

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DOUGLAS and others—*Appellants*.SCOUGALL and others—*Respondents*.

Ship sails, and soon after encounters a storm, becomes leaky, puts back, and is found on survey to be materially decayed, and damage discovered which could not be fairly considered as the effect of the storm. Held by the House of Lords *reversing* a judgment of the Court of Session, that the ship was not sea-worthy when she sailed on the voyage insured.

May 17, 1816.

INSURANCE.
—SEA-WORTHINESS.

Lord Eldon. (C.) observing, that nothing in the law of insurance was of more importance than the implied warranty of sea-worthiness, with a view both to the benefit of commerce and the preservation of human life; that in a question of sea-worthiness, honesty of intention is no answer, but that the fact of sea-worthiness must appear, or otherwise the underwriter is discharged; and that, though a vessel after sailing encounters a storm, yet, unless the damage which unfits her for the voyage can be fairly considered as the effects of the storm, the implied warranty is not complied with.

THIS was an insurance on the ship North Star, and her freight, from Leith to Pictou, in North America, and the question was whether the vessel was *sea-worthy* at the time of her sailing from Leith?

Insurance on the ship North Star, and on her freight.

The vessel was an old Dutch prize 350 tons burthen, which had been employed as a whale ship, and was purchased in 1804 by the Respondents at the price of 1,200*l.* including the fishing materials valued at 500*l.* The vessel was put into the hands

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of *Strachan* and *Gavin*, ship carpenters in Leith, to prepare her for the voyage to America. The vessel was not stripped nor opened so as to enable the carpenters to judge of her internal state and condition; but repairs to the amount of 280*l.* were done to her outer coating or skin, which, in the opinion of the carpenters, put her in a condition to perform her voyage to America, and they certified accordingly.

— Vessel sails
23d May,
1804.

Encounters a
storm; and
becomes
leaky;

And is taken
to Greenock.

Survey.

Action, No-
vember, 1804.
Lordordi-
nary's interlo-
cutors.

On the 23d May, 1804, the vessel sailed on her intended voyage, and on the same day the Appellants underwrote a policy of insurance on her and her freight, to the extent of 2,100*l.* On the 6th and 7th June she encountered a severe gale of wind, and as she began to make so much water that the crew could not keep her free with both pumps, the master bore up for a port, and brought her to Greenock on the 15th June.

Soon after her arrival the vessel was surveyed under the authority of the magistrates, by John Scott and Robert Steele, two ship builders, who reported that the vessel was materially decayed. The Respondents called on the under-writers to repair her, but they refused, on the ground that the report proved that she was not sea-worthy when she sailed on the voyage insured. The Respondents then caused her to be repaired, and brought an action in the Court of Session for payment of the amount, being a sum of 1,426*l.* 9*s.* 3*d.* The Lord Ordinary by several interlocutors, in 1807-8-9, decided in favour of the assured, upon the ground of the certificate of sea-worthiness by the Leith carpenters and the protest of the master. Upon petition to the first division of the Court condescendances were

ordered and given in, and by interlocutor 20th February, 1810, a proof was allowed and led. May 17, 1816.

The certificate of the Leith carpenters, and the master's protest relied upon by the insured, were as follows :

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Court allows a proof.

Evidence.

“ *Leith, July 19, 1804.* ”

“ We hereby certify to all whom it may concern,
“ that the North Star of Leith, belonging to
“ Messrs. Richard Scougall and Co., and others, was
“ in our dock in April last, and underwent every
“ repair that was judged necessary, for enabling her
“ to proceed on her voyage to Pictou, for which
“ she was engaged, and that the carpenter's repairs
“ amounted to 280*l.* sterling.”

Certificate by
Messrs.
Strachan and
Gavin.

(Signed) “ STRACHAN & GAVIN.”

