

additional fact can in part relieve them. White advanced to the plaintiff £2180 to enable the plaintiff to meet this cheque for £2300. So the plaintiff, in fact, has only lost up to the present time the difference—namely, £120—and the defendants urge that he can recover from them nothing beyond this actual loss. I do not think so. I agree with Buckley, L.J., that the whole £2300 paid to the defendants was paid out of Irvine's money at his own bankers. Where he got that money is irrelevant. He may have to account for £2180 of it to White's trustees. I do not know whether it will be so or not, it will depend on the rights between the plaintiff and White's trustees. But I see nothing that can entitle the defendants to stand in the shoes of White's trustees and claim against the plaintiff what in effect is a set-off arising out of an indebtedness of the plaintiff, not to themselves, but to White. If any case could be cited in favour of the defendants' contention it might be necessary to contrast it with other authorities, but I think there is no such case, and that the law is plain.

LORD ROBERTSON and LORD COLLINS concurred.

Appeal dismissed.

Counsel for the Appellants—Rufus Isaacs, K.C.—Maurice Hill—H. Beazley. Agents—Rawle, Johnstone, & Company, Solicitors.

Counsel for the Respondents—Horridge, K.C.—Leslie Scott. Agents—Walker, Son, & Field, Solicitors.

HOUSE OF LORDS.

Friday, March 6.

(Before the Lord Chancellor (Loreburn),
Lords Robertson and Collins.)

MACBETH & COMPANY v. MARITIME
INSURANCE COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

Insurance—Marine Insurance—Constructive Total Loss—Cost of Repairs—Value of Wreck.

In deciding the question whether or not there has been a constructive total loss of a vessel which has been wrecked, the selling value of the wreck falls to be added to the cost of repairing the vessel.

A vessel's value was £12,000. She was wrecked. The cost of repairing her was £11,000; the wreck was worth £1000. Held that she was a constructive total loss.

Judgment of Court of Appeal reversed. *Angel v. Merchants' Marine Insurance Company* (1903), 1 K.B. 811, overruled.

Appeal from a judgment of the Court of

Appeal (LORD ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.J.J.), who had affirmed a judgment of WALTON, J., in favour of the respondents, the defendants below, at the trial of the action before him without a jury.

The facts sufficiently appear from the considered judgments, *infra*.

LORD CHANCELLOR (LOREBURN)—In this case the steamship "Araucania" was insured by the respondents in a valued policy for £12,000, free of particular average, and with a condition that in reckoning whether or not there should be a constructive total loss the repaired value should be taken at the valuation of £12,000. She went ashore. The learned Judge has found, and it is not disputed, that the cost of repairing was £11,000. So if that alone is to be considered, she was not a constructive total loss. But she would be so if, to the cost of repairing, the selling value of the wreck were to be added. Whether or not it ought to be added is the question before the House. The learned Judges, both in the Court of first instance and in the Court of Appeal, answered that question in the negative, not upon any view of their own, but in deference to the decision of *Angel v. Merchants' Marine Insurance Company*, pronounced by the Court of Appeal in 1903. In *Angel's* case one of the Lords Justices expressed himself on this point in terms of dissent from his colleagues. This question admits of ready answer as soon as it is ascertained what is the true test by which a court is to be guided. Really the choice lies between two tests. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is £11,000, and the repaired value is £12,000. If the latter test be adopted, then the appeal must be allowed, for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so. If this were an open question, there seems to me ground for arguing that the former is the sound view. But I think that this is not really an open question, notwithstanding the recent decision in *Angel's* case. I will not enter upon a criticism of the authorities. I have had the advantage of seeing in print the opinion of Lord Collins, who fully discusses them, and I agree in his conclusion. When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation, and this test has been laid down repeatedly by many high authorities over a long period of time. I think that it was too late to disturb it in 1903. I will merely add that in my opinion the rule can only apply where there has been a wreck or something equivalent to a wreck. If an

owner tried to treat as a constructive total loss such a case as was put in argument, of a vessel worth £5000 as she lay damaged in harbour after a storm, which would cost £6000 to make her fit to take the sea, and would then be worth only £10,000 as repaired, he would fail. Among other reasons the loss would not be by perils of the sea. Accordingly I am of opinion that the appeal should be allowed.

