and remitted to the Lord Ordinary in the Bill Chamber to hear the reclaimers on their objections to the trustee's discharge.

Counsel for Petitioner (Respondent)—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Defenders (Reclaimers)—A. J. Young. Agents—Watt & Anderson, S.S.C.

# HOUSE OF LORDS.

*Thursday, December* 13.

## BURRELL *v.* SIMPSON & COMPANY AND OTHERS.

(Before the Lord Chancellor, Lord Penzance, Lord Blackburn, and Lord Gordon.)

(*Ante*, November 24, 1876, vol. xiv. 120, 4 R. 177.)

*Ship — Insurance—Loss by Collision—Where both Ships belong to one Owner—Right of Underwriters to Recover—Merchant Shipping Act Amendment Act* 1862, *sec.* 54.

Two steamships belonging to the same owner came into collision. One was sunk, the fault being solely attributable to the other. In a petition, brought under the Merchant Shipping Acts 1854 and 1862, for a limitation of the liability of the petitioner *qua* owner of the offending vessel, and for a ranking of claimants upon the fund—*held (rev.* the Court of Session) that the right of the underwriters on a total loss was merely to make such claim of damages as the insured himself could have made, and that if the person insured, as in this case, caused the damage, a claim by the underwriters was not maintainable.

William Burrell, shipowner in Glasgow, owned two steamships, the "Fitzmaurice" and "Dunluce Castle," of Glasgow, trading between Leith and London. On 14th February 1876 the "Dunluce Castle" was totally lost through collision with, and by the fault of, the, "Fitzmaurice." No lives were lost. Burrell, as owner of the offending vessel, presented a petition for limitation of liability under the Merchant Shipping Acts 1854 and 1862, and paid the sum so ascertained to be due into Court. Claims were made against the fund by various parties, including the owners of cargo, the seamen, and also by Thomson and others, the underwriters, on the ground that they had paid on the policy for the loss of the "Dunluce." The claim of the underwriters was opposed by the other claimants, but was sustained by the Court of Session, as reported *ante*, of date November 24, 1876, vol. xiv. 120, 4 R. 177.

Simpson & Company, the owners of cargo, appealed to the House of Lords, and argued—A person could not sue himself, neither could his assignee. The contract of insurance was a mere contract of indemnity, and the insurers could recover from the wrong-doers no more than the assured himself could recover. The insurers had no independent right of their own, and were wholly identified with the insured. If an owner chose to run down his own ship, there was no reason why he should recover, or why his assignees should. No instance could be produced of insurers ever having a larger interest than the assured. In the present case the insurers might have set up the negligence of the assured as an answer to his claim on them for the amount of the policy. But inasmuch as they had paid they were entitled to recover back the sum as paid in error.

Argued for the respondents—The fact of both ships having the same owner made no difference to the underwriters. Ships were deemed almost living persons, and were so treated by all the Continental nations, though England and the United States had not been in the habit of bringing this point out clearly. This was a case which required this view to be acted upon, and the Legislature had practically so treated the matter when they said a maximum sum might be fixed on to represent the liability of the ship. The insurer of a ship had an inchoate interest from the moment of the contract being made, and had a right to pursue his remedy against her whatever shape the ship took.

On delivering judgment—

Lord Chancellor—My Lords, the appellants in this case dispute a claim which was made by the respondents (other than William Burrell) in the Court of Session, and allowed by them to rank as creditors upon a sum of £3590, which was paid into Court under circumstances which I will shortly mention.

William Burrell was the owner of two ships, the "Dunluce Castle" and the "Fitzmaurice," trading between Leith and London. The "Dunluce Castle" was insured by two time policies. The policies were in the usual form, and were against (among other things) the perils of the seas. They were underwritten by the respondents, other than William Burrell, and those respondents I will afterwards call the underwriters. The "Dunluce Castle," on her passage from London to Leith on the 4th of February 1876, came into collision with the "Fitzmaurice" off Lowestoft, and in consequence of the collision the "Dunluce Castle" with her cargo was sunk and totally lost. The "Fitzmaurice" was entirely in the wrong, and it was through the negligent navigation of those in charge of her that the collision took place.

