

of conduct on his part, and that he neglected the legitimate interests of his debtor, I should have sustained the action, and remitted it to probation on those grounds. But I am of opinion that this case presents no such aspect. I therefore agree that the interlocutor should be recalled and the action dismissed.

LORD CRAIGHILL—I am entirely of the same opinion. In most cases where relevancy is to be a ground of judgment, in whole or in part, we are not in the habit of dealing strictly with the record when the party by whom the averments are made is seeking to enlarge that which has been put forward as the base and scope of his case. Sometimes matter may be introduced into the record by which the difficulties entertained on the subject-matter of contention are lessened; but where, as in this case, the party declines to accede to any proposal of that kind, the consequence is that we are left to determine a point like this on the pleadings as they stand. And I have no doubt in my own mind, in regard to the allegation on the record of a recal of the authority, and in regard also to the allegation of reckless and irregular conduct on the part of the defender in carrying through this sale, that the judgment your Lordship has proposed cannot be avoided.

LORD RUTHERFURD CLARK was absent.

The Court recalled the Lord Ordinary's interlocutor, found that the record contained no relevant statements to support the conclusions of the action, and dismissed the action.

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agents—Brown & Patrick, L.A.

Counsel for Defender—Wallace. Agents—Russell & Dunlop, C.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

WHITWORTH & BROTHERS v. SHEPHERD.

Ship—Insurance—Abandonment—Transfer of Share—Process—Mora.

A ship was stranded, and the owner intimated to the underwriters who had insured her that he abandoned her, and claimed for a constructive total loss. On this footing he sued one of them, who settled the case, by paying him the whole sum which he had underwritten. It was afterwards decided in an action against the other underwriters that there was only a partial loss. The underwriter who had made the payment then brought an action against the owner to have it found that having accepted an abandonment, and paid a claim on that footing, he had an interest in the vessel to the extent of that payment, and for an accounting. The ship had meantime been unprofitable. The Lord Ordinary gave decree for the value of a share of the ship corresponding to the pursuer's payments, but expressed the opinion that an offer by the defender to transfer such a share would have been an answer to the action. The defender

reclaimed, and offered such a transfer, but the pursuer declined to accept it except on condition of being freed from losses down to the date of the tender. *Held* that the offer came too late, and that the pursuer was not bound to accept it.

In May 1879 the screw-steamer "Krishna," of Glasgow, was stranded on the coast of India, near Bombay. She was insured at a value of £9000, of which £500 was underwritten by Benjamin Whitworth & Brothers, of Manchester, and the remainder with an insurance company and Glasgow underwriters. On 7th June her owner, Joseph Augustus Shepherd, of Bombay, tendered total abandonment of her to the underwriters, and claimed as for a constructive total loss. Whitworth Brothers disputed this claim, and Shepherd raised an action against them in England, which was settled before trial on the footing of the defendants (Whitworth Brothers) paying the total sum sued for, viz., £500, as the sum contained in the policy, £75 under the suing and labouring clause, and £20 of interest thereon, in all £595, together with the costs of the action.

The Glasgow underwriters also disputed (in the Scottish Courts) liability for a constructive total loss, and in an action against them (reported February 25, 1881, 18 Scot. Law Rep. 349, and December 1, 1881, 19 Scot. Law Rep. 577, 9 R. (H. L.) 1) it was held by the House of Lords that the loss was partial, not total.

Thereafter average adjusters found the partial loss to be 20 per cent. of the value of the ship.

From the time when the vessel was salvaged, and taken to a port of safety, in November 1879, Shepherd used her as his own, and he did so at the date of the action, retaining her whole earnings and exclusive control over her.

On 20th September 1883 Whitworth Brothers, having used arrestments, raised an action in the Court of Session against Shepherd, concluding for decree for £700, with interest at 5 per cent. from 7th June 1879 (the date on which he had intimated total abandonment to them) till payment, and further, to have the defender ordained to exhibit an account of his intrusions with the vessel and with the freight, and other moneys derived therefrom, from 23d May 1879 till the date of his lodging such an account, whereby the true balance due by him to the pursuers might appear, and to pay them the sum of £700, or such other sum as should appear to be the true balance due by him to them, with interest, from 7th June 1879.

