

July 20, 1813. had decided on the point of form, then the judgment must remain as it was.

INSURANCE.

Ordered and adjudged, that the cause be remitted to the Court of Session, to review the interlocutors complained of.

Agent for the Assured, CHALMER.

Agent for the Underwriters, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WATSON and others—*Appellants*.

CLARK—*Respondent*.

May 12, 1813.

INSURANCE.

INSURANCE on the Midsummer Blossom, an old ship, "at and from Honduras to London." Ship sails on her voyage, and, in a few days after, without adequate cause, becomes so leaky as to compel the Master to return. Vessel strikes on a reef of rocks, and is lost. Decided that she was *not* sea-worthy at the commencement of the risk.

THIS was a question of insurance upon the cargo of the ship Midsummer Blossom, of which the Respondent was owner. The vessel was lost in November, 1801, on a voyage from Belize river, in Honduras, to London; and the question was, Whether the ship was or was not *sea-worthy* at the time when she undertook to perform the voyage

homeward? The risk insured by the Appellants (underwriters) was, "*at and from Honduras to London.*"

May 12, 1813:

INSURANCE.

The underwriters having refused to settle the loss, the owner raised an action against them in the Admiralty Court; and after a variety of proceedings, and the production of several documents in regard to the state of the ship at different times, the Judge Admiral pronounced in favour of the underwriters, "*Finding that the ship or vessel in question, the Midsummer Blossom, was not seaworthy when she sailed from Honduras on the voyage insured, and that therefore the policy was null and void, &c. &c.*" This judgment having been brought under review of the Court of Session, in the form of an action of reduction, the Lord Ordinary appointed a special condescendance of the reasons of reduction to be given in. This having been accordingly done, he pronounced an interlocutor in favour of the owner, "*being of opinion that there was no evidence, express or presumptive, that the vessel in question was not seaworthy at the commencement of the risk.*" The underwriters reclaimed to the whole Court; but the Court adhered to the Lord Ordinary's interlocutor, and thereupon the underwriters appealed.

Action in Admiralty Court.

Nov. 18, 1803. Judge Admiral finds the vessel not seaworthy at the commencement of the risk.

Court of Session decides in favour of the assured, on ground that there was no evidence that the ship was not seaworthy.

It was admitted, "that the vessel had not been thoroughly inspected, and ascertained to be seaworthy, immediately before sailing on the voyage in which she was lost," and therefore her seaworthiness, or the contrary, at that time, could not be directly proved. The case therefore rested upon indirect and presumptive evidence, arising from the

May 12, 1815.

INSURANCE.
State of the
facts.

general state of the vessel, and events and circumstances of the voyage.

It appeared that the ship was thirty-five years old at the period in question; that she was built in 1766, had been thoroughly repaired in 1781, and received several partial repairs afterwards; one in her hull, immediately previous to her sailing to Honduras. She performed the voyage outward with ease. While in the river Belize, at Honduras, she was struck by lightning, and this destroyed her masts, (which were soon replaced,) but did no injury to the hull: she was then making twelve inches water in twenty-four hours. It was proved that the Respondent had found great difficulty in getting insurances done upon her in London at 25 and 26 guineas per cent., owing to the age of the vessel, combined with the unfavourable season of the year and the length of the voyage. The insurance in question was done at Aberdeen, at 15 guineas per cent. The subsequent facts appear in the following protest of the Master, First and Second Mates, and Carpenter, to which the Chancellor referred in his observations on the case. They stated, "That they sailed in the said ship from Belize river, in Honduras, on Tuesday, the 27th of October, 1801, on a voyage to London, with a cargo of mahogany and logwood, at which time the said ship was, to the best of their knowledge, and as they verily believed, *staunch, strong, and fit for the said intended voyage*; and at one P. M. came to anchor off Goff's Key.—Wednesday, at day-light, got under way in company with the ship Hope, bound for London, and the ship Nancy, for Ja-

Protest of
Master, &c.
referred to by
the Chancellor.

