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Counsel for Claimants Mr and Mrs Sharples' Marriage-Contract Trustees—Macfarlane. Agents—John C. Brodie & Sons, W.S.

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Thursday, January 30.

FIRST DIVISION.

[Lord Low, Ordinary.]

CLARKE v. SCOTT.

*Ship—Charter-Party—Insurance—Obligation by Owner to Pay Insurance—Collision—Relief—Transaction.*

The owner of a steam trawler hired her out for a certain period under an agreement whereby the charterer was to find crew, stores, &c., and the owner was "to pay insurance only." At the date of the charter-party the trawler was insured, according to the usual practice in the case of such vessels, so as to leave one-fifth of three-fourths of her value uncovered, and the owner continued to pay the premiums upon the existing policies. It was proved that it would have been possible to insure the trawler for her full value.

During the period of the demise of the trawler, she came into collision with, and seriously damaged, another vessel, the collision being due to the fault of the master and crew of the trawler, for whom the charterer was responsible. The owner of the trawler intimated the loss to his underwriters, and, without the knowledge of the charterer, settled through the underwriters with the owners of the other vessel, the damage to both vessels, with the exception of one-fifth of three-fourths, being paid by the underwriters.

In an action brought by the owner against the charterer for repayment of the damage not covered by the insurance, *held (aff. judgment of Lord Low)* that the defender must be assoilzied, on the grounds (1) that the owner, having undertaken to insure, must bear any loss which could have been covered by insurance; and (2) that not being agent for the charterer, he had no authority to settle claims on his behalf for which the charterer alone was liable.

On 31st December 1894, John Martin Clarke, shipowner, Leith, raised an action for payment of certain sums of money, against James R. Scott, Granton, in circumstances thus set forth by the Lord Ordinary in his opinion—"By agreement dated 14th June 1894 the pursuer hired his steam trawler 'Rosslyn' to the defender for the

period of three months, at the sum of £14 per week. It was provided as follows:—"The said James Scott to find crew, stores, &c., and all working expenses, the boat to be handed over in good order and condition, and to be returned in the same good order and condition, fair wear and tear excepted, the said J. M. Clarke to pay insurance only." The defender accordingly obtained possession of the boat, and worked her from Shields with his own crew. In August 1894 the 'Rosslyn' came into collision with the 'Hugo Georg' of Stettin, and both vessels were damaged, the latter the more seriously of the two. It is not disputed that the 'Rosslyn' was in fault. The 'Rosslyn' was insured by the pursuer in two insurance and indemnity associations or clubs, the one at North Shields and the other at Sunderland. It appears that under the rules of these associations it is impossible to insure for the full value—one-fifth of three-fourths of the value always remaining uncovered. The pursuer had insured for the greatest amount possible with these associations. . . . . After the collision the associations settled with the owners of the 'Hugo Georg' for the injury done to that vessel. The amount was fixed at £264, of which the associations paid £225, being the total amount less one-fifth of three-fourths. The balance of £39 odds was paid by the pursuer. . . . The pursuer admits that no communications passed between him and the defender in regard to the claim of the 'Hugo Georg,' and that the defender had nothing to do with the settlement."

The sums sued for were the above mentioned sum of £39, 14s. 9d., a sum of £9, 4s. 9d., being the uninsured portion of the cost of repairs to the "Rosslyn" rendered necessary by damage resulting from the collision and from the carelessness of the defenders, and not from fair wear and tear, and lastly a sum of £22, being demurrage due for the detention of the vessel while these repairs were being executed.

The pursuer averred—"At the time of the said agreement being made, the 'Rosslyn' was insured to the extent of four-fifths of the value of said vessel, this being the highest amount for which vessels of the class of the 'Rosslyn' can be insured. This was well-known to the defender, who has himself effected insurances on vessels of the same class on exactly the same footing. The pursuer duly paid the premiums of insurance on said vessel in terms of the agreement. It was the understanding of both parties that the clause as to the payment of insurance had reference to the existing insurance on said vessel, by which she was covered as fully as vessels of her class can be when insured in the ordinary clubs in which all trawlers of her class are insured. The said clause, if it implied any obligation on the pursuer to insure at all, implied only that the said vessel should be insured in the manner usually adopted in the case of trawlers, and did not impose on the pursuer any obligation, as now maintained by the defender, of covering the

whole vessel by insurance. Had the pursuer attempted to insure the remaining one-fifth not already covered by insurance, the policies then current on the vessel would have been liable to immediate forfeiture, in terms of the club rules. This was well known to the defender."