This being so, Burrell, as the owner of the vessel that was in fault, and admitting his liability, petitioned the Court of Session, under the Merchant Shipping Acts 1854 and 1862, to stop all actions instituted against him, paying into Court the sum of £3590 already mentioned, being the tonnage liability fixed by the Acts, and leaving those who had any claim or right of action against him to establish their claim or right against that sum.

In the proceedings consequent on this petition the appellants, as owners of the cargo on board the "Dunluce Castle," made and established a claim against the fund, as did also the master and seamen of the ship in respect of their effects lost in the collision, and the respondents, the underwriters, also made a claim, on the ground that they had paid £6000 to Burrell under the

two insurances on the "Dunluce Castle" as upon a total loss, and ought to rank as creditors against the fund *in medio* for that amount. The appellants resisted the right of the underwriters to share in the distribution of the fund; but the Court of Session, by the interlocutors under appeal, have sustained the right of the underwriters, and your Lordships have now to say whether that decision is correct.

My Lords, I ought, in the first place, to state that, in my opinion, the question must be considered just as if the underwriters had brought an action against Burrell. It is true that under the Merchant Shipping Acts all actions against Burrell have been restrained, and a limited sum of money has been paid into Court to answer rateably, as far as it will suffice, the claims of all persons who have brought or might bring actions against him. But the Merchant Shipping Acts do not profess to create any new right. On the contrary, they act in restraint of existing rights, substituting merely a limited for an unlimited liability. The question must be looked at therefore in the same way as it would be if, all other things remaining the same, the underwriters were not in competition with any other claimants, but were suing Burrell for damages on the ground that his ship the "Fitzmaurice" had through careless navigation run down his other ship the "Dunluce Castle," upon which they, being the insurers, had paid as for a total loss.

My Lords, the learned counsel who argued this case at your Lordships' bar on behalf of the respondents, could not suggest that such an action had ever been brought, nor could they point out in any text-book or in any decided case any authority that such an action could be maintained. In order, however, to determine whether such an action could be maintained, it is necessary to ascertain the principle upon which the underwriters, having paid as upon a total loss, are held to succeed to whatever can be recovered in respect of the thing insured.

The Lord President states this principle thus—"It is necessary to consider very particularly what is the effect of a total loss, either actual or constructive, as in a question between the owners and the underwriters of the lost vessel. There can be no doubt that whether the loss be actual or constructive—if it be a total loss—the property of the sunk vessel passes to the underwriters; and it is also quite settled that all the incidents of that property pass with it. But it is necessary to go a little deeper than that general statement of principle in order to see what is the precise relation of the underwriters and the owners after the property of the vessel has so passed from the one to the other. It is quite clear that in any transference either of an heritable subject or of a corporeal moveable by voluntary conveyance nothing passes as an incident of the subject of the nature of a claim of damages. The disponee of an heritable subject, or the purchaser of a corporeal moveable, takes it just as it stands at the time of the conveyance, with of course all the incidental rights belonging to it as a piece of property; but it is quite clear that in such a case a claim of damage for injury done to that property before transference takes place could never pass along with the conveyance of the subject. Now, it is quite settled that in that kind of vendition which takes place by the operation of law, when the underwriter pays the contents of his policy upon a sunk ship, a claim of damages against a vessel which has caused the loss of the ship by collision, does pass along with the property of what remains of the vessel; and therefore it is quite obvious, from that consideration alone, without going any further, that the transference, which is operated by force of law when the underwriter pays under his policy upon the lost ship, is something quite different from an ordinary voluntary conveyance of a corporeal moveable." And further on the Lord President continues thus—"Then is it to be said that when the property of the sunk vessel has passed to the underwriters with all its incidents, including the right to claim against the offending ship for the damage done by the collision, that the owner of the offending vessel shall escape from this liability because he was also owner of the sunk ship? I confess I am quite unable to see any ground in law for holding that. It seems to me, on the contrary, to be quite clear that the operation of the legal assignment of the ship from the owner to the underwriters is to carry with it all the rights which would have belonged to any owner of that vessel, no matter who he might be; and as soon as by that legal assignment the owner of the offending ship ceased to be the owner of the 'Dunluce Castle,' there was no longer any identity of persons between the party who makes the claim and the party who is liable to satisfy the claim. That identity is put an end to by the operation of law, and therefore I think that the underwriters in these circumstances would have a perfectly good ground for action against the owner of the 'Fitzmaurice' to make good the damage caused by the collision."

