THOMAS LUTWIDGE, Merchant in Whitehaven; and PETER HOW, Merchant, his Assignee, - - } *Appellants;*

ARCHIBALD GRAY, JOHN BUCHANNAN, and JOHN KING, Merchants in Glasgow, - - - - - - } *Respondents.*

23d February, 1734.

MUTUAL CONTRACT.—AFFREIGHTMENT.—PERICULUM.—Charter party is not dissolved by the loss of the ship. Freight is still due on the part of the cargo which is saved.

A vessel being wrecked, and the freighters having taken possession of part of the goods, and abandoned them to the insurers, —found that the whole freight is due for those goods, and that the freighters are primarily liable.

The ship-master having declined to carry the goods to the end of the voyage in another ship, and the owners of the goods having taken them away,—found that freight *pro rata itineris* is due for these, although they proved to be so damaged as to be quite useless; and that the freighters are primarily liable for it.

[Fol. Dic. II. p. 59. Elchies, *voce* mutual contract, No. 3. Mor. Dict. p. 10111.]

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BY charter party between Lutwidge and the respondents, the former became bound to transport a cargo of tobacco from Virginia to Port-Glasgow, at a certain rate per ton, to be paid, one half upon the ship's discharge, and the rest within six months thereafter.

The ship was wrecked on the coast of Ireland, and the greater part of the cargo destroyed or much

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damaged. Lutwidge informed the respondents immediately of the disaster, and that he intended to send a ship to transport the remainder of the cargo to Port-Glasgow. The ship was sent, but returned empty, the respondents having previously sent their agent to the spot, to whom that part of the goods which belonged to them were delivered on payment of the salvage, and by whom they were abandoned, and the bills of lading indorsed to the insurers at Bristol.

The remainder belonged to merchants in Glasgow, whose agent it appears paid the salvage, and was willing that the goods should be carried in the ship which had been sent for them, provided that the master would grant bills of lading to deliver at Port-Glasgow or Greenock; but he declining to do so, or to oblige himself otherwise than by receipts for the goods, binding him to deliver them in Great Britain,* the agent freighted another vessel in which they were conveyed to Glasgow, upon arrival at which place they were destroyed as useless.

The respondents refusing to pay any freight because the ship was lost, an action was brought against them in the Court of Admiralty, and it was

1729. found "that freight was due for that part of the "cargo which was saved, though damnified, in re- "spect of the defenders' intromitting therewith, "and acknowledging the property; and that the "defenders were liable for the full freight of all

* This statement is taken from the respondents' paper alone, but it would appear from circumstances noticed at the end of this report, that such was held to be the fact on deciding the case.

" the goods saved, notwithstanding they were not " brought by the pursuer's ship to the port of de- " livery."

The cause was brought by suspension into the Court of Session, where it was found, " that the " contract of affreightment was dissolved by the " total loss of the ship, albeit some of the ship- " wrecked goods were saved out of the shipwreck; " and that the freighters indorsing the bills of lad- " ing to the insurers did not subject the freight- " ers to any freight for the goods recovered by the " insurers; but found the merchants liable for the " freight, *pro rata itineris*, of such of the goods as " were brought to Glasgow, notwithstanding some " of the tobacco was found damnified, and burnt " there." February 12, 1732.

Upon advising a reclaiming petition and answers, the Court " adhered to their former interlocutors, " notwithstanding that the merchants employed an " agent to recover and preserve the goods for the " behoof of the insurers." July 5.

The appeal was brought from " part of an inter- " locutor of the 12th February, 1732, and the in- " terlocutor of the 5th July affirming the same. Entered Feb. 26, and March 2, 1733.

Pleaded for the Appellants:—It is an established rule by the maritime law of all nations; that where a ship is lost, and the whole or part of the cargo saved, the contract of affreightment is not resolved; and that the freight is due for so much of the goods as are delivered; seeing it is for delivery of the goods that the payment of freight is stipulated.

In cases of shipwreck, it is in the option of the master of the ship to take his freight *pro ratione*

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itineris immensi, and to be free of further transportation, or to provide another ship to carry the cargo to the port of delivery; and there is no difference in law, whether the ship be quite lost or so disabled as not to be conveniently repaired. The master is entitled to the full freight of the goods saved, if he bring the goods to the port of delivery in another hired ship, in the same manner as he would have been entitled thereto had the goods been brought by the ship first freighted.

