No. 1.

The Court, 26th April 1776, upon advising this petition and answers, adhered to their former interlocutor.

Reporter, *Lord Alva*. For the Chargers, *Crosbie*. For the Suspenders, *Ilay Campbell*. *D. of Faculty Dundas*.

*** This judgment was reversed upon appeal, 25th November 1776.

J. W.

1777. *December* 2.

JOHN DALRYMPLE *against* JAMES JOHNSTON and Others.

No. 2.

When a ship is short insured, the owner is to be held as insuring himself to the extent of the deficiency.

See No. 2. p. 7073.

IN the end of the year 1769, Captain Dalrymple proceeded on a voyage in the Neptune from Fraserburgh to Dantzick, and from thence back to Fraserburgh. Having arrived safe at Dantzick, disposed of his outward cargo, and procured a large homeward cargo, he ordered insurance. £300 was accordingly insured upon the cargo at London, and another insurance for £750 was made by Captain Dalrymple with Messrs. Cole and Bingley at London, upon the ship and goods. His factor, Mr. Higgens, at the same time, got an insurance made at Glasgow of £250, in goods only.

The underwriters there were Messrs. Johnston, Jackson, and Bogle.

The ship having been driven ashore upon the coast of Sweden, Captain Dalrymple wrote to the London and Glasgow underwriters, informing them of the misfortune, and requesting their advice and instructions for the government of his conduct. He received answers from both, authorising him to act in the best manner he could for the benefit of all concerned. Every thing was done accordingly by Dalrymple which was in his power, for the safety of the ship and cargo; but the expenses, after all his care, exceeded very considerably the amount of what was saved. Dalrymple having charged the underwriters for the balance due to him in consequence of the expenses he had been at in fulfilling their orders, he received from the London underwriters, without the least scruple or difficulty, their proportion of the loss, amounting to £850 Sterling, together with 15 *per cent.* upon that sum as the amount of his expenses. The gentlemen at Glasgow, however, did not seem willing to settle matters upon the same footing; upon which Dalrymple brought an action against them before the Judge Admiral, who, after a variety of procedure, found the underwriters liable in the sums charged. A bill of suspension having been presented by the underwriters, Lord Covington ordered informations and reported the cause.

Pleaded for the suspenders: The cases of the London and the Glasgow insurers upon this adventure are very different. It was the interest of the London insurers, who had underwritten upon the ship, to slump matters; for by

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this means they have laid more upon the underwriters, who insured only a part of the cargo, and had nothing more to do with the ship than they are justly liable for. But more particularly,

The assured, to the extent of what he was short insured, must stand in every circumstance of the voyage as his own underwriter, and must bear his share of the charges incurred in endeavouring to preserve the subject. The ship itself was short insured by £100. The freight was not at all insured including premium, and the goods were short insured also. The whole short insurance amounts to somewhat more then £275, which Captain Dalrymple must have lost altogether upon abandoning the ship, or in case of a total loss; so that if he chose to try to save something both for himself and the other parties concerned, he must be liable for his share of the expense thereby occasioned, he being at the same time entitled to what belonged to him of the property recovered. In this view of the case, it is impossible to consider the assured as a *negotiorum gestor* for the insurers, and entitled to be indemnified in full by them as he pretends, or that he might have abandoned the ship as a total wreck, leaving it to the insurers to do as they pleased. For that his interest was to the extent of the sums short insured, is a rule universally understood in mercantile practice, and is so laid down by the determinations of courts of law. 2d Burrow, 1171.

It is indeed said by the assured, that there was no such short insurance, for that the premium and the freight are not to be included. But with regard to the premium, it must be included as part of the interest to be insured, because insurance is meant for a complete indemnification, and the premium of insurance falls to be regarded as making a part of the value of the goods. It is an established rule, that wherever a charge falls to be made upon goods, the goods are to be rated at least at what they cost when aboard, and no distinction takes place with regard to the articles of which this cost may be made up. If goods, for instance, chance to be bought at a distance from the port, the carriage falls undoubtedly to be part of the price; or if the merchant has bought the unwrought materials, and got them manufactured, both the price of the materials, and the charge of the manufacture, must be added, in order to discover the cost of the goods at shipping. In the same manner the premium of insurance must also be taken in to the account. It is money laid out as much as carriage. The merchant will state it in his books, and charge it in his sales, and accordingly by the ordinances both of the city of Hamburgh and of Amsterdam, the premium of insurance is ordained to be computed as well as other insurable subjects, 1st Magens, p. 37. Sect. 37. 2d Ibid. p. 130. Sect. 7.

