No 23.

Answered; It has been admitted, that the Anna did not join the fleet at the place of rendezvous. Of course she did not, in terms of the warranty, sail along with the convoy. Whether this failure was owing to pure accident or to fault, or whether it had any actual influence on the fate of the adventure, is of no consequence; to void the policy, it is enough that thus the warranty was not complied with. 'It is perfectly immaterial (to use the words of Lord Mans-'field) for what purpose a warranty in a policy of insurance is introduced; 'but being inserted, the contract does not exist unless it is literally complied 'with. There is a difference between a hypothetical and a conditional con-'tract; the latter admits of equity; and where it cannot be performed literally, 'may be performed as nearly as possible. But in a hypothetical contract like 'this, if the event does not happen, there is no agreement.' Park on Insurances, p. 363. 368. 391.; 27th June 1786, Dunmore and Company *contra* Allan, No 21. p. 7101. In all the cases quoted on the other side, except the case of Victorine *versus* Cleeve, the voyages had been commenced after a previous junction at the place of rendezvous; and in that particular one where there was no appointed rendezvous, the ship had actually sailed to meet her convoy. It is besides to be remarked, that the alleged fatality would not have happened to the Anna, if, as she ought, she had joined the other ships at Bluefields.

The Judge-Admiral having decerned in absence against the underwriters,

The Lord Ordinary 'suspended the letters *simpliciter*.' And on advising a reclaiming petition and answers,

The Court adhered to the interlocutor of the Lord Ordinary.

A petition reclaiming against this judgment was appointed to be answered, but afterwards refused.

Lord Ordinary, *Braxfield*. Act. *G. Fergusson, Ross*. Alt. *Blair*. Clerk, *Home*.
S. *Fol. Dic. v.* 3. *p.* 330. *Fac. Col. No* 49. *p.* 87.

SECT. V.

Valued Policy.

No 24.

1765. *June* 21. & 1772. *February* 13. M'Nair *against* Coulter.

James M'Nair, master of a ship belonging to his father, wrote to the latter from Barbadoes, acquainting him, that he was ready to sail for Virginia with a cargo, the value of which, along with the ship would be about L. 1200 currency.

His father insured the ship at Glasgow, the policy bearing, 'the said goods, 'body, tackle, &c. valued at L. 1000 without further account.' The vessel was lost off Bermudas. It afterwards appeared, that the information of the value was false, the real value of the ship and cargo not being a half of the sum insured; but there was no evidence that the father was accessory to the fraud. The son was prosecuted for having wilfully sunk the ship; but acquitted of that charge, and found guilty only of having sent fraudulent advice with a view to the insurance. In an action for the insured sum against the underwriters, the LORDS found, that the policy did not oblige them to pay the sums at which the ship and cargo were insured, but only the real value, as it appeared on proof. But the House of Lords reversed the judgment, and decreed for payment of the sum in the policy. No 24.

Fol. Dic. v. 3. *p.* 331. *Millar on Insurance.*

1783. *December* 2.

JAMES WILSON, and Others, *against* JOHN WORDIE, and Others.

No 25.
Insurers are liable for the estimated value, tho' beyond the true, if the estimate be made without fraud.

WILSON, and other owners of a private ship of war, having got notice that she had captured a Spanish merchantman, made insurance upon the prize; which, in the policy opened by Wordie and others, the underwriters, was valued at L. 20,000, including 20,700 dollars in specie. The vessel was retaken by a French privateer, but not before the Scottish captors had sent ashore 4200 dollars, which indeed appear to have been nearly the amount of the specie found on board of the prize.

An action instituted in the Court of Admiralty, by the insured against the underwriters, having been brought by advocation and reduction before the Court of Session, it was

Pleaded for the defenders; It is an established maxim respecting insurances, that the concealment or misrepresentation, even by mistake, of any such important fact or circumstance as may make 'the risk really run different from 'that understood and intended to be run at the time of the agreement,' renders the policy void. The over-valuation in this case, so undeniably, especially as to the dollars, evidently increased the disadvantage of the insurers situation, or the risk which they run, and ought therefore to prove fatal to the claim of the pursuers; Weskett's Digest of Insurance-laws, p. 28.

But though the policy were not thus to be annulled *in toto*, it ought at least, in consideration of its object, to be restricted to the loss truly sustained. Insurance is a contract of indemnity; and where no damage can possibly arise, or so far as no subject exists on which it may be incurred, there is no room for any obligation. Hence the defenders are liable according to the true extent only of the loss in question, notwithstanding the over-valuation in the policy.