

“ 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.”

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[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,

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for the benefit of all concerned: Decided, that, under these circumstances, the assured were entitled to abandon, and recover as for a total loss.

Terms of the policies.

THIS was a question of insurance on the ship and cargo of *The Friendship*, employed in a voyage to Africa in the slave-trade. The insurance was in the names of the Appellants, and all others concerned, “at and from Liverpool to the coast of Africa, during the stay and trade at any ports and places there, and from thence to the port and ports of discharge, sale, and final destination, in the British or foreign West Indies and America,” upon any kind of goods and merchandises; and also upon “the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called *The Friendship*, beginning the adventure upon the said goods and merchandizes from the loading thereof at Liverpool, and to continue on the ship, &c. until moored at anchor twenty-four hours; and on the goods and merchandizes till discharged and safely landed.”

The perils insured were the common ones, including “barratry of the Masters and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c. or any part thereof.”

The Friendship, in prosecution of the voyage for which she was insured, sailed from Liverpool the 9th August, 1801, under the command of William

Beamish Lane, and arrived off the coast of Africa, in Majumbo Bay, on the 6th October thereafter. Soon after her arrival, and before any slaves were taken in, the crew mutinied, and resolved to carry the ship into an enemy's port.

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Mutiny of the crew.

On the sixth day after the vessel had anchored, it being necessary for the Master to go on shore, he landed from one of the boats, and directed the boatmen to wait his return on the beach; but no sooner had the Master turned his back, than, disobeying the orders given by him, they sailed to the vessel, to put her under the command of the mutinous party. In the middle of the night, that part of the crew who were not in the conspiracy were disturbed by the sound of musquetry on deck; and on coming up they discovered that the Second Mate, who had been on watch at the time, was shot by the mutineers. The other two Mates were roughly handled. The mutinous part of the crew soon acquired the undisputed command of the vessel, and having cut the cable, they set sail, with the avowed intention of proceeding to an enemy's port.

A short time after the mutiny broke out, the First Mate, Third Mate, and five of the sailors who would not join in the piratical scheme that had been formed, were permitted to go on shore in the whale-boat, and they carried along with them a very considerable quantity of the *ship's stores and provisions*: others of the seamen who were desirous of joining this party were refused permission, as their assistance, it was thought, would be necessary in the course of the future voyage. On the appearance of the whale-boat in the offing, the Master

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proceeded in a canoe to meet it, and was then informed of what had happened; and the seven men who had been allowed to quit the vessel in the whale-boat became his companions in a voyage in quest of the ship.

The mutinous crew determined to sail for Cayenne, but none of them being able to navigate the ship, they were obliged to apply for assistance to the Boatswain, Mr. Sherborne, to whom, on this account, they had refused permission to land. The Boatswain, with pretended readiness, undertook the task, appearing to favour the views of the crew; but secretly determined, with the co-operation of one or two whom he could trust, to steer a different course, and accordingly conducted the vessel to Barbadoes, where she was boarded and taken possession of by a ship of war. The mutineers were put in irons, and some of the ringleaders tried and executed.

Ship conducted to Barbadoes.

Government Agent takes charge of the ship.

The Government Agent at Barbadoes took charge of the ship; and, in the absence of the Master, and without waiting for orders from this country, he found it necessary to dispose of *the whole of the cargo and stores* that still remained in the ship on her arrival at Barbadoes.

The Captain and his followers, in the mean time, sailed in the boat for St. Thomas's, where he supposed the ship might touch; from thence he went to Demarara, and then to Barbadoes, where he found the ship, with nothing but the hull and rigging remaining.

Correspondence in regard to the ship.

The Government Agent, before he disposed of the ship, wrote to the Appellants a letter containing

this passage:—" I observe, in your instructions to
 " Captain Lane, that, after selling the cargo of ne-
 " groes, if he could obtain 2000*l.* sterling for the
 " ship, he was to do so: *and did I not conclude that*
 " *the vessel and cargo were insured, I should buy*
 " *her on your account, and load her to you; but on*
 " *considering the voyage is broken up, and peace*
 " *having taken place, which will reduce the price*
 " *of shipping, I think it will be more advisable to*
 " *sell every thing, and remit you the net proceeds,*
 " *with the proper documents for recovery from the*
 " *underwriters."* On the 2d day of March, 1802,
 he again wrote the Appellants:—" I am very
 " anxiously waiting to hear from you, as should it
 " be your wish to purchase in the ship Friendship,
 " (should she sell very cheap and below your limits
 " considerably of 2000*l.*) I would do so, and obtain
 " for her a load home; but should that not be the
 " case, she shall be sold, and the affairs closed im-
 " mediately."

Captain Lane, the Master of the vessel, after his
 arrival at Barbadoes, wrote to the Appellants, and
 the following passage occurred in his letter:—" I
 " found, upon my arrival here, the cargo had been dis-
 " posed of by Mr. Maxwell, being the King's Agent
 " here. He informed me he had not disposed of
 " the ship until your answer to him respecting your
 " wish to buy the ship, (which he said he daily ex-
 " pected,) in which case he would immediately load
 " her for Liverpool; and as he had seen your orders,
 " desiring I would sell the vessel for 2000*l.*, and
 " that he had every reason to believe she would go

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Dec. 6, 1801.

