the house property in question fell to be dealt with as moveable estate.

The Lord Justice-Clerk concurred.

Lord Neaves was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find—(1) that the parties of the first part are not entitled to the whole of the five-seventh shares of the property in question; and (2) that the parties of the second part are entitled to share in the value thereof; and appoint the expenses of both parties to be paid out of the said five-seventh shares, and decern; and remit to the Auditor to tax the expenses now found due, and to report."

Counsel for James Macgregor—Adam—Hon. H. J. Moncrieff. Agent—William Montgomery, W.S.

Counsel for W. D. J. O'Reilly and Miss O'Reilly—J. A. Crichton. Agent—Ebenezer Mill, S.S.C.

Counsel for Mrs Jones and Charles Overend and Children—Darling. Agent—George Burns, W.S.

Tuesday, May 23.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

WILLIAM HUTCHINSON & CO. *v.* THE ABERDEEN SEA INSURANCE CO.

Ship—Marine Insurance—Risk—Material Concealment—Change of Ship's Nationality—Merchant Shipping Act 1873 (36 *and* 37 *Vict. c.* 85).

A ship was transferred, by means of a fictitious sale, from a British to a Belgian register for the purpose of escaping the inspection provided by the Merchant Shipping Act 1873.—*Held* that failure to intimate the change of nationality when proposing for a new insurance, to a company with whom the ship had been previously insured, was material concealment, to the effect of voiding the policy, altaough, as a matter of fact, the ship was seaworthy.

In this case William Hutchinson & Co., merchants, Newcastle-on-Tyne, sued the Aberdeen Sea Insurance Co. for the sum of £701, 16s. sterling, with interest at the rate of 5 per cent. per annum from 15th December 1874 till payment, being the amount of an insurance effected by the pursuers with the defenders on 3d December 1874 against the loss of the vessel "John George" on the voyage from the Tyne to Cronstadt or Wyburg, while there, and thence back to the east coast of Great Britain.

The circumstances in which the insurance was effected, and in which the pursuers now claimed, are sufficiently set forth by the Lord Ordinary in the following interlocutor, dated 19th November 1875:—

"The Lord Ordinary, &c. . . . . finds in point of fact, *Primo*, That by policy of insurance dated 3d September 1874 the pursuers Messrs William Hutchinson & Co., who were part owners of the vessel 'John George,' in name of themselves and the other owners, effected through Messrs John and Robert Catto, shipbrokers, Aberdeen, an insurance against the loss of the said vessel at and from the Tyne to Cronstadt or Wyburg, while there, and thence back to the east coast of Great Britain, and that the said vessel was underwritten by the defenders in various sums, making up in all the sum of £725: *Secundo*, That thereafter the 'John George' proceeded to Cronstadt, and thence sailed for Leith; that during the voyage a severe gale arose, in consequence of which the 'John George' was, on the 9th of December 1874, driven ashore on the coast of Northumberland, and became a total wreck: *Tertio*, That the pursuers then claimed from the defenders, as underwriters, the sum of £701, 16s. as the amount due under said policy, but that the defenders have declined to make any payment under the policy, in respect that material facts were concealed from them by the pursuers at the time the insurance was effected: *Quarto*, That in April 1873 the pursuers, through said John and Robert Catto, had effected in Aberdeen a previous insurance on the 'John George,' and that the pursuers on that occasion, through the said Messrs Catto, informed the underwriters that the said vessel was registered at South Shields, and referred them to the French Bureau Veritas, which corresponds to the Lloyds Registry in England, in which the 'John George' was entered as an English ship, registered at South Shields as having been built at Sunderland in 1837, and as standing in April 1873 as having been classed in 1872 of the second class for two years: *Quinto*, That in the French Bureau Veritas current at the date of the policy sued on, the 'John George' still stood as a British ship, and of the same class as at the date of the former policy in April 1873; and that the defenders—nine of whom had been underwriters in the previous policy in 1873—all became underwriters on the policy sued on, in the belief that the 'John George' was a registered British ship, and that no information to the contrary was ever communicated by the pursuers to Messrs Catto, or reached any of the underwriters: *Sexto*, That prior to the 28th July 1874 the 'John George' had been transferred to a Belgian owner by a fictitious sale and mortgage, effected by James Primrose Lindsay, then the managing owner and principal part owner of said vessel, and that said vessel was on said date registered in Belgium as a Belgian vessel, and continued so registered at the date of the wreck, and that the British registry of said vessel was closed on 25th August 1874: *Septimo*, That the said transfer of ownership and change of registry were effected for the purpose of excluding the 'John George' from the operation of the Merchant Shipping Act of 1873, which empowered the Board of Trade to inspect and detain British vessels which were believed to be unseaworthy: *Octavo*, That such inspection by the officers of the Board of Trade is calculated to afford, and does afford, protection to underwriters in policies of insurance on British vessels for a single voyage, effected without any special survey on behalf of the underwriters: *Nono*, That the facts of the transfer of the ownership of the vessel and change of registry, were, or ought to have been, within the know-