“ maica.—Thursday, the 29th October, Hat-key May 12, 1813.
 “ bearing west about four leagues from that, took INSURANCE.
 “ our departure *with fresh gales and squally wea-*
 “ *ther.* At ten, *fresh gales*, in mizen top-sail, jib,
 “ main-top-mast stay-sail, and mizen stay-sail. At
 “ four A. M. *very heavy rain and squally*, in one
 “ reef of the fore and main-top sail. At noon, ob-
 “ served, in latitude $17^{\circ} 18' N.$, the ship making a
 “ deal of water.—Friday, the 30th, *fresh gales and*
 “ *a very heavy sea* from the northward; the ship
 “ making so much water as to keep one pump con-
 “ tinually at work. At noon, observed in $17^{\circ} 50' N.$;
 “ the ship Hope on our larboard quarter; a *heavy*
 “ *sea*, and the ship making ten inches of water in
 “ an hour.—Saturday, the 31st of October, the ship
 “ continued making much water, pumping her
 “ every half hour.—Sunday, November the 1st,
 “ *fresh breezes and squally, with a heavy swell*
 “ *from the northward*; the ship Hope in company;
 “ the ship making so much water one watch could
 “ scarce keep her free. The people came aft to the
 “ Captain and complained, wishing him to proceed
 “ for Jamaica, as they thought it impossible to go
 “ to England with the ship. At noon, observed in
 “ latitude $18^{\circ} 15'$.—Monday, the 2d of November,
 “ fresh breezes from the northward and eastward,
 “ and at ten P. M. squally with rain, in jib,
 “ mizen-top sail, and one reef of the main-top sail;
 “ the ship making a deal more water, two feet and
 “ a half in the hour, and seven hands constantly
 “ employed at the pump.—Tuesday, November 3,
 “ moderate breezes; the ship still making much
 “ water; one pump constantly at work; the ship

May 12, 1813.

INSURANCE.

“ Hope in company. Observed in $18^{\circ} 30'$ N.—
 “ Wednesday, the ship still making two feet and a
 “ half water in an hour. At seven A. M. tacked,
 “ *and hove to, to endeavour to find the leak*; at
 “ eight tacked ship.—Thursday, *squally weather and*
 “ *a heavy sea*; the ship making more water; one
 “ pump could not keep her free. At noon, ob-
 “ served in $20^{\circ} 02'$ N.; both pumps at work.—
 “ Friday, November 6th, advice of all hands being
 “ asked, and both pumps still going, it was con-
 “ cluded best to return back, as they were not able
 “ to continue at the pumps; bore down upon the
 “ ship Hope, and informed them of our situation.
 “ At two P. M. bore up for Belize, at which time
 “ the ship made upwards of forty inches per hour;
 “ steady breezes and clear; find the ship going
 “ before the wind does not make so much water.—
 “ Saturday, the 7th, fresh breezes and clear; all sail
 “ set. At six A. M. made Ambergrease Key,
 “ distant about seven miles; squared the yards, and
 “ bore more away; the ship still making the same
 “ water.—Sunday, November 8th; at six P. M.
 “ in fore-top gallant-sail, main top-mast stay-sail,
 “ and jib; at eight in main-top gallant-sail; (at six
 “ P. M. Ambergrease bore west by south about
 “ three leagues;) at ten P. M. hauled up the fore-
 “ sail, and lowered the mizen top-sail on the cap;
 “ hazy thick weather; at twelve hove to with her
 “ head to the eastward. At half-past twelve the
 “ ship struck on Turneef; kept the pump con-
 “ stantly going, but found it of no use, the ship
 “ having three feet water in less than an hour;
 “ cleared the boats. At four A. M. the ship had

“ nine feet water in her; squally weather with
 “ heavy rain; got yards and top-masts down. At
 “ noon, the Captain and four hands set off for
 “ Belize river’s mouth, to get every assistance in
 “ his power, in order to save all that was possible
 “ for the benefit of all concerned.”

May 12, 1813.

INSURANCE.

The following letter, from the Captain to the owner, was also referred to by the Chancellor:—

“ Honduras, December 9, 1801.

Master’s letter to his owner.

