

APPENDIX.

PART I.

INSURANCE.

1776. *March 8. and April 26.*

WILLIAM WILSON and COMPANY, Merchants in Glasgow, *against* ALEXANDER ELLIOT, JAMES COULTER, and Others, merchants in GLASGOW.

UPON the 9th of February 1774, a policy of insurance was effected by Messrs. Hamilton and Bogle, Insurance Brokers in Glasgow, for a cargo of tobacco, belonging to Messrs. Wilson and Company, shipped on board the ship Kingston, George Finlay master, from Carron shore to Hull. This adventure Messrs. Elliot, Coulter, &c. insured as underwriters; but with the following stipulation, “beginning the adventure upon the said tobacco at and from “the lading thereof, on board said Kingston at Carron Wharf, and to continue “and endure until said Kingston, *being allowed a liberty to call at Leith*, shall “arrive at Hull, and there be safely unloaded.” In the original written order given to the Brokers by Wilson and Company, it was stipulated that there should be liberty to call *as usual*. The above variation in the policy, made by the Broker and underwriters, was altogether unknown to the merchants.

The vessel, which had sailed some days before the policy of insurance was signed, instead of calling at Leith, called at Morison’s haven near Prestonpans, about six miles beyond the port of Leith, and continued in that harbour for four or five days, taking in a new loading of sulphur. Having left this harbour, it proceeded on the voyage, and was lost the day after in the direct course to Hull, off Holy Island. Wilson and Company, upon this, insisted for payment of the loss they had sustained from the underwriters. The underwriters, on the other hand, contended that the policy was vacated by the vessel’s having gone into Morison’s haven, which they maintained to be a *wilful deviation*. After an ineffectual attempt to settle matters by arbitration, Wilson

No. I.
Deviation.

See No. 17.
p. 7096.

No. 1. and Company commenced three several actions before the High Court of Admiralty, one against the Underwriters, another against the Insurance Brokers, and a third against the Carron Company, suited each to the circumstances in which the different parties stood. No defences were given in either in the action against the Insurance Brokers or in that against the Carron Company. The defences given in for the Underwriters, proceeded upon the ground that the policy was vacated by the deviation. A good deal of procedure took place before the Judge Admiral, in the course of which he allowed the defenders a proof of all facts and circumstances tending to show what passed relative to the making of the insurance between the defenders and the Insurance Brokers. This proof the defenders however declined, and the Judge Admiral (7th April 1775) pronounced his final interlocutor in the following terms: “ Having advised the petition of Alexander Elliot and others defenders, with “ the answers made thereto for William Wilson and Company, merchants in “ Glasgow pursuers, and the writs produced, &c. and having considered that the “ defenders do decline and wave the bringing of any proof in terms of the former interlocutor of date 14th February 1775; finds that in all cases of insurance of goods on ship board, belonging to others than the owner and master of the ship, it is a general rule in law and practice that the insurance is effectual, although the loss may have happened in a deviation from the course of the voyage upon which the insurance is made, the insured not knowing of nor consenting to such deviation; and finds that at the making of insurance upon such goods on ship board, it may be agreed between parties, that in the event of a deviation not allowed of in the policy, the insurance shall then cease and terminate, and not be further effectual for the remaining part of the voyage; but finds that in the present case, there are not facts sufficient to infer that it was agreed the insurance was to terminate and be no further effectual, in case of a deviation for the remaining part of the voyage; and further, having considered that the ship Kingston, after going into Morison’s harbour and sailing from thence, did attain to and was in the direct course of the voyage from Carron Wharf to Hull, when she was wrecked; finds upon the whole, that the defenders are chargeable with the sums underwritten by them respectively upon the policy of insurance, produced and libelled on, and therefore refuses the desire of the defenders’ said petition, as also refuses the desire of the former petition for the said defenders, and adheres to the former interlocutor and decret of date 6th January 1775, and decerns.”

These judgments of the admiral, the underwriters brought under review of the Court of Session by a bill of suspension, which being presented to the Lord Alva Ordinary, he after some steps of procedure took the cause to report before the whole Lords upon mutual informations.