As to the freight, it immediately became one of the subjects of the voyage when the goods were put on board at Dantzick; and as the assured did not insure its value, he must stand insurer for it himself. He was therefore concerned, and had a real and substantial interest to the amount of £120 Sterling,

No. 2. which is admitted would have been the amount of the freight. The freight must be understood to commence that moment the goods are put aboard the ship, and the owner is as really a creditor for it as for a sum due by bond, and is at full liberty to insure the one as well as the other. The freight, it is true, is frequently *not payable* till the ship's arrival, but this does not prove that the right to it did not exist from the beginning. The distinction betwixt the existence of obligations and the time of the performance, is well known in law. Thus house rents become due immediately upon the tenants entry, but are not payable till the term be elapsed, during the currency of which *dies cedit sed non venit.* It is true, that if the cargo be totally lost in the course of the voyage, no freight is due; but this does not disprove the prior existence of the right to the freight. This is of the nature of a *resolutive* condition, not of a *suspensive* one, and may be also exemplified in the case of house rents, where if the house chance to be burnt or otherways destroyed, during the currency of a term, without any fault on the part of the tenant, no rent can be demanded, while at the same time it does not from thence follow that the obligation on the tenant did not commence with his possession. Tonge *against* Watts Strange, 1251, Hilary term, 19th George the Second; Luke against Lyde, Michaelmas term, 33d George the Second, reported by Burrow. Molloy, B. 2. C. 4. § 4. Roccus, Number 181. Voet. ad Tit. Loc. Cond. From these reasonings and authorities, it appears, that the right of the freight commences whenever the goods are put aboard; that this right is not altogether dependent upon the arrival of the ship at the port of destination, nor dissolved even by the shipwreck, if but any of the goods are saved. It is in short an inseparable attendant of the goods. If they be totally lost no freight is due by the freighter; and it is to provide against that event that insurance of the freight becomes necessary, so as to make good to the owner of the ship the whole freight, or whatever part of it may be lost. The owner of the ship having thus a substantial interest to the amount of his freight, it is of consequence a legal subject of insurance, and the assured in so far as he has not insured, must be considered in this respect to have short insured.

It was in the third place contended for the underwriters, that the proceeds of the ship and cargo ought not to be blended, because this confounds the interests of parties, by making their particular properties be considered as a common fund, while the underwriters on the ship, and the underwriters on the goods, are really distinct from one another. When the different parties in the present case agreed to join in endeavouring to save the ship and cargo, this did not mean that these different subjects were to alter their natures or properties, and from thenceforward to become common, nor that the charges incurred were to be paid in any other way than according to the interests of those concerned. And if, from the different interests of the parties, the one is in a better situation than the other, no law in the world will oblige them to communicate profit and loss, being in no co-partnership.

Argument for the assured. No. 2.

1*st*, As to the premium of insurance being an insureable subject, the law no doubt allows the insured to insure to the extent of the premium, so as to cover himself totally from a loss, if a loss should happen; yet, it is by no means requisite to make an insurance to that extent, for it is an *equitable* interest which is permitted to be insured, not a strictly *legal* one required under the penalty of being held as short insured to that extent. It is in the power of any person to cover himself against any loss at all by insuring the premiums, but he is under no necessity of doing so.

2*d*, With regard to the freight, it is neither more nor less than a consideration, paid to the owner of a ship, for carrying goods from one port to another. If the work be not performed, from the nature of the contract no freight can be due, no more than wages would be due to a workman, which he had stipulated for performing a certain piece of work, but which he had either failed, neglected, or found it impracticable to perform. The freight therefore, strictly speaking, can only be due upon delivery of the goods at the destined port; and if the vessel be wrecked in the voyage, or the goods perish, or be so much damaged as to be totally abandoned by the owner, no freight will be due. If the owner indeed be willing to receive the goods, the master is in that case entitled to insist for the whole freight, provided he implement his contract;—and the owner must pay the freight if he receives the goods, however much damaged they are. But if the owner or merchant refuses to take the goods, an end is put to the claim of freight entirely, for the master can demand no freight for carrying forward to the port of destination, the goods which the owner disclaims any further concern with. All these principles are clearly laid down in the case Luke against Lyde, quoted by the suspenders, and from them it evidently follows that freight is a conditional benefit, arising to the owner of the ship on the delivery of the goods at the port of destination.

That this profit of freight may be insured, it is unnecessary to dispute, but a variety of circumstances must concur in order to it. Thus it is necessary, that a freight should be settled and ascertained upon a particular cargo before it can be insured, which precise sum of freight must be the subject of insurance. But in the present case, there are not *termini habiles* for such freight. The assured was proprietor of the ship to the extent of 5-eighths, and he was *institor* of the ship, having the direction of her in the course of the voyage. He was also sole owner of the cargo. How then was it possible for him to make a contract of affreightment, unless he was to sit down in his cabin at Dantzick, and enter into a formal contract with himself, to pay himself a certain sum in name of freight for the homeward voyage, and afterward to write to London to get that sum insured? Such an insurance might be deemed fraudulent, at least equally inexpedient as an insurance of seamen's wages, since it must na-

No. 2. turally tend to make a shipmaster less solicitous about the concern in general than he would otherwise be.

