with penal consequences. On the contrary, alterations are explicitly recognized; Marshall, p. 225. And as there was no fraudulent vitiation, but a trifling addition, for which none of the underwriters who consented to it, thought of requiring an additional premium, there is no reasonable ground for holding the insurance as vacated. No. 9.

The Lords, upon advising the mutual memorials, "alter the interlocutor of "the Lord Ordinary; find the letters orderly proceeded in the suspension, "repel the reasons of reduction, and assoilzie." This interlocutor was pronounced by the casting vote of the Lord President.

A reclaiming petition against this interlocutor was, after having been advised, with answers, refused.

Observed on the Bench: It is material, in this case, that the vessel was cleared out from Jamaica to Belfast. The master knew nothing of the subsequent alteration of his destination. Though the policy was therefore altered, there was no alteration in the voyage. It is clear, that the smallest alteration in the voyage vacates the policy; but there is a wide difference between an alteration in the voyage and an alteration in the policy. In the one case, the risk is changed, but, in the other, it may remain the same; and it is the difference in risk which vacates the policy. The case of Laird against Robertson was reversed in the House of Lords; because, *de facto*, the voyage was altered.

But while this was the opinion of the majority of the Judges, several of their Lordships, nevertheless, held, that there was here an alteration of the policy, by which the risk was extended without the consent of the underwriter, which was sufficient to vacate the insurance.

Lord Ordinary, *Hermand.* Act. *Maxwell Morison.* Agent, *D. Thomson*, W. S.
Alt. *Gillies.* Agents, *J.* and *T. Peat.* Clerk, *Pringle*

J. *Fac. Coll. No. 230. p. 520.*

1808. *June* 14.

CHARLES SELKRIG, Trustee on the Sequestrated Estate of HAY SMITH, *against* PITCAIRN and SCOTT, and other Insurance Brokers.

No. 10.
The bankruptcy of the insurer, while the risk is undetermined, does not give the insured a right to retain the premium, or em-

HAY SMITH was an underwriter at the offices of Pitcairn and Scott, &c. He accordingly had underwritten, at these offices, policies to a large amount, of which the risks were undetermined. In this situation he became bankrupt. No part of the premiums on these policies had at that time been paid. The brokers, on his bankruptcy, conceiving these contracts of insurance with him to be no longer binding, and wishing to secure the insured, made second insurances on the subjects of all these policies. In settling accounts with Mr. Selkrig, who was appointed trustee on the estate of Hay Smith, these brokers

No. 10. ploy it in making a second insurance.

gave Hay Smith credit for all the premiums in the policies above-mentioned which he had underwritten; but, on the other hand, they placed to his debit all the premiums which they had paid for the second insurances made on the subjects of the first policies,—alleging, that, as his bankruptcy rendered the first insurances void, the insured had a right to retain the premiums, and *a fortiori* to apply them towards making second insurances, in place of the first, which had failed *. Mr. Selkrig refused to admit their claim of retention, demanding the full premiums, and offering to let them rank for the loss on the bankrupt's estate; and he accordingly brought an action against the different brokers for the premiums. These actions were conjoined.

The first interlocutor of the Lord Ordinary was,—"Finds it stated by the "defenders, that upon the bankruptcy of Hay Smith, which happened in the "year 1801, they transferred the premiums of undetermined risks standing at "his credit to the debit of the said Hay Smith, and made second insurances "upon those risks which had been underwritten by him, placing the premiums "to his debit: Finds that these re-insurances were either made for behoof of "Hay Smith's estate, or were double insurances made for behoof of the de-"fenders, or of the assured, their constituents: Finds that, in the first case, "the re-insurance was ineffectual, in so far as not made with the concurrence "of the pursuer, the trustee for Smith's creditors, in terms of the act 19th "Geo. II. ch. 37.—and that, in the second, his estate cannot be affected by "the expense thereof, which would be to create an undue preference to the "persons insured by Hay Smith, in prejudice of his other creditors: Finds "that, though by subscription of the policy the underwriter becomes creditor "to the broker for his premium, yet the broker does not become his creditor "for any losses, averages, or returns, that may eventually become due;—so "that there is no concursus of debit and credit entitling the broker to retain "or apply the premiums in his hands to a second insurance, as in this case: "Repels the defences; finds the defenders liable for the amount of the balances "due by them, without deduction of the premiums paid, or other expenses "incurred in consequence of the re-insurances in question; and decerns."

