July 27, 1814.

LEASE.—COVENANT.—TENANTRY ACT.

was there any case in which relief was given where there appeared gross, wilful, and obstinate neglect.

Judgment. Decree *reversed*.

Agents for Appellant, WILLIAMS and BROOKS.
Agent for Respondent, FLADGATE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SMITH and others (Underwriters)—*Appellants*.
ROBERTSON and others (Merchants)—*Respondents*.

May 2, June 8, July 27, 1814.

INSURANCE.—ABANDONMENT.

INSURANCE on ship Ruby, at and from Halifax to Plymouth, captured on the voyage—intelligence of the capture and immediate abandonment, and some steps taken by the underwriters to settle the loss—intelligence then of her being re-captured, and refusal by the underwriters to settle, except for a partial loss. Held by the Scotch Admiralty Court and Court of Session, that upon notice of abandonment, given on intelligence of the capture, the transaction was closed, and not subject to be disturbed by any event appearing on subsequent intelligence, and the judgment *affirmed* in the House of Lords on the ground of the acceptance of the abandonment by the underwriters; by this means keeping clear of the principle on which the Court of King's Bench had decided the cases of *Bainbridge v. Neilson*, and *Faulkner v. Ritchie: sed quere*, Whether it does not appear that *Lord Eldon* (Chancellor) was far from being satisfied with these decisions.

Dubitante Lord Eldon, whether there might not be found to be as much uncertainty in the law of marine insurance as in any other branch of the law.

Insurance on ship Ruby, August, 1805.

THE ship Ruby, belonging to Respondents, merchants at Greenock, was insured at Glasgow, "at and

" from Halifax to the discharging port in Britain, with " leave to call at Quebec." The Ruby sailed Aug. 24, 1805, from Quebec for Plymouth. She was captured on the voyage, Sept. 16, 1805, by the Vangador, Spanish privateer. On Oct. 18, 1805, the owners received intelligence of the capture, and on the same day wrote to their brokers at Glasgow, stating the circumstances, and adding, " *In the mean time* " *we abandon our interest in the ship to the under-* " *writers*, and you will be pleased to communicate " the same to them." On the following day, the brokers wrote in answer, that they had notified the abandonment accordingly. The master's protest was sent to Glasgow on the 19th October, and was, on 21st October, referred by the underwriters to two of their number, who returned it to the brokers on the 24th, with a notification that they were satisfied.

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INSURANCE. —ABANDONMENT

Capture. Intelligence of it— and abandonment, Oct. 19.

Abandonment acquiesced in.

On the afternoon of the 24th, advice was received of the re-capture of the vessel by a Guernsey privateer. Certain underwriters upon her at Greenock (who afterwards, pursuant to award of two referees at Lloyd's, settled as for a total loss) took charge of the vessel without prejudice, and brought her from Guernsey to Plymouth, where she discharged her cargo and earned her freight. The Glasgow underwriters refused to settle except for a partial loss, and proceedings against them were instituted by the owners in the Scotch Admiralty Court, and upon judgment there in favour of the owners, the underwriters carried the matter by suspension before the Court of Session. An attempt was made there to show, that there had been an over-valuation, and

Intelligence of re-capture received Oct. 24.

Underwriters refuse to settle for a total loss, and action by the insured.

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that there had been no complete abandonment, but without effect. The points chiefly relied upon were two:—1st, That the moment when the assured received advice of the capture, the right to abandon vested; and that the owners having exercised that right *bonâ fide* upon the state of the fact as it had come to their knowledge, the transaction was finally closed as between the parties, and not to be opened up or disturbed by any subsequent event, or event of which the intelligence subsequently arrived. 2d, That the underwriters, in this case, had acquiesced in or *accepted* the abandonment, and therefore were concluded independent of the general principle. The Court of Session (First Division) gave judgment in favour of the owners upon the principle. From this judgment the underwriters appealed.

Two points.

Judgment below for the insured, Feb. 10, 1809. *Vide* Buch. Rep. 73. 76.

May 2, 1814.

