Caze & Richaud *v.* Baltimore Insurance Co. (*a*)

Liability of underwriters for freight.

The underwriters upon a cargo are not liable for freight *pro rata itineris*, to the owner of the vessel, who is also owner of the cargo insured, in a case where the vessel and cargo were captured, the cargo abandoned to the underwriters as a total loss, and by them accepted, the loss paid, the cargo condemned, restored upon appeal, and the proceeds of the cargo paid over to the underwriters.[1]

Freight *pro rata itineris* is not due, unless the owner of the cargo voluntarily agree to receive it, at a place short of its ultimate destination.

Error to the Circuit Court for the district of Maryland, in an action of *indebitatus assumpsit* for freight *of goods by the ship Hamilton, [*359
from Bordeaux to Halifax. In the court below, a case was agreed by the parties, which was, in substance, as follows:

On the 28th of July 1805, Mr. John Ducorneau, of Bordeaux, the agent of the plaintiffs, shipped for them, there, on their account, on board the ship Hamilton, of which they were owners, a cargo of the value of $22,986, on a voyage from Bordeaux to New York, where the plaintiffs resided. On the voyage, she was captured by a British vessel of war, and carried into Halifax, where the ship and cargo were condemned. Within due time after the plaintiffs heard of the capture, they abandoned as for a total loss, to the defendants, who accepted the abandonment and paid the amount insured. From the sentence of condemnation in the vice-admiralty court, as to the vessel and cargo, but not as to freight, there was an appeal, upon which the sentence was reversed and the proceeds of the vessel and cargo were restored. The proceeds of the cargo were paid over to the underwriters; but the sum they received was less than the sum they had paid upon the policy.

The question, upon this case, was, whether the plaintiffs, who were owners of both vessel and cargo, were entitled to recover from the underwriters upon the cargo, freight from Bordeaux to Halifax.

Harper, for plaintiffs in error, contended, that they were so entitled. The underwriters who became the owners of the cargo, at Halifax, were benefited by the transportation from Bordeaux. The cargo was liable for its freight. The underwriters received the whole proceeds. So much thereof as amounted to the value of the freight was received by them to the use of the plaintiffs, as owners of the ship.

Pinkney, Attorney-General, contrà.—This action certainly cannot be maintained upon an insurer's liability for freight, under a policy on cargo. *The case of *Baillie* v. *Modigliani*, 2 Marsh. 728, is decisive to that [*360
effect; and even if an insurer were liable for freight, under the policy, he must be sued upon that, and could not be made to answer for it in this form of action.

But it is said, that this claim does not rest on the policy; but is founded upon the idea, that as the underwriters became proprietors (by the abandon-

---

(*a*) February 20th, 1813. Absent, Todd, Justice.

[1] Re-affirmed in Marcardier *v.* Chesapeake Ins. Co., 8 Cr. 50; and Columbian Ins. Co. *v.* Catlett, 12 Wheat. 396. But if the insurers accept an abandonment, and take possession of the cargo injured, at an intermediate port, they are liable for freight *pro rata itineris* on the goods so accepted. The Mohawk, 8 Wall. 153.

ment and acceptance) of the cargo, or rather of the proceeds of the cargo, at Halifax, they succeeded to the burden as well as to the benefit, and must, consequently, pay freight *pro rata itineris* to the plaintiffs, as owners of the ship. To this it may be answered, that if any freight was due, it was due from the plaintiffs themselves, because it was earned, while they were the owners of the goods, and because the abandonment could not throw upon the underwriters a responsibility for freight for which the assured were already liable. There could be no privity of contract between the insurers and the ship-owners with reference to such freight; and the ship-owners could have no lien on the proceeds arising from the sales under the condemnation.

