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off in the evening, it may sometimes be necessary for him to write a second time. Underwriters would frequently be defrauded, if this were not incumbent upon him. Indeed, it is the risk, as known at the departure of the post, which is undertaken by them; and, for this reason, there can be no obligation on the party desiring the insurance to communicate subsequent information. He certainly would not be bound to do so by express; and as little is he bound to act upon the chance of one mail overtaking another.

If the policy were to be vacated, wherever it was possible to give subsequent information, it would introduce much uncertainty in questions of this sort, which ought to be regulated by simple and definite rules.

The proportion of underwriters, who have acquiesced in the pursuer's demand, shews the general understanding on the subject.

The Lord Ordinary reported the cause, on informations.

The Court were, in general, of opinion, that George Scougal ought to have written on the 2d of November; and, on that ground,

THE LORDS assolizied the defenders.

Reporter, *Lord Craig.*

Act. *Moodie.*

Alt. *D. Cathcart.*

Clerk, *Home.*

D. D.

Fac. Coll. No. 73. p. 166.

1803. *June 24.*

ALLAN, and Others, *against* YOUNG, ROSS, RICHARDSON, and Company.

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What concealment sufficient to vacate the policy.

ON the morning of the 5th March, 1801, the ship *Lady Stormonth* sailed from the roads of Dundee for London. Two days afterwards, the ship *Duchess of Athole* likewise sailed on the same voyage, and reached London on the 14th, without having been able to hear any intelligence of the other vessel. This circumstance was communicated to Mess. Young, Ross, Richardson, and Company, merchants in Perth, the owners of both vessels, in the following letter from the wharfinger, (14th March, 1801.) 'I wrote you by last post, to which I refer. I am exceedingly sorry to hear that the *Lady Stormonth* has not yet appeared, nor any tidings of her. *Her fate is now almost certain.* The *Duchess of Athole* arrived this day at noon, and Captain Gilbert neither saw nor heard any thing of the *Stormonth*, which is almost complete confirmation of her capture; but I sincerely hope my decision may prove premature. Should any thing favourable happen to-morrow, I will be happy to hand you the intelligence,' &c.

This letter was not sent to the insurance brokers; but, immediately on receipt of it, the following was written to them: 'We have some printed goods on board the *Lady Stormonth*, George Tod Master, which left Dundee for London on the 5th; and not having heard of her arrival, we incline to have part covered; and request you will get us insured L. 700, if you can obtain it at two to five guineas *per cent.* At all events, cover for us L. 400 or L. 500, though the premium should be high.' The insurance was effected at 20 *per cent.*; and the policy underwritten by Alexander Allan, and others.

The Lady Stormonth having been captured and carried to France, the underwriters refused to make up the loss, in terms of this policy, because the wharfinger's letter had not been communicated to them; and the insured commenced an action in the Court of Admiralty, to compel them to abide by their policy.

The Judge Admiral (22d January, 1802,) "found the alleged concealment not of such a nature as would be sufficient, if instructed, to vacate or vitiate the policy."

Again, on advising a reclaiming petition, with answers, he pronounced this interlocutor, (18th June, 1802,) "In respect the situation of the vessel in question was, in point of risk, fairly and correctly represented by the insured; in respect the non-arrival of the vessel was implied in the very nature of the risk; and, in respect that the arrival of the ship Duchess of Athole was an event which the insured were not bound to communicate, and which could have little weight in the calculation of the risk to be incurred, refuses the petition."

Against this judgment the underwriters presented a bill of suspension, which was refused. The underwriters petitioned the Court; and

Pleaded, The leading principle in the law of insurance is, that every concealment on the part of the insured renders the policy void and null. Insurance is a contract of speculation. The facts upon which the risk is to be computed, lie, for the most part, within the knowledge of the party concerned only; and, as the underwriter relies upon him for information, if any thing be concealed, which makes him form a wrong estimate, even though without any fraudulent intention, the contract must be annulled; Park on Mar. Insurance, p. 174. 177.; and the opinion of Lord Mansfield, in Carter against Boehm, in Burrow's Reports, p. 1905.

In the wharfinger's letter are two facts material to be known, which led him to a conviction that the Lady Stormonth was lost; that she had not arrived on the 14th; and that another ship, which had sailed two days later, had arrived, and could give no account of her. The owners had thus not only not heard any thing of her arrival, but they had positively heard that she had not arrived; and that a vessel, sailing in the same route, had not heard any thing of her on the passage, and had arrived, though she had sailed some days later. These are circumstances materially entering into the calculation of risk. They were not bound, indeed, to give speculations; but they were bound to give all the facts on which these speculations were founded; and, had they done so, the underwriters would just have formed the same opinion as the wharfinger, and would not have touched the policy at any premium.

The premium taken is high, and is that for a missing ship, which is in the case of a vessel of which no intelligence has been received. There is a chance that she may have put into another port; or she may have actually arrived at the place of her destination, though no certain accounts of this have been received. The case, however, is very different, where certain accounts have been received that she had not arrived, and that another vessel, sailing some

No 14. days afterwards, by the same track, had arrived, without having heard any thing of the other.