The defender's answer was as follows:—"Explained that it was distinctly understood that the pursuer was to fully insure his vessel against all risks, and that this was the understanding of the parties in reference to the clause as to insurance in the charter-party. The pursuer could without difficulty have insured the vessel to the full amount of her value."

The pursuer pleaded—" (1) The pursuer having suffered loss and injury to the amount concluded for, through the fault of the defender, or of those for whom he is responsible, he is entitled to decree therefor, with expenses. (2) The defender having failed to redeliver the said vessel in the same good order and condition in which he received her (fair wear and tear excepted), he is bound to make payment to the pursuer of the loss thereby caused."

The defender pleaded—" (2) The action is irrelevant. (3) The material averments of the pursuer being unfounded in fact, and his contentions untenable in law, the defender should be assolizied, with expenses."

On 19th February 1895 the Lord Ordinary allowed the parties a proof of their averments. The import of the proof as led sufficiently appears from the opinion of the Lord Ordinary and of Lord Kinnear.

On 29th June 1895 the Lord Ordinary (Low) assolizied the defenders from the conclusions of the action.

*Opinion.*—[*After narrating the facts given above his Lordship proceeded*].—"The pursuer had insured for the greatest amount possible with these associations. It is also proved that the practice is to insure vessels of the description of the 'Rosslyn' with such clubs, as otherwise a very high rate of premium is demanded. It is not, however, in my judgment, proved that the vessel could not have been insured otherwise for full value. The evidence on the point is somewhat conflicting, but Mr Armit, who has had great experience, says that there is no doubt that the vessel could have been insured at Lloyds for full value. . . .

"It is clear from the agreement that the insurance of the vessel was left with the pursuer. But he says that he was under no obligation to insure the vessel to her full value, and that having insured her under the usual way and to the usual amount, he is entitled to recover from the defender the uninsured balance of the loss which was occasioned by the defender's fault. The pursuer argues that the £39 which he has paid to the owners of the 'Hugo Georg' is money which he has lost through the fault of the defender, and which the latter must therefore repay.

"I do not think that it is necessary to determine whether the pursuer came under an obligation to the defender to insure the vessel, or to insure her for the full value.

But however that may be, I cannot read the contract otherwise than as meaning that the pursuer was to take the risk of the vessel being uninsured either in whole or in part.

"I therefore do not think that the £39 can be claimed from the defender *ex contractu*, and if the claim is well founded at all, it must be *ex delicto*.

"The claim appears to me to be one of relief, the pursuer seeking to be relieved of the sums which he has paid in respect of the injuries to the 'Hugo Georg' over and above the amount covered by his insurance. Now, I do not think that the pursuer was liable to the owners of the 'Hugo Georg' at all. The 'Rosslyn' was hired or demised to the defender, and he had the sole control of her, and worked her by his own crew. In these circumstances it appears to me that it was the defender (whose servants were in fault) and not the pursuer, who was responsible to the owners of the 'Hugo Georg' for the injuries caused by the collision. The pursuer, however, elected through his underwriters to settle the claim of the owners, and he did so, as I have said, without any communication with the defender. He did not intimate to the defender that he proposed to hold him liable in relief; and the defender was given no opportunity of considering or objecting to the claim. Further, the amount paid by the underwriters and the pursuer was not fixed by any decree, but was apparently adjusted between the underwriters and the claimants. No doubt the probability is that the underwriters made a prudent settlement of the amount, but it cannot be assumed against the defender that if the claim had been enforced against him, a smaller amount than that for which the underwriters settled might not have been awarded.

"In these circumstances I do not think that the pursuer has any claim of relief against the defender. The grounds of judgment in the case of *Gardiner v. Main*, 22 R. 100, appear to me to be directly applicable.

"The pursuer also claims from the defender the amount necessary to make good the injuries which the 'Rosslyn' received in the collision, in so far as these were not covered by the insurance. The underwriters have paid the cost of repairing the damages to the vessel, except to the extent of one-fifth of three-fourths, which the pursuer has paid himself. I think that this claim is in the same position as that with which I have already dealt, and that the same considerations apply. I am therefore of opinion that it cannot be sustained.

"Finally, the pursuer claims the cost of making good injuries received by the vessel while in the defender's possession, which were not caused by the collision, and are not the results of ordinary wear and tear. He also claims for detention of the vessel while these injuries were being made good. It is not disputed that such a claim would be perfectly good if the pursuer was able to prove it, but I do not think that he has proved it. His evidence upon the point is extremely vague, and I do not know what

are the injuries which he alleges that the vessel received, nor what precisely are the items of cost which he says fall under this head.