On a representation and answers, the second interlocutor of the Lord Ordinary was,—"Having again considered this representation, with the answers "thereto, and whole process, the Lord Ordinary, however he may have en-"deavoured to make up his own mind upon this cause, yet considering it as "of great importance in itself, and involving various points, which have never, "so far as he observed, been decided in this country,—appoints the process "to be enrolled, and recommends to the counsel to consider, whether it

* In some cases it appears that the second premiums exceeded the first, but yet had been stated in full in the accounts to the debit of the bankrupt; but this seems to have been an inaccuracy not ultimately insisted on. The ultimate claim of the defenders seems to have been confined to retention.

" might not have been expedient that a case should be made up for the opi- No. 10.
" nion of English counsel, or of the committee of underwriters at Lloyd's,
" stating this question,—How far the creditors of an underwriter, becoming
" bankrupt during the dependence of a risk, are entitled to rank upon the
" premiums due to him?—*2dly*, What is the precise nature of re-insurance
" and double insurance respectively, and how far the one description or the
" other applies to the second insurances made in this case; as well as upon
" any other point of law, or mercantile practice, which may tend to throw
" light upon the merits of the present question."

Agreeably to this interlocutor, opinions of English counsel were taken. These learned gentlemen were all perfectly clear that, by the law of England, the bankruptcy of the underwriter, while the risk was undetermined, did not entitle the insured to retain the premium, but, on the contrary, that he must pay the premium to the bankrupt estate. That he may now, by virtue of statute 19th Geo. II. ch. 32. claim upon the bankrupt estate, for the loss, when it shall be ascertained, as if it had taken place upon the bankruptcy, but that even before (by that statute) he was entitled to do this, the premium still could not by the law of England be retained. One of these learned gentlemen gave the reason for this rule, viz. that the premium ought to be paid before signing the policy; and, though it be not paid, is presumed to have been paid, and the consequences are as if it had been paid; so that it becomes not a conditional, but an absolute debt, due to the insured by the broker or the insured.

2dly, They were equally clear, that, by the law of England, the brokers or insured in this case, could not legally make a *reinsurance*, that being prohibited by statute 19th Geo. II. ch. 37. except to the *insurer* or his creditors. But farther, that the second insurances made here were not *re-insurances* but *double insurances*, which were good; but by which the first insurer, Hay Smith and his creditors, could not be in any way affected.

On advising these opinions, the Lord Ordinary finally adhered to his interlocutor above mentioned.

The cause came before the Inner House on petition and answers.

Argument for the defenders.

The opinions of the English counsel, it is admitted, do show that, on the whole of this question, an English Court would decide against the defenders. But this decision would rest not upon the peculiar rules of the law of insurance, but upon general rules in the law of England, forming no necessary part of the law of insurance, and diametrically opposite to the general rules of our law. It is a general rule of our law, that in a mutual contract, a party cannot demand implement of the obligation *de presenti* of the other party, if it appears that he would not be able to implement his own counter obligation *de futuro*; and this rule equally affects those who, by bankruptcy, come to take the place of either of the parties. They take the right and obligation of the mutual contract together, and cannot enforce the one while they leave the other not to be per-

No. 10. formed. Whenever it appears that the obligation on the one side cannot be performed, that on the other side becomes void. Such is one of the most important rules of our system, and of almost all systems of law except that of England. In England, a different general rule obtains. There a party in a mutual contract may insist for performance of the obligation *de presenti* by the other party, though it do appear that he will not be able to implement his own counter obligation *de futuro*, at least his creditors may take the *de presenti* right in such a mutual contract, and insist for performance upon it, though they leave the counter obligation *de futuro* to a certainty of non-performance. The mutual contractor, who is thus forced to implement of his own obligation *de presenti*, cannot, by the common law of England, even rank upon the bankrupt estate for the value of his corresponding *de futuro* right, but must make his claim when the period of *future* performance arrives against the debtor, who must then be totally denuded by the commission of bankruptcy. Cullen's Bankrupt Law, page 85. It required a special statute, 19 Geo. II. 32. 2. to provide a partial remedy to the evils arising from the operation of this general rule in cases of insurance. By that statute, the insured, though he must pay the premium to the creditors of the bankrupt insurer, is indulged with the privilege of ranking at least on the bankrupt estate for the amount of the loss, when it shall be ascertained, instead of being left to claim against the denuded bankrupt. Such is the general rule of the law of England in relation to mutual contracts and bankruptcy; and it is because that rule is a general law in England, that of course it applies there, in so far as not modified by statute, to cases of insurance as well as all other cases of mutual contract. It is no part of the peculiar law of insurance.

