to all freight afterwards earned.

It was to this state of circumstances that Chief Justice *Tindal* referred in *Chapman* v. *Benson* (*a*), where he said:—"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight or the possibility of ever receiving it, if earned, such freight going to the underwriters on ship." But there the very learned Chief Justice had in contemplation what was then treated as a total loss and abandonment *before the freight was earned.* The distinction between the case of *Benson* v. *Chapman* according to what were supposed in the Court of Common Pleas to be the facts, and the present case, is, that in *Benson* v. *Chapman* before any freight had been earned there had been a damage so serious as to justify the owner in treating it as a total loss and abandoning the ship to the underwriters. Whereas in the present case the owners remained in actual possession till after the freight had been earned, and earned by reason of the ship having actually performed the voyage in question.

I do not apprehend that there is any doubt as to the soundness of the doctrine laid down by Chief Justice *Tindal,* though the judgment of the Court of Common Pleas was reversed by the Exchequer Chamber, and that reversal was afterwards sustained by this House. There is, however, a manifest and most important difference between the case on which Chief Justice *Tindal* was reasoning and the present.

(*a*) 6 Man. & Sel. 792.

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The Chief Justice was referring to a case of loss and abandonment during the course of the voyage, and before the freight had been earned. But in the case before your Lordships, although, according to the verdict, the ship was totally lost, yet there was no abandonment till after she had arrived in port, till the owners were in a condition to insist on payment of the freight, and till that freight had in fact been received by them. And here I must cite what was said by Mr. Baron *Alderson* when he delivered to your Lordships the opinion of the Judges in *Benson* v. *Chapman* (*a*), namely that there was no instance to be found in which an action for a total loss of freight had been held to be maintainable against the underwriters on freight, where the freight has been actually earned.

On the ground, therefore, that the contract of the underwriters on freight was strictly performed, that the freight insured was actually earned and received by the owners, and that, but for their own subsequent act, they might have retained it against all the world, I have come to the conclusion that the judgment below is erroneous, and I now move your Lordships that it be reversed.

Lord TRURO:

Lord Truro's opinion.

My Lords, if this case had not been one of considerable importance, I should have been well content to rest entirely upon the reasons which the noble Lord has given,—reasons which I think are consistent with every previous decision except that which is now the subject of appeal.

My Lords, I own it appears to me that the assured's right of abandonment and recovery against the

(*a*) 2 House of Lords' Cases, 721.

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insurers of the ship has been determined by this House under circumstances somewhat peculiar; for the ship actually performed the voyage, delivered her cargo, and earned her freight; circumstances which, as far as I am aware, have never occurred where the owners have been held entitled to abandon the ship and claim as for a total loss, however extensive the damage incurred during the voyage. The cases in which abandonment had previously been allowed were cases in which the voyage had either been actually lost, or the ship has been placed in such circumstances by the perils insured against, that no prudent owner uninsured would do that which had become necessary to enable the ship to perform the voyage.

That the insurers of the ship were liable to indemnify the owners for the pecuniary damage incident to repair, is quite clear; but the decision establishing their right to abandon and recover as for a total loss appears to be somewhat in advance of prior determinations.

The authority nearest in point of circumstances, and referred to by my Lord *Cottenham* in moving the judgment of the House, is that of *Samuel* v. *Royal Exchange Assurance Company* (*a*). There the ship arrived at the dock gates, but, before entering the dock, was totally lost and consequently prevented from completing her voyage. The Plaintiff was held entitled to recover as for a total loss, but only upon the ground that the ship was lost during her voyage, that is, before she was moored at the place of her ultimate destination; for it is not in my opinion at all material whether the loss happens a short time before the inception of the risk, or a short time before the voyage is completed.

In the action against the insurers of this ship the jury found facts which must be coupled with other

(*a*) 8 Barn. & Cress. 119.

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facts admitted upon the record; it being a clear principle of law that that which the parties admit by their pleadings the jury even cannot gainsay. It is not within the issue left to them. This has been much overlooked. The verdict must always be construed with reference to the admissions of the parties. Viewed in this light, it shows that the ship, although so damaged as not to be worth repairing, had yet performed her voyage. Now these facts should be attended to in dealing with the present case.

To determine whether there has been a loss of freight within the meaning of the policy on freight, we must consider what are the obligations which the underwriter takes upon himself by that policy. My noble and learned friend has, I think, stated them most correctly. I conceive that the underwriter on freight binds himself to indemnify the assured when prevented from performing the voyage insured, by any of the perils mentioned in the policy. But he does not engage that the assured shall be able to retain the freight as between him and other persons after it has been earned.