The cases quoted by the underwriters, prove no more than that where a sum has been specially contracted for in name of freight, that sum may be insured when the ship itself is likewise insured. But this is far short of what is necessary to be maintained in the present case, to wit, that freight must be insured in all cases, whether specially bargained for or not, and even where it is not possible for such bargain to be made.

3dly, The only light in which the assured is to be considered here, is merely as a *negotiorum gestor*, or rather a *mandatarius*, there having been a total abandonment of both ship and cargo by the owners, that abandonment being accepted of by the insurers, and they having become *eo ipso* responsible for a total loss. For repayment of this total loss, the assured had a clear title, on account of his insurance. But in his new character of acting for the benefit of the insurers, and by their orders, he has a claim for indemnification of the money laid out by him for their behoof; for which indemnification the present action is brought.

4thly, With regard to the proceeds of the ship and cargo being blended, there was no possibility in the nature of things of separating the expense of saving the ship from the expense of saving the cargo. The operation with regard to both was one and the same, and the proceeds of both hence fell to be applied to it indiscriminately. A discretionary power was intrusted to the charger, which he conducted *tanquam bonus pater familias*; he is clearly, therefore, entitled to indemnification by the *actio mandati contraria*.

The Court (5th February 1777,) pronounced the following interlocutor: "Find, that as the charger was sole owner both of the ship and of the cargo on "board of said ship in her homeward voyage, in so far as there was a short insur-"ance either by omitting to insure subjects which might and ought to have been "insured, or by insuring, at under value, the subjects which were insured, the "charger himself must be held as insurer to the extent of these deficiencies; and "find that as the ship though valued in the policy at £800 Sterling, was insured "only at £700 Sterling, whereby there was a short insurance upon the ship "to the amount of £100 Sterling, and that though the invoice price of the "goods aboard said ship was £623 Sterling, they were insured to the extent "only of £600 Sterling, whereby there was a short insurance upon these of "£23 Sterling; the charger stood insurer for both these deficiencies, and "is bound to contribute with the other insurers *pro rata* in making good the "damages sustained by the after disaster and wreck of the ship and cargo, and "the expenses incurred in endeavouring to save the same, to the amount, as "per particular account in process, of £447. 2*s*. 10*d*. Sterling; and find, that "though by the mercantile law and practice, the owner of the ship and goods "is allowed to cover the premium of insurance by adding the same to the sum

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" insured upon the ship and goods respectively, yet as that is a privilege and " indulgence which the owners are at liberty to use or not, and which when " used has no influence upon the real value of the ship and goods; and as in " this case the premium of insurance was not included in the sum insured either " upon ship or cargo; the charger did not stand insurer for these premiums, " nor is bound to contribute for them in making good the damages; and find, " that as the freight had no reality or existence either at the time when the " goods were put on board, or when the shipwreck happened in the course of the " homeward voyage, and was then only *in spe* or expectation upon the after " contingent event of the safe arrival of ship and cargo at the port of destination, " which event never took place by reason of the total wreck of ship and cargo, " whereby any claim which would otherwise have been competent for the sti- " pulated freight was effectually sopited, the same cannot come *in computo* as a " subject liable to any contribution in making good the damages, nor is the " charger to be stated as insurer of the freight; and find, that what was afterward " recovered of the wreck of the ship remained the property of the owners " of the ship, and that what was recovered of the wreck of the goods, did in " like manner remain the property of the owners of the goods, and consequently " that the sum of £76. 4*s*. 1*d*. Sterling, being the price at which the savings " from the wreck of the ship were sold, and the sum of £185. 9*s*. 3*d*. Sterling " being the price at which the savings from the wreck of the goods were sold, " must belong to the owners of the ship and goods respectively; and find, " that the sum of £447. 2*s*. 10*d*. Sterling, expended by the charger in endea- " vouring to save the ship and cargo, must be made good by the underwriters " conform to their respective interests, the charger contributing his proportion " to the extent of the short insurance for which he stands insurer; and remit " to the Ordinary to proceed accordingly, and further to do as he shall think " just."

Both parties reclaimed. But the Court, upon advising their respective petitions and answers, adhered (2d December 1777) to the whole interlocutor, and found the underwriters liable in expenses.

Lord Ordinary, *Covington*. For the Assured, *Crosbie*. For the Underwriters, *Ilay Campbell*, *Rolland*.

J. W.

1800. *January* 22.

JOHN CAMPBELL *against* ROBERT ALLAN, Agent for the Westminster Insurance Society.

No. 3.
Restitution of the premium refused, although the

JOHN CAMPBELL insured £2000 for one year, on the life of Thomas Allan, with his father Robert Allan, agent in Edinburgh for the Westminster Insurance Society, and paid £24. 18*s*. as the premium.