In the protest the master stated that, “ on the Protest
“ 6th and 7th current, (June 1804), he met with a
“ severe gale of wind, which obliged him to lay
“ the vessel to under a close-reefed main-top-sail,
“ and she then began to make a great deal of water :
“ that on the 8th, the vessel shipped a sea, which
“ laid her upon her beam-ends ; that he then found
“ it necessary to cut away the mizen-boom and sail,
“ also the mizen-staysail, to get the ship wore
“ round on the larboard tack ; she then began to
“ strain and make so much water that they could
“ scarcely keep her free with both pumps constantly
“ going ; in this situation they continued during
“ the gale, till the people were entirely done out at
“ the pumps : at six A. M. *shipped another sea,*
“ *which sprung the boltsprit, and wrought the stem*
“ *entirely loose ;* at the same time washed the boats
“ out of the chocks ; the ship at this time making

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“ three feet water in the hour, and the people re-
“ fusing to stand longer by the pumps, the repre-
“ senter then judged it proper to beat up for the
“ north of Ireland or any other place where they
“ could get the ship in safety.”

The most material documents, however, were the reports of the Greenock ship-builders, especially the first. They were as follow.

FIRST REPORT.

First report of
the Greenock
ship-builders.

In pursuance of the warrant of Nathan Wilson, Esq., justice of the peace, we have this day carefully and minutely examined the ship North Star of Leith, James Edmonstone, master, at present in the dry-dock here. We find the iron-work in general very much decayed, and wrought loose; one rider in the after-hold broke; three lower-deck beams decayed, and sprung abaft the main-mast; three and one-half ditto decayed, and sprung before the main-mast; six lower-deck knees decayed, and sprung; three breast-hooks forward in the lower-hold, and one above the deck, decayed; one plank below the lower-deck beams, on each side, decayed; and two planks on the larboard side of the bilge taken off, to examine the timbers, which we find good, but the iron-work quite gone; the ceiling on the floor, in general, quite loose; the iron-work about the hanging-knees in general decayed, and the timber about the bolts; a part of the outside doubling we have taken off, in order to examine the state of the plank and iron-work; the plank we find good and sound, but the bolts and nails quite gone; the boltsprit is sprung, and the stem wrought loose,

on account of the decayed iron, and labouring of the ship at sea. May 17, 1816.

N. B. There is one top-timber, and two ceiling planks, broke in the 'twixt decks, on the starboard side.

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(Signed) JOHN SCOTT.

ROBERT STEELE.

Greenock,
July 12, 1804.

SECOND REPORT.

Agreeable to the appointment of Nathan Wilson, Esq. justice of the peace, we have examined and surveyed, a second time, the ship North Star, of Leith, at present in dock here, after the doublings is taken off the bows, and some of the lower-deck beams and breast-hooks is taken out, a great number of tree-nail and bolt-holes are bored all over the bottom, from the keel to the bends; most part of the old bolts extracted; we find the timber and plank sound and fresh, as far as can be seen; and it is our joint opinion that, after the repairs going on is completed, and what is pointed out to us by Mr. Scott and Captain Edmonstone, that the ship North Star will be staunch and sea-worthy, and fit to proceed on her present voyage to Pictou in North America. Second report.

(Signed) JOHN SCOTT.

ROBERT STEELE.

FRANCIS MORGAN.

JOHN GALT.

Greenock,
Aug. 10, 1804.

The log-book was not produced in an entire state, a great part of it having been used for making cartridges; but some leaves of it were produced, which went to confirm the protest. Neither the master nor any person on board at the time of the storm were examined as witnesses. Steele and Scott were ex-

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THINESS.

Interlocutor,
December,
1811.

Additional
evidence.
Scott's letter.

mined, and reconciled the first and second report by stating that the second related to parts of the ship which could not be inspected at the time when the first report was made; part only of the doubling or outer planks having been taken off at time of the first report, whereas the whole had been taken off when the second was made.

The Court by interlocutor December 6th, 1811, adhered to the Lord Ordinary's interlocutor reclaimed against. Immediately before pronouncing that interlocutor the Respondents produced, and were allowed to lodge in process, a letter, which had been mislaid, and had not been till then recovered, written to them by Scott, who was employed to repair the vessel after she had been opened up. The letter was as follows:

“ Greenock, 28th July, 1804.

