

SECT. II.

Abandonment to the Insurers where the goods suffer damage.

1780. February 1. JAMES EDMONSTONE *against* WILLIAM JACKSON.

No 28.

When the owners of a ship, which has been captured, are entitled to abandon it to the insurers.

IN September 1776, the ship *Duntreath*, belonging to James Edmonstone, was, by William Jackson, insured at the value of L. 1300 from Grenada to Florida, and from Florida to Grenada.

At the date of this policy, the ship had, in prosecution of the adventure, arrived at Florida. In its return, it was, on the 29th of November, taken by an American privateer, retaken about five weeks after, and brought to Rhode Island. From Rhode Island it was carried to New York, and there underwent a thorough repair; the expense of which, with the salvage, amounted to L. 658. It remained at New York till January 1778, when it proceeded on its voyage to Grenada; but was again taken by the enemy, retaken, and then carried into Grenada. From the second capture it had received no damage; but no person appearing at Grenada in behalf of the owners, it was appraised and sold, by order from the Court of Admiralty there, and the proceeds, which amounted to L. 1045, deposited, after payment of the salvage and other charges, in the hands of the keeper of Admiralty register.

Mr Edmonstone sued the underwriter before the High Court of Admiralty in Scotland, 1st, for L. 658, as the amount of the salvage and repairs paid at New York; and, 2dly, for L. 1300, being the whole sum underwritten by the policy; the second capture and recapture, with the proceedings at Grenada, being considered as a *total* loss, and the pursuer being willing to abandon to the defender the proceeds of the ship lodged in the Admiralty register at Grenada.

To the first conclusion no objection was made; but in bar of the second it was *contended* by the defender, That the insured was entitled only to the salvage paid to the recaptors, and the other charges, if any, incurred by them in bringing the ship to Grenada.

This question was brought under the review of the Court of Session, by an action for setting aside a judgment of the Admiralty Court, by which the insurer's plea had been sustained.

Pleaded for the pursuer; In the language of insurance, a loss is *total* when the plan of the voyage has been deranged, when the property has been altered, or greatly injured. The object of the insured is, to secure himself from every loss which may arise in the prosecution of a particular adventure. This could not

be obtained, were he, in such cases, obliged to accept reparation merely of the actual damage, and afterwards to bestow his labour and time in following out a voyage which can no longer be beneficial to him. While a ship in particular remains in the possession of the enemy, the insured is without doubt entitled to recover the value. The subsequent title to restitution, arising from the recapture, which must be made effectual with much trouble, risk, and expense, cannot deprive him of that right, nor reduce him to a worse situation than before; Aitken's Reports, p. 195.; Sir James Burrough's Reports, v. 2. p. 685. *Goss versus Withers*.

Nearly two years had in this case elapsed between the ship's setting out and arriving at its destined port. In the interval, a loss equal to half the insured value had been sustained, and it had been twice seized by the enemy. It was afterwards sold by the recaptors, by virtue of the powers given to them for that effect. The mode of accounting most agreeable to the principles of insurance, and least liable to dispute, is, that the insurer should come in place of the insured, by the cession here proposed.

Answered, The consequences of the first capture and recapture being settled by the parties on the footing of an *average* loss, the question now at issue must depend on the events subsequent to the ship's departure from New York.

Insurance is merely a contract of *indemnification* of the losses therein provided against. The insured are therefore not at liberty, on account of an inconsiderable loss or delay, to throw up all charge of the subject insured, or to neglect any thing to which they would have attended if that had remained at their own risk; Magen's Essay on Insurance, v. 2. p. 92, 138, 272, 274, 230, 65, 75, 192, 352. Such a conduct would be repugnant to that good faith so essentially requisite in this contract, and could only proceed from an over-valuation, or other circumstance unconnected with the policy, and for which no consideration was given to the underwriter.

In this instance, the owner, or his agent, on the ship's arrival at its place of destination, ought to have claimed it from the recaptors. Upon payment of the salvage, his property was in the same situation as if it never had been seized; as if it had been ransomed for an eighth of the value, or had escaped entirely, with a loss in its rigging to that extent; cases where it is certain no abandon would be permitted. On these principles the Courts of England decided in a case precisely similar to the present; Sir James Burrough's Reports, v. 2. p. 1198, *Hamilton versus Mendez*. No regard was there paid to the ideal divestiture of property occasioned by a temporary capture; and it was held, that where, without any great delay, or material damage, a ship had arrived at its destined port before any action brought, or any offer to abandon, the insured were entitled only to a verdict for an *average* loss. The cases quoted on the other side were decided on specialties, remarked by the judge who pronounced this decision.

No 28. THE COURT laid out of view the events preceding the ship's departure from New York; and found, 'That in this case the insured was not entitled to abandon the ship on account of the second capture; and that the insurer was only liable for a partial loss; and therefore assoilzied from the reasons of reduction.'

Lord Ordinary, *Gardenston.*

Act. *Ilay Campbell.*

Alt. *Blair.*

C.

Fol. Dic. v. 3. p. 334. Fac. Col. No 103. p. 195.

1786. *June 16.*

GAVIN KEMPT and COMPANY *against* WILLIAM GLEN, and Others.

No 29.
Whether an
abandon may
not be made
by the insured,
when
only a part of
the goods is
proved to
have suffered
damage.

CERTAIN goods belonging to Gavin Kempt and Company, were insured by William Glen and others, on a voyage from the river Clyde to Antigua. The ship which was to carry them sailed from Greenock on 18th November 1782.

On 7th December, the ship was overset in a gale of wind; but soon was brought to rights, and proceeded on the voyage.

On 24th January following, the ship was captured by the enemy; she was retaken on 26th; and on 29th arrived at the place of destination in Antigua.

Afterwards, in consequence of an application in behalf of the owners, the goods were sold by authority of the Admiral. No regular appreciation was made; and from the account of sales, a very few articles appeared to have been damaged. But the prices fell more than 50 per cent. below the insured values.

The owners brought their action against the underwriters, as if the loss had been a total one; and

Pleaded; The object of insurance on any adventure, is to protect the party insured from every disadvantage to which his property would otherwise have been exposed. Whenever, therefore, the loss has been such as renders the adventure no longer worth his attention, he is permitted to abandon his property to the underwriters, and to betake himself to the indemnification provided in his favour by the policy. This, then, the pursuers were here warranted to do; their goods having been so depreciated, either by the damage occasioned by the storm, or in consequence of the capture by the enemy, as to be sold at less than a half of their original value.

Answered for the defenders; Such a surrender can only take place when the goods insured have never reached their destined port, or when so material a delay has intervened, as entirely disappointed the purpose of the voyage. In those cases, the adventure covered by the policy having essentially failed, the loss may be justly deemed a total one; and a general abandonment has been allowed, as the most expeditious, as well as the most accurate method of adjusting matters between the parties.