

But where only a small part of the cargo has suffered damage, whether from a temporary capture, or from any other cause, a very different practice does and ought to prevail. The particular articles damaged alone, after being regularly valued by the Judge-Admiral of the place, are to be exposed to sale, and the insurers are obliged so far to make up the loss.

No 29.

There cannot be the least pretence, in such a case, for abandoning those parts of the cargo which, according to the condition of the policy, have arrived in safety at their place of destination. Should the prices of these fall below the values specified in the insurance, this must proceed either from an over valuation, or from a fall in the markets; the former being a fraudulent act on the part of the insured, from which he could derive no advantage, while the loss occasioned by the latter would not fall within the agreement. *Fac. Col. 1st February 1780, Edmonston contra Jackson, No 28. p. 7112.*

The Court were unanimously of opinion, that matters were to be settled between the parties on the footing of a partial loss; the claim of the pursuers being to be restricted to the loss arising on the articles damaged, and the salvage due to the re-captors.

THE LORDS 'found no sufficient ground proved for a total abandonment; and remitted to the Lord Ordinary to proceed accordingly.'

Reporter, *Lord Eskgrove.* Act. *Solicitor-General.* Alt. *Rolland.* Clerk, *Menzies.*
C. *Fol. Dic. v. 3. p. 334.* *Fac. Col. No 272. p. 419.*

1798. February 6. ROBERT YOUNG and Others against ROBERT DEAS.

ROBERT YOUNG and others, in 1792, insured against loss to the extent of L. 300, on a ship belonging to Robert Deas, for a voyage from Wemyss to Dundee, and to return, by a policy in which the ship was valued at L. 400.

The vessel was stranded on a sand bank on her way to Dundee; but after she had lain on the sand for several days, and part of her cargo was unloaded, she got off and arrived at Dundee.

Deas immediately informed the underwriters of what had happened. A correspondence ensued; the vessel was surveyed; and it appeared that L. 300 would be required to put her in a state of complete repair.

The underwriters refused to pay any part of this sum, alleging, that the vessel was not sea-worthy when she sailed from Wemyss, or at least that her present state was owing, not to the stranding, but to her having been previously out of repair.

Upon this Deas brought an action before the Judge-Admiral, concluding, that the underwriters should pay L. 225, as three-fourths of the damage sustained by the vessel, with the same proportion of salvage and other charges.

No 30.

When a ship is insured as of a certain value, and a loss takes place, which entitles the owners to abandon her, they are entitled to recover the whole sum insured; and it is not competent for the underwriters to prove that the ship was overvalued in the policy, or that the loss arose from her being

No 30.
previously
out of repair,
after they
have failed in
establishing
that she was
not sea-wor-
thy at the
commence-
ment of the
voyage.

The Admiral proposed that the ship should be sold; but to this underwriters would not consent.

A proof was allowed, and the Admiral "found, that the defenders have not proved their defences; found them liable in the policy libelled," and ordained the pursuer to give in a condescence of the sum due to him; and upon advising the condescence, &c. the Admiral, 'in respect the defenders refused to consent to the sale of the vessel at an earlier period of the cause, and in respect that they do not now allege that the vessel is capable of being repaired, found, that the pursuer is entitled to abandon the wreck, reserving his claim to one-fourth thereof; therefore found the defenders liable for the full sum of L. 300 Sterling stipulated in the policy, with interest thereof as libelled; modified the account of the pursuer's disbursements, on account of the vessel, to L. 21 : 18s. Sterling, and found the defenders liable for three-fourths thereof.'

The underwriters brought a reduction of this decree.

The Lord Ordinary, in 1796, having ordered the ship, which had lain all this time at Dundee, to be sold, she brought L. 151.

His Lordship afterwards 'found, That the only reason insisted on by the pursuers for setting aside the decree pronounced by the Judge-Admiral is, that the defender's vessel, the Betsey, not having been sea-worthy at the time of her beginning the voyage insured, the policy of insurance was therefore altogether void; and, in respect that when the whole evidence of the cause is taken together, there do not appear to be sufficient and satisfactory reasons for considering the vessel as not being sea-worthy at the period aforesaid, assoilzied the defender.'

Upon advising a petition, with answers, the COURT (15th November 1797) 'adhered to the Lord Ordinary's interlocutor, in so far as respects the general defence, of the Betsey not being sea-worthy at the period of insurance, reserving to the parties to be heard before the Lord Ordinary as to the extent of the damage acclaimed under the policy.'

In a petition against this reservation, Deas

Pleaded; Although a ship arrive at the port of destination, if she be so disabled as to be useless to the insured without being repaired, and the underwriters refuse to bestow the necessary expense, the insured are entitled to abandon her, and the loss is considered to be total, just as if the vessel had foundered during the voyage; 1. Termly Reports 188, Bond v. Hunter, stated in Cazalet v. Barbe; 2. Burr. p. 683. 697; Douglas, p. 219. 221; Park, p. 145; 2. Termly Reports, 407; Millar, p. 283. Now, the loss in this case being of that description, the petitioner is entitled to the whole sum claimed without any modification. The very object of a valued policy is to preclude the necessity of investigating the value of the subject; and it will not avail the underwriters to prove that the vessel was rated at too high a sum, unless they can further establish, either that the insured had no fair interest in the subject, in which case, it will fall under the description of a wager policy, or that his object in overva-

luing her was fraudulent; 2. Burr. 1171; 3. Termly Reports, p. 362; Park, p. 98. 103. 266; Sect. 5. *b. t.*; neither of which exceptions apply to the present case. No 30.

In answering the petition, the underwriters hardly disputed these general principles, though they stated, that the authorities quoted as to valued policies, related to the case where the cargo, and not the ship, was insured; and that if the same doctrine were extended to the latter, it would give rise to much imposition on underwriters, and endanger the lives of seamen, by holding out a temptation to trade with improper vessels. But they rested their argument chiefly on the circumstances of the case, holding it established from the proof, that this was an average, and not a general loss; that the petitioner himself considered it as such from his mode of framing his claim before the Admiral; Millar, p. 282; and that therefore they could only be liable for their proportion of the damage sustained during the voyage, which was trifling, the sums afterwards required for repairing the ship having arisen from her prior state.

THE LORDS, upon the general grounds stated for the petitioner, "found, that by the policy in question, the ship was valued at L. 400 Sterling, and was insured by the defenders at L. 300, being three-fourths of the total sum, and the pursuer himself standing insurer for the remaining fourth: Found, that for the reasons stated in the Judge-Admiral's interlocutor, the loss is to be considered as total; and therefore, that the defenders are liable in three-fourths of the total loss; but, found, that the materials having been sold for L. 151, from which must be deducted the expenses of the sale, and any disbursements made upon the vessel by the pursuer after she was wrecked, and prior to the sale, the net balance arising upon the sale, after such deduction, must be allowed as a deduction from the total loss, and the pursuer's claim against the defenders must of course be restricted to three-fourths of the remainder; and remitted to the Lord Ordinary to order an account to be made up according to the above principles."

Lord Ordinary, *Glenlee.*

For Deas, *Williamson.*

Alt. *D. Cathcart.*

Clerk, *Colquhoun.*

D. D.

Fac. Col. No 61. p. 149.