Insurance, in its own nature, is just a mutual contract like other mutual contracts, and it has shared the same fate that any other particular mutual contract, arising among the general rules of English law, must have done.

In the *first* place, there is nothing in the contract of insurance which makes the premium instantly pass out of the hands of the assured, either *de facto* or *de jure*.

As to the first, it is admitted in this case, that *de facto* the premiums were in the hands of the insured.

As to the second, the only foundation it ever was supposed to have in the law of insurance, was from the form of the receipt for the premium, which bears that it has been paid, though *de facto* it has not been paid at the time. This receipt it was supposed extinguished all claim on the part of the insurer against the insured, to whom an acknowledgment of payment was given. What the insurer got in payment on giving this receipt, was a new obligation to pay the premium by the *broker*, to whom alone therefore he had to look for payment. The broker, on the other hand, who thus granted his own obligation to the insurer for behoof of the insured, had a claim on the insured for the value of

that obligation, that is, for the amount of the premium, and to him alone the insured was bound to pay. No. 10.

In this way, the obligation on the insured to pay the premium had no connection with the obligation of the insurer to pay for the loss, because the former was due wholly to the broker, not at all to the insured; and the latter was due wholly to the insured, not at all to the broker. But this arrangement, though it once was supposed to be the law of insurance, has not been received as such in this country, or even in England.

If this had been strictly the law, it is clear that the insurer never could have been entitled to recover the premium directly from the insured: He must have looked to the broker alone, and the insured must always have paid to the broker. If then the broker became bankrupt, his creditors must have received the premiums as a debt due to him by the insured; and the insurer could only have ranked on the broker's estate for the amount of them, as a distinct debt due by the broker to him. But this is not the rule of the law of England. See (p. 89. *infra*) opinion of Mr. Wood on the case Bertram *versus* Richmond and Freebairn, 26th November 1802, No. 33. p. 7122. By this opinion, and by that case decided on that opinion, it is the law both of England and Scotland, that the premiums are due by the insured, not solely or principally to the broker, but to the insurer; and that if the broker becomes bankrupt, the insurer is entitled to claim them himself, without the intervention of the broker at all. There is an end, therefore, of the supposed arrangement in the contract of insurance, by which the obligation of the insured to pay the premiums became absolute and independent of the counter obligation of the insured to be answerable for the loss. This supposed rule of the law of insurance rested entirely on the idea of the premium being due solely to the broker, and as it is not due solely to the broker, there is no longer any foundation in the peculiar form or law of insurance for this rule. It may remain in England by virtue of other general rules of their law of mutual contract and bankruptcy, but there is no reason why we should adopt these in opposition to our own law of mutual contract and bankruptcy.

Accordingly, there is a series of decisions, finding this part of our law did hold good in cases of insurance, and that contracts of insurance became wholly void, when, by the bankruptcy of the insurer, his obligation to answer the loss could not be performed, and when the insured declared the bargain at an end, by making a second insurance on the same subject.

The insured was not held bound even to wait till the creditors had determined whether they would undertake the burden of the contract or not. Creditors of Elliot against Morison and Co. 28th June 1785, No. 31. p. 7118; Keith against Thomson and Son, 3d July 1795, No. 32. p. 7120.

According to the principle established by these cases, the defenders, acting as agents for the insured in this case, declared the contract at an end on the bankrupcy of the insurer Hay Smith, and effected a second insurance on the

No. 10. same subject. To this they applied the premiums of the first; and to this they were entitled to apply them, as the first had become void, and the second was a legal insurance in all views, whether the first had been void or not; since the opinions of the English counsel show that it was not such a re-insurance as is prohibited by law.