The view of the Lord President therefore appears to be that after payment by the underwriters as on a total loss, there is effected, by some independent operation of law, a transfer of whatever, if anything, can be recovered in specie of the thing insured; and that there is also created by a similar operation of law, and by reason of the transfer of the thing insured, an independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for the damage to the thing insured which was the cause of the loss.

My Lords, speaking with great respect for the Lord President and the other learned Judges who followed his opinion, I feel bound to say I am not aware of any authority for the view of the case thus taken by him. The case cited by him of the *North of England Insurance Association* v. *Armstrong*, 39 L.J., Q. B. 81, does not appear to me to touch the question. The reasoning of the Lord President would be inapplicable to the case of a partial loss; and yet no one would dispute the right of underwriters, after paying to A on a partial loss occasioned to his ship by the collision of the ship of B, to sue B if his ship was in fault. I know of no foundation for the right of underwriters except the well-known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the under-

writers of a ship that has been lost are entitled to the ship in specie, if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all.

The case of *Yates* v. *Whyte*, Jan. 26, 1838, 4 Bingham's New Cases, 272, involved questions analogous to and, as it seems to me, decisive of the present. The plaintiff was there suing the defendants for damaging his ship by collision, and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage; and if the insurers had possessed an independent right of action against the defendants, the defendants might no doubt have been right in their contention. I think it desirable to read to your Lordships what was said by some of the learned Judges in that case. Chief-Justice Tindal says—"I think this case is decided in principle by that of *Mason* v. *Sainsbury*, Marshall on Insurance (3d Edn.) 796, 3 Douglas' Reps. 61. There a party, whose property had been burned by a mob, was allowed, after receiving the amount of his loss from an insurance office, to sue the Hundred on the Statute 1 Geo. I. for the benefit of the insurers. The only distinction between that case and the present is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with the insurers is no bar to a claim for damages against the wrong-doer. Lord Mansfield says (Marshall on Insurance, 3d Edn. 796)—'Though the office paid without suit, this must be considered as without prejudice, and it is to all intents as if it had never been paid. The question comes to this—Can the owner of the house, having insured it, come against the Hundred under this Act? Who is first liable? If the Hundred be first liable, still it makes no difference. If the insurers be first liable, then payment by them is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured* put in the place of the insurer.* In abandonment it is so, and the insurer uses the name of the insured. It is an extremely clear case. The Act puts the Hundred in the place of the trespassers; and on principles of policy I am satisfied it is to be considered as if the insurers had not paid a farthing.' That the insurers may recover in the name of the assured after he has been satisfied appears from *Randal* v. *Cockran*, June 17, 1748, 1 Ves. sen. 97, where it was held that they had the plainest equity to institute such a suit. Such therefore is the situation of the underwriters here that this case has received its answer from it. If the plaintiff cannot recover, the wrong-doer pays nothing, and takes all the benefit of a policy of insurance without paying the premium. Our judgment must be for the plaintiff."

Mr Justice Park says—"I am of the same opinion. This point has been decided ever since the time of Lord Hardwicke—so much so, that it has been laid down in text-writers that where the assured, who has been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal* v. *Cockran* it was said they had the clearest equity to use the name of the assured in order to reimburse themselves, and in *Mason* v. *Sainsbury* the Judges were all unanimous; they held indeed that the insurers could not sue in their own names, but they confirmed the general doctrine that the wrong-doer should be ultimately liable notwithstanding a payment by the insurers."