The pursuers stated that they had accepted the abandonment of the "Krishna." "(Cond. 7) By the abandonment and acceptance thereof fore-said, and the payment made by the pursuers in respect of said policy undertaken by them, the pursuers acquired and had vested in them a right of property in said vessel to at least an extent proportionate to the amount insured by them by said policy, which was not less than one-eighteenth share of the whole vessel." "(Cond. 9) The value of the share to which the pursuers acquired right by virtue of said abandonment, acceptance thereof, and payment, is not less than £700. The defender, however, refuses to pay this sum, or any sum, to the pursuers, or to give to the pursuers control of the said share, although he has appropriated and still retains as his own the said share of said vessel, and the whole freight and earnings thereof and effeiring thereto. On payment of said

sum and interest thereon, the pursuers are willing, from and after the date of payment, to give up their right to said share to the defender, their claims to the bygone earnings and freight of the ship being also satisfied. Moreover, although the defender has been called upon by the pursuers to render an account of his intromissions with said vessel and the freight and earnings thereof since 23d May 1879, and to make payment to them of the balance due to them thereon, he has failed to do so. The amount of the nett balance of said freight and earnings effeiring to the share or interest in said ship acquired by the pursuers as aforesaid, for the period down to the raising of this action, is not less than £700. If the said nett balance effeiring as aforesaid is less than £700, then the deficiency is due to the fault and negligence of the defender, and he is liable therefor. In these circumstances the present action has been rendered necessary."

The defender referred to the proceedings in the English action, and denied that there had been any acceptance of the abandonment. He refused to recognise the pursuers' right to payment of the sum sued for, and to give them control of the vessel, and to render an account of his intromissions. He stated that the vessel was mortgaged for a sum of £13,168, by mortgage dated 11th October 1881."

The pursuers pleaded—" (1) The pursuers having accepted the abandonment by the defender of the said vessel, and in respect thereof paid him the amount insured by him under their policy, as also the sum payable by them under the sue and labour clause of said policy, they are entitled to one-eighteenth part of said vessel. (2) The share in said vessel belonging to the pursuers amounting in value at least to £700, and the defender having wrongfully taken possession of said share and dealt therewith as his own, and still insisting on his right to do so, the pursuers are entitled to decree for said sum, with interest and expenses as concluded for in the first conclusions of the summons. (3) The defender having taken possession of said vessel, and dealt with her and her freight and her earnings as his own, and the pursuers having an interest in her, and the said freights and earnings, for which the defender has failed to account, the pursuers are entitled to have an accounting made to them by the defender, and to payment of the balance due them as shown therein, with interest and expenses as concluded for in the conclusions of the summons to that effect. (4) In the event of the nett balance of freight and earnings effeiring to the pursuers' said share amounting to less than £700, the pursuers are entitled to decree for any deficiency, in respect the same is due to the defender's fault."

The defender pleaded—" (3) The averments of the pursuers are irrelevant. (4) The pursuers' averments, so far as material, being unfounded in fact, the defender is entitled to absolvitor, with expenses. (5) In any event, the pursuers are not entitled to decree for more than the proportion of the sum sued for corresponding to their interest in the said policy."