"The evidence, however, of Mr Mancor, who was called for the defender, is quite distinct, and must, I think, be taken as conclusive upon this point. He is surveyor for the Sunderland Association, and he says that the association require ships insured with them to be surveyed once a year. When the 'Rosslyn' came into Leith to have the damage caused by the collision repaired, Mr Mancor, acting upon the instructions of the association, took the opportunity to have her surveyed, and she was accordingly put into the dry dock. Mr Mancor then ordered such repairs to be made as, apart from the injuries caused by the collision, were required to put her into good order. Among other things, she was scraped and painted, and her detention in the dock beyond two days seems to have been due to the work which Mr Mancor required to be done. Mr Mancor says distinctly that when he surveyed the vessel he saw no damage to her except from collision and by fair wear and tear."

The pursuer reclaimed, and argued—(1) No doubt the pursuer had undertaken to insure, but such an undertaking, while it left the pursuer free as owner not to insure but to take the risk himself, meant at the most to insure not to the full extent of all risks, but to the extent to which vessels like the "Rosslyn" were usually insured. The vast majority of trawlers were not insured to cover the whole risk, and the defender knew this quite well when the bargain was made. The pursuer being admittedly free from liability in connection with the collision with the "Hugo Georg," was entitled to recover from the defender, who was liable, what was not covered by the insurance. (2) Alternatively, the pursuer was bound by the agreement to insure not only for his own interest but also as agent of the defender. If that were so, he was entitled in the same capacity to settle as best he could with the owners of the "Hugo Georg"—*Fraser v. Gallaway*, June 9, 1809, F.C., and the defender must abide by that settlement. (3) In any event the pursuer was compelled to settle with the owners of the "Hugo Georg" in order to escape the operation of the English maritime lien, the vessels having proceeded to an English port after the collision—*Marsden on Collisions*, p. 90, and "*The Teconderoga*" v. "*The Leamington*," there cited.

Argued for the defender—(1) By the agreement the pursuer undertook to insure, and the charterer was entitled to rely upon his doing so. It was quite possible for him to insure to the full amount, and if he failed to do this, and chose to run the risk in regard to one-fifth of three-fourths, the loss must fall on him alone—*Watson & Company v. Shankland*, May 16, 1873, 11 Macph. (H.L.) 51; Nov. 27, 1871, 10 Macph. 142, per Lord Cowan, p. 158. Further, the pursuer was barred from recovering by the fact of his having settled with

the owners of the "Hugo Georg" behind the defender's back, the defender being primarily liable, and being therefore the person who had to settle with the owners of the "Hugo Georg"—*Struthers v. Dykes*, July 7, 1847, 9 D. 1437; *Gardiner v. Main*, November 29, 1894, 22 R. 100. (2) The pursuer's contention that he was the defender's agent to insure the vessel was inconsistent with the view that, if he had pleased, he as owner was at liberty not to insure at all and to take the risk. (3) To avoid the risk of the vessel being attached under the English law of maritime lien, the pursuer was possibly entitled to settle, but only on condition of liberating the charterer. It had, however, been decided that maritime lien only attached to a vessel when there was personal liability on the part of the owner—*Morgan v. Castlegate Steamship Company*, L.R. [1893], A.C. 38.

At advising—

LORD KINNEAR—The facts of the case are correctly stated in the first two paragraphs of the Lord Ordinary's opinion. [*His Lordship here quoted the passage extracted above.*]

Were it not for the stipulation that the pursuer should pay insurance, there can be no question as to the liabilities arising from the fault of those in charge of the "Rosslyn." The pursuer had abandoned for the period of the contract all power and authority over the vessel. The charterer was the owner for the time being; the master and crew were his servants, he was in exclusive possession through them, and he was responsible for their negligence. It cannot be disputed that but for the stipulation as to insurance he would have been liable to make good to the pursuer the damage done to the "Rosslyn," nor that he and not the pursuer was responsible to the owners of the other vessel. The first question is, whether his liability to the pursuer has been modified or discharged. I think with the Lord Ordinary that it was a term of the contract that the insurance which it was for the interest of the owner, or for the common interest of both parties to make, should be made by the pursuer; and therefore that he must be held to have relinquished any claim against the defender in respect of risk which might have been covered by insurance. The defender cannot be made liable for loss against which he might have protected himself and his owner by insurance had he not been entitled to rely upon such insurance being effected by the pursuer. It appears that at the time of the agreement the vessel was insured with certain mutual insurance societies, and that no new insurance was effected by the pursuer. But by the rules of these societies the pursuer could only recover four-fifths of the damage done by the collision; and he maintains that the defender must make good the remaining fifth. If the construction I have put upon the contract is sound, he cannot require the defender to supplement a defective insurance. But it is said, first, that a steam trawler cannot be insured except to the extent of four-fifths of the value; and

