master has violated his contract as such, and defrauded the owners, who are thus subjected to great loss; while he himself, though he accomplished but the half of his voyage, has been rewarded with the whole of his freight. No 4.

Answered, The only loss which arose here from perils of the sea, that of part of the salmon thrown overboard, the insurers are willing to repair; for the going into the harbour of St Lucar was of itself no loss; nor did any other consequence follow from it than a scheme of trade concerted for the benefit of the owners, which is so strangely compared to detention by kings, princes, or people. As to barratry, it is a criminal act, and cannot exist without a fraudulent design. Stamma *versus* Brown; Strange's Reports, p. 1173; whereas here nothing in the conduct of the shipmaster betrays the want of *bona fides*.

An argument was likewise stated relative to the common exception in policies, 'of corn, fish, fruit, &c. from all but general average,' which however the Court seemed not to think material in the cause.

THE LORDS found, 'That the underwriters were not liable for any loss that may have arisen from the sale of the salmon at St Lucar.'

Lord Ordinary, *Elliock*. Act. *M'Intosh, Wight*. Alt. *Lord Advocate*. Clerk, *Home*.

S. *Fol. Dic. v.* 3. *p.* 330. *Fac. Col. No* 190. *p.* 299.

1793. *March* 1.

CHARLES ADDISON and SONS *against* WILLIAM DUGUID and Others.

No 5.
An insurance that a whale ship would return with a certain quantity of blubber, found not to be a gaming policy.

THE ship Leviathan, belonging to Charles Addison and Sons, sailed from Borrowstounness on the 21st February 1793, fitted out for the whale fishing trade.

In May 1791, Messrs Addisons opened a policy, on which Mr Duguid and other underwriters insured that the ship should return to Borrowstounness with ninety butts of blubber, and obliged themselves to pay for the deficiency at the rate of L. 7 Sterling *per* butt.

The Leviathan returned with only five butts of blubber.

Addison and Sons having brought an action against the underwriters, for payment of the loss, in defence, it was

Pleaded; The statute 19 Geo. II. c. 37. enacts, that no assurance or assurances shall 'be made by any person or persons, bodies corporate or politic, on 'any ship or ships belonging to his Majesty, or any of his subjects, or on any 'goods, merchandises or effects, laden or to be laden on board of any such ship 'or ships, interest or no interest, or without further proof of interest than the 'policy, or *by way of gaming or wagering*, or without benefit of salvage to the 'assurer, and that every such insurance shall be null and void to all intents 'and purposes.'

The present assurance falls under this statute, being just a wager, that a particular ship will get ninety butts of blubber. It is not a contract of indemnity,

No 5. because, however small the quantity of blubber obtained, the deficiency was to be held as loss. It is essential to a valid policy, that it relate to an existing subject, in which the insured have an interest, but this cannot be said of the present, made before any fish had been caught; Park on Insurance, p. 259. 261. 262. 268. 272. and 273.

But besides, policies like the present are too dangerous in their consequences, both to the public and to individuals, to be supported even at common law. The high bounty given to promote this trade would, by their means, be converted into a premium to underwriters, whose obligation would render the owners indifferent to the success of their ship, and give rise to innumerable frauds on the fishing ground. Vessels not insured, for instance, might be allowed to appropriate whales caught by ships secured from loss in this manner.

Answered; The statute applies only to wager policies strictly so called, that is, to such as relate to a fact or event in which the parties have no sort of interest. But where the insured have an interest, whatever be its nature, the insurance is effectual. Thus a merchant may insure the profit he expects upon an adventure; or, if he has a cargo consigned to him, he may insure his commission upon the sales; Millar on Insurance, p. 226.; Park, 305. *et seq.* These cases are much stronger than the present, as the object in both was to insure a contingent profit, whereas the policy in question was in fact a contract of indemnity, as the quantity of blubber insured, although it had been got, was insufficient to defray the expense of the voyage.

No danger can arise to the public from supporting policies of this nature, as the statutes introducing the bounty contain a variety of provisions, which effectually prevent any abuse in its application.

The question came before the Court by a bill of suspension, presented by the underwriters, in consequence of a decree of the Judge-Admiral against them.