My Lords, the proposition of Mr. Baron *Alderson* in *Benson* v. *Chapman* (*a*), has received no answer, and I apprehend is unimpeachable. I allude to that passage where the learned Judge lays it down that there was no case in which it had ever been held that an action could be maintained against underwriters on freight "where the freight had actually been earned." It was both earned and received in the present case.

The decision of the Court of Common Pleas in *Benson* v. *Chapman* proceeded upon the distinct ground that the voyage had been lost—that is to say, that the ship had been reduced to such a state of damage by the

(*a*) 2 House of Lords' Cases, 721.

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perils insured against, that she could not be put into a condition to perform the voyage without an outlay such as no uninsured prudent owner would incur; for the owner, in order to save the underwriters, would not be bound to do that, greatly to his injury, which he would not do if uninsured.

That judgment was indeed reversed in the Exchequer Chamber, and the reversal of the Exchequer Chamber was sustained by this House; but nobody uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. The judgment was reversed because the Court of Error could not draw that conclusion of fact upon the special verdict which the Court of Common Pleas had drawn upon the special case; the law being perfectly unimpugned both in the Exchequer Chamber and in this House.

Now, my Lords, having regard to the true construction of the policy, in other words the obligation of the underwriters on freight, the facts of this case appear to be conclusive against the claim of the Respondents. The decision below, however, rests upon a different construction of the policy, and it therefore becomes necessary to examine that construction.

The expression, "the loss of freight," has two meanings, and the distinction between them is material. First—Freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight; or, secondly, freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstances unconnected with the contract between the assured and the underwriters on freight. For a loss of freight in the first sense, the underwriter on freight is liable. But for any loss of freight in the second sense, I

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conceive the underwriter is not answerable. I can extract no obligation whatever from the policy which should subject him to such a liability. He has performed his warranty; the freight has been earned; and he has no concern with the subsequent results.

In the present case the owners received the freight, on their own account, for their own benefit; and as the facts stood when they so received it, they were entitled to retain it against all the world. The contract between the owners and the underwriters on freight had been entirely performed, and the relation between them determined. The owners were then entitled to claim full compensation from the insurers of the ship for any pecuniary loss they might have incurred by reason of the damage their ship had sustained. But rather than thus claim as for a partial loss, they preferred to claim as for a total loss. The consequence of their electing to take that course was to make the freight which he had received for his own benefit, an item in account between them and the insurers of the ship. Therefore the present claim against the insurers of the freight is founded, not on the policy for freight, but upon something else with which the insurers of the freight have nothing to do.

The act of abandonment, if it did not operate as an assignment (*a*) of the ship, at least enured as a binding agreement to assign it, and thereby vested the insurers of the ship with all the rights which belonged to the owners; among which rights was that of having the benefit of the earnings of the ship during the voyage.

(*a*) In course of the argument Lord Truro said:—"The abandonment does not vest the property. The Registry Acts prevent the passing of the property except in a certain way. The owners, however, become trustees for the underwriters."

My Lords, in *M'Carthy* v. *Abel* (*a*), there were insurances on both ship and freight. The ship had been detained by the Russian Government at Riga, and the cargo taken out. While under detention there was an abandonment of ship and freight to the respective underwriters, all of whom paid the owner as for a total loss. The ship, however, was afterwards released. She performed her voyage, and earned freight, which the underwriters on ship received; whereupon the assured brought an action on the policy for the freight. Lord *Ellenborough*, in giving judgment, held that the case resolved itself into a single point, viz., "Whether the freight has been lost or not? If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned, and received by or on behalf of the plaintiffs, the assured, and if so, no loss can be properly demanded against the underwriters on the freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be considered as having, been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quacunque via data*—that is, whether there has been no loss at all of freight, or, being such, it has been a loss only occasioned by the act of the plaintiffs themselves—they are not entitled to recover, and therefore a non-suit must be entered."

My Lords, this case appears to me to be a distinct

(*a*) 5 East, 388; see also *Everth* v. *Smith*, 2 Man. & Sel. 285.

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authority bearing upon the present. The attempts of counsel at the bar to answer it were unsuccessful.

On the whole, I think your Lordships are bound in point of law to reverse the decision of the Court below.

Interlocutors reversed.

COTTERILL.—TURNER.