1795. *July* 3.

WILLIAM KEITH, Trustee for the Creditors of THOMAS ANDERSON *against* JAMES THOMSON and SON.

No 32.
An underwriter having become bankrupt while certain risks were in dependence, the premiums for which had not been then paid by the insured; and the broker, at whose office these risks had been undertaken, having, of his own accord, reassured them for behoof of all concerned, at a lower rate than that originally stipulated; he was found entitled, in accounting with the creditors of the original underwriter, to set off the second premiums in compensation of the first, payment of which he had by that time received from the insured, and to be debtor to the creditors only for the balance.

UPON the bankruptcy of Thomas Anderson, there were policies of insurance underwritten by him to the extent of L. 1020, at the office of James Thomson and Son, insusance-brokers in Edinburgh, the risks of which were undetermined.

No part of the premiums upon these risks, amounting to L. 36: 17: 5d. was received by James Thomson, and Son, from the insured, for several months afterwards.

Immediately on Anderson's bankruptcy, James Thomson and Son, without consulting either his creditors or the insured, opened, 'for behoof of the insured in said policies, and all others concerned,' a policy for covering the same risks, which was filled up for the premium of L. 30: 13: 4d.

The loss upon these risks, which was L. 75, was paid by the second insurer.

Anderson's Creditors have as yet drawn only 2s. a-pound of the sums due them.

James Thomson and Son were accustomed to charge the underwriter, upon the gross amount of the premiums, 5 *per cent.* of brokerage; 2½ *per cent.* for commission; and 2½ *per cent.* for guaranteeing the premium.

In an action brought by the Trustee for Anderson's creditors against James Thomson and Son, they gave credit for L. 36: 17: 5d. the amount of the original premiums, which they had by that time received from the insured; and, on the other hand, they took credit for the L. 30: 13: 4d. which they themselves had paid to the second insurer. The pursuer

Objected; The presumption of law is, that the premium is in possession of the broker, for behoof of the underwriter at the signing of the policy, which, according to the common style, contains a discharge from the latter to the insured for payment of it. The broker, indeed, does not immediately pay it over to the underwriter; but so much is it understood to be at the risk of the former, that at the annual settlement of accounts which takes place between them, he gives the underwriter credit for it, even although he should not have recovered it from the insured. And accordingly the charge made by him corresponds to the risk he undertakes. The amount of the original premiums, therefore, in the present case, was just so much money due by the defenders to Anderson at his bankruptcy, and they had no right to dispose of it afterwards, without express authority from his creditors.

But farther, the transaction in question was both illegal in itself, and detrimental to the creditors. The second insurance must either have been made for behoof of Anderson and his creditors, or for behoof of the insured. If for behoof of the former, it was what is called a re-assurance, which by 19th Geo. II.

c. 37. § 4. is lawful only when the insurer becomes bankrupt, or dies, and can be made only by himself, 'his executors, administrators or assigns;' none of which characters belonged to the defenders. If, on the other hand, the second insurance was for behoof of the insured, or, in other words, was a double insurance, the premium must be paid by the insured. If no second insurance had been made, the creditors would have received full payment of the original premium from the broker, and the insured would have ranked as ordinary creditors for the loss sustained by them; and as Anderson's funds have yielded only 2s. a-pound, for L. 75 they would have drawn only L. 7: 10s.; so that the creditors lose above L. 20 by the transaction, while a partial preference is given to the insured. No 32.

Answered; In insurance, as in all mutual contracts, one party cannot demand performance, without being himself ready to execute the counterpart of the obligation; and therefore, as the premium is the consideration paid for the risk undertaken by the underwriter, if, in consequence of a change in the destination of the vessel, the policy is vacated; or if, from the bankruptcy of the underwriter, he is unable to indemnify for the loss, the insured must be entitled to recover the premium, if paid, and to retain it, if still in his own possession. The obligation of the broker to guarantee the payment of it, holds only where the underwriter is himself *in titulo* to demand it from the insured.