Mr Justice Vaughan says—"No case has been cited which establishes the point contended for on behalf of the defendants, while *Randal* v. *Cockran* and *Mason* v. *Sainsbury* are in point for the plaintiff. In *Mason* v. *Sainsbury* it was argued, as here, that the plaintiff having received his indemnity from the insurers, could not recover a second time against the Hundred; but Lord Mansfield said—'Who is first liable? If the Hundred be first liable, still it makes no difference; if the insurers be first liable, then payment by them is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. We every day see the insured* put in the place of the insurer.'* And in *Clark* v. *The Hundred of Blything*, 1823, 2 Barnewall and Cresswell 254, the authority of *Mason* v. *Sainsbury* was expressly recognised by Lord Tenterden."

My Lords, these authorities seem to me to be conclusive that the right of the underwriters is merely to make such claim for damages as the insured himself could have made. And it is for this reason that (according to the English mode of procedure) they would have to make it in his name; and if this is so, it cannot of course be made against the insured himself.

It may be said that this view of the law inflicts considerable hardship upon the underwriters. I am not, however, satisfied that this is the case. Either the policy by which the underwriters are bound is an insurance against perils of the seas arising from the negligent navigation of any other vessel, even although that vessel belong to the person insured, or it is not. If it is not an insurance against such a peril of the sea, the underwriters should defend themselves accordingly, and decline to pay for the loss. If, on the other hand, the insurance is a contract to indemnify against the consequences of the negligent navigation of any other ship of the insured, it would be but little short of an absurdity that the underwriters should, in the first place, indemnify the insured for the consequences of that negligent navigation according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation.

I must therefore move your Lordships that the interlocutor of 24th November 1876 be varied, by inserting after the words "rank and prefer the whole of the other claimants" the words "other than the underwriters," and by inserting a finding that the underwriters Thomas Thomson and others are jointly and severally liable to the appellants Simpson & Company and others with regard to the expenses occasioned by the discussion between the claimants Thomas Thomson and

* This quotation is reported *sic* in 4 Bingham's New Cases, p. 284, and seems to have been taken from Marshall on Insurance, (3d ed.), p. 796. In 3 Douglas' Reps. 61, where there is another report of the case, the words *insured* and *insurer* are transposed, which appears the correct way.

and others and Simpson & Company and others; and that the interlocutor of the 10th March 1877 should be reversed, with a declaration that the objections for Simpson & Company and Henderson, Hogg, & Company ought to have been received; and with this declaration remit the case to the Court of Session; and I further move your Lordships that the respondents, the underwriters, be ordered to pay to the appellants the costs of this appeal.

Lord Penzance—My Lords, the facts which give rise to the question in this case are undisputed, and are these.

Mr Burrell was the sole owner of two vessels, the "Dunluce Castle" and the "Fitzmaurice," which came into collision at sea. The collision was due entirely to the negligence of those in charge of the "Fitzmaurice," and the result of it was that the other vessel (the "Dunluce Castle") and her cargo were wholly lost. Mr Burrell, as owner of the ship in fault, instituted this suit under the provisions of the Merchant Shipping Acts for the purpose of limiting his liability to those who had suffered by the collision to a sum equalling the value of the ship in fault, calculated at £8 per ton, and has paid into a bank under order of the Court that sum, to be distributed by the Court among those entitled to it.

The respondents are underwriters who had insured the vessel which was sunk (the "Dunluce Castle"), and who have paid Mr Burrell, as the owner of that vessel, under a valued policy effected with them by him, the sum of £6000 as for a total loss. For this sum they have claimed to rank with the other claimants upon the fund in Court, and the question is, whether they are entitled to do so? The Court below have affirmed their right and allowed the claims, and it is from that decision that the present appeal is brought.