Argument for pursuers:

In a question depending on a point of mercantile law, the desire of rendering the decisions on our law here uniform with those of the Courts of England, where that law has been so much longer known, and so much more fully considered, has always been the paramount principle in the minds of our Judges. The opinions of the English counsel, therefore, must be conclusive in the present case.

It is a mistake to say, that these opinions are founded on any general rules of the laws of England. They are strictly confined to the *law of insurance* arising out of the form of that contract, to which form, and not to any general rules of English law, they refer. They are demonstrative, therefore, of the mercantile law of insurance, which is not more the law of England than of this country. By this mercantile law, the Courts of Scotland must be guided in cases of insurance, though it were contrary to our general rules relative to contracts; but in truth it is not contrary to these rules, since it only applies to contracts of a form quite different from any of those to which these general rules ever were held applicable.

By the contract of insurance, the premium ought instantly to be paid. But though *de facto* it is not paid, yet it is held to be paid. The insurer grants a receipt for it; and on the policy he is precluded from pleading that it is not paid. His obligation is rendered absolute; the responsibility for the loss has no dependence on the future payment of the premium. In the same way, his claim for the premium is rendered absolute, and has no dependence on his responsibility for the loss. It is just as if he had received the money, for which he granted the receipt, and then lent it back again to the insured. All this arises from the peculiar form of this transaction, which is quite different from that of a common mutual contract; and accordingly, to this form, and not to the general law of England, this rule of the law of insurance is by the English counsel ascribed. See opinion of Serjeant Marshall particularly.

The law of mutual contract, therefore, has no application to this case. In it there is no mutual contract now existing. The original obligation to pay the premium, which was the counter part of the obligation to answer the loss, is extinguished by the receipt; and in its place is substituted a new and absolute independent obligation, for a sum to the amount of the original premiums for which the receipt was given.

Neither the insured nor insurer, then, can plead the law of mutual contract. The one cannot refuse to answer the loss, because the premium is not paid, nor can the other refuse to pay the premium, because the loss will not be an-

swered. The creditors, therefore, of the insurer are entitled to demand the premiums, without any regard to the future responsibility of their debtor, the insurer, for the loss. No. 10.

This rule, it will be observed, does not rest at all upon the intervention of the broker, nor is it rested upon that by Serjeant Marshall; whether the broker therefore be the only creditor for the premiums to the insured, and the only debtor for them to the insurer or not, is of no moment to the pursuer's plea. If there had been no broker in this case at all, if the action had been directly against the insured, it would still have been perfectly good.

It is however by no means clear, that by the law of insurance in England, (and our law of insurance must be the same,) the broker is not the proper and only debtor to the insurer for the premium. The case quoted in Mr. Wood's opinion, and on which that opinion rests, where, in consequence of the broker's bankruptcy, an equitable exception seems to have been admitted in favour of the insured, will by no means go the length of establishing that, in all cases, even where the broker is solvent, he is not the true debtor to the insurer, and creditor to the insured.

This is the rule that is universally understood to prevail among mercantile men, both in England and here.

If such be the rule of law, it must decide this case; for here the defenders are not the insured but the brokers, who must be bound to pay the premiums to the insurer or his creditors, without the pretence of a retention for a claim of responsibility not due to themselves but to the insured.

The second insurances, effected by the defenders, are circumstances of no importance at all in this case; whether they are re-insurances or double insurances is of no moment. If the defenders had no right to retain the premiums, they could have none to apply them to purchase second insurances.

One Judge observed, that the question seemed to resolve into this point, whether the general rules of our law, in relation to mutual contract, should yield to those of the law merchant in cases of insurance; that he doubted whether we should not adhere to our own common law principles; that the obligation to make real payment of the premium was plainly a part of the transaction; and, therefore, the insured, if the insurer became unable to fulfil his part, had, by the law of Scotland, a strong plea to be free of this counter obligation. The rest of the Judges who spoke adopted the argument of the pursuer.

The interlocutor of Court was, "adhere to the interlocutor of the Lord "Ordinary."

The defenders reclaimed against this interlocutor; but the Court, (14th June 1808,) "Adhered."

Lord Ordinary, *Hermand.* Act. *Ad. Gillies.* Alt. *Dav. Cathcart.*
R. Aytoun, W. S. and *A. Kid*, Agents, *Scott*, Clerk.

M. *Fac. Coll. No. 52. p. 187.*

No. 10.