Letter of the
 King's Agent
 at Barbadoes
 to the Appel-
 lants.

March 3, 1802.

Letter from
 the Master of
 the vessel to
 the Appel-
 lants.

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Feb. 4, 1802.
Appellants'
answer to the
King's Agent
in Barbadoes.

“ off for much less than the value you set upon her,
“ he thought it proper to consult you,” &c.

In answer to Mr. Maxwell's letter of 6th Decem-
ber, 1801, the Appellants wrote in the following
terms :—“ We are duly favoured with yours of the
“ 6th of December, informing us of the melancholy
“ fate of the ship Friendship. We are, however,
“ glad the business has got into your hands ; and as
“ the time is particularly hazardous with regard to the
“ stability of the underwriters, as they are winding
“ up their accounts, and several are expected to
“ be found wanting, therefore we must earnestly re-
“ quest you will hand us immediately the sales, and
“ a remittance for the proceeds of the ship and
“ cargo, without which we can make no settlement
“ with them. You see, therefore, how precariously
“ we are situated in this unfortunate affair, and that
“ dispatch in the settlement may prevent us suffer-
“ ing a very heavy loss. We, however, hope to be
“ favoured with the needful before you receive this ;
“ and in the expectation of hearing from you,
“ we are,” &c.

In consequence of this letter, Mr. Maxwell de-
termined to sell the vessel immediately, and he ac-
cordingly wrote to the Appellants :—“ Annexed you
“ will be pleased to find copy of my last respects,
“ since which I have received your favour of the
“ 4th February by the ship Ilam, and observed that
“ you had abandoned to the underwriters. You say
“ nothing about buying in the ship and loading her
“ home to you, which has determined me imme-
“ diately to advertise her for sale for the most she

March 14,
1802.
Letter from
the King's
Agent at Bar-
badoes to the
Appellants.

“ will bring. She will be sold on Monday the 22d
 “ instant, when all the transactions shall be closed,
 “ and forwarded with net proceeds by next op-
 “ portunity after,” &c.

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The ship was sold accordingly.

The Appellants, immediately upon hearing of the fate of the ship from the agent's first letter, gave notice of abandonment to the underwriters.

Notice to the underwriters of the resolution of the assured to abandon,

The question was, Whether or not, under these circumstances, this was a total loss ?

The underwriters in Scotland having refused to settle as for a total loss, the assured raised their action in the Admiralty Court, and obtained a decree for their whole demand. The underwriters presented their bill of suspension to the Court of Session, which was passed as to the ship, but refused as to the sums underwritten on the cargo, and therefore the underwriters settled for the latter sums. The only remaining question, therefore, was as to the ship. The parties having, by order of the Lord Ordinary, given in informations to the Court, the reasons of suspension were sustained, and the letters suspended ; or, in other words, the Court reversed the decree of the Judge Admiral, as to the sums underwritten on the ship, and discharged the underwriters, and thereupon the assured appealed.

Nov. 11, 1803.
 Decree of the Admiralty Court in favour of the assured.

Court of Session decides in favour of the underwriters, as far as regarded the ship.

The Respondents maintained,

1st, That the assured were not entitled to abandon, because the ship was not lost ; but, on the contrary, as tight, staunch, and strong, as when she arrived on the coast from Liverpool. The general maxim, that if the voyage was lost the assured

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Manning v.
Newnham.
Park 169.—
Milles v.
Fletcher.
Doug. 219.—
Fitzgerald v.
Pole.
5 Brown. P.C.
131.—Mar-
shall 504.

2 East. 109.

Mitchel v.
Eddie.
1 T. R. 608.

might abandon, imported nothing more, than that they might abandon that particular interest with regard to which the object of the voyage was not accomplished. It was not meant, that if the cargo perished the owners might abandon the ship, though in perfect safety at her port of destination; nor that, if the ship was wrecked, the freighter might abandon the cargo in the above predicament. *The ship*, it was admitted, sustained no damage during the voyage. She arrived in the West Indies in safety, and this was the extent of the obligation undertaken by the underwriters. The general maxim might apply to cases where the ship, though not lost, nor in danger of being lost, could not reach her port of destination, but was not applicable to the present case. The case of the *Good Fellow* privateer was directly in point, and decidedly in favour of the underwriters. There the crew mutinied, the object of the voyage was lost, but the vessel arrived at her destined port in safety, and the underwriters upon her were discharged. They also relied on the case of *Shaw v. Felton*.

2d, It was likewise contended that the assured had not abandoned in time; and,

3d, That, if they had abandoned in time, they had afterwards waved that abandonment by interfering with the sale of the vessel, in a manner contrary to the interest of the underwriters.

