

# APPENDIX.

## PART I.

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### MUTUAL CONTRACT.

1777. *February 20.*

JAMES HOGG, and MESSRS SCOTT, STEWART, and M'KENZIE, his Assignees,  
*against* The TRUSTEES and CHILDREN of JAMES INGLIS.

By a contract entered into betwixt the pursuer and James Inglis, merchant in Edinburgh, Inglis became bound to take on board the ship Batchelor, the pursuer, his family and servants, and about two hundred emigrants, and to proceed with them to North Carolina. Mr. Hogg, on the other hand, became bound to make payment to Mr. Inglis of a certain sum in name of freight, for himself, his family and the emigrants, of which one half was paid before the ship left Leith Roads, and the other half when the passengers were taken on board at Thurso-bay. The reason of the freight being thus paid per advance, was on account of the peculiar nature of the outfits on this voyage, and the large quantity of provisions it was necessary to lay in.

After setting sail from Thurso-bay, the vessel was obliged, by distress of weather, to put into Stromness in Orkney; and afterward having taken her departure from Stromness, she again met with such contrary winds, as forced her to put into Voila Sound in Shetland, in the utmost distress.

Before the vessel could leave Shetland, it became necessary to send out a sloop from Leith with materials for refitting the vessel, which Mr. Inglis accordingly did. But it was found that these repairs were not sufficient to enable her to proceed upon her voyage to Carolina, and she was accordingly brought back to Leith, in order to be refitted there. Several of the emigrants quitted the vessel on this occasion, and returned home.

When the vessel arrived in the harbour of Leith, it was sometime before she could be got into dock; and the pursuer, his family, and the remaining emi-

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No. 1. grants, who had been detained all the winter in Shetland, and had been waiting for their voyage for nearly a year, began to doubt whether Mr. Inglis really intended now to proceed with the vessel on the purposed voyage. The pursuer, accordingly, having addressed a letter to Mr. Inglis, on this subject, received an answer from him, which he considered as a refusal to proceed on the voyage; in consequence of which he and the emigrants having assigned their different claims to Messrs. Walter Scott and Andrew Stewart, Writers to the Signet, and Chas. M'Kenzie writer in Edinburgh, an action was brought against Mr. Inglis at their instance, before the Admiral, for restitution of the freight, and for damages; and Mr. Inglis having afterward died, the action was transferred against his representatives.

The Judge Admiral found, by his first interlocutor, that Mr. Inglis was liable in repayment to the pursuers of the freight, making some deductions, with the interest, and modified the damages to the sum of £4. Both parties having reclaimed against this interlocutor, the Judge Admiral pronounced a second judgment, in which he adhered in substance to the former interlocutor, but modified the damages to £10. This interlocutor having been brought before Lord Auchinleck Ordinary, he ordered answers to be put in to the bill, which having been advised by Lord Hailes, Ordinary on the bills, was refused by him.

A reclaiming petition having been presented, and the bill passed;

Pleaded for the defenders: A great part of the sum received for freight was laid out in equipping the vessel and laying in provisions, which have been in a great measure consumed. It would be very hard, if after having executed *bona fide* the whole articles prestable by him till the unfortunate disaster which disabled the vessel from proceeding, the defender should be made to refund the whole sums received, and lose all the articles of equipment and furnishings into the bargain.

In cases of common affreightment, where, in consideration of the master's undertaking to carry a parcel of goods from one port to be delivered at another, and upon performance thereof stipulates a certain premium to be paid to him, it may be true, that, where the ship becomes so disabled as not to be fit to perform the voyage, no freight is due to the master or owner. But the present case is different, where the covenant is, that the whole freight should be paid before the vessel takes her departure, from her home port. This difference it from contracts *locati conducti*, in which it is not usual to pay the wages or hire before the service is performed. Here, from the nature of the outfits, this became absolutely necessary; and it is the universal custom of merchants, that where ever the contract of affreightment is such, that the freight is to be paid before the vessel sets out on her voyage, no repetition of the freight in such case lies, if by any accident not proceeding from the fault of the master, she is prevented from accomplishing the intended voyage. In proof of this, the defenders appealed to the opinions of several London merchants of emi-

nence which they had obtained. And the principle for refusing repetition is a very plain one, viz. that the person who paid the freight has it in his power to secure himself against all loss, by insuring the same, while the owner, or master of the vessel, cannot insure that which he has actually received.

