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by the appellants from the respondents, the owners, to proceed to Riga or St. Petersburgh, from St. Andrews, warranted by the respondents "completely fitted, and sound "to proceed on the voyage." She sprung a leak on her voyage out, and was lost on her voyage home. In an action on the policy, the defence stated was, that the ship was not sea-worthy. The Court of Session, after various interlocutors, sustained action for the sum in the policy. In the House of Lords this was reversed.

For the Appellant, *J. A. Park*, *Ralph Carr.*
For the Respondents, *David Douglas*, *Fra. Horner.*

WM. ROBINSON of Banff, CHAS. KER of Liverpool, ROBERT AINSLIE, Writer to the Signet, and JAMES CAMPBELL of Edinburgh, and GEORGE ROBINSON, W.S., Edinburgh, Underwriters on the hull and materials of the ship Midsummer Blossom, ... } *Appellants;*

WM. CLARK, Junior, of Wallsend, Esq., and PATRICK IRVINE, WS., Mandatory, } *Respondents.*

House of Lords, 15th May 1813.

INSURANCE—UNSEAWORTHINESS—CONCEALMENT.—A vessel was insured from Honduras to London. Soon after leaving the harbour she became leaky, and returned again to port. In doing so, she struck against a rock, and was lost. In an action for the sum in the policy, held there was no sufficient evidence of unseaworthiness. Reversed in the House of Lords, and held that the ship was to be taken as having been unseaworthy at the time of sailing on the voyage insured.

The appellants are underwriters on the hull and vessel, Midsummer Blossom, of which the respondent Clark is proprietor; the vessel was lost in Nov. 1801, on a voyage from Belize river in Honduras to London; and the question for decision was, if the ship was or was not sea-worthy at the time when she undertook to perform, or sailed on her homeward voyage? The risk assured was, "at and from Honduras to London." The vessel was thirty-five years old. She sailed from Belize harbour on 28th October.

Soon after sailing on her voyage she became leaky, and returned again to port. In doing so, she struck, and was lost.

Action having been raised for the sum in the policy, the appellants stated this defence, that the vessel was not sea-worthy at the time she sailed on her voyage insured. They also stated, that her situation, while lying in the river Belize, in Honduras, had not been disclosed to them.

The Judge-Admiral found, after various procedure, and production of documents, "That the ship or vessel in ques-
"tion, the Midsummer Blossom, was not sea-worthy when
"she sailed from Honduras on the voyage insured, there-
"fore, finds the policy null and void, and assoilzies the de-
"fenders."

A reduction was brought of this decree before the Court of Session. It came before Lord Meadowbank, Ordinary, who pronounced an interlocutor, setting forth, that "there Nov. 13, 1804.
"was no sufficient evidence, express or presumptive, that
"the vessel in question was not sea-worthy at the com-
"mencement of the risk," and reduced and decerned accordingly. On reclaiming petition, the Court adhered. And, May 16, 1806.
on second reclaiming petition, the Court adhered.* Nov. 26, 1806.

Against these interlocutors the present appeal was brought, with a special reference to another appeal, Watson *v.* Clark, Dow, vol. i. p. 336, which had reference to the cargo.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,—

"My Lords,

"I notice, first, in this case, what was *last* noticed by the re-

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* Opinions of the Judges :—

LORD PRESIDENT CAMPBELL.—"Sea-worthiness is to be presumed if the common attestations of carpenters are produced. The loss may have been occasioned by striking on the reef.

THE LORD JUSTICE CLERK (HOPE.)—"It is enough that a ship is apparently in a state of sea-worthiness when she sails, and that the owners believe so. There was no opportunity of surveying and repairing at Honduras. The burden of proof is on the underwriters to show that she was not sea-worthy before she sailed on her voyage."

LORD MEADOWBANK.—"The vessel took in much water only after sailing; and here it was only partial leak, not total failure."

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pondents' counsel, namely, the matter of the premium. I am not aware that from the form of the proceedings before us, we can do any thing in regard to the premium. But if your Lordships shall be of opinion that the sea-worthiness was not made out, you may make your judgment so as not to prejudice this matter of the premium.

" My connection with a Court of Common Law was of short duration, and but few cases upon this point came before me during that period. I always felt the difficulty of cases of this kind, where the grounds of decision were founded on presumption, and not upon evidence. I thought it right, in such cases, to state the matter of law, only leaving the facts entirely to the jury.

" We sit here as judges, both of the law and the fact; I am therefore called upon to state my views of both, which I shall do with all jealousy of my judgment.

" In every case of this kind, there is a warranty of sea-worthiness; and sea-worthiness is always to be presumed till the contrary is shown. This may be shown either by evidence or by inference.

" It would be quite sufficient in this case, that the ship was sea-worthy at her departure from Honduras. If she was so, it matters not if she became not sea-worthy within an hour afterwards, for in that case the underwriters would still be liable. If the ship had been lost merely from damage sustained at sea, the *onus probandi* as to the non sea-worthiness would fall on the underwriters; but if the ship, in a short time after commencing her voyage, is obliged to return without any such causes, the presumption is, that it was from causes existing before setting sail on her intended voyage, and from non sea-worthiness; and the *onus probandi* in such a case would then be on the assured, to show that she was sea-worthy.