“ Messrs. R. Scougall and Co., Leith.

“ Gentlemen—Captain Anderson delivered us
“ your favour of the 24th instant. Next day we
“ began our operations on your ship, the North Star.
“ *All the doublings is nearly stript off both bows,*
“ *and two of the worst of the lower-deck-beams is*
“ *taken out, and some of the hanging-knees. The*
“ *ship turns out much better than ever we could*
“ *imagine. All the timbers in the wake of beam-*
“ *ends is perfectly sound and fresh, and nothing is*
“ *as yet discovered defective in any part of the ship*
“ *that we have opened and examined. The bolts in*
“ *the doubling is innumerable, and very difficult*
“ *to extract. All the inside plank is sound, and*
“ *good. We have now a much better opinion of the*
“ *ship than we had, and will write you next week*

“ how she proves, before we put any thing new on
 “ her. We remain,” &c. May 17, 1816.

(Signed) “ JOHN SCOTT AND SONS.”

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The Court afterwards by interlocutor 29th May, 1812, remitted to the Lord Ordinary to examine Scott again as to the circumstances set forth in the above letter, and generally as to the state of the vessel. Interlocutor
May, 1812.

Scott was accordingly again examined, and the most material part of the deposition with reference to the above letter was as follows: Scott again ex-
amined, 1812.

“ Depones, that the second report is perfectly cor-
 “ rect; and he adds, in general, that he is now Second depo-
sition of J.
Scott.
 “ satisfied that *what he stated in that report, and*
 “ *letter of 28th July, is perfectly correct and true.*
 “ Being interrogated, if he wishes to alter his former
 “ deposition, now that he has seen said letter? de-
 “ pones, that he does not. Interrogated for the
 “ defenders, whether he is now of opinion, that any
 “ of the facts stated, with regard to the state of the
 “ vessel, in the first report, was erroneous? de-
 “ pones, that he does not wish to contradict the
 “ statement made in said report; but he adds, in
 “ explanation, that, *from the slight and cursory*
 “ *inspection which he made of the vessel at the time*
 “ *he made his first report, he thought there was a*
 “ *certain decay in her, but, upon more minute in-*
 “ *spection, which he was enabled to make by taking*
 “ *off her doublings, she turned out to be in a much*
 “ *better state than he at first thought her.* Inter-
 “ rogated, whether, if he had known the state of
 “ the vessel to be such as it turned out to be, on a
 “ minute inspection at Greenock, he would have

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Interlocutor
27th May,
1813.
Appeal.

“ considered her *in a fit or safe state for a voyage*
“ *to America from Leith?* depones, *that he cer-*
“ *tainly would, and that many ships in a worse state*
“ *have gone to America and back again; and the*
“ Deponent adds, that the vessel in her voyage
“ from Leith to Greenock, had experienced a severe
“ storm and heavy sea, and had suffered by it.”

The Court by interlocutor of 27th May, 1813, adhered to the interlocutor reclaimed against; and from these interlocutors the underwriters appealed.

Sir S. Romilly and *Mr. Adam*, for Appellants;
Mr. Serjeant Marshall and *Mr. Grant*, for Respondents.

Judgment.

Importance of requiring a strict compliance with the implied warranty of seaworthiness.

In a question of seaworthiness the honest intention of the insurer is no answer. The FACT of seaworthiness must appear,

Lord Eldon (C.) This is a mere question of fact, whether this ship when she sailed from Leith to Pictou in North America was sea-worthy, or well furnished, tight, staunch, and strong for the voyage insured. I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is sea-worthy when she sails on the voyage insured; and I have endeavoured, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of a sound discretion, I have been enabled to do so.