But no freight was due. The goods belonged to the owners of the ship, and of course, the bill of lading did not call for freight. On the contrary, it declared, that no freight was to be paid, "the cargo being owner's property." To imply a contract between the owners of the cargo and themselves, to pay freight to themselves, and that too against the bill of lading, would be absurd. It follows, that at the time of the abandonment, the plaintiffs had no right, either complete or inchoate, to freight upon the goods insured. If it were even admitted, then, to the utmost extent contended for, that the insurers, accepting the abandonment, took the cargo *cum onere*, they could not be charged with freight in this case, since the thing insured was, when they succeeded to it, free from such a charge. If they became liable for freight, they did not take simply *cum onere;* for the *onus* relied upon by the plaintiff's counsel did not exist, when the subject-matter came to them by abandonment. The abandonment and acceptance must have created, *361] not passed, it. If, indeed, the ship had afterwards performed *any service to the underwriters, with respect to these goods, an *assumpsit* might be implied *pro tanto* against them; but this demand is for freight supposed to have been earned, while the goods belonged to the plaintiffs, and were expressly, as well as from the nature of the transaction, exempt from freight.

The doctrine of lien which has been spoken of by the plaintiffs' counsel cannot serve his cause; for the plaintiffs could have no lien for freight which was not due; even if there could be a subsisting lien upon these proceeds, for freight which was due.

But freight was not due, for other reasons. It may be conceded, that freight is in some cases due *pro rata itineris*, where the voyage being intercepted, the owner of the cargo consents to receive it at a place short of its destination. But he must be a volunteer. A forced receipt, as on this occasion, has never been adjudged to give a title to *pro rata* freight. Besides, this cargo was lost; and even if the proceeds had covered the value, it may well be questioned, notwithstanding the *dictum* in *Baillie* v. *Modigliani*, whether, by taking the proceeds, the owner gives a right to *pro rata* freight.

But however that may be, it can scarcely be maintained, that a forced acceptance (by the owner, or by an insurer to whom an abandonment has been made) of proceeds far short of the value (as was the fact here), will give such a right.

Harper, in reply.—The case in Marshall wants the essential ingredient of ownership in the person making the abandonment. It was, too, a case of

partial loss. The defendants in the present case are sued, not as underwriters, but as owners of goods liable for freight. The benefit they receive from the transportation of the goods is a good foundation for an implied promise. The decision in Burrow's reports, of consent to receive the cargo liable *pro rata itineris* has never been questioned.

February 24th, 1813. STORY, J., delivered the opinion of the court, as follows :—*The present action is brought to recover freight *pro rata itineris*, under the following circumstances: The plaintiffs were the [*362 owners of the ship Hamilton and cargo, and effected insurance of her cargo on a voyage from Bordeaux to New York. The sum of $11,000 was underwritten by the defendants—the sum of $10,000 at Philadelphia, and the residue of the value of the cargo ($1986) was left uninsured. During the voyage, the ship and cargo were captured, carried into Halifax, and there condemned. The plaintiffs abandoned to the underwriters, and received payment for a total loss. An appeal from the sentence of condemnation was interposed, and the sentence finally reversed, and the proceeds of the cargo, which had been previously sold by order of court, were paid over to the underwriters, in proportion to the sums underwritten by them respectively.

We are all of opinion, that the plaintiffs are not entitled to recover in the present action. In the first place, the court are satisfied, that as between the assured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo, against which he does not undertake to indemnify the owner; and if authority be necessary to support the position, it is fully borne out by the doctrine of Lord MANSFIELD in *Baillie* v. *Modigliani*, Marsh. 728.

In the next place, we are all of opinion, that no freight whatsoever was, under the circumstances of this case, due. Freight, in general, is not due unless the voyage be performed. Here, the ship and cargo never arrived at their port of destination, and of course, the whole freight could not be due. Was a *pro rata* freight due? We think not. The whole class of cases resting on the authority of *Luke* v. *Lyde* (2 Burr. 882), proceed on the ground, that there is a voluntary acceptance of the goods themselves, at an intermediate port; and not, as in the present case, a compulsive receipt from the hands of the admiralty, after capture and condemnation, and ultimate restoration upon the appeal. There is, in our judgment, no equity to support such a claim; and although *it receive countenance from some [*363 remarks incidentally thrown out in *Baillie* v. *Modigliani*, the current of more recent authority, as well as of principle, clearly points the other way.

It may be further added, that as between the assured and the underwriter, the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo, after an abandonment. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.