At any rate, allowing that this fatality was to resolve the contract entirely, so as to oblige the defenders to repeat the freight, they ought at least to have deduction of the value of the provisions, which were consumed by those very persons on whose account the freight was paid, not barely for passage, but for their maintenance during their voyage.

Besides, as to the other ground of the judgment against the defenders, viz. that Mr. Inglis had refused to proceed on the voyage, it was stated that this was a very strained inference from his letter; and that at any rate, he having immediately after got the ship put into dock, and so completely refitted as to be able to proceed on her voyage, and having notified to the pursuer, and the other emigrants, his readiness to proceed, this offer, even though he had been somewhat dilatory before, is sufficient to save him from the conclusions of this action. Indeed, from the pursuer not accepting this offer, it evidently appears that he was not wishing to obtain a *bona fide* implement of the contract, but to evade the performance of it, and to procure, on account of those emigrants who had now changed their minds, and chose to remain in Scotland, repetition of that freight, which has been laid out in fitting up a vessel, peculiarly adapted for their voyage to America.

Answered for the pursuers :

The interlocutors complained of are in reality more favourable than the defenders had reason to expect, since no damages in fact have been awarded, and they have only been found liable in repetition of the freight. There is no ground for any distinction, betwixt the case of goods, and the case of passengers, nor betwixt paying before hand, and after the voyage is performed. The obligation to perform is the same on the owner. If he be at greater expense in fitting out the ship, it is to be supposed, that he puts on a freight in proportion. It is entirely a contract of chance; and the obligation is equally binding in all cases of affreightment. This clear principle is not contradicted by the opinions of the merchants, appealed to by the defenders. Without entering into any particular discussion of these opinions, it follows, from the defenders' own principles, that if it is at all in the power of the owner, or master, to perform his contract, and he notwithstanding abstains, he cannot be entitled to the freight, either by retaining it if received, or recovering it if not received. This can only happen where the vessel has been so irreparably damaged, that it cannot be refitted so as to proceed on the voyage. But this is not the present case; for Mr. Inglis actually refitted the vessel, and afterward offered to proceed in the voyage. This offer indeed was made too late, and cannot avail the defenders, as Mr. Hogg had already contracted for his passage in another vessel, and the other emigrants had been previously dispersed. And as to the

No. 1. claim for deduction of the value of the provisions, when it is considered that the passengers had to maintain themselves all the winter in Shetland, and that they received provisions from the owner only when at sea, no claim can be competent to the defenders on this account.

The Court pronounced the following interlocutor: 'In respect that the vessel was not totally disabled, and that James Inglis declined to perform his contract, after his return from Shetland to Leith, Find, that the representatives of the said James Inglis are bound to repeat the whole freight, without deduction of any of the price of the provisions consumed in the first parts of the voyage, and remit to the Lord Ordinary to proceed accordingly.'

The defenders having submitted this interlocutor to review, it was stated for them, that the *rationes decidendi* of the Judge Admiral, and of this Court, though they ended in the same conclusions, were totally dissimilar in their principles, and that it was therefore necessary to examine these principles with the greatest attention. The Admiral had found that no freight is due where the vessel is totally disabled, and the interlocutor of this Court has found, that the vessel not having been totally disabled, this is a ground for repetition of the freight. With regard to the proposition in the Admiral's interlocutor, it would be most unjust, if, by disability, arising not from the fault of the owner, or master, but from unavoidable accident, he was to be liable in repetition of the freight, when by such disability he suffers a loss, to which the freight is no way adequate, while the loss suffered by the freighter is comparatively inconsiderable.