LORD ROBERTSON—I find it impossible to refuse the demand of the appellants. When a ship has been damaged during a voyage the practical question is, Shall she be repaired or abandoned? The pros and cons on this question are, as it seems to me, necessarily of a commercial and pecuniary nature, and necessarily looked at from the standpoint of the person whose pocket is affected. It follows that a balance-sheet has to be drawn up, showing what is gained and what is lost by repairing on the one hand and by abandoning on the other. Now, I am unable to see how such a balance-sheet can be accurate unless it includes the *corpus* of the damaged ship. The curious part of the respondents' case is that they do include it, but only on one side of the account, for it is part of the value of the ship if repaired. I can see no reason why it should not enter the account on the opposite hypothesis—that the ship is not repaired—and it would unquestionably do so, as matter of business, in determining the decision of any rational man who had to consider the question. It was urged, however, that in a contract of insurance what is insured is the ship as a thing, and not in its relation to the commercial enterprises of its owner. While, as presented, this sounds plausible, it is fallacious. What is insured is the life of the ship as a living instrument of commerce; and the owner is not credited with any romantic attachment to the ship, so that he will keep life in her at all costs and to the sacrifice of the commerce of which she is an instrument. Again, there is nothing in the argument that the wrecked ship, if abandoned, may after all be bought and resuscitated and resume activity in other hands. This merely means that a wrong judgment was come to on the question of fact, and that the cost of repair was well-spent money instead of, as was thought, ill-spent money. But whichever view be taken of the present controversy, some conclusion must be come to in each case on the question whether it is worth while to repair, and the argument necessarily assumes, in any case in hand, that the conclusion come to is right. In what I have said I have proceeded on the assumption that in ascertaining whether there is a constructive total loss, one has to hold an inquest, as it were, and consider whether the ship shall be repaired or shall be abandoned. I do so, first of all, because I do not see how there can be such a thing as a constructive total loss without this being done; and secondly, because it has for long been laid down by very high authorities that the criterion is the presumable judgment of the owner, on the footing

of his being uninsured and acting in his own interests. I desire to say that my judgment is given on principle, and not merely on authority.

LORD COLLINS—This is virtually an appeal from the judgment of the Court of Appeal in *Angel v. Merchants' Marine Insurance Company*, and raises the question whether, in determining whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the owner is entitled to add the break-up value of the wreck to the estimated cost of repairs. The circumstances which will justify an owner in abandoning his vessel when he elects not to repair her are thus stated in Arnould on Marine Insurance, 5th ed., p. 1003—"On that question the rule of law is clearly established, but variously expressed. By Blackburn, J., it is said 'the question between the assured and the underwriters on a ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth'—*Rankin v. Potter*. By Tindal, C.J., it is said to be that 'where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss'—*Benson v. Chapman* (6 M. & G. 792). The same thing as more briefly expressed by Patteson, J. (*Irving v. Manning*), is thus—'Would a prudent owner uninsured repair?' or rather, as Wilde, B., said (*Grainger v. Martin*), 'Would he sell unrepaired?'" On the same subject Blackburn, J., thus expresses himself in *Kemp v. Halliday*—"The question whether it is practicable to save the subject-matter within the meaning of the phrase as explained by Maule, J., in *Moss v. Smith* has been differently left to the jury. In *Gardner v. Salvador* (1 Moo. & R. 116) Bayley, B., left it to the jury to say whether by means within the reach of the captain, which he could reasonably use, the ship could be saved. The mode of putting the question generally adopted has been to ask whether a prudent uninsured owner would have done it. In *Rosetto v. Gurney* (11 C.B. 176) the Court, approving of what has been said by Maule, J., in *Moss v. Smith*, state the rule thus—'If the damage is repairable, the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible.' The three modes of expression all seem to me to convey the same idea. No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them. But if the means within his reach would cost less than the object is worth, a prudent