“ I am sorry to state to you the loss of the Mid-
 “ summer Blossom. I sailed from here the 27th of
 “ October, in company with the ship Hope, Captain
 “ Storrow. On the second day after sailing from
 “ here, *I found the ship made much more water*
 “ *than common*, and kept increasing daily. On the
 “ 5th of November I encountered a fresh gale,
 “ which the ship then made forty-two inches water
 “ per hour, so as to keep the pumps constantly
 “ going. On the 6th I bore down on the Hope,
 “ and informed her our situation; and as all hands
 “ declared, that if the ship continued making the
 “ same water, they would not be able to keep her
 “ free longer than three or four days, so I concluded;
 “ and thought it most proper to bear up for the
 “ river Belize. I then reckoned in lat. 20° 02’ N.
 “ and lon. 85° 07’ by my account. On the 7th made
 “ the land; at eight P. M. shortened sail; at twelve
 “ A. M. hove to; at one A. M. struck, and ashore
 “ under the lee-side of Turneef, where there she re-
 “ mains. St. George’s Key bears from her W. b. N.
 “ All materials were saved and sold at public vendue;

May 12, 1813.

INSURANCE.

“ also the ship and cargo, for the benefit of all
“ concerned.”

From this state of the facts, two opposite conclusions were drawn by the litigating parties; the underwriters maintaining, that as the vessel had proved to be utterly unfit for the voyage so soon after her sailing, without any adequate cause to produce that unfitness subsequent to the period of her leaving the river Belize, the evident presumption was, that she was not sea-worthy at the commencement of the risk; while the owner contended that the leaky state of the vessel, which forced the Captain to put back, was owing to the tempestuous weather which she encountered subsequent to the time of her sailing from Honduras Bay; and the evidence of the existence of tempestuous weather during the period in question consisted of the above documents, and extracts to the same effect from the log-book.

As to the principles of law applicable to the case, it was maintained, on the part of the Appellants,

1st, “ That in no case ought the loss arising from
“ the inherent inability of the ship to fall upon the
“ insurer;” and “ that in every marine contract
“ there was an implied warranty that the ship
“ should be sea-worthy, tight, staunch, and strong,
“ properly manned, sufficiently stored, and fully
“ equal to the necessary fatigue of the particular
“ voyage intended at the date of the policy.”

2d, That an inherent defect, or want of sea-worthiness, must be presumed from the subsequent failure to perform, unless that failure should be

Park 220.
Marshall 364.
Magens II.90.
140.
Emerigon
580.
Marshall 364.
Le Guidon,
&c. &c.

Marshall 265.
Munro v.
Vaudam.
Park 221, 267.

shown to have arisen, subsequent to the commencement of the voyage, from the *extraordinary* perils of the sea.

May 12, 1819.

INSURANCE.

3d, That from these leading principles two other consequent rules followed of necessity; that in questions of this kind, the incapacity of a ship is as certain if she was unable to accomplish the whole as if she was inadequate to the accomplishment of any part of the contracted voyage; and that the legal presumption of inability must, in all cases where there were no stronger counter-presumptions, lay the *onus probandi* upon the assured, the vessel being understood to be warranted to be in a fit condition not only to begin, but to finish her voyage; and that neither the innocence nor ignorance of the assured could avail him against a breach of the implied warranty, the law on that head being absolute.

Mills v. Roebuck.

Park 221. 252.

Marshall 372.

Marshall 386.

273. 366.

Lee v. Beach.

Oliver v. Cowley.

Park 228.

Marshall 368.

369.

Christie v. Secretan. 3 T. R.

192.

The Respondents contended, that the law, as stated on the other side, did not apply to the facts. The vessel was proved, by the evidence of the Captain and others, to have been sea-worthy when she sailed from England, and had suffered no damage on the voyage; and that her leaky state, after sailing from Honduras, was owing to the stormy weather. Captain Rains, of the navy, stated that her making twelve inches water in twenty-four hours was a matter of no consequence, as very good vessels often did the same.

The Appellants, to encounter the inference attempted to be drawn from the effect of the weather, had produced to the Court of Session a certificate from the Regulating Captain at Leith, stating that

May 12, 1813.