By the practice of Edinburgh, the insured do not pay the premium till the risk be determined. Any argument to the contrary, drawn from the words of style employed in the policy, (which are very inaccurate) must yield to the fact; and, accordingly, it has been found, that if the underwriter, in the meantime become insolvent, the insured are entitled to insure anew, and retain the original premium; 28th June 1785, Creditors of Elliot, No 31. p. 7118. By the practice of England, the premium is paid at the signing of the policy, and therefore, there can be no question of retention in that country: But, precisely on the same principle, the insured are entitled to rank for the premium; Wesket *voce* Insurer, § 6.; Magens, vol. 1. p. 83. 94.; Park, p. 371. and the same is the law of other mercantile countries; Wesket *voce* Bankrupt; Magens, vol. 2. p. 137. 233. 272. In England, too, before the 19th of Geo. II. c. 32, the insured could in no case rank on the estate of an underwriter for a loss arising after the date of his bankruptcy; but they were entitled to rank for the premium which they had previously paid; and if it had not been paid, it cannot be supposed that they were obliged to throw it into a fund from which the law allowed them to draw no dividend for their contingent loss.

The present case is the same as if the second insurance had been made by the insured themselves, (which would clearly have been a legal transaction; Magens, vol. 1. p. 94.; Park, p. 276.) with this difference, that the creditors have been allowed the difference between the two premiums, which, however, they owe to the acquiescence of the insured.

No 32.

If no second insurance had been made, the insured would have been entitled to retain the premium as a partial security for the contingent loss upon L. 1020, and have ranked for the balance; and as the loss turned out to be L. 75, they would have had the same right of retention which they claim at present, and yet been entitled to draw a dividend for about L. 40.

The Lord Ordinary found, 'That the premiums of the first insurance in 'question were unpaid, in the hands of the insured, at the period of Ander- 'son's bankruptcy: Found, That after his bankruptcy, and when he was un- 'able to make good the loss, if any should be sustained, it was not competent 'either for him or the trustee, to make good the premiums against the insured: 'And, in respect that the defenders debit themselves with the premium for the 'first insurances, and which are greater than the premiums for the second in- 'surances; found, that when they take credit for the premiums paid for the 'second insurances, no injustice is thereby done to Anderson and his Creditors; 'and, therefore, upon the whole, found, that they are entitled to retain, out 'of the sum in their hands, the premiums paid for the second insurances.'

The Lords, upon advising a reclaiming petition and answers, 'adhered.'

Lord Ordinary, *Justice-Clerk.* Act. *Tait.* Alt. *John Clerk.* Clerk. *Home.*

D. D. *Fol. Dic. v. 3. p. 335. Fac. Col. No 181. p. 428.*

1802. *November 26.*

Bertram *against* Richmond and Freebairn's Trustee.

No 33.
The premiums due to underwriters make no part of the broker's sequestrated estate, if not uplifted previously to his bankruptcy.

Gilbert Bertram, merchant in Leith, underwrote policies of insurance with Richmond and Freebairn, insurance-brokers; who having become bankrupt, the Trustee for their creditors *insisted*, That he was entitled to receive from the assured all premiums remaining unuplifted in their hands, and that each underwriter was only to rank with the other creditors of the broker for the amount of such premiums as were due on the policies underwritten by himself. Accordingly, the trustee having, since the bankruptcy, uplifted some of these premiums, Bertram brought an action, concluding for restitution of them, as belonging to him and the other underwriters, and not to the bankrupt estate.

The Lord Ordinary reported the cause upon memorials.

The pursuer

Pleaded; The underwriter and the insured are the only persons concerned immediately in the contract of insurance, although, for the sake of convenience, it is usually transacted by means of a broker, whose name, however, never appears in any of the proceedings. He receives a certain premium for his trouble in making out the policy, and in collecting and guaranteeing the premium from the assured, which is generally paid over to the underwriters once a-year. When the defenders became bankrupt, the premiums for the year