uninsured owner would adopt them rather than suffer the thing to perish, though a prudent insured owner, especially if insured in a valued policy, would probably act otherwise if the law permitted him by doing so to recover from the underwriters for a total loss." A few lines further on he continues—"In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay, ought to be taken into account; and amongst those the fact that cargo would be saved by the operation and would contribute to the expense seems to me a very important element." As appears, then, from the passages cited, the test usually applied at that time (1865) was what would a prudent uninsured owner do in the circumstances, and the same test has continued to be applied ever since, and was approved by the House of Lords as lately as 1898 in *Sailing Ship Blairmore Company v. Macredie*. First, then, dealing with the specific issue raised on this appeal, apart from authority, what part, if any, ought the break-up value of the hull to have as a factor in the calculation of the cost of bringing into existence a navigable ship as compared with the value of the ship when so produced? Suppose that the owner, finding himself in possession of a ship which, as the result of a sea peril, can be sold only at a break-up price, sells it, and suppose that the purchaser elects to try the experiment of repairing her, and then reckons up the cost at which he has completed the whole operation. Obviously he would have to count the cost at which he had bought the wreck. Why is not the owner in the like position if, instead of selling the wreck, he has applied the materials to be used in bringing into existence a navigable ship? He owned materials which had a certain saleable value, and he was free to dispose of them as he chose; instead of realising their value he has utilised them in the process of turning the wreck into a navigable ship. Why is their saleable value not equally a factor in the calculation of the cost at which he brought into being a navigable ship? It seems to me that no prudent uninsured owner could be expected to leave out of his calculation the realisable value of the wreck. The above reasoning assumes throughout that only the break-up value of the wreck can be introduced into the calculation. Lord Campbell so treats it in *Fleming v. Smith* when he says—"If a prudent person uninsured would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." To assume that the wreck has a saleable value as a ship would be to accept a hypothesis inconsistent with the assumption on which a constructive total loss is based, for the existence of such a market value is inconsistent with the hypothesis that no prudent uninsured owner would repair, since we cannot assume that the purchasers are less prudent than the hypothetical uninsured

owner; and since they are prepared to give more than a break-up price for the wreck, it may be presumed that it is because they see their way to making it navigable at a cost which it will be worth their while to incur. These being the general considerations underlying the case, it remains to consider the state of the authorities when *Angel v. Merchants' Marine Insurance Company* was decided. There are very few instances in which the precise point which has been raised here is discussed. The most important is the case of *Young v. Turing*, which contains a clear expression of opinion directly in point. There, on a claim as for a total loss, Tindal, C.J., who tried the case, in summing up told the jury that in considering whether the loss was partial or total they ought to look at "all the circumstances attending the ship," and to judge whether under all those circumstances a prudent owner, if uninsured, would have declined to repair the ship. It was proved that the ship as she lay "to sell for the purpose of being broken up" was worth £700. On a bill of exceptions to this direction Lord Abinger, C.B., in delivering the unanimous judgment of the Court of Exchequer Chamber, thus expressed himself—"The Lord Chief Justice has laid down the usual and recognised rule that the jury ought to consider whether, under all the circumstances attending the ship, a prudent owner if uninsured would have repaired the vessel. Now, to the value of the repairs must be added her value as she lay in the dock; that is to say, to £4615"—the estimated cost of the repairs—"must be added £700, making £5315 as the cost"—that is to say, the cost of the repairs. He therefore clearly treats the break-up value of the wreck as one of the factors to be reckoned in the estimated cost of reparation by the uninsured owner. This weighty utterance was put aside in *Angel's* case as a mere dictum of Lord Abinger, and the same view was pressed upon us here. But whether it be a dictum or a decision, it has the authority, not of Lord Abinger alone, but of the Exchequer Chamber, which must have consisted of at least five, and probably of seven, judges drawn from the Courts of Queen's Bench and Exchequer, not to mention Tindal, C.J., whose direction was upheld. Their names do not appear in the report. But is it fair to say that this pronouncement in its context was merely an *obiter dictum*? I think not. The learned Chief Baron has begun by overruling the first exception, which complained of the direction that the value of the policy was immaterial and might be disregarded. He then addresses himself to what, later on, he describes as the "substantial fact"—that is, that "her value when repaired is less than the cost." It is in the process of ascertaining this fact that he addresses himself at the outset to sifting the evidence as to the cost of repairs in view of the direction of the Chief Justice which was excepted to, that the jury should take into their consideration "all the circumstances that affected the ship," and that evidence as to the break-up value