For the underwriters it was argued, that the doctrine of deviation is now so clearly established by the practice of the Courts in England, that the smallest

intention of departure in that respect from the express tenor of a policy, never fails to liberate the underwriters. The very nature of the contract necessarily induces this, as the hazard is only undertaken on the account of a particular voyage; and it is peculiarly founded in reasons of equity and expediency, as the insured by their more intimate knowledge of particular circumstances have always the advantage of the insurers. The conditions therefore expressed in the policy are understood to be so sacredly warranted by the insured, that any alteration whatever, whether with or without his consent, whether in a greater or lesser degree, has the effect to void the contract. In this contract the insurer becomes bound to pay the loss arising upon a certain adventure by the perils and accidents insured against; and he is on the other hand to receive a certain premium or consideration adequate to the risque. The premium is accordingly calculated according to the circumstances of the voyage, and the whole transaction thus being entered into upon the footing of a particular adventure, it would be quite incongruous and contrary to the intention of parties, as well as most unjust in itself, were the insurer to be bound, not only for the voyage and adventure which is the subject of the policy, but for another not spoken of, and for which no premium was paid. A ship, it is true, may by stress of weather be forced out of her proper course, and such deviation does not vacate the policy, being one of those very accidents which are insured against. The voyage in this case still continues the same, though the ship has been forced *vi majeure* out of the proper course. But the case of an intentional deviation, in order to touch at a port not mentioned in the policy of insurance, is altogether different. The chance here is varied; the voyage wilfully altered; the ship exposed to new accidents; and no premium stipulated for the hazard thereby incurred. In such case there is no *consensus in idem placitum*, and the contract therefore is void. But besides the general argument, the deviation here was the manifest cause of the loss. Had the ship stopt at Leith, as was allowed by the policy, there was no probability of her staying there above half a day; as Carson vessels, when they stop at Leith, seldom or never go into the harbour, but remain in the road, whither passengers are sent to be put on board. The wind and weather would have thus been favourable for the voyage had the ship only touched at Leith; but the proceeding to Morison's haven, and the detention there by taking in a new cargo, exposed the vessel to the storm in which she perished.

The underwriters also founded a good deal upon a late case, Steven and Co. against Douglas, No. 16: p. 7096. in which it was found that the policy of insurance was vacated by the deviation, although the insurance was made upon goods put on board by a third party, who had no connection with the ship, and who was utterly ignorant of any intention to deviate. And this decision, it was said, entirely overthrew the ratio of the Judge Admiral's interlocutor.

No. 1.

The assured on the other hand contended, that there was no deviation sufficient to vacate the policy : They had given express instructions for insuring the vessel, with an allowance to touch as usual ; and it cannot be denied, that the usual places to touch at in the course of a voyage from Carron to Hull, are Leith, Borrowstonness, and Morison's Haven, at any or at all of which the vessel would have been entitled to touch had the insurance been made in the terms offered. Instead of touching at Leith, however, she touched at Morison's haven. She met with no accident in doing so. She came back again to the course she would have held from Carron to Hull had she touched no where. She was safe when she regained this direct course; and was afterward, in the prosecution of her voyage, cast away upon the coast of England by a violent storm. There was therefore an essential difference betwixt this case, and that of Steven and Company against Douglas. In that case, the vessel was lost in the very act of deviation, the wreck being found upon the coast of Gyrvane in Ayrshire, which was altogether out of her proper course. But in this case the vessel was lost in her direct course, and when no harm whatever had arisen from her touching at Morison's haven.

The conduct of the underwriters, the assured contended, was also such as to render them liable. They ought either to have underwritten the policy in the precise terms in which it was offered to them, or to have refused to sign it explicitly. But by taking upon themselves to alter the terms, and to underwrite a policy notwithstanding, without making any mention of the alteration to the assured, they ought upon that account alone to indemnify any loss which had arisen from their own improper conduct. And this conclusion is still stronger, when it is considered, that the ship had sailed some days before the policy of the insurance was signed, and it was thus impossible that the course of the vessel could be altered.

A case was mentioned of Hogg and Kinloch against Bogles and Scott, determined before Lord Mansfield, where a ship lying in the harbour of Dundee was freighted to carry a cargo of lead from Leith to Campvere, and insured from the Frith of Forth to that port. A freight having offered from Dundee to Campvere, she agreed to take it and give up the other from Leith. The ship was lost ; but it was proved that she had come within the precincts of the Frith of Forth, and so continued in the very same course as if she had come from Leith, and in consequence of this, Lord Mansfield directed the Jury to find that the underwriters were liable. This case, it was said, was almost a direct parallel to the present one ; for the navigation from Dundee to the mouth of the Frith of Forth was not within the line of the course insured, and the vessel might have met with contrary winds there, which in case of her coming out of the Frith of Forth would have been favourable. These winds might have retarded her, and might, according to the argument of the present underwriters, have been the occasion of exposing her to the storm in which she was wrecked. But hypothetical arguments drawn from mere im-

possibilities were disregarded in the decision, and because the vessel had come safe into the course in which she was insured, the underwriters were found liable.

No. 1.