As the claim thus put forward is made under the provisions of the statutes above referred to, I will call attention to those provisions. The 25th and 26th Vict. cap. 63, (Merchant Shipping Act Amendment Act 1862), sec. 54, provides—"That the owner of any ship shall not (except in cases of their actual fault and priority) be answerable in damages in respect of loss or damage to ship or goods" in an amount exceeding £8 per ton of the ship doing the injury. And the Statute 17th and 18th Vict. cap. 104 (The Merchant Shipping Act 1854), sec. 514 (which is incorporated with the last-mentioned Act) provides that "in cases where any liability is alleged to have been incurred by any owner" in respect of injuries to ships or goods, &c., "and several claims are made or apprehended" a suit may be instituted by such owner "for the purpose of determining the amount of such liability, and for distribution of such amount rateably among the claimants."

From these provisions it is, I think, clear that no claim upon the fund can properly be made except in respect of some "liability" of the owner to the claimant by reason of an injury or wrong for which the owner would be "answerable in damages to the person claiming." And accordingly the objection made to this claim by the appellants is that the underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, except such, if any, as they may have derived from the owner of the lost ship, in whose place they may claim to stand, and that he himself had and could have no such right of action, inasmuch as being the owner of both vessels any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law.

In answer to this objection it seems to have been considered by the Court below that by the payment of a total loss, and the cession or transfer to the underwriters of the vessel (or whatever might remain of her) which followed thereupon by operation of law, some new right of action sprung up or was created against the owner of the wrong-doing ship in favour of the underwriters. I say "new" right of action, because the right of action contemplated is something different from and other than the right of action which resided in the owner of the injured ship, the benefit of which could only be made available to the underwriters by transference from that owner, and consequently could only be pursued in his name.

My Lords, I entirely agree with the reasoning of the Lord Chancellor on this head, and am of opinion that there is no warrant to be found in the existing decisions for such a proposition.

But in the argument at your Lordships' bar the learned counsel for the respondents took their stand upon a much broader ground. They contended that the underwriters, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrong-doer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance.

The principle involved seems to me to be this —That where damage is done by a wrong-doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial, by the damage done to the chattel have a right of action against the wrong-doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow, that if by the negligence of a wrong-doer goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently-driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicine for a fixed sum by the year, also have a right of action in respect of the additional cost of

attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person, to the serious loss of the manager. Can the manager recover damages for that loss from the wrong-doer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

My Lords, I have given these illustrations because I fail to see any distinction in principle between them and the right asserted by the underwriters in the present case; and if I am right in so regarding them, they show at least how much would be involved in a decision by your Lordships whereby that right should be affirmed.

But the ground upon which I will ask your Lordships to reject this contention of the respondents' counsel is this—That upon the cases cited, no precedent or authority has been found or produced to the House for an action against the wrong-doer, except in the name, and therefore in point of law on the part, of one who had either some property in or possession of the chattel injured. On the other hand, the existence of authorities in which the suit has been brought in the name of the owner, though for the benefit of persons having a collateral interest, is somewhat strong to show that such persons had no right of action in themselves. For it is to be presumed that a person having such a right would pursue it directly, and not indirectly, through the name of another.

The observations of Lord Mansfield in the case of *Mason* v. *Sainsbury*, which was an action against the Hundred for damage done to the petitioner's property, the value of which underwriters had already paid, throw some light on the subject—"If the insurers be first liable, then payment to them is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of a contract of insurance. It is an indemnity. We every day see the insurer* put in the place of the insured.* In abandonment it is so, and the insurer uses the name of the insured."

Chief-Justice Tindal quotes this language in the case of *Yates* v. *Whyte*, 4 Bingham's New Cases, 283, and adds—"That the insurers may recover in the name of the assured after he has been satisfied appears from *Randal* v. *Cockran*, where it was held that they had the plainest equity to institute such a suit."