On the part of the Appellants, it was contended, that,

1st, The cases of capture and recapture, where the voyage was ultimately performed, had no appli-

cation in favour of the Respondents. Here the voyage was totally lost, and it was absurd to say that the ship had performed it within the meaning of the policy. The general rules which governed cases of this sort were well known and settled. They were summed up in the dicta of learned Judges, countenanced by a train of decisions. “*Insurance being made on the ship for the voyage, if either the ship or the voyage be lost, that is a total loss.*” (Mr. Justice Buller, in *Gazalet v. St. Barb.*) “*If the voyage be absolutely lost, or not worth pursuing, under these and many other like circumstances, the insured may disentangle himself and abandon.*” (Lord Mansfield, in *Hamilton v. Mendez.*) It was contrary to every principle to say, because the hull of a ship is found in a port which falls within the general description of the places to which she was insured, brought in there in a state of mutiny, deprived of her lawful commander and officers, not under the control of the assured or their agents, but in the hands of mutineers, without cargo and without stores, and, at the time of her seizure by the mutineers, not having completed any one act of her mission, that therefore she has performed the insured voyage within the meaning of the policy. The underwriters engaged for the ship’s arrival at the port of destination free from perils *in the course of her legitimate trade.* Here the ship has not so arrived, and therefore it seems clear within all the decisions, that the assured may recover as for a total loss, having abandoned.

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1 T. R. 187.

2 Bur. 1209.

2d, The resolution to abandon was communi-

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cated to the underwriters as soon as the assured received information of the misfortune; and,

3d, As to the allegation that they had waved the abandonment, they had done nothing more in respect to interference than what was agreeable to constant usage and the requisition in the policy, “*that the assured shall sue, labour, and travel, in and about the defence, recovery,*” &c. &c. of the property insured.”

Messrs. Adam and Nolan (for Respondents.) It had lately been decided, that the loss of the voyage was not necessarily the loss of the ship. Insurance was a contract of indemnity. Suppose two insurances on a ship from Edinburgh to London, one on the ship, the other on the cargo; the cargo, consisting, for instance, of fish, might be lost, and yet the ship reach her proper port in perfect safety. Could the assured bring in the insurer on the ship under these circumstances? The undertaking by the underwriter on the ship was, not that she should perform her voyage, but that, until she arrived at her port of destination, he would protect the assured against a total or partial loss *of the ship*. The case of the assured rested entirely on *dicta* of Buller and Mansfield. The case of *Parsons v. Scott*, (in C. P.) and the case of *Bainbridge v. Neilson*, (in K. B.) were decidedly in favour of the view of the case contended for on the part of the underwriters, though the Judges must have had all these *dicta* before them.

1 Taunt. 363.

10 East. 329.

(*Chancellor*. The House of Lords determined,

in *Fitzgerald v. Pole*, that the loss of the voyage was not the loss of the ship; but the Courts in Westminster Hall got out of that, no one knew how.)

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5 Br.P.C.131.

By the decision in the case of *Parsons v. Scott*, the old rule was restored, in opposition to the *dicta* above mentioned, which were mere *obiter dicta*; as the decision, in the particular cases, did not turn upon them. In the cases of *Goss v. Withers*, *Hamilton v. Mendez*, *Mills v. Fletcher*, the ship had suffered considerable damage. Here, though the cargo was lost by barratry of the mariners, the ship was safe. Another point was, that the instructions to the Master were, to go first to Surinam and Demarara, and then to St. Vincent's, &c.; whereas, the words of the policy were, to her port, &c. in the British or Foreign West Indies, and afterwards to America; and it was decided, that where a vessel was to go to more ports than one, they must be taken in the order of the policy.

2 Bur. 695.
2 Bur. 1209.
Doug. 219.

Messrs. Park and Brougham (for Appellants.) In the trading map, Surinam and Demarara were in the West Indies; but, at any rate, the vessel had been carried to Barbadoes first, owing to the mutiny of the crew. This, like every case of abandonment, depended, in some measure, on peculiar circumstances. What they went upon was this, that, under the special circumstances of the case, the underwriters ought to be put in their place. They were not called upon to maintain, that, in all cases, the loss of the voyage was the loss of the ship. The case of *Fitzgerald v. Pole* was quite different

5 Br.P.C.131.

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1 Taunt. 363.

from the present; and the case of *Parsons v. Scott* applied as little. Here there was an utter dilapidation, which was wanting in both these cases. The underwriters might as well say that a vessel was in good safety if the hull was raised up again, though she had before sunk, and the whole crew had perished. As to the question of abandonment and waver, they would only just notice, that the assured had, by the first post, communicated their resolution to abandon, and had only interfered afterwards for the interest of all concerned, the underwriters having refused to act.

Judgment.

Lord Chancellor. Under the particular circumstances of this case, he was of opinion, that the assured were entitled to abandon, that they did abandon in time, and that the abandonment was not waved.

Ordered and adjudged, that the interlocutor complained of be *reversed*, and that the decree of the Court of Admiralty, of 11th Nov. 1803, be *affirmed*.

Agent for Appellant, CHALMER.

Agent for Respondent, MUNDELL.