1788. *December* 10. WALTER MONTEATH *against* DAVID CROSSE and Others.

No 23.
A vessel warranted to sail with convoy, instead of proceeding to the place of rendezvous, remained in a harbour within reach of the convoy's signals, to which she paid obedience, but was by accident prevented from joining it for several days after sailing. Long after the junction, the ship being captured, the underwriters, from failure of the warranty, were found free.

CROSSE and other underwriters subscribed a policy of insurance, 'assuring, in 'favour of Monteath, certain sums on goods aboard of the Anna at Jamaica, 'in the voyage from that island to the river Clyde; the Anna being thereby 'warranted to sail with convoy on or before 1st August 1782.'

Without proceeding to Bluefields-bay, the appointed place of rendezvous prior to joining the convoy, the vessel lay in the harbour of Savannah-la-Mar, at the distance of several miles, but not out of the reach of signals from thence. While there, the Captain received sailing orders from the Admiral who commanded the convoy.

On the 25th July, by a very peculiar accident, a land-breeze sprung up in the day-time, of which the fleet taking advantage, set sail; but before the Anna, though completely ready, could clear the harbour, she was stopped in her course by a sudden calm. She joined the fleet however on the 29th, and continued with it till 16th September, when it was dispersed by a storm. Afterwards she was captured by the enemy, and carried into France.

The insured values being demanded, they were refused, on this ground, that the warranty in the policy, 'of sailing with convoy,' had not been fulfilled, as the ship did not in fact join it for several days after sailing.

In an action, however, at the instance of the insured, removed from the Court of Admiralty into the Court of Session, the pursuers

Pleaded; The warranty was truly complied with. The ship lying within sight and hearing of signals, had received sailing orders, and as soon as the signal for unmooring was given, being quite ready to put to sea, she was proceeding to join the convoy, when, in circumstances hardly less extraordinary than if an earthquake had happened, for land-breezes in the day are equally rare, she was suddenly arrested by a calm. Her having thus commenced the voyage by setting out to join the convoy, which, by a fatality only, she was prevented from effecting, it is to be deemed an equivalent to an actual junction at that time. So in England this matter has been frequently determined. Millar on Insurance, p. 528, Phynne *versus* Webster. Douglas, Rep. p. 344, Bond *versus* Nutt; ib. 350, Thelluson *versus* Fergusson; Strange's Rep. p. 1290, Victorine *versus* Cleeve.

Though any wilful deviation from the course of the voyage insured, as being contrary to an implied warranty, voids the policy, yet the non-compliance supposed in this case ought not to have that effect; because not only was it altogether casual and involuntary, but such as evidently could have no possible influence on the situation of the ship at the time of the capture, she having been exactly under the same protection of the convoy as if she had joined it on the 25th instead of the 29th of July.

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.