The case was argued at length in the House of Lords on the principle; though it seems unnecessary to follow that argument, as the decision ultimately turned upon the acceptance. *Marshall*, Sergeant, (for Respondent,) said, that whoever read the judgment of the Court of Session must be convinced that it could not easily be shaken; and the speech of *Lord President Blair* would have done honour to any Judge that ever sat in that Court or in Westminster Hall. The foreign books, especially *Pothier*, the reasonableness of the principle itself, and the language of *Lord Mansfield* in *Goss v. Withers*, were relied upon for the assured. To these, on the part of the underwriters, were opposed chiefly the decisions of the Court of King's Bench in *Bainbridge v. Neilson*, and, in a subsequent case,

Pothier, No. 138.

Goss v. Withers, 2 Bur. 695.

Bainbridge v. Neilson, 10 East. 329.

Faulkner v. Ritchie. The *Lord Chancellor*, in the course of the argument, took occasion to notice, that the House of Lords had determined that the ship and voyage were different things; but the Court of King's Bench had afterwards said that they were the same, and had taken upon themselves to reverse a judgment of the House of Lords and the Exchequer Chamber. His Lordship also put a case:—Suppose a vessel proceeding to the East Indies, captured two days' sail from the coast, re-captured two days after, and the re-capture not known till she reached her port—action in the mean time and judgment—could the underwriters recover back their money in another action? If the decisions in *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*, were right, the question was, whether the argument for the underwriters must not go to that extent. The judgment of the Court of Session, he said, was a very able one.

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INSURANCE. —ABANDONMENT.

Fitzgerald v. Pole, Willes, 641.

Adam and *Romilly* for Appellants; *Marshall* and *Horner* for Respondents.

Lord Eldon (Chancellor.) If he had thought it sufficient, in this case, merely to have come to a conclusion satisfactory to himself, he should have been ready to proceed to judgment immediately. But from the circumstances of the case, and certain decisions which had taken place in the Courts below in this country, it appeared to him, for reasons which he should now very shortly state, to be proper that the case should be argued again by one

June 8, 1814. Observations in judgment.

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Counsel on each side, and in the presence of the Judges.

INSURANCE. —ABANDONMENT. Facts stated.

The question arose in an action on a policy of insurance commenced in the Court of Admiralty in Scotland, and subsequently brought under review of the Court of Session, which took cognizance of these matters. The insurance was against the usual perils, and capture among the rest. The vessel was captured, and the insured abandoned; that was, they gave up the property to the underwriters, and claimed as for a total loss, as they were entitled to do in case of capture. The underwriters (the Counsel on one side insisted) agreed to accept this abandonment; while on the other hand it was insisted, that the matter went no farther than a treaty to have it ascertained whether the loss had taken place.

After this had been concluded, information was received of the re-capture. Then the loss was not total, but only the amount of the salvage, &c. It was contended, on the part of those who brought the action, that the loss was total at the time of the capture, and that they did not know of the re-capture when they offered to abandon; and that, as the contract of insurance was, in most cases, construed according to what was *supposed* to be the situation of things at the time of entering into it, the right to abandon vested when the intelligence of the capture was received; and that having so vested, nothing could deprive them of that right, they having chosen to exercise it; and they cited text writers and cases in support of that principle.

An election might, it was contended, be made in these cases to abandon, or to take the chance of re-capture, and claim for a partial loss. But here, they said, they had made their election, and that this was founded on their right to do so; and that at the time they claimed they had the right, because a present demand could not properly be made without a present right; and that if there was a present right, there was a corresponding obligation to accede to it *de præsenti*.

Then their Lordships had heard cases cited where the re-capture was known at the time of the offer to abandon; and cases with respect to what would be the law, if the re-capture were known between the offer to abandon and the action brought; if known between the institution of the action and the judgment, or between the judgment and execution or payment: and it was curious, that while those who had been most concerned in settling what was the law on this subject had taken great credit to themselves for its certainty; and that the text writers had boasted of how little uncertainty there was in this branch of law; it might perhaps be found, when the matter came to be examined with the proper degree of impartiality, that there was full as much uncertainty on this subject as in any other branch of the law, as it appeared to him.