The Court, 23d January 1776, pronounced the following interlocutor: "On report of the Lord Alva, and having advised informations *hinc inde*, and "considered the policy of insurance, and whole circumstances of the case, They "repeal the reasons of suspension, find the letters orderly proceeded, and "decern."

Against this interlocutor the underwriters contended, in a reclaiming petition, that as a deviation had been made, and as the interlocutor proceeded *upon the whole circumstances of the case*, the Court would, had they taken the abstract question merely into consideration, have pronounced a judgment in their favour; for that by the decision of Steven against Douglas, No. 16. p. 7096. the Court had established that the general proposition assumed by the Judge Admiral, and which was the ground of his interlocutor, had been overthrown; as that decision found that any wilful deviation from the covenanted voyage did, from the moment of deviation, vacate the insurance, and also that it made no difference in the question of deviation whether it was with or without the knowledge of the insured. Now the present case is attended with no such peculiar circumstances as to set aside the general proposition. The fact of deviation is as clearly marked as any fact of that nature can be: The vessel was allowed by the policy to touch at the Port of Leith, but went into a totally different harbour. A limitation in the policy was made, and the parties must have understood that this limitation made some difference. Yet it is impossible to discover where the difference lies, if the same interlocutor is to be pronounced in the case when a limitation is insisted upon and agreed to, as would have been if no limitation had been insisted upon at all.

It is indeed very strenuously contended by the assured, that the underwriters were culpable by inserting a limitation inconsistent with the instructions under which the broker acted, more especially as the ship had sailed, and no new orders could be given as to the place of calling. The amount of this charge however is nothing more than that they declined entering into a contract of insurance upon any other terms than they thought proper; a circumstance, to which no idea of impropriety can be affixed, unless it be culpable for a man to judge of the extent of the obligation he is to come under. The broker who is the agent of the assured, not of the underwriters, agreed to this limitation. That the broker is the agent of the assured, the underwriters contended, was plain from this, that it is not the business of the underwriter to inquire into the secret orders or instructions of the assured to the broker, and it would be altogether improper and impertinent in him to do so; and it happens every day, that a broker acting thus as agent for the assured, gives a higher premium, when the underwriter refuses a policy at the premium offered. Should the broker

No. 1. in such a case go beyond the limits of his instructions, no blame surely can lie at the door of the underwriter, but the broker alone is responsible for his conduct to the assured. As to the ship having sailed before the insurance was made, and that no alteration could then be made upon the sailing orders, the only conclusion to be deduced is, that the merchant ought to have made his insurance earlier; or that the owners of the vessel ought to have told him that the ship had sailed with an intention to call at Morison's haven; or that the broker, knowing that the ship had sailed, ought not to have entered into a limited policy of insurance. Besides, were this circumstance of the ship having sailed allowed to have any influence in the cause, it behoved to operate in behalf of the underwriters; for knowing at the time of signing the policy that the ship had sailed some days before, they had reason to expect from the favourable winds and weather that she had then completed her voyage, which in fact would have been the case had she not tarried so long at Morison's haven.

As to the argument urged in behalf of the assured, that the deviation was very trifling, and there was no additional risk;—no consideration of this kind, it was contended, could be admitted. If the risk was increased in ever so small a degree, it was a risk which the underwriters had not undertaken nor contracted for. It was not the voyage insured. Neither can any distinction remain betwixt a great and a small deviation; for who can mark where a small deviation ends, and where a great deviation begins? In short, all such disquisitions are extraneous in questions of this kind. The moment the policy is signed, there is an end of all calculations of chances and risk. If the ship keeps within the terms of the policy, the underwriters will not be permitted to investigate every step of the voyage in order to discover whether matters might not have been better managed for the behoof of all concerned. As little, on the other hand, will the merchant be permitted to justify a deviation from the terms of the policy, by alledging that the risk was equal or even diminished. There is no species of transaction more *stricti juris*, than a contract of insurance, and the clear terms of a policy can never lead to arbitrary or equipolent circumstances.

With regard to the case of Hogg and Kinloch against Bogles and Scott, the assured can derive no aid from it. It is no where said in that case that a deviation does not vacate the policy of insurance; nor that the policy once vacated is revived by returning to the proper course. The ground of that decision was, that there never was a deviation *from the time the insured voyage began*. The ship was insured from the Frith of Forth to Campvere; and the objection of the underwriters accordingly resolved into this, that the ship had only gone a part of the tract insured and not the whole of it. A strange objection this to the payment of a policy, that the assured had exposed the underwriters to the risk of only a part, and not the whole of the insured tract. But had the ship, after setting out from the Frith of Forth, gone to the Frith of Tay, and

afterward proceeded to Campvere, there could not have been a doubt that the policy was vacated.

