

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 Anderson's bankruptcy: Found, That after his bankruptcy, and when he was unable 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 insurances; 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 unlifted 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

1801 were in general in the hands of the insured. These are not due to the broker ; he gives no value for them ; nor does his name ever appear in the policy constituting the debt. They are due solely to the underwriter, who, for them, was to indemnify the insured from any loss which might be incurred. The broker, in his own name, could not sue for them ; he is only a factor for the underwriter. By signing the policy, the underwriter does not mean to accept of the security of one person alone, instead of all the various persons for whom he underwrites, but holds the broker only as a cautioner for them, as an additional security, without discharging the principal debtor. The guarantee of these premiums inferred no doubt a power to uplift, so long as they could do so ; but, by bankruptcy, having been unable to perform their part, the pursuer is entitled, in this mutual contract, to be free from his part of the engagement, and to uplift them himself ; Creditors of Jordanhill against Garnock, *voce* MUTUAL CONTRACT. Similar cases have been decided in the English courts upon these principles ; King's Bench, 15th May 1798, Robson against Wilson.

*Answered* ; Every policy instantly discharges the assured of the premium ; not that the underwriter immediately receives, but the same thing is done in reality ; for the broker takes the risk upon himself, and he becomes debtor for its amount to the underwriter, and the sole debtor, as the assured is by the policy itself discharged. The underwriter often does not know the persons he has insured, but relies entirely on the broker for his security. When he becomes bankrupt, the underwriter cannot resort again to the security of the assured, or claim from them the premiums ; Park on Insurances, p. 26. ; Wesket on Insurance, p. 63. 407. ; Miller on Insurance, p. 115.

THE COURT were unanimous in preferring the underwriter, on the principle, that though where a factor has received money belonging to his principal, it becomes blended with his own estate, and cannot be distinguished from it ; yet when he becomes bankrupt before receiving it, the principal may claim his own money, which never made a part of the factor's estate, but is entirely separate and distinct.

Lord Ordinary, *Polkennet*.

For Trustee, *A. Campbell, W. Maxwell Morison*.

Agent, *Dav. Thomson, W. S.*

For Bertram, *J. Wolfe-Murray*.

Agent, *G. Robinson, W. S.*

Clerk, *Menzies*.

F.

*Fac. Col. No 63. p. 144.*

\* \* \* Recapture by a non-commissioned ship vests an insurable interest. See 19th November 1801, Yelton, &c. against Smith, &c. *voce* PRIZE.

\* \* \* In the Appendix to this Title will be found the particulars of the English Cases referred to in the above reports, and many others.