If the goods had been brought in the first ship, freight would have been due upon such parts of the cargo as were even damaged by stress of weather, or other accidents, provided it was not through the fault of the master or mariners; and the freighters cannot give up part of their cargo, because of less value than the freight, and retain another part which may be in good condition. They must either abandon the whole to the master of the ship or pay the whole freight. An abandonment to the master frees from freight, because it enables him to dispose of the effects; but an abandonment made to any other person, which authorises that other person to intercept the effects from the master, is properly an assignment; and with respect to the master, is the same thing as if the proprietor had laid hold of the goods and taken them into his own custody. And although merchants insuring, in order to entitle them to the insurance money, must assign their right in the goods to the insurers, by indorsing the bills of lading; yet such assignment is only an abandonment to the insurers, not to the master. And the fact of their having made that abandonment effectual, by their

agent's claiming the goods, and conveying them to Bristol for behoof of the insurers, in prejudice of the appellant's right of retention, is the foundation of his claim against them; they having thus enabled the insurers to recover the goods which they themselves had no right to, except upon payment of the freight. They must therefore be liable to the appellant, who was thus by their act and deed, deprived of the security which he had an undoubted right to retain.

Although the goods were not brought to the port of discharge, yet since the appellant had sent another ship for transporting them, the respondents were answerable for the whole freight, inasmuch as it was only through their refusing to deliver them that they were not brought to the port of delivery.

The appellants are not bound to sue the insurers, or the other merchants at Glasgow with whom they had no contract, but only the respondents, who entered into the charter party, and became therefore bound to pay the freight.

Pleaded for the Respondents:—No freight could be due upon the charter party, the ship having been lost; and even as to that part which was recovered out of the sea, no freight could be demanded either in law or equity, the same having been so damnified that it was useless to the merchant, and could not be admitted to an entry, and therefore was burnt at the scales.

At all events, they could be only liable for a proportional part of the freight for what was saved,

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viz. from Virginia to Youghall in Ireland, and therefore the remainder of the voyage ought to be deducted.

The charter party being dissolved by the loss of the ship, the appellant had only a claim in equity, in so far as the proprietors of the tobacco were profited, and therefore freight ought only to be paid in proportion to the value of the tobacco after deduction of the salvage.

The respondents having abandoned the tobacco to the insurers, as by law they might and were obliged to do, any freight which the appellant could claim, was due by the insurers and not by the respondents; and he had his remedy against the insurers either by action or detention, which would have been competent to him if he would have paid the salvage.

He had no claim upon the respondents for the freight of the tobacco which was not abandoned to the insurers; but his claim, if he had any, would lie against the merchants to whom it belonged.

Judgment Feb. 23. 1734.

After hearing counsel, "it is ordered and adjudged, &c. That the said interlocutor, and "the affirmance thereof, complained of in the "said appeal, be and are hereby reversed; and "it is hereby declared, that the said respon-"dents are liable for the full freight of such "goods as were given up to the insurers, and "for the freight *pro rata itineris* of such of the "goods as were brought to Glasgow, notwith-"standing some of the tobacco was found damni-"fied and burnt there."

For Appellants, *Dun. Forbes, Wm. Murray.*
For Respondents, *Ro. Dundas, Will. Hamilton.*

In the Fol. Dictionary, and in Morrison's Dictionary, this case is reported without any notice of the reversal. In Elchies it is properly stated, and likewise in Bell's Commentaries, I. p. 480. Note. The circumstances are also detailed in Abbot's law of shipping, p. 316 (Edit. 1812.)

In deciding the case of Luke *et alii* v. Lyde (Burrow II. 882,) Lord Mansfield, founding upon the present case, (in which he had been counsel) remarked " that it was well considered in the House " of Lords, and that Lord Talbot gave the reasons of the judgement " of the House at length."

" The House of Lords determined upon these reasons, (delivered p. 885.
" by the Lord Chancellor Talbot,) ' That the whole freight was due
' upon the goods sent to Bristol, because the master offered a ship to
' carry the goods to Glasgow, which was the port of delivery. But
' as the master declined carrying the other goods to Glasgow, (the
' port of their delivery) they determined that as to them, he ought
' to be paid only *pro rata*, viz. as much as was proportionable to his
' carrying them to Youghall, the place where the accident happen-
' ed.' And this was all agreeable to the maritime law."

Lord Mansfield farther says, " it is quite immaterial what the p. 890.
" merchant made of the goods afterwards; for the master has no-
" thing at all to do with the goodness or badness of the market; nor
" indeed can that be properly known, till after the freight is paid;
" for the master is not bound to deliver the goods, till after he is
" paid his freight. No sort of notice was taken of that matter in
" the case of Lutwidge and How v. Gray, in the House of Lords;
" and yet there the tobacco was damaged very greatly; even so much
" that part of it was burnt at the scales in Glasgow."