of the ship was before them, as to which, apparently, there was no conflict. It must be remembered that the cost of repairs was not an agreed figure, but had been put variously by the English witnesses as £3530 and £4615, as the learned Chief Baron points out. On the other hand, the value of the ship when repaired was not an agreed figure, though the Dutch witnesses had put it at £2915. The English evidence did not fix a definite sum, but put it that if the ship could have got a British register it would have been worth more than the repairs. The jury had given a general verdict, not ascertaining the figures, and the contention of the defendants that the loss was partial only rendered an examination of the figures on either side of the account desirable. It seems to me impossible, in these circumstances, to say that the break-up value of the wreck was immaterial to the calculation. Clearly the learned Judges who agreed in the judgment must have regarded it as material to the decision, and so likewise must the counsel in the case who caused the figure to be set out in the bill of exceptions. The decision as to the effect of the value being named in the policy was affirmed in the House of Lords in *Irving v. Manning*, and the test there applied of the prudent uninsured owner was approved. No adverse comment seems to have come from any source upon the passage here in question. If any such criticism had been made or thought applicable, it is very strange that in the unanimous opinion of the advising Judges, said to have been prepared by Parke, B., where the test question is re-stated, having the expressions used in the judgment in *Young v. Turing* necessarily and specially before them, they should not have drawn attention to the flaw, if such they deemed it, in the statement of what factors should be taken into consideration on the question "what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against." There are two other important expressions of judicial opinion directly in point—namely, that of Martin, B., in advising the House of Lords in *Rankine v. Potter*, and that of Bramwell, B., on the same occasion. Both these statements are important, not merely as expressions of opinion by specially competent authorities, but as evidence of what was regarded as settled law at that time. They state the proposition, which is that involved in this case, as though it stood outside controversy, needing no argument or exposition, and they might well do so, as the law laid down on this subject in *Young v. Turing* had, so far as appears, never been judicially questioned up to that time. Nor is it fair in this case either to dismiss these statements as mere *obiter dicta*. It is true that the learned Judges were only advising the House, and not deciding the question before it, but it was essential to their argument to establish a total loss of the ship as bringing about a total loss of the freight, as to which the question of abandonment was raised for

decision in the House of Lords, and on the figures quoted the proposition affirmed was vital to their conclusion. I do not think it necessary to refer to the observations of Lord Blackburn in *Aitchison v. Lohre*, on which both sides relied equally, but they do not appear to me to form a safe ground for an inference either way. Since then, and before the decision of *Angel's* case in 1903, Barnes, J., in "*The Thornhill*" (not reported), and in *Marten v. Sydney Lloyds*, and Phillimore, J., in *Beaver Line v. London and Provincial Marine Insurance Company*, and Walton, J., in *Wild Rose Steamship Company v. Jupe*, have expressed opinions in favour of the contention of the appellants in this case (see Arnould on Marine Insurance, 7th ed., p. 1268). An attempt was made in the argument to suggest that the judgment of Maule, J., in *Moss v. Smith* had somehow altered the law as received up to that time, and that the test of what the prudent uninsured owner would do was no longer applicable since that decision, but this contention is quite inconsistent with the opinion of Blackburn, J., in *Kemp v. Halliday*, to which I have already referred, as well as with a series of later authorities in which the old test has been treated as still applicable. Neither does there seem to be any force in the observation of Matthew, L.J., that the increased facilities of communication in more modern times have made the test no longer applicable. No doubt the prudent uninsured owner now has probably more complete information at his disposal than he might have had formerly, but it is difficult to see what possible bearing this fact can have upon the principle involved. The more complete the information at his disposal the more accurate is his decision likely to be. No case has been cited before *Angel's* case which in terms threw any doubt upon the proposition affirmed in *Young v. Turing* and in the other judicial opinions above cited, and the fact is that on investigation it will be found that the attack upon them rests, not on any judicial pronouncement with respect to them, but upon the views put forward in Mr M'Arthur's book on Marine Insurance, first published in 1885. These views have been adopted by the editors of the seventh edition of Arnould on Marine Insurance, and found favour with the learned Judges who formed the majority in *Angel's* case. The works of average adjusters are no doubt sometimes referred to in cases of this class, but Mr M'Arthur's views are not, apparently, universally accepted by average adjusters, and, as he himself admits, are strongly opposed by an authority among them no less eminent than himself, Mr Lowndes, in his work on Marine Insurance, as well as by Mr Gow (see M'Arthur, 2nd ed. 1890, p. 149, note g; Lowndes, 2nd ed., s. 135; Gow on Marine Insurance, 2nd ed., p. 150, note). It is to be noted that Mr M'Arthur himself, as well as Mr Lowndes, treat *Young v. Turing* as a decision on the point. His chief arguments against the rule contended for are (1) that it might apply where the ship as it stood