secondly, that the existing insurance was known to both parties, and therefore that the contract must be construed with reference to its conditions. I think the evidence is against the pursuer on both of the points. I do not doubt that vessels of that class are commonly insured in mutual societies, the rules of which impose the limitation upon which the pursuer relies. But it is proved that they may also be insured at Lloyds for their full value, and there is no evidence that the defender knew anything about the pursuer's insurance, or that he knew the rules of the mutual assurance associations. I see no ground, therefore, for holding that it was agreed or understood between the parties that the insurance should be restricted so as to throw upon the charterer the obligation of making good the damage which might not be covered. I think with the Lord Ordinary the sound and reasonable view of the contract is, that the pursuer undertook to protect himself by such insurance as he might think fit; and therefore that he took upon himself the risk of the vessel being uninsured in whole or in part.

The second question depends upon somewhat different conditions. The pursuer was not responsible to the owners of the "Hugo Georg"—the vessel which was injured by collision with the "Rosslyn"—for the fault or negligence of the charterer or his servants. But he seems to have assumed that he was responsible as owner of the "Rosslyn." By the rules of the associations with which he was insured he was entitled to recover a proportion of any loss or damage for which he might become liable to the owners of any other ship or boat which might be injured by collision with the steamer insured; and he says that the damage done by the "Hugo Georg" was paid in the first instance by his underwriters—"In a question between me and the underwriters I assumed that I was the owner of the ship, and I communicated with them on that understanding. The amount of the claim by the 'Hugo Georg' was £264, and there was recovered a sum of £225, leaving £39 which I could not recover under the conditions of the policy,"—and this sum he now seeks to recover from the defender. But he settled with the owners of the "Hugo Georg" through the underwriters without any notice to the defender. He says—"I had no correspondence with the defender on the subject of the claim which the owners of the 'Hugo Georg' made against me. He had nothing to do with the settlement." There is no evidence of the grounds on which this settlement was made. It may be presumed that the insurers in their own interest would pay no more than was reasonable. But the fact remains that there is no evidence of the extent of the injury to the "Hugo Georg," and that the claims of her owners were settled by agreement without notice to the defender. In these circumstances I agree with the Lord Ordinary that the pursuer has no claim to be relieved by the defender of payments which he made voluntarily and extrajudicially. But it was argued that

the pursuer was bound to meet the claim of the owners of the "Hugo Georg," or at all events, that he was entitled to step forward and take the settlement into his own hands, because he might have been compelled to satisfy their demand through the operation of a maritime lien by which his vessel might have been attached. There are decisions by which this argument might have been supported, but these decisions have been overruled by the judgment of the House of Lords in *Morgan v. The Castlegate*, where the new doctrine is laid down by Lord Watson to the effect that "inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability." It follows that if another ship has been injured by reason of the negligence or want of skill of those in charge of the "Rosslyn," that vessel cannot be made the means of compensation if those in charge of her at the time were not the servants of the owner.

Again, it is argued that by the stipulation with reference to insurance the defender had made the pursuer his agent for settling any claims which might be brought against him for damage done by the collision of the "Rosslyn" with other vessels. I am unable to see any ground for this inference. I do not think it necessary to determine whether the contract imposed any obligation on the pursuer to insure against risks in which he himself had no interest, and, in particular, whether it obliged him to insure the defender against any loss arising from his own fault, or from the carelessness or want of skill of his master or crew. I think this very doubtful. But if the contract has any bearing on this liability, it is only by imposing an obligation on the pursuer to insure. I am unable to see how an obligation to insure the defender against certain risks can be held to create a right to be indemnified by the defender for loss arising from risks insured against; if such an obligation existed, he was either bound to effect additional insurances so as to cover the entire risk, or else he was bound to do nothing more than to give the defender the benefit of the existing insurance. In the one case he can have no claim against the defender, because he has not performed his own obligation. In the other case his obligation was to assign his partial insurance, and he had no right or duty to interfere with the settlement, and no relation with the defender from which any authority can be inferred to fix the amount payable by him without notice and without inquiry. It was no doubt a very convenient method of fixing the amount of the claim to leave the settlement to the underwriters, and if the defender had been consulted, it might have been a very prudent thing for him to consent to that arrangement. But that was for him to consider, and not for the pursuer, unless the pursuer had agreed to take the risk upon himself. I must own I should have been well pleased if it had been possible to come to a different conclusion, because it

seems to me very possible that the pursuer has paid what was really the defender's debt. But the defender, on the other hand, cannot be compelled to make good a debt which has not been proved. No evidence has been adduced of the damage for which he is said to be liable, and he is not bound by an agreement, of which he knew nothing, effected by persons whom he had not authorised to act for him.