To these arguments the assured replied, in their answers, that the conduct of the underwriters in altering the policy was, after all that had been said, totally unjustifiable. If they did not choose to underwrite it as it stood, they ought either to have refused it altogether, or at the most to have exacted a higher premium. No blame could have rested upon them in either of these cases; but the alteration of the policy can be considered in no other than in a very blameable light. The broker also, they maintained to be the agent of the underwriters, not of the assured. It is between the broker and the assured that the contract is made; the former receiving the order from the latter, and getting the insurance done upon it by those underwriters who frequent his office, and by whom he is paid. It is he who keeps an account of the premiums that are due to the underwriters, and who is answerable to them for these premiums. As their agent, therefore, any private alteration of a policy made between him and them must be considered as collusive.

With regard to the demand of the underwriters to have the general point determined;—it is an old maxim, that, *periculosa est in jure amnis definitio*. Every case has its own peculiar circumstances which can with difficulty be reduced under any general rule. And in the present subject, accordingly, the question will much oftener be, whether a deviation has been committed, than what should be the effect of a deviation; the determination of which must always depend on a variety of connected circumstances. This was in fact the question in the case of *Steven and Douglas*; in which no precise judgment was given as to the effect of a deviation in case no damage was sustained in the course of the deviation itself. A deviation is then only committed, when the nature of the voyage has been altered from that which was insured, and the risk increased. There is thus no question here about a great or a small deviation, but whether there was any deviation at all. The vessel might have called at all the usual places betwixt Carron and Hull. The policy contained an express allowance for calling at Leith without any limitation of the time; and the risk of the voyage being prolonged by calling at a port was clearly undertaken by the underwriters, as it made no difference of hazard whether that port was Leith or Morison's Haven. So rigid an adherence to literal terms as the underwriters require would be totally destructive of policies of insurance. The argument of the underwriters goes even beyond literal interpretation; for a liberty to call at Leith can never be construed as a prohibition of calling any where else, provided such calling be according to *usage*.

And as to the case of *Hogg and Kinloch* against *Bogles and Scott*, the voyage which was actually made was more dangerous than the voyage insured; and the comment of the underwriters upon it is therefore nothing to the purpose.

No. 1. The Court, 26th April 1776, upon advising this petition and answers, adhered to their former interlocutor.

Reporter, *Lord Alva.* For the Chargers, *Crosbie.* For the Suspenders, *Jay Campbell.*
D. of Faculty Dundas.

* * This judgment was reversed upon appeal, 25th November 1776.

J. W.

1777. *December 2.*

JOHN DALRYMPLE *against* JAMES JOHNSTON and Others.

No. 2.

When a ship is short insured, the owner is to be held as insuring himself to the extent of the deficiency.

See No. 2.
p. 7073.

IN the end of the year 1769, Captain Dalrymple proceeded on a voyage in the *Neptunè* from Fraserburgh to Dantzick, and from thence back to Fraserburgh. Having arrived safe at Dantzick, disposed of his outward cargo, and procured a large homeward cargo, he ordered insurance. £300 was accordingly insured upon the cargo at London, and another insurance for £750 was made by Captain Dalrymple with Messrs. Cole and Bingley at London, upon the ship and goods. His factor, Mr. Higgens, at the same time, got an insurance made at Glasgow of £250, in goods only.

The underwriters there were Messrs. Johnston, Jackson, and Bogle.

The ship having been driven ashore upon the coast of Sweden, Captain Dalrymple wrote to the London and Glasgow underwriters, informing them of the misfortune, and requesting their advice and instructions for the government of his conduct. He received answers from both, authorising him to act in the best manner he could for the benefit of all concerned. Every thing was done accordingly by Dalrymple, which was in his power, for the safety of the ship and cargo; but the expenses, after all his care, exceeded very considerably the amount of what was saved. Dalrymple having charged the underwriters for the balance due to him in consequence of the expenses he had been at in fulfilling their orders, he received from the London underwriters, without the least scruple or difficulty, their proportion of the loss, amounting to £850 Sterling, together with 15 *per cent.* upon that sum as the amount of his expenses. The gentlemen at Glasgow, however, did not seem willing to settle matters upon the same footing; upon which Dalrymple brought an action against them before the Judge Admiral, who, after a variety of procedure, found the underwriters liable in the sums charged. A bill of suspension having been presented by the underwriters, Lord Covington ordered informations and reported the cause.

Pleaded for the suspenders: The cases of the London and the Glasgow insurers upon this adventure are very different. It was the interest of the London insurers, who had underwritten upon the ship, to slump matters; for by