It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not sea-worthy, the underwriter is not liable. And this,

I think, may be fairly stated, without imputing any moral blame to the owners in this case, that both they and the Leith ship-carpenters undertook to run some risk; as it is quite clear that, whether it be customary to strip off the double skins, or coatings, or not, unless they do go through that operation, they may, without intending wrong, fall into fatal mistake. Here the stripping off of both skins did not take place, and the outer, if stripped off at all, was but very partially stripped off; and it is not speaking too harshly to say that the owner was willing she should be repaired at the very least expense that should appear to be necessary.

The ship sails, and appears to have been for two or three days in a violent storm. If so damaged as that the damage might be fairly considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as in common probability she would not be if she had been sea-worthy when she sailed on the voyage, the implied warranty is not observed.

On the ship coming into port she was surveyed by Scott and Steele, and, whatever Scott might say in 1812, it is clear that he and Steele, applying particular assertions to particular facts, upon this survey, stated that part of the timbers were *decayed*, and that the iron work, in general, was very *much decayed* and wrought loose; and they distinguished between that sort of decay and the damage which would have been produced from the effect of the storm alone; and no ingenuity can reconcile this with the construction attempted to be put on Scott's evidence in 1812. Steele states how he reconciles it with his second report, and his evidence goes to

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otherwise the underwriter is discharged.

Though a vessel after sailing on the voyage insured encounters a storm and is damaged, unless the damage is such as can be fairly considered as the effect of the storm, the implied warranty is not complied with.

First report.
July 12, 1804.

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THINESS.

support the effect of the first survey, from which it appeared that the ship was not sea-worthy for that voyage. Scott seems to have forgot his letter of 28th July, 1804; and I do not wonder that, when it was produced, the Court felt a curiosity to see how he would reconcile his notion of the state of the vessel on 28th July, 1804, with the first report, and his evidence in 1811. Instead of that plain way in which Steele explains himself, see what species of testimony he gives in 1812 to explain the apparent contradiction. Suppose, however, that he acted honestly in this, still it could never have been laid down here, or recommended in Guildhall that his evidence in 1812 in opposition to his first report, and his evidence in 1811 should do away the effect of all the rest.

I do not say any thing as to the log-book; but cases have been sometimes decided on what is not given in evidence, as well as on what is given. If the captain was at the port when the survey was made in 1804; those who wish to support this demand against the underwriters, ought to have called him, and to have asked him “ what do you say as “ to the state of the vessel at the time of this “ survey ? ”

Having considered the whole of this evidence, I never was more clear about any thing than that it is proved to be perfectly manifest, and proved to my entire satisfaction, that this vessel was not sea-worthy for the voyage when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her; and if the cause could have come, and had come here originally, I would have recommended to give costs to the underwriters.

But it is not customary to give costs where a decision of the Court below is reversed.

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THINGS.

Judgment of the Court below *reversed*.

Agent for Appellants, CAMPBELL.

Agent for Respondents, BERRY.

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APPEAL FROM THE COURT OF SESSION.

MAXWELL and others—*Appellants*.

GORDON—*Respondent*.

ON refusal of the heritors of a parish to take the proper steps to rebuild the parish church found by the Presbytery to be ruinous, the Presbytery themselves advertise for and adopt a plan and estimates, and contract for the rebuilding, and assess the heritors for the necessary sums, but neglect to assess some feuars of a part of a small village included in the parish. Suspension presented by the adverse heritors against the charge for the sums, on the ground of irregularity in the proceedings of the Presbytery, but all objection abandoned as to the jurisdiction of the Presbytery to assess, in case of refusal by the heritors. Suspension refused by the Court of Session, and the judgment affirmed by the House of Lords, with a remit as to the feuars.

Feb. 16,
June 19, 1816.

REPAIRING
AND RE-
BUILDING OF
CHURCHES.

IN consequence of a representation and complaint made by Mr. McCulloch, of Ardwell, one of the heritors of the parish of Anwoth, to the Presbytery of Kirkcudbright, of the ruinous state of the parish

Complaint to
Presbytery of
ruinous state
of Anwoth
church.