could be sold for more than the break-up value, an hypothesis which is excluded, as has already been pointed out, by the terms of the rule itself; (2) the analogy of the practice in cases of constructive total loss of cargo. But, as pointed out by Mr Scrutton in argument and by Mr Lowndes in his book (2nd ed., sec. 133, note), the analogy between ship and cargo cannot for special reasons be made good. It remains to consider the passage inserted by the present editors in the seventh edition of Arnould on Marine Insurance (see section 1124). This is really an expansion of Mr M'Arthur's view, but they are undoubtedly the originators of the notion that the passage cited from *Young v. Turing* was "a dictum of Lord Abinger." But underlying the whole position is the fallacy that where in the statement of the uninsured owner test the break-up value of the ship is not expressly mentioned it must be deemed to be excluded. In this way they claim as authorities in their favour every case in which the proposition is stated in general terms, as, for instance, where Lord Watson, whom they quote, says, in *Sailing Ship Blairmore Company v. Macredie*, "in order to instruct a total constructive loss . . . it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration and repair." They treat this as an authority inconsistent with the so-called dictum in *Young v. Turing*. But what is there in the language there used to exclude the breakup value of the hull as a factor in the "cost of reparation and repair," to the carrying out of which it is by hypothesis applied? They likewise treat as an authority in their favour the direction of Tindal, C.J., in *Benson v. Chapman*, that "where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss." We are dealing, be it observed, with an owner deemed to be uninsured, whose vessel, which has never ceased to be his property, is lying at the bottom of the sea. She is a necessary factor in the formation of the repaired ship which it is proposed to bring into being; at whose cost, it may be asked, except that of her owner is she contributed to the new entity which is to be formed by the process of reparation? It seems to me that the direction of Tindal, C.J., so far from asserting that the value of a necessary factor in the reparation is to be excluded from the computation of the cost of that operation, throws the *onus* of making it good upon those who contend for such an inference. It is perhaps worth noting that though the last edition of Arnould, for which he was himself responsible, was

published as late as 1857, that is more than fifteen years after *Young v. Turing* was decided, the decision remained unquestioned in that work through all editions up to the seventh, the first by the present editors, published sixty years after the case was decided. May it not be possible that "the misconception which has," according to these learned editors, "been allowed to find its way into the minds of more than one of our learned Judges," and is "partly due to an *obiter dictum* of Lord Abinger," may in truth have found its way elsewhere? With regard to the decision in *Angel's* case I should perhaps add one word. Though Vaughan Williams, L.J., did not formally differ, it was because he thought that the facts were not sufficiently ascertained to warrant him in differing from the learned Judge in the Court below. But the whole train of reasoning in his judgment is directed to combating the proposition for which the respondents in this case contend. Stirling, L.J., seems also to have felt some misgiving as to whether the question was really raised upon the facts, but no doubt, on the assumption that it was, he, as well as Mathew, L.J., answered it in favour of the present respondents. With the greatest possible respect for these learned Judges, and for the reasons which I have given, I feel compelled to differ from them. In my opinion the judgment should be for the appellants.

Appeal sustained.

Counsel for the Appellants—Scrutton, K.C.—Bailhache—D. Stephens. Agents—Holman, Birdwood, & Company, Solicitors.

Counsel for the Respondents—J. A. Hamilton, K.C.—F. P. Mackinnon. Agents—Waltons, Johnson, Bubb, & Whatton, Solicitors.

PRIVY COUNCIL.

Thursday, April 2.

(Present—The Right Hons. The Earl of Halsbury, Lords Macnaghten and Atkinson, and Sir Arthur Wilson.)

HOULDER BROTHERS & CO. v. COMMISSIONER OF PUBLIC WORKS.

COMMISSIONER OF PUBLIC WORKS v. HOULDER BROTHERS & CO.

(CONSOLIDATED APPEALS FROM THE SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE.)

Ship—Charter-Party—Demurrage—Rate—Contract—Sub-Contract—Breach of Contract.

H. & Company agreed to supply a Commissioner of Public Works with a certain quantity of coal "on monthly shipments for six months," delivery to be accepted "at the rate of 120 tons per day for sailers, and 250 tons per day by