Answered, The question in all similar cases is, Whether there has been such a concealment, designed or not, as varies materially the object of the policy, and changes the risk understood to be run? The risk in this case was that of a vessel which had not arrived at her destination, so far as was known to either of the parties at the time, although the time occupied had been longer than vessels usually take to perform a voyage of that kind. The circumstances concealed, which are alleged to be material, and to vary the risk, are the knowledge of the vessel not having arrived, and that the *Duchess of Athole* had arrived. But the not-arrival was necessarily implied and understood, and was involved in the very definition of the risk; it was the very circumstance, the underwriters saw, which led the owners to make the insurance; and it was upon this supposition, also, that the high premium, ten times the usual amount, was calculated: And, while the underwriters exact this exorbitant premium, they cannot surely vacate the obligation they thus came under, upon the pretence that information was not given to them of a fact which they themselves supposed, and which was the basis of their calculation. Nor could the circumstances relative to the *Duchess of Athole*, if mentioned, at all guide the underwriters in their calculation of risk. The sailing of one vessel bears no relation to the sailing of another; and all the information which could have been derived was, that a vessel might perform a voyage in less time than the *Lady Stormonth* had done. But still this was the very basis of the transaction between the parties, upon which risk was estimated, and the premium calculated to be equivalent to it. In *Thomson against Buchanan*, (20th June, 1781,) No 8. p. 7085. the underwriters were assoilzied; but this judgment was reversed in the House of Lords, as the concealment did not appear material, though the circumstances were stronger than those alleged here.

The Court laid it down as a general rule, That the case of the underwriter is, in all situations, to be viewed in a favourable light; that comparatively few of the circumstances which are known to the owner can be known to him; and, consequently, that in entering into this contract, while the insured can practice many frauds upon the underwriter, he can scarcely ever deceive the insured. The rule of law, that the concealment or disguise must be of some material circumstance, affecting the calculation of risk, they did not mean to depart from; but if the owner should himself presume to be the judge of what is material to the risk, the underwriter would probably seldom have the real circumstances for estimating the risk explained to him. In this view, all the advices on the subject of the vessel which the owner has received, should be shewn to him, whether they appear to be material or not, as the underwriter alone is the proper judge of this. In the present case, the Court, in conformity to those general ideas, thought, that the wharfinger's letter

should have been communicated; and that the information which it contained was material; and, therefore,

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They remitted to the Lord Ordinary to alter his interlocutor, and to pass the bill.

Lord Ordinary, *Metwren.*Act. *Hay.*Agent, *H. Fotheringham.*Alt. *Moodie.*Agent, *Jo. Tawse.*

F.

*Fac. Coll. No. 113. p. 248.*1803. *June 24.*GILLESPIE & COMPANY *against* DOUGLAS.

WILLIAM GILLESPIE and Company, merchants in Glasgow, received the following letter from their correspondents at New York, (13th May, 1797.)

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What concealment sufficient to vacate the policy.

' You have inclosed bill for L. 1000. Also have shipped in the *Fanny* one thousand dollars, which we hope will safely come to hand. We have also shipped in the *Ohio* ninety-seven bales of cotton, the amount of which we will send by the same ship. *She will sail about twelve hours after the Fanny.* *P. S.* Insure, if she does not come soon to hand.'

This letter arrived by the *Fanny*; and, a few days afterwards, (24th June, 1797.) Gillespie and Company addressed the following order to their brokers: ' Insure in our favour L. 1000, on goods *per* the *Ohio*, at and from New York to Clyde, for eight guineas *per cent.*'

The policy was accordingly filled up on these terms; and Gilbert Douglas, merchant in Glasgow, was one of the underwriters.

The *Ohio* was taken by the enemy on her passage home, was carried into a French port, and condemned.

Douglas declined paying his share of this loss, on the principle that there had been a concealment of a material circumstance, which affected the risk, by not disclosing the information received by the letter of 13th May, relative to the time when the *Ohio* was to sail.

Gillespie and Company brought an action upon the policy against him; and the LORD ORDINARY sustained the defences, (29th November, 1800.)

To which judgment the Court adhered, on advising a petition, with answers.

They considered the information, relative to the time of the *Ohio* sailing, as material, and affecting very much the risk to be insured against. If the insurance had been effected immediately on receipt of the letter by the *Fanny*, the case might have been different, and the risk would just have been a common risk; but, after waiting for several days, during which the vessel, which was to sail only twelve hours after the letter of advice, did not arrive, the risk became that of a missing ship.

Lord Ordinary, *Craig.*Act. *A. Campbell, Junior.*Agent, *R. Marshall, W. S.*Alt. *Semple.*Agent, *G. Dunlop.*Clerk, *Pringle.*

F.

Fac. Coll. No. 114. p. 251.