And in the same case Justice Park said—"This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in text-writers that where the assured, who had been indemnified for a wrong, recovers from the wrong-doer, the insurers may recover the amount from the assured. In *Randal* v. *Cockran* it was said they had the clearest equity to use the name of the assured in order to reimburse themselves, and in *Mason* v. *Sainsbury*, the Judges were all unanimous; they held indeed that the insurers could not sue in their own names, but they confirmed the doctrine that the wrong-doer should be ultimately liable notwithstanding a payment by the insurers."

*See foot-note *ante*, p. 295.

A question was raised in the course of the argument at your Lordships' bar, whether the underwriters could have defended themselves against an action brought on the policy by Mr Burrell on the ground that the loss was occasioned by a ship which belonged to himself, and was navigated by his agents and servants? The solution of this question, whichever way it be solved, does not seem to me to advance the claim now made by the underwriters. If they had a good defence against Mr Burrell's claim, they were bound to avail themselves of it, and thus throw the loss upon Mr Burrell, instead of paying him and claiming to throw the loss on the other creditors of the distributable fund. If, on the other hand, they had no such defence, I fail to see how that circumstance has any bearing upon or in any degree improves their position in the claim they now make.

In the result therefore I submit to your Lordships that the only liabilities in respect of which Mr Burrell paid the fund into Court under the statute were those for which he was answerable in damages; and that as he could not be answerable in damages to himself, no claim ought to be allowed against the fund in respect of any right derived from him, and enforceable only in his name; while, on the other hand, the underwriters have produced no authority or even judicial dictum for the proposition that in their own right, and independently of Mr Burrell in his character of assured, they could have sued him for damages in his character of owner of the "Fitzmaurice." And for these reasons I concur in all respects in the motion placed before the House by the noble and learned Lord on the woolsack.

Lord Blackburn—My Lords, I have had the advantage of reading the opinion of the noble and learned Lord who spoke last in this case, in which I completely agree. But as the Judges in the Court below have given a judgment the other way, I think the respect which I sincerely feel for their authority makes it proper to say why I dissent from their reasoning, or, in other words, to point out what seems to me the fallacy in the judgment in the Court below.

My Lords, I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due, but not earned at the time of the disaster, is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship, who before the freight was completely earned had taken possession of the ship (See *Keith* v. *Burrows*, July 1877, Law Reps., 2 Appeal Cases, 636). This is at times very hard upon the insured owner of the ship; he can, however, avoid it by claiming only for a partial loss, keeping the property in himself, and so keeping the right to earn the accruing freight. In such a case he recovers an indemnity for the amount of the loss actually sustained, in calculating which all the benefits incident to the property retained by the shipowner must be considered.

But the right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle—and on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes. This will appear clear if we suppose that the owner of the "Dunluce Castle" had in this case been a different person from Mr Burrell, and that the "Dunluce Castle" instead of being totally sunk had only been injured to the extent of 50 per cent. of her value. The owner of the "Dunluce Castle" would have had a right of action to recover that 50 per cent. from Mr Burrell, not because he was the owner of the "Fitzmaurice," but because he was the master of the captain and crew whose negligence in the course of their employment occasioned the damage. The underwriters could not resist payment of an indemnity to the owner of the "Dunluce Castle" on the ground that he had a remedy over against Mr Burrell, but they would have had a right, if he had already recovered something from Mr Burrell, to have that considered in settling what that idemnity should be; or, if he had not yet recovered from Mr Burrell, they would, on the principle laid down in *Randal* v. *Cockran*, have a right to get what they could from Mr Burrell in order to recoup themselves.

*Mason* v. *Sainsbury* and *Yates* v. *Whyte* were both cases of partial loss only. The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity.

In England the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters. In other systems of jurisprudence, or it may be in our own as altered hereafter, the assignee of such a right may be able to sue in his own name. The important question will still remain. Is it a transfer of a right of action, which cannot be transferred unless it already exists, or a fresh right created? The whole reasoning of the Court below is applicable to the case of a total loss, and of a total loss only. It would not be applicable to the case of a partial loss of 99 per cent. or even more. I think, however, the reason of the law is not more applicable to those who have indemnified for a total loss than to those who have indemnified for a partial one.