INSURANCE.

he had read the log-book of the *Midsummer Blossom*, and that there was nothing in the state of the weather, as there described, that could hurt a sea-worthy ship.

Park for Appellants; *Gaselee* and *Horner* for Respondents.

Observations
and Judgment.

When the inability of a ship appears in a short time from the period of her setting sail, the presumption is, that it arises from causes existing before the commencement of the voyage.
Age of ship (35) not a proof of want of sea-worthiness, but of weight in evidence.

Lord Eldon (Chancellor) held it to be a clear and established principle, that if a ship was sea-worthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with, and the underwriter was liable. But when the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was, that it was from causes existing before her setting sail on her intended voyage, and that the ship was then *not sea-worthy*; and the *onus probandi*, in such a case, rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. He did not think himself justified in considering the mere age of the ship, which was thirty-five years, as a sufficient ground of itself for the conclusion that she was not sea-worthy; but surely this was a circumstance of some weight in the evidence. The vessel, too, before she sailed, made twelve inches of water in twenty-four hours; but this was a circumstance which in itself was stated in evidence by Captain *Rains* to be of no great importance; and he (*Rains*) had said that he would not hesitate to take up a ship for government service that made no more water in the

twenty-four hours. It was, however, to be considered, that this might be more or less material, according to the age of the ship. The fact of a ship of thirty-five years of age making twelve inches water in twenty-four hours was unquestionably to be viewed in a different light from a new one making the same quantity of water in the same time. In the latter case, it might be no evidence at all of inability; in the former case, in connexion with other suspicious circumstances, it undoubtedly might be very material evidence. Then their Lordships would consider the protest of the Captain, from which it appeared, that in two days from the time of her sailing she made ten inches of water in one hour, without any adequate cause alleged for it, or any cause, except fresh gales and squally weather. Now, though he did not pretend to much skill in nautical matters, yet he had been in a situation where he had an opportunity of hearing more of the conversation of seamen than perhaps any Judge on the bench, and if he were on board a collier, he should not be much afraid though he heard the seamen talking of fresh gales and squally weather. It was then discovered that the ship was unfit to perform the voyage, and an attempt was made to find out the leak, but the result of this attempt was not stated. If their Lordships could find out any adequate cause of this inability to perform the voyage, arising after the vessel sailed, then she might have been sea-worthy; but if they could not, then the presumption was, that she had not been sea-worthy at the time of setting sail; and it signified nothing as to this case, whether the vessel, after the inability

May 12, 1813.

INSURANCE.

Circumstance of her making 12 inches water in 24 hours of more or less weight according to the age of the vessel.

In two days from the time of setting sail, the ship makes 10 inches water in an hour, without adequate cause stated.

After the inability was discovered, it sig-

May 12, 1813.

INSURANCE.

nified nothing whether injured by striking on a reef of rocks, or in any other way.

had been discovered, was injured by striking upon a reef of rocks, or in any other way. Then it went on to state the return to Belize river, and that the vessel made upwards of forty inches water in an hour, and that too during steady breezes and clear weather; and that the ship could be kept afloat, even by pumping, no longer than three or four days. His Lordship then read the letter of the 9th December, and observed, that their Lordships would do full justice to this protest and letter, (*vide ante*,) if they held that no cause was alleged by them for the state of the vessel, except the nature of the weather.

The affidavit of the Captain stated, that the loss did not happen in consequence of any damage done by lightning, but that the ship, in the thickness of the weather, when returning, struck on a reef of rocks. Be it so; but if it was meant to infer from it, that this was the cause of the inability to perform the voyage, which inability had been before admitted when the bowsprit of the vessel was turned round towards Belize river, it was an inference of a fact which was physically impossible.

Question was, Whether any circumstance happened between the time of her setting sail and her return, that could account for her condition?