But if the error of the Admiral consisted in drawing a wrong conclusion from his premises, the error of the interlocutor of this Court consists in establishing wrong data. The vessel, though not totally disabled to proceed in any voyage, was so far disabled as to be unable to proceed in her original covenanted voyage, and it was not till at the distance of some months, that she could be got so repaired, as to proceed in a new voyage. In this light, therefore, and upon the principle laid down by the Court, the defenders ought not to be liable in repetition of the freight.

But besides, it is to be considered, that the interlocutor of the Court finds Mr. Hogg, and all the emigrants, entitled to this repetition, whereas, if upon inquiry it should appear that all or most of them had changed their minds, and resolved not to proceed in the voyage, it would be manifestly unjust, to give them repetition of that freight, when they had abandoned the voyage for which it was paid. The interlocutor is, at all events, therefore, too general, by throwing the whole emigrants into one mass, when they ought to be distinguished according to their respective situations.

The pursuers answered, that to suppose the freight to be the property of the owner, even where the voyage is disappointed by a total wreck, is contrary to the general principles of law. The contract of freight, is a *locatio operarum*. If the freighter, or *conductor operis*, call on the owner to implement, it may be an excuse for his non-performance, that he is not able to perform: But his

inability to implement is no reason for insisting that the other party should implement to him. It is in fact the very reverse, and the reason why no implement can be demanded, while the *locator operarum* can have no hire for what he does not perform. And accordingly, it is laid down by all the authorities, that where the voyage cannot be performed, there is no title to the freight: Voet. Tit. *Locati Conducti*, § 27. Postlethwaite, *voce* Freight. Beawes' *Lex Mercatoria*. Savary, *voce* Freight, and Magen's Collections.

As to the freighter's insuring or not insuring the freight, it makes no difference; for the insurers would have had the same action against the defenders, which the pursuers now have. And as to the argument founded upon the after offer of Mr. Inglis, it is evident that in the contract of freight the owner must perform with good faith and alacrity, and otherwise it would be most imprudent in the freighter to trust him after his refusal with the execution of the voyage. Nor was it in consequence of any change of mind that the subsequent offer of proceeding in the voyage was not accepted of, but on account of the poor emigrants having been all dispersed before it was made.

Some of the Judges were of opinion, that even though there had been a total disability to proceed in the voyage, the defenders were liable in repetition of the freight. A condescence, however, was ordered, with regard to the facts relative to the requisitions made by Mr. Hogg, for Mr. Inglis to proceed in the voyage, and relative to the disposition of the emigrants, and their families, to proceed in the voyage, before Mr. Inglis's offer. Upon advising which, the Court adhered to their former interlocutor.

Lord Ordinary, *Haites*. Act. *Geo. Ogilvie*. Alt. *Dean of Faculty Dundas, Craobie*.

J. W.

1777. July 30.

DAME MARY WIGHTMAN, Wife of SIR JAMES FOULIS of COLLINGTON, BART. and MRS. JANET WIGHTMAN, Spouse to JOHN BROWN in Easter Salton, and their said Husbands, Pursuers, against GEORGE WILSON, and his TUTORS and CURATORS, Defenders.

THE deceased George Wilson, mason in Edinburgh, grandfather of the defender, in his contract of marriage, (7th April 1758,) with Miss Wilhelmina Wightman, his second wife, provided her, in the event of her surviving him, with £100 Sterling of jointure *per annum*, and the whole of the household furniture. She was likewise to have the disposal, of the sum of £500 Sterling, payable at the first term of Whitsunday, or Martinmas, next after the decease of the longest liver of him and his said future spouse: And with full power to her to appropriate, distribute, and divide the said sum, to and

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the case  
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p. 9201.  
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