I have only further to observe, that if the law had been that the owners of a ship were to be treated as a *quasi* corporation, and so the owners of the "Dunluce Castle" had had a right of action for damages against the owners of the "Fitzmaurice," irrespectively of whether some or the whole of the shareholders in the two *quasi* corporations were identical, the case would have been quite different. But such is not the law, and the Legislature in the Acts now in consideration did not intend to give any right of action for damages which did not exist before, but only to limit the amount recoverable under the existing law.

I think that the question whether the underwriters had or had not a defence against any action on the policy by Mr Burrell does not arise, and I prefer to say nothing about it.

Lord Gordon—My Lords, this case is attended with some difficulty; but having given it that anxious consideration to which the opinions of the very learned Judges of the Court of Session are so well entitled, I have come to the opinion that the appeal must be sustained.

I have had the advantage of seeing and considering the opinions which have been delivered by your Lordships, and I concur in that of your Lordship on the woolsack. It is unnecessary therefore that I should detain your Lordships by any lengthened remarks.

The discussion arises with reference to a fund which is of limited amount, and beyond which there is no liability against the person who has provided the fund, viz., the owner of the "Fitzmaurice," which was the vessel doing the injury to the "Dunluce Castle," in respect of which all the claims arise. There are several claimants on the fund, in particular the owners of the cargo which was on board of the "Dunluce Castle" at the time she was injured, and the underwriters on that vessel. The fund is insufficient for payment in full of all the claims, and the owners of the cargo object, and are entitled to object, to the right of these underwriters to rank on the fund. The peculiarity in the case is, that the same person is the owner of both ships—both the ship which was sunk and that which did the injury. If the ship had belonged to different owners I think there can be no doubt that in such a case as here occurs, viz., a case of a total loss, the underwriters would have been entitled as in right of the owner of the injured ship to vindicate a claim of damages against the owner of the vessel which had caused the damage, and to participate in the fund *in medio* which forms the measure of the offending shipowner's liability under the Merchant Shipping Acts. But that is not the case with which your Lordships have to deal; and you must consider the case on the facts as they arise, viz., that the same person was the owner of both ships.

I think there is nothing peculiar to Scotch law in the case, the systems of both countries in regard to marine insurance being the same, and the provisions of the Merchant Shipping Acts applying equally to both.

The view which I take of the case is a very short one, and it is this—I think the case must be looked at as if the owner of the "Dunluce Castle" had not been insured. His having effected insurance was a very proper and prudent act, but he did it for his own benefit, and the underwriters cannot complain that they have had to meet the risk against which they insured. Now, I think it is clear that if the owner of the "Dunluce Castle" had not been insured he could have had no claim against himself as the owner of the "Fitzmaurice" which caused the injury to the "Dunluce Castle." The injury to that ship was substantially caused by its own owner, and he could not be liable to himself for the

damage so caused. And if he could not be liable to himself, he could not assign any right, either expressly or by implication of law, to any third person, as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner, but they are not entitled to more. And if the owner of the "Dunluce Castle" had no right to sue the owner of the "Fitzmaurice," neither can the underwriters on the "Dunluce Castle," whose rights were derived from the owner of that vessel.

I therefore concur in the judgment which my noble and learned friend on the woolsack proposes.

Interlocutor of Court of Session 24th November 1876 varied by inserting after the words "rank and prefer the whole of the other claimants" the words "other than the underwriters" and by inserting a finding that the underwriters Thomas Thomson and others are jointly and severally liable to the applicants Simpson & Co. and others with regard to the expenses occasioned by the discussion between the claimants Thomas Thomson and others and Simpson & Co. and others; and interlocutor of the 10th March 1877 reversed, with a declaration that the objections for Simpson & Co. and Henderson, Hogg, & Co. ought to have been received; and cause remitted with this declaration to the Court of Session; and respondents, the underwriters, ordered to pay to the appellants the costs of this appeal.