THE LORD ORDINARY refused the bill.

On advising a reclaiming petition, answers, replies, and duplies, it was

Observed on the Bench: This is clearly a gaming policy. It is precisely similar to insuring a *jactus retis*. Besides, the success depends entirely on the will of the insured, and on this account alone the policy should be voided. It would not be lawful to insure that a privateer will take a prize.

Two of the Judges were inclined to think, that this sort of insurance was lawful to the extent of indemnification. But it was suggested to be impossible in practice to draw a line; and that owners might secure themselves sufficiently by insuring the ship, the freight, and a certain sum upon the fish, under the provision of their being actually taken.

The Court passed the bill.

Lord Ordinary, *Gardenston*, Act. *Rolland*, *Hay*. Alt. *J. Clerk*, *W. Clerk*. Clerk, *Menzies*.

N. B. The underwriters were willing to wave the objection to the legality of the policy, and to rest their defence upon the information on the part of the insured not having been complete. The Court, however went entirely on the first defence, from which they did not think the underwriters in *hoc statu* entitled to depart.

1797. *May* 23.—THE facts which gave rise to this question have been stated above, 1st March 1793. No 5.

From the report of that date, it appears, that the Court passed the bill of suspension for Duguid and others. And the suspension having been discussed before the Lord Ordinary, his Lordship took the cause to report on informations.

The outlines of the argument will be found in the former report.

At advising the cause, some of the Judges still expressed an apprehension, that bad consequences might result from sustaining policies of this description, but influenced chiefly by there being no instance of their having been disallowed in England*, they did not consider them to be illegal.

A great many of the Judges, however, were now of opinion, that the policy was both safe and lawful. It was pretty clear, (it was observed) that the sum insured did not go beyond indemnification to the owners; and, at any rate, as the ship had sailed before the insurance was made, it could not affect the success of the adventure.

THE COURT unanimously (19th June 1795) repelled the reasons of suspension. And on advising a reclaiming petition for one of the defenders, with answers, the Lords adhered.

Lord Ordinary, *Craig.* Act. *Rolland, Hay.* Alt. *Jo. Clerk, W. Clerk.* Clerk, *Home.*

Fol. Dic. v. 3. *p.* 332. *Fac. Col. No* 41. *p.* 83. *& No* 27. *p.* 64.

* The following opinion of an eminent English counsel was produced, and had considerable influence on the decision.

Query 1. Whether any case of the precise same kind, or a similar nature, has occurred in the courts of England, and what judgment has been pronounced thereon?

Answer: I do not know or believe any case precisely like the present, or so near in principle as obviously to govern it, has ever come in litigation before any court in England. I speak of an insurance at once objected to, on the ground of its being a mere wager, and so prohibited by statute; and also because, under all its circumstances, it is so manifestly against public policy, that it is therefore illegal.

Query 2. What would probably be the decision in the courts of Westminster Hall upon the case now before the Court of Session, were it to be tried in England?

Answer: I am strongly of opinion, that a decision in the courts of Westminster Hall in this case would be in favour of the assured.

Query 3. Whether in your opinion the insurance in question is liable to a good objection, either upon the statute or at common law?

Answer: It is perfectly clear to me that this is not a wagering policy, within the meaning of the statute, but insurance of profit on a fishing adventure; in order to take the chance of which the insured has been necessarily put to great expenses in the outfit of the vessel, purchasing proper tackle for whale-fishing, manning, &c. As for the argument on the ground of public policy, I confess I do not feel it. To entitle the adventurer to the bounty, he must comply with the requisition of the statute giving it, as to fitting out, manning the vessel, &c.; and notwithstanding any such insurance as is at all likely to be entered into, it will always be the interest of the insured to get as many fish as he can. The underwriters know the bounties given by law, and it cannot be probable that they will underwrite a policy which will tempt the insured to neglect the adventure in order to come upon them; and of this they have as good means to judge as the insured themselves.

Upon the whole, I am of opinion, that this contract of insurance is legal, and the insured entitled to recover against the underwriters.

(Signed) EDWARD BEARCROFT.