The only remaining question is one of fact, on which I see no reason for interfering with the Lord Ordinary's judgment.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—Salvesen—Sandeman. Agents—Snody & Asher, S.S.C.  
Counsel for the Defender—C. N. Johnston—Abel. Agents—T. & W. A. M'Laren, S.S.C.

Wednesday, January 22.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### GIBSON'S TRUSTEES v. GALLAWAY.

*Bill of Exchange—Promissory-Note—Proof of Extrinsic Agreement—Parole—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 100.*

Section 100 of the Bills of Exchange Act 1882 does not authorise the admission of parole evidence of an extrinsic agreement between the granter and payee of a promissory-note that the note should be renewed, subject to payment of interest, from time to time until the granter should be in a position to repay the principal sum, the effect of such evidence being to contradict the written obligation expressed in the note.

Opinion reserved, whether, if the agreement had been for a definite time, it would have been competent to prove it.

The late Mr Thomas Gibson of Bainfield advanced in loan to Mr William Harry Galloway, merchant, Musselburgh, the sum of £200. In return for the loan Mr Galloway granted a promissory-note in favour of Mr Gibson, which was renewed from time to time. On 1st June 1894 Mr Galloway granted a renewal promissory-note in the following terms:—  
“£200. Leith, 1st June 1894.

Three months after date, I, William Harry Galloway, residing at Tusculum, Musselburgh, promise to pay Thomas Gibson, Esq., 35 Leamington Terrace, Edinburgh, the sum of two hundred pounds sterling, for value received.

(Signed) W. H. GALLAWAY.”

Mr Gibson died in October 1894, and an action was raised against Mr Galloway by

his testamentary trustees concluding for payment of the loan of £200 with interest.

The defender averred—“(Ans. 2) Explained that under an arrangement between the defender and the said deceased, made on 1st June 1894, the said loan was to bear interest at the rate of 5 per cent. per annum, and the said promissory-note was to be renewed when due, and from time to time thereafter, until the defender should be in a position to repay same without detriment to his business engagements. The defender was assured by the deceased that the date of repayment would be left to himself so long as interest was paid, and Mr Gibson further undertook that this arrangement would subsist even after his death. The defender has understood, since this arrangement was come to, that the contract could be terminated only on his initiative.”

The Lord Ordinary (KINCAIRNEY) on 27th November 1895 allowed the parties a proof of their averments.

The pursuers reclaimed, and argued—There was no relevant defence. An agreement such as that averred by the defender that he was to pay when he pleased would altogether nullify the promissory-note. The effect would be to substitute a parole agreement directly contradictory of the written contract. Section 100 of the Bills of Exchange Act did not authorise such a substitution, and the written obligations could only be modified by writ—*National Bank of Australasia v. Turnbull & Company*, March 5, 1891, 18 R. 629, at p. 634.

Argued for respondent—The Lord Ordinary was right in allowing an inquiry *quo animo* the loan had been made and the promissory-note granted. The 100th section of the Bills of Exchange Act was specially directed to meet a case like this, and the facts, which the defender desired to prove, being essentially “relevant to any question of liability thereon,” might be proved by parole evidence. The opinions of Lord Adam and Lord Kinnear in *The National Bank of Australia* favoured this view.

At advising—

LORD M'LAREN—This is an action by testamentary trustees on a promissory-note for £200 granted by the defender to the truster, which, according to its terms, is payable three months after date. The defence is contained in the answer to the second article of the condescendence, in which the defender admits the advance of £200, and states—[reads]. It is not easy to reduce this statement to a definite proposition, and the difficulty is probably due to the inherent indefiniteness of the arrangement described rather than to any want of care or precision on the part of the defender's legal advisers. It appears to me that the statement can only have two meanings; either it means that the defender was not liable in payment of the principal sum in the bill, but was only to pay an annuity to his creditor equal to the interest on that sum, or it means that Mr Gibson having made this advance as a favour to the defender, represented to him that he should not