

STEWART AND OTHERS, . . . APPELLANTS.

THE GREENOCK MARINE INSURANCE }
COMPANY } RESPONDENTS(a).

1847.
15th & 17th June.
1848.
1st September.

To constitute what is accounted in law the total loss of a ship insured, it is not necessary that she shall be actually annihilated.

The assured claiming as upon a total loss must give up to the underwriters the remains of the property, together with all benefit and advantage incident to it.

Such property vests in the underwriters; being changed by the constructive loss and abandonment (b).

Upon such constructive loss and abandonment the freight if earned will belong, not to the owners, but to the underwriters on ship.

THE Appellants insured their ship, the *Laurel* of Greenock, at the office of the Respondents. They also insured the freight, but with a different company, viz., the Scottish Marine Insurance Company, of Glasgow.

The *Laurel* sailed from Quebec for Liverpool, on the 14th of July, 1842. On the 27th of July she encountered, and was seriously damaged by an iceberg; but on the 11th of August was brought into the Mersey, where, on the receding of the tide, she took ground and sustained further injury. Nevertheless, on the following day, the 12th of August, she was floated into dock, and moored. On the 13th or 14th of August, she delivered her cargo, which consisted of timber, to the consignees, who duly made payment of the freight.

It was not until some days after these occurrences that the ship was surveyed, and found in such a state as to be not worth repairing. The owners consequently determined to abandon her, and, on the 1st September, gave notice of abandonment to the underwriters; which notice, however, they refused to accept.

The owners therefore brought an action in the Court of Session against them, claiming as for a total loss; to which action a defence was put in to the effect that as the damage sustained did not amount either

(a) This case is omitted by Mr. Bell; but see 2 House of Lords' Cases, p. 159.

(b) But see the next case.

actually or constructively to an absolute annihilation of the vessel, there was no ground for claiming as for a total loss. It was further contended that if the owners were entitled to abandon, they were bound to account for the freight they had received; that freight having been earned by the ship, and passing as an incident of the surrender.

STEWART AND
OTHERS
v.
THE GREENOCK
MARINE INSU-
RANCE COMPANY.

The following issue was settled for trial:

Whether the said ship, by and through injury sustained on or about the 27th of July, 1842, and on or about the 11th of August, 1842, or one or other of these dates, and during the currency of the policies, became a wreck and was totally lost? and whether the Defenders under the said policies are indebted and resting-owing to the Pursuers in the sums of 1,500*l.* and 500*l.*, contained respectively in the said policies, or any part thereof?

The following verdict was returned by the jury:

That in respect of the matters proven before them, they find for the Pursuers, in respect that the *Laurel* was properly abandoned, and not worth repairing: That the damage arose from her coming in contact with an iceberg, and also from grounding at the dock at Liverpool. Also find, that the ship was perfectly sea-worthy; reserving for the decision of the Court the point raised by the Defenders of their title to a proportion of the freight. Also find, that the vessel was a total loss, irrespective of the decayed timber and deficient sails.

The Court below, after much deliberation, decided in favour of the underwriters the question reserved by the jury. In other words, they held that the insurers of the ship were entitled to the freight, or a due proportion thereof, subject to all just deductions upon taking the account. Against this decision the owners appealed.

Sir *Frederick Thesiger* and Mr. *Watson* (Mr. *Anderson* being with them), for the Appellants: Here the freight was earned before the abandonment. The judgment gives to the abandonment a retrospective operation, for which no authority can be cited.

STEWART AND
OTHERS
v.
THE GREENOCK
MARINE INSU-
RANCE COMPANY.

Sir *Fitzroy Kelly* and Mr. *Wickens*, for the Respondents: By paying the full value of the ship, the underwriters have acquired right to all her earnings.

The cases mainly relied upon are discussed in the following remarks of—

The LORD CHANCELLOR (*a*):

*Lord Chancellor's
opinion.*

My Lords, in considering the question reserved by the jury for the decision of the Court, the facts, as found by the verdict, must be the ground upon which such consideration must proceed (*b*); and if these are properly attended to, much of the apparent difficulty of the case will, I think, disappear.

The verdict finds, *first*, that there was a total loss of the *Laurel*; *secondly*, that the *Laurel* was properly abandoned, and not worth repairing. The latter indeed is a consequence of the first, rather than a distinct finding. The verdict finds for the plaintiff, which involves a finding that the total loss was within the period covered by the policy.

The verdict finds the total loss to have arisen from the ship having come in contact with an iceberg on the 27th of July, and also from its having grounded outside the docks at Liverpool on the 11th of August.