" It is laid down in all our books upon this class of cases, (though the great man who may be said to have formed the law upon this subject, is not always to be reconciled with the same principles), that 'if a ship sail upon a voyage, and in a day or two becomes leaky 'and founders, or is obliged to return to port without any storm or 'adequate cause to produce such an effect, the presumption is, that 'she was not sea-worthy when she sailed.'

" If this principle be right, and I doubt not your Lordships will concur with me in thinking it indisputable, let us examine and apply it to the circumstances of this case. I don't consider the age of this ship as a conclusive circumstance; it may be of more or less weight according to the state of repair of the vessel, but it is not to be laid out of the question.

" The next circumstance that I notice is, the letter from the captain, dated at Barbadoes, 18th July 1801, in which he writes, 'She 'sails very fast and keeps tight; we only draw her out twice in 'twenty-four hours.'

" Then we have the letter of the captain of the 27th September

1801, from Honduras. He writes thus:—'The ship keeps very 'tight, she only makes about twelve inches in twenty-four hours.' This was before starting on the voyage insured.

"I cannot pay much attention to the affidavit of Captain Raimes bearing relation to this last letter. It does not follow from the circumstance there stated, that the ship, lying in Belize river, made only twelve inches water in the twenty-four hours, that, therefore, she must be sea-worthy. The age of the ship, and the circumstance of the water made in the outward bound voyage, were also to be taken into consideration along with the captain's statement of the condition of the ship while in the river Belize.

"I next come to the protest of the 7th of December 1801, every word of which calls for particular attention.

(Here his Lordship read the same.)

"When a judge is obliged also to perform the part of a jury, he may be in danger of mistaking the language of seamen; but I see nothing that is doubtful. From my early habits, I probably know rather more of this than any judge on the Bench; had I been in a collier when the weather here mentioned occurred, we should have laughed at the idea of damage to the ship.

"We see from this protest, that, on the 30th of October, the ship, which on the 27th of September, while in harbour, drew twelve inches of water in twenty-four hours, was now drawing 240 inches in the same time. On the 31st October, the ship continues 'making much 'water, pumping her every half hour.' On the 1st November, there is evidence of a general understanding of the unworthiness of the ship, from the conduct of the seamen. I observe that the water kept increasing every day. On the third of November, they hove to to endeavour to find the leak; I don't find this stated in the captain's letter or affidavit. This must have been done to try if they could discover how the water was admitted into the ship. Whether this was found out or not we are left totally in the dark.

"On the 6th of November, the advice of all the hands on board is taken, and the ship turns back; at this time she was making upwards of forty inches per hour, being about 1008 inches in the 24 hours.

"The next thing is the letter of 9th December 1802, and in it he assigns no cause but the weather.

"The next document is the affidavit of the 24th of December 1802; this may be amusing reading, but it is irregular to admit this as evidence in a cause. This affidavit attributes the loss of the ship solely to the 'thickness of weather.'

"In my poor judgment, the circumstance which occasioned the actual loss of the ship, in this case, has nothing to do with the true question between the parties. It is quite clear that, when the ship put about her bowsprit and returned, she was not sea-worthy.

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"The true question here is, where no cause is assigned for the ship's return, but those stated in the log-book and other documents, whether the conclusion is to be drawn, that she was not sea-worthy at the time of sailing?

"We are here in a case of hazard, but we are obliged to make up our minds; and I am convinced, for my own part, that the ship was not sea-worthy when she sailed; and I think that, if ever a case was laid which required the plaintiff himself to answer it, this is that case.

"In this case the assured was bound to let us know all he could inform us of. Should he not have told us the cause of the leak? We must think that it was competent to him to have said what, in particular, was the cause of the influx of water. We find that the hull of the ship was afterwards sold; they had an opportunity of examining it; but they say nothing about it.

It was urged upon this, that if there was any defect of evidence, the cause might be remitted, to enable the parties to give further evidence therein. But the facts do not appear to me to warrant this. It would, on the general principle, be dangerous in the extreme, after parties have seen where the *shoe pinched*, to send back a cause like this, where masters of ships have their own conduct or misconduct to account for, in order to allow them to supply that defect; and I therefore, on these grounds, move a reversal of the interlocutors of the Court of Session."

LORD REDESDALE and LORD CARLETON each spoke a few words, stating their concurrence with the opinion of the Lord Chancellor.

The Lords find, that the ship in question, the Midsummer Blossom, was not sea-worthy when she sailed from Honduras on the voyage insured, and therefore find the policy null and void. And it is therefore ordered and adjudged that the interlocutors complained of be reversed, and the defender assoilzied. And it is further ordered that the judgment be without prejudice to any claim of return of premiums which the respondents might have had at the commencement of this action.

For Appellants, *J. Clerk, Wm. Robinson.*
For Respondents, *F. Jeffrey.*