Doubtful whether there was not as much uncertainty in the law of insurance as in any other branch in law.

If it were fitting to decide this case merely on the question, whether there had or had not been an acceptance; perhaps the circumstances of this case might afford a ground of decision upon the particular fact, which would prejudice no other past decision, and which would furnish no precedent for

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any future decision, unless in a case where the circumstances might be precisely the same. But it must be recollected, that the Court of Session put it on quite different principles. On a subject of this importance it was impossible to leave the law in such a state, that what was a good decision in the one country should be bad in the other, where the decisions on this question of mercantile law ought in both countries to be the same; and it was difficult to say that the same principle might not comprehend and determine the whole of the cases in which there existed these minute shades of difference. In deciding this case, their Lordships might affect the decisions of their own Courts; and it was therefore proper that the case should be argued in the presence of the Judges; and then a question might be put, which would settle the principle that would decide all the cases that might occur with the variety of facts to which he had alluded.

July 27, 1814. Observations in Judgment.

Lord Eldon (Chancellor.) It would be in the recollection of their Lordships, that he had at one time intimated that it would be proper to have this case re-heard, and that the twelve Judges should attend and give their advice. He had been induced to propose the adoption of this course, principally from having regard to a case (*Bainbridge v. Neilson*) decided in the Court of King's Bench, and another case mentioned at the bar, (*Faulkner v. Ritchie,*) by which the doctrine in the case of *Bainbridge v. Neilson*, as to the effect of the abandonment, was confirmed.

10 East. 329.]

Their Lordships were aware, and it was due to

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the Court of Session to mark the fact, that these cases were all heard there in such a course, that there was no obtacle in point of form to prevent their coming before their Lordships. By the old mode of proceeding in Westminster Hall, 40 years before he had ever set foot in it, the practice was, to have special verdicts found, and then the case might come upon error to the House of Lords. But this practice had been altered by *Lord Mansfield*, upon the whole with considerable utility; and now, for the sake of expedition, instead of entering the matter at length upon the record in a special verdict, special cases were made for the opinion of the Court; and nothing appearing on the record but the general verdict, the subject might have no door by which to come into that House. But in the Court of Session, as he understood their practice, the cases were heard in such a form, that the subject could not be prevented from coming to their Lordships; and therefore it was no discredit to the Court of Session that so many of their decisions in these insurance cases were brought under the review of their Lordships.

Practice of making cases for the opinion of the Courts in Westminster Hall, instead of entering special verdicts—effect of it in preventing cases from being brought to the House of Lords.

Nothing in the practice of the Court of Session to prevent the subject from coming to the House of Lords for decision.

Since the time when this case was last mentioned to their Lordships, he had had an opportunity of considering it with great attention, of consulting with his noble friend near him, (*Lord Redesdale*,) and of discussing the question with different persons whose judgment was entitled to the greatest respect; and the conclusion to which he had come was this,—that without intimating in the least what, if the cases of *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*, had come before their Lordships, would

No opinion given as to what might have been the decision of the

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House of Lords, if the cases of Bainbridge v Neilson, and Faulkner v. Ritchie, had been brought before that House.

The acceptance the ground of decision.

be the judgment of the House of Lords, and protesting against being considered as giving any opinion agreeing or not agreeing with these decisions, it was clear that the present case was out of the principle of these cases. Here it was not made out that the underwriters had any right whatever to refuse to settle as for a total loss: they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss. It was therefore on the effect of the transactions in this particular case, without reference to others, that he thought the decision of the Court of Session right.

Lord Redesdale. I concur.

Judgment.

Judgment *affirmed.*

Agents for Appellant, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, BERRY.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

CUNNINGHAMS—*Appellants.*
CUNNINGHAMS—*Respondents.*

May 6, 9, 11, July 20, 1814.

MARRIAGE.

A MAN and woman, after a known illicit connexion, cohabit together in such a way as to create a repute, though a divided one, of their being married persons; and the man, in order to get lodgings in the houses of persons of respectability, and to save the woman from rude treatment by one