The Lord Ordinary (M'LAREN), after a proof, pronounced this interlocutor:—" Finds that by the abandonment of the 'Krishna,' the pursuers acquired an interest in that vessel to the extent

of one-eighteenth of her value, being the proportion which the sum assured by them (£500) bears to the total value: Finds that the defender has mortgaged the 'Krishna' for a sum exceeding her value, and is unable to give the pursuer an unencumbered transfer: Finds that the value of the vessel has depreciated to the extent of 20 per cent. by stranding, and that the value of the pursuers' interest was equal to the sum insured, less 20 per cent, or £400, and decerns against the defender for payment of that sum, with interest at five per cent. from 24th May 1880, being the date of the settlement of the policy: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—This is an action by underwriters, or the representative of underwriters, against the owners of the 'Krishna,' claiming, in respect of the abandonment of certain shares in the vessel to them, the value represented by those shares, and a sum representing the interest of the underwriters in the freight. The claim arises in this way, that the 'Krishna' in the summer of 1879 was stranded off the coast of India, near Bombay, while on her voyage to that port, and thereupon the owners intimated to the underwriters a claim for a settlement on the footing of a constructive total loss. That claim was ultimately disputed by the underwriters, and an action against the underwriters, who are the pursuers in the present action, was brought in the High Court of Justice in England. Another action, as I understand, was instituted against the Scotch underwriters, who were the largest insurers of the vessel, in the Sheriff Court of Lanarkshire, which, after being appealed to this Court, ultimately went to the House of Lords. The result of these two actions was different. In the action instituted in England, Messrs Benjamin Whitworth & Brothers, the present pursuers, ultimately withdrew their defences, and paid the full sum claimed, as the receipt bears, in settlement of the action. The sum paid was £595, and it consisted of £500, being the sum insured, £75 which was claimed under the suing and labouring clause, and £20 of interest. It appears to me to be indisputable that a payment in full in settlement of an action is a payment subject to all the conditions under which the plaintiff or pursuer makes his claim, and therefore, that when Messrs Whitworth, for themselves and the other underwriters whom they represent, made payment in full, they did so as for a constructive total loss, and with the result that the vessel was abandoned to them to the extent of the share of its value which they had insured. But in the action instituted in Scotland the underwriters pressed the case to a decision, and it was found, in accordance with what appears to be the truth of the case, that this was not a constructive total loss but only a partial loss. The Sheriff's judgment was affirmed in this Court, and I think that in the House of Lords it was held that as it was a judgment in fact they could not review it. Now, in pursuance of this decree, the question of partial loss was put into the hands of average stators, the one party representing that the partial loss was twenty-five per cent. of the value of the ship, while the other party stated it at fifteen per cent. The mean of these two valuations was taken, and the underwriters paid twenty per cent. upon the sum which they had insured,—that is, to cover the cost of repair-

ing the vessel, or restoring her, and the depreciation, if there was any, in her value. The sum insured by the present pursuers is only £500, out of a total value of £9000, and I have to consider in the first instance what were the rights of the pursuers when they accepted the abandonment and paid the sum which they had undertaken to pay by their policy. Their right, I apprehend, was to require the owners to execute a transfer to them which would enable them to be registered as owners to the extent of the interest which they had acquired in the vessel by abandonment. But they do not appear to have been very active in the prosecution of their right. A correspondence took place, I think, nearly two years after, which led to no satisfactory result, and then this action was instituted. If at the present time the ship had been, as she was when the insurance was effected, unencumbered, I think that the right of Messrs Whitworth and the parties whom they represent would have been now just what it was at the date of the settlement—a right to a transfer, and along with that, probably, an accounting for the freight that had been earned by the ship since she was put into proper repair. But before this action was brought, the owners effected a mortgage on the vessel to the extent of £13,000—a circumstance which was stated to me in evidence, and is not in dispute. The vessel is therefore mortgaged to an extent exceeding its value, and a transfer to the pursuers would not be productive of any benefit to them unless the mortgage was at the same time cleared off. If I had been informed by the shipowner that he intended to clear away the mortgage, and was willing after doing so to transfer the vessel to the extent required, probably I might have felt compelled to dismiss this action, as having been brought upon the assumption that the owner was not going to give a transfer. But it is plain that it would not be for the interests of the owner to displace a mortgage of £13,000 in order to enable him to settle a claim of £500; and accordingly it was explained by counsel that this was not contemplated, and that I was not to assume there was any intention in the meantime of paying off the mortgage. Then it appears to me that the case is in the position in which it would have been if Messrs Whitworth had in the first instance sued for a transfer, and the defender being unable to give an unencumbered transfer, had refused or been unable to implement the decree. The remedy of the pursuers would then have been to bring a new action for payment of damages, being the value of the share of the vessel which had been withheld from them; and when I am informed that there is no intention of giving an unencumbered transfer, I think it would be in the highest degree inconsistent and prejudicial that I should dismiss this action merely that an action leading to no result should be brought for a transfer, and then that we should have this action revived again. I think, on the contrary, that it being ascertained that the defender is not in a position to give an unencumbered transfer, the right of the pursuers has arisen to a pecuniary payment or compensation equal to the net value of their interest in the ship, and the only question is, what is that value? Now, there is not very much evidence as to the actual value of the vessel, but there is nothing to suggest that she