The true question was, Whether any circumstances which happened between her sailing from Honduras Bay and her return to Belize could be fairly considered as accounting sufficiently for the non-sea-worthiness of the ship? This was putting it perhaps too strongly. The question was, Whether their Lordships could say that the vessel had been reduced to such a state as that described, by such causes as were alleged for it? He had considered the case with rather a jealousy of the underwriters,

and yet he could not but think that the vessel was not sea-worthy at the commencement of the voyage. The case which the Respondent himself stated in his own favour required an answer; and surely, under these circumstances, the presumption was such as to throw the *onus probandi* upon the assured. This was a case, then, in which it appeared to him, on the whole, that want of sea-worthiness was sufficiently proved. He could not agree with Lord Meadowbank, that there was no evidence, express or presumptive, of a want of sea-worthiness at the time of commencing the voyage. He thought there was very strong presumptive evidence of it. He should propose, therefore, to reverse the decision of the Court of Session, and to say, with the Judge Admiral, that the vessel was not sea-worthy at the time of the commencement of the voyage, and that the policy was null and void. Then, as to the question of sending this back again to the Court of Session, if the justice of the case had required it, that must be done. But their Lordships would be cautious how they sent back again a case which had been disposed of there in 1802 or 1803, and was heard here in 1813. Considering the bias which the Captain must have, even in the first representation of the case, when it was necessary for him to justify his own conduct, it would be dangerous to send this back again for fresh evidence, after it was discovered where the shoe pinched. Such a step would, upon general principles, be too mischievous for their Lordships to listen to such a proposition in the present case. His noble friend near him,

May 12, 1813.

INSURANCE.

Vessel not sea-worthy at the commencement of the voyage.

May 12, 1813.

INSURANCE.

Principle of law, that if a vessel soon after leaving port is obliged to return, presumption is, that she was not at first sea-worthy, and the *onus probandi* is thrown on the assured.

(*Redesdale*,) who had presided in the Irish Court of Chancery with so much credit to himself and advantage to his country, and who, in addition to his knowledge of equity, was as good a common lawyer as any in the kingdom, he was happy to find, agreed with him in this opinion.

Lord Redesdale. He had always understood it to be a clear and distinct rule of law, that if a vessel, in a short time after leaving the port where the voyage commenced, was obliged to return, the presumption was, that she had not been sea-worthy when the voyage began, and that the *onus probandi* was, in such a case, thrown on the assured. The Court below appeared to have proceeded upon a different principle. This vessel, without any apparent cause of injury subsequent to her leaving port, was obliged to put back, being incapable of proceeding on her voyage. There was not only presumptive, but direct evidence that she was not sea-worthy; for if, upon the statement of facts, it appeared that there was neither bad weather nor any thing else to injure the vessel after her leaving port, and yet it was found that she was in a bad condition, and continued increasing in that badness; then it was clear that she could not have been sea-worthy when the voyage commenced. The principle upon which his opinion was founded was distinctly recognized in the books and cases.

The judgment was in the following form:—

“The Lords find, that the ship in question, the *Midsummer Blossom*, was not sea-worthy when

“ she sailed from Honduras on the voyage insured, May 12, 1813.
 “ and therefore find the policy null and void. And
 “ it is therefore ordered and adjudged, that the in-
 “ terlocutors complained of *be reversed*, and the
 “ defenders assoilzied. And it is further ordered,
 “ that the judgment be without prejudice to any
 “ claim of return of premium which the Respond-
 “ ents might have had at the commencement of this
 “ action.”

INSURANCE.

[The same judgment was pronounced in another appeal, arising from an insurance on *the ship*, in which the question was the same.]

Agents for Appellants, SPOTTISWOODE and ROBERTSON.

Agents for Respondent, ATCHESON and MORGAN.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

BROWN and others (Merchants)—*Appellants*.

SMITH and others (Underwriters)—*Respondents*.

SHIP insured “ at and from Liverpool to the coast of Africa, June 2, 1813.
 “ &c., and from thence to the West Indies and America.”
 On her arrival on the coast, the crew mutiny, and resolve
 to carry the ship to an enemy’s port; but, not being able
 to navigate the vessel, this is entrusted to the Boatswain,
 who, instead of making for Cayenne, as the crew imagined,
 steered for Barbadoes, where the ringleaders were seized,
 and some executed. Government Agent takes possession
 of the ship, and sells her, and her outward cargo and stores,

INSURANCE.