In my view of this case, it is not material whether the total loss is to be considered as having been completed on the 27th of July, or on the 12th of August; for the voyage was not completed at either of these two dates. It was indeed argued that the voyage had been completed at the latter date, and the freight earned at that time: the freight was, in fact, subsequently earned by the delivery of the goods, but at the last date to which the total loss can be referred, namely, the 12th of August, it had not been earned. If, instead of

(*a*) Lord Cottenham.

(*b*) Compare the remarks of Lord Truro, *infra*, p. 340.

timber, the cargo had been of a perishable quality, and therefore destroyed by the ship's filling with water on the 12th of August, could it have been contended that the freight had been earned?

STEWART AND
OTHERS
v.
THE GREENOCK
MARINE INSU-
RANCE COMPANY.

Lord Chancellor's
opinion.

The facts of this case, upon this point, are identical with those in *Samuel v. Royal Exchange Assurance Company (a)*, in which a ship having been lost whilst moored near the dock-gates at Deptford, waiting to be admitted, the owner was held entitled to recover against the underwriters for a total loss, the place where the vessel was moored not being the place of its ultimate destination. The case is the same as it would have been if the ship had ceased to exist as such on the 27th of July, and the cargo had been brought home and delivered by other means. This case, therefore, is one of a total loss, happening before the completion of the voyage.

Now, to constitute a total loss, the actual annihilation of the subject of the insurance is not necessary: it is sufficient if the expenses of repairs would exceed the value of the ship when repaired. In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming, as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters. Now the freight which a ship is in the course of earning is a benefit or advantage belonging to it, and is as much to be given up to, or to become the property of the underwriters paying for a total loss of ship, as any other matter of value belonging to or incident to the subject insured.

It cannot be of importance at what part of the

(a) 8 B. & C. 119; but see the remarks of Lord Truro, *infra*, p. 339.

STEWART AND
OTHERS
v.
THE GREENOCK
MARINE INSU-
RANCE COMPANY.

Lord Chancellor's
opinion.

voyage the accident happens, and the property in the vessel is changed by what is accounted in law to be a total loss.

In *Benson v. Chapman (a)*, the ship, soon after leaving the port of loading, sustained damage sufficient to entitle the owner to recover as for a total loss, but the Captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned, but the Court held that the total loss of the ship carried with it the total loss of the freight. Chief-Justice *Tindal* says, "the assured has sustained a total loss of the freight, if he abandons the ship to the underwriters on ship, and is justified in so doing, for after such abandonment he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." The damage amounting, as between the assured and the underwriters, to a total loss, the abandonment did not alter the relative rights of the parties, and the principle of that decision was, that the plaintiff, the owner, was entitled to recover against the underwriters on freight as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight, and though the freight was afterwards earned, it did not belong to the owners, but to the underwriters on ship. If, then, in that case, the freight, though actually earned by the ship, after what amounted to a total loss as between the owner and the underwriters on freight, did not belong to the owner, but to the underwriters on the ship, how, in the present case, can the freight earned by the delivery of the cargo after a total loss of the ship belong to the assured? In *Case v.*

(a) 6 M. & G., 792, argued in this House upon a Writ of Error, on July 3rd and 4th, 1848, but not decided when the judgment in this case was given.—See *infra*, pp. 337, 340.

Davidson (a), the ship was on its voyage, and in the course of earning freight, when it was captured. It was abandoned, and by the abandonment became a total loss as between the owner and the underwriters, but that abandonment cannot have greater effect than an actual total loss. In this state of things the ship was re-captured, and earned freight which was held to belong to the underwriters on the ship, although the owner had abandoned it to the underwriters on the freight. Lord *Tenterden* says, "I have never heard of an instance in which the assured, after abandoning the ship to the underwriters, has stepped in and claimed the freight as against the underwriters; on the contrary, the practice has been uncontested, that the abandonee has received the freight (b)."

STEWART AND
OTHERS
v.
THE GREENOCK
MARINE INSU-
RANCE COMPANY.
—
Lord Chancellor's
opinion.

Unless the title of an abandonee, in cases in which abandonment is necessary, is better than the title upon an actual loss not requiring abandonment (which cannot be), these authorities are decisive of the present case, the jury having found an actual total loss.

My noble and learned friend (c) agrees with me; and I accordingly move your Lordships to affirm the decision of the Court below.

Interlocutor affirmed, with Costs.—See next case.

(a) 5. M. & S. 79, Affirmed in the Exchequer Chamber; 2 Brod. & Bing. 379; 5 Moore, 117; 8 Price, 542.

(b) "Suppose, however, the ship to have performed nine-tenths of her voyage at the time of the abandonment; the underwriters would receive the whole benefit and earnings." Per Mr. Justice Bayley. *Case v. Davidson*, 5 Man. & Sel. 79.

(c) Lord Brougham.