was insured in excess of her real value, and I may therefore assume as a basis that she was worth £9000 when the insurances were effected. She was damaged by stranding, as has been ascertained by decree of this Court, followed by payment to the extent of 20 per cent. of her worth, and therefore in adjusting this pecuniary claim on the part of the underwriters who paid in full, I must make a deduction of 20 per cent. from the value of their share of the vessel—I mean that just as the shares which remained to the owner were diminished by 20 per cent. through the stranding—that being the sum that was made up to them—so with respect to this £500, which is one-eighteenth of the total value of the vessel, I must hold that the vessel was injured to the extent of 20 per cent. of that £500, and that her value to the pursuers was lessened in proportion. Their share was therefore worth, when abandoned, to them £400; I mean the share which they received by abandonment was £400 instead of £500, the difference being the measure of the injury which the vessel had sustained by stranding. Without entering into any more elaborate calculation, I am prepared to give decree for the £400, with interest, as representing the loss which the pursuers have sustained in consequence of the defender having failed to transfer certain shares of the vessel to them, in proportion to the interest which they had acquired in her by abandonment. Interest on this sum will run only from the date when the insurance money was paid—24th May 1880—because up to that time interest was running on both sides of the account. I also find the pursuers entitled to expenses.”

The defender reclaimed, and stated that he now tendered the share in the “*Krishna*” as at the date of the abandonment, which, in accordance with the view of the Lord Ordinary, was a sufficient answer to the action.

The pursuers argued that this tender came too late. They were not bound to accept such a tender, the result of which would be that they would have to bear the losses which depression of trade had caused the “*Krishna*.”

At advising—

LORD JUSTICE-CLERK—It is unfortunate that the defender did not make originally that offer which he has now made at the end of the case. The Lord Ordinary has decided against him on the ground that no tender of transference of a share corresponding to the extent of the value which this insurer had made good to the insured had been made. On the contrary, it is admitted on record that he refused to allow the insurer the amount of control proportionate to the shares. In the ninth article of the condensation the pursuers say—“The defender, however, refuses to pay this sum, or any sum, to the pursuers, or to give to the pursuers control of the said share.” The answer to that is—“Admitted that the defender refuses to recognise the pursuers’ right to payment of the said sum, and to give them control of the said vessel, and to render an account of his intrusions.” This refusal, then, substantially continued till the Lord Ordinary heard and decided the case. For my own part I think the tender would have been good if it had been made *tempestive*, but the defender is not entitled to go back now; it is too late for him, when the Lord Ordinary has given judgment against him, to

tender actual implement of the original obligation. The value of the shares may have materially changed.

I am therefore of opinion that he cannot complain if after he has refused to implement the contract found to be binding on him, he is now precluded from tendering actual specific implement.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Reclaimer—Trayner—Guthrie.
Agents—Maconochie & Hare, W.S.

Counsel for Respondent—J. P. B. Robertson
—Dickson. Agents—J. & J. Ross, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

JAMIESON (DUNDAS' TRUSTEE) AND ANOTHER *v.* THE FORTH BRIDGE RAILWAY COMPANY.