**** *Opinion of Mr. Park.*

I am of opinion, that, by the law of England, the assignees of an underwriter, who has become bankrupt, may maintain an action against the broker, to recover the premiums upon all policies which he procured the underwriter to effect before his bankruptcy, notwithstanding the risks may be still depending. The contract is complete between the parties; and though the subsequent bankruptcy may occasion an inability to discharge the obligations of the underwriter *in part*, or perhaps *entirely*, still the contract is a valid subsisting contract, and the premium belongs to the estate of the underwriter, just as much as if he had continued solvent, and able to pay every shilling. The remedy of the assured is pointed out by the statute 19th Geo. II. ch. 32. § 2. which has authorised the assured, in case the underwriter becomes bankrupt, before a loss happens, to *claim*, and after the loss, to *prove* his debt, just as if the contingency had taken place before the bankruptcy. But the statute necessarily treats this as an existing contract; and I am of opinion that it follows, that the premiums cannot be diverted by the assured or broker into any other channel, such as effecting new insurances; but must be paid to the estate of the underwriter.

Opinion of Sir V. Gibbs, Baronet.

The assignees of an underwriter, who becomes bankrupt in this country, are entitled to recover from the broker the premiums on all the policies which he procured to be underwritten by the bankrupt before his bankruptcy, although the risks may be still depending; and the assured are entitled, by the 19th Geo. II. C. 32. to make claim under the commission; and if a loss shall afterward happen, to prove it in like manner as they might have done if it had taken place before the bankruptcy.

Opinion of Mr. Serjeant Marshall.

The premium, as the word imports, ought regularly to be paid to each underwriter before he subscribes the policy. Every policy contains an acknowledgment of the receipt of premium, which has the effect of precluding the underwriter, in actions on the policy, from objecting that the premium had not been paid. The underwriter may however give credit to the insured, or to his broker, for the premium. But this indulgence cannot have the effect of rendering his right to it contingent, or of making it depend on his own future solvency. *Aliud est enim diem obligationis non venisse, aliud, humanitatis gratia, tempus indulgeri solutionis.* His subscription to the policy gives him a vested

right to the premium, which can only be divested by the contract becoming void *ab initio*, or by the risk never having commenced. He has the same right to demand the premium when the accustomed credit is expired, as he would have had to retain it, if it had been paid when he subscribed the policy. For these reasons, I am clearly of opinion that the trustee, in behalf of the creditors of Hay Smith, is entitled to recover from the brokers the amount of the premiums due to the bankrupt, in respect of the risks which were undetermined at the time of his bankruptcy. A practice nearly similar to that which the brokers in this case contend for, has prevailed in France; but I have never been able to learn that it makes a part of the law of insurance in any other country. In England it is quite unknown. No. 10.

Opinion of Mr. Wood, in the case of Bertram against Richmond and Freebairn's Trustee, referred to above.

I take it to be clear, that by the law and practice of England, the underwriters are entitled to receive from the assured all such premiums as the broker had not actually received at the time when he became bankrupt; and that it makes no difference whether the broker do or do not receive a premium for guaranteeing the premium to the underwriters. The premiums in the hands of the insured unpaid are the property of the underwriters, and can only be sued for in the names of the underwriters; neither the bankrupt nor his assignee could sue for them, and consequently they form no part of the bankrupt's estate to be distributed amongst his creditors. His guaranteeing them may give the underwriter an additional security, but does not deprive him of the remedy the law gives him against the insurer, who has not paid over the money to the bankrupts. I do not know of any determination reported in any printed collection, directly in point with the present case. The principle will be found in a series of cases in Cooke's Bankrupt Law, p. 414. The case of Robson *v.* Wilson was argued before the Court of King's Bench in May 1798, by Mr. Chambre and myself. Mr. Chambre argued that case on the footing of partnership, and I followed the same line of argument in my answer; but the Court decided in favour of the plaintiff, upon the principle above stated, viz. That as the premiums had not been paid over by the defendant to the brokers, who had become bankrupt, the plaintiff, the underwriter, was not bound to come in as a creditor under the commission of the bankrupt, but was entitled to recover the whole of the premiums against the defendant. This case is not reported; but Mr. Meggison, who was the defendant's attorney, has a note of the judgment of the Court, which I have seen.