Counsel for Simpson & Coy. (Appellants)—Watkin Williams, Q.C. — Mathew. Agents—Waltons, Rubb, & Waltons, Solicitors.

Counsel for Underwriters (Respondents) — Benjamin, Q.C.—Clarkson. Agents—Grahames & Wardlaw, Solicitors.

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# COURT OF SESSION.

*Wednesday, January 23.*

## SECOND DIVISION.

[Sheriff of Kirkcudbright.

### THOMSON *v.* MAGISTRATES OF KIRKCUDBRIGHT AND GEDDES.

*Reparation—Act of Grace—Liability of a Governor of a Jail for Release of a Prisoner.*

The governor of a jail on the morning of the tenth day after an award of aliment to a prisoner under the Act of Grace, certified, as was the fact, that there was no aliment in his hands. The prisoner was thereafter upon that certificate liberated by the magistrates. In an action of damages against the magistrates and the governor of the jail—*held* that the action, as laid against the magistrates was irrelevant, and that the governor could not be held liable, he having merely certified to a fact within his knowledge.

*Opinion per* Lord Justice-Clerk, that the maxim *dies inceptus pro completo habetur* does not apply where such a limitation would cut off some right of action or deprive a creditor of some advantage.

James Craik was imprisoned in the County Jail of Kirkcudbright on 26th of July 1876 for a debt of £31, 3s. 2d., being the amount of inlying expenses and aliment of an illegitimate child and expenses of process for which decree had been given against him at the instance of Elizabeth Thomson, the pursuer in the present action. Decree for the expenses had been taken out in name of Robert Broatch as agent disburser, and Broatch for the purposes of this action had granted an assignation to Thomson of his right and interest in the decree and expenses.

On 18th August 1876 Craik presented a petition to the magistrates for the benefit of the Act of Grace, and aliment of 1s. a-day was awarded, to be payable from the date of incarceration so long as he should be detained in jail. The prisoner's deposition and the deliverance were intimated to Mr Broatch, the pursuer's agent, by registered letter, received at 6.40 P.M. of 19th August. On the morning of the 29th of August William Geddes, the governor of the prison, issued the following certificate:—

"29*th August* 1876.—I certify that no aliment is in my hands for maintaining the within designed James Craik.

"WILLIAM GEDDES, Governor of Prison."

This was laid before one of the magistrates, who issued this order for Craik's liberation:—

"*Kirkcudbright, 29th August* 1876.—On above certificate you are authorised to liberate the prisoner.

"C. FINLAYSON, Magistrate."

He was liberated about 8.30 A.M. About an hour or an hour and a-half after the liberation, by that morning's post, Geddes received a letter from Broatch, posted on the previous day, enclosing £2 as aliment. Craik soon after his liberation obtained decree of *cessio bonorum*.

The pursuer raised this action against the Provost and Magistrates of Kirkcudbright and also against Geddes for payment of the £31, 3s. 2d., in respect that the prisoner Craik was wrongfully liberated.

She pleaded, *inter alia*—"(1) By liberating the prisoner within the ten days from the date of the intimation of the deliverance and awarding aliment, notwithstanding sufficient aliment being in the defender William Geddes' hands within that time, the whole defenders, being responsible for the prisoner's safe custody, ought to be held liable for the debt due by the prisoner, or damages sustained by the pursuer and her cedent in consequence of said liberation equivalent to said debt. (2) Said liberation having been granted by the defender William Geddes, and acquiesced in or approved of by the other defenders without authority, or payment of the debt, or a certificate or warrant, they ought to be held liable in the debt or damages as concluded for."

After various procedure the Sheriff-Substitute (NICOLSON), on 16th January 1877, pronounced an interlocutor in which he assoilzied both the defenders. He added this note:—

"*Note.*—[*After stating the facts*]—It thus appears that the prisoner was liberated before the