Railway—Construction of Railway—Compulsory Taking of Land—Compensation.

The promoters of a railway company, one of whose proposed undertakings was the erection of a bridge over an estuary, entered, while the bill in which they sought powers to carry out the undertaking was in Parliament, into an agreement with the proprietor of an island in the estuary to pay to him £1500 for the right to erect piers thereon, and in full of compensation for damage caused by such erection—the payment to be contingent on the Act passing and the works being commenced. The Act passed, the works commenced, and the £1500 was paid, and a discharge in full of claims for ground taken and for compensation was granted. Thereafter the company obtained a new Act, authorising a deviation from the line of railway which was to pass over the bridge, but under which the bridge was to be of the same position and character. This Act provided that the company should “abandon the construction of the railway” authorised by the former Act. It gave them power to take such land as might be required for the construction of the new line. They then gave notice that they intended to take the whole of the island. The proprietor maintained that the £1500 already paid to him by the company under the former Act was not to be taken into account in estimating the amount of compensation payable to him for the loss of the whole island. *Held* that the amount formerly paid ought to be taken into account.

In 1873, when the Forth Bridge Railway Bill of that year, for the incorporation of the Forth Bridge Railway Company, and for authority to the company to make certain railways, one of which was to cross the Firth of Forth by

a bridge, was passing through Parliament, one of the proposals of which bill was the acquisition of part of the island of Inchgarvie in the Firth of Forth, forming part of the estate of Dundas, an agreement was made between the provisional directors of the company of the first part, and James Dundas of Dundas, George Dundas, younger of Dundas, and George Auldjo Jamieson, Chartered Accountant in Edinburgh, trustee on the Dundas estate under trust-disposition executed by George Dundas, on the second part. The second parties had opposed the progress of the bill in Parliament. By the agreement they agreed to withdraw all opposition to the bill, “on the condition that the first parties, contingent on the Act being obtained, and also contingent on the works being commenced, paid to them ‘for the right to erect the necessary piers in execution of the powers asked by the said bill, on the island of Inchgarvie,’ and ‘in full of all claims for compensation therefor, amenity, residential damage, and damage to remaining lands, and of all other claims which they have or could have by or in consequence of the execution of the said works, whether of a temporary or permanent nature, the sum of £1500, said payment to be made within twenty-one days from the date of any portion of the said works being commenced.’” The first parties undertook, within six weeks after the passing of the bill, to deliver to the second parties a formal agreement to the above effect, under the seal of the company, the first agreement to be void on the execution of the formal agreement.

The bill passed in August 1873, and became the Forth Bridge Act of that year, the railways permitted by it to be made being enumerated in section 5.

On 17th September 1878, the company, by a minute endorsed on the agreement, ratified and confirmed it in its whole articles and conditions, and agreed, contingently on the works therein referred to being commenced, to pay to the second parties in the agreement, as proprietors of Inchgarvie, “for the right to erect the necessary piers in connection with the powers contained in the said Forth Bridge Railway Act 1873, and in full of all claims for compensation therefor, amenity, residential damage, and damage to remaining lands, and of all other claims which they have or could have by or in consequence of the execution of said works, whether of a temporary or permanent nature, the sum of £1500; said payment to be made within twenty-one days from the date of any portion of the said works being commenced.”

The company commenced their works on the island on 23d September following, and paid £1500 to Mr Jamieson as trustee, who granted a discharge, *inter alia*, in the following terms—“Therefore I do hereby, as trustee foresaid, discharge the Forth Bridge Railway Company not only of the said sum of £1500 paid to me as aforesaid, but also of all claims for ground required, taken, or occupied, or to be taken or occupied, by the said Forth Bridge Railway Company, on the said island of Inchgarvie, for the execution of the works authorised by the said Forth Bridge Railway Act, 1873, and for compensation for the right to erect the necessary piers in execution of the powers contained in the said Forth Bridge Railway Act 1873,