ledge of the pursuers at the date of their effecting the policy of insurance sued on, and were not made known by them to the defenders: *Decimo*, That the said transfer of the vessel and change of flag were material facts, the knowledge of which would have materially influenced the underwriters in determining whether to accept or decline the insurance when proposed, and the amount of premium to be charged if the risk were accepted, and that it would have been reasonable in them to have been so influenced: Therefore, and in point of law, finds that the policy sued on is void in respect of the foresaid concealment of material facts, and that the pursuers are not entitled to recover the sums insured by the policy; but finds, in respect of the minute for the defenders, No. 86 of process, that the defenders are willing to repay to the pursuers the premium paid by them on said policy, which amounts to £45, 17s. 6d.: Decerns against the defenders for payment of the said sum accordingly: *Quoad ultra* assoilzies the defenders, and decerns, &c.

"*Note.*—The findings in the foregoing interlocutor so fully set forth the grounds of judgment as to render it unnecessary to enter into much detailed explanation in this note.

"The law applicable to such cases is stated thus by Arnold, vol. i. p. 511,—'It is the duty of the assured to communicate to the underwriters all the intelligence he has that may affect the mind of the underwriter as to either of the two following points:—(1) Whether he will take the risk at all; (2) At what premium he will take it.

"'This is a duty attaching at the time of effecting the insurance, and not at all dependent on subsequent events, for the effect of a concealment on the policy is determined not by its eventual relation to the risk, but with reference to its immediate influence on the judgment of the underwriter. For so is the law, that were the intelligence concealed to turn out to be wholly unfounded, or the loss to arise from a cause totally unconnected with the fact concealed, the policy is nevertheless void.'

"And on the same point Parson says, vol. i. p. 469,—'If it is proved that material facts are not disclosed, it is not always necessary to constitute a concealment that these facts were actually known to the assured. It is enough if he might have known them and ought to have known them; for it is certainly his duty to use all customary and reasonable means to acquire all the information which it is his duty to impart. And this means all the information which the insurer ought to have in making his bargain, and which he may reasonably believe the insured possesses.'

"In dealing with cases like the present, the questions whether there was concealment from the underwriters, and whether the facts concealed were material, that is to say, whether everything was disclosed which would affect the judgment of a rational underwriter, governing himself by the principles and calculations on which underwriters do in practice act, are proper jury questions to be decided on the evidence adduced. See Parson on Insurance, vol. i. p. 495, as referred to in the judgment of the Court of Queen's Bench in *Ioindes* v. *Pender*, 27th May 1874, 9 Law Reports, p. 539. It appears to me to be in this case clearly proved that the underwriters believed and entered into the policy of September 1874 in the belief that the 'John George' was then a British registered ship, which she undoubtedly was at the date of a former policy effected through the same brokers, and with substantially the same underwriters, in April 1873. It is also proved that James Primrose Lindsay, who was in July, August, and September 1874 the principal owner of the vessel, by means of a nominal sale to a person in Belgium of the name of Watson, and by a mortgage granted by Watson in his favour, so arranged matters that the 'John George' became ostensibly the property of a Belgian owner, and was registered in the Belgian registry as a Belgian ship. All this was done by the 28th of July 1874. It is also proved that the change of ownership and flag was made expressly for the purpose of exempting the vessel from inspection by Board of Trade surveyors under the powers of the Merchant Shipping Act of 1873. The result of such inspection has been that very many ships have been prevented from sailing on the ground of being unseaworthy, and until they were not merely made barely seaworthy, but received such additional fittings and repairs as greatly to conduce to their safety on the voyage.

"The pursuer William Hutchinson, who is the sole partner of the firm of William Hutchinson & Co., and who effected the insurance, was a part owner of the vessel, and although he said in his examination that at the time he effected the insurance he was not aware that the flag had been changed, he yet admitted—'I had heard it mentioned by Mr J. P. Lindsay that he had some idea of putting her under the Belgian flag, but I never knew positively that it had been done. I took no interest in the matter, but left it entirely in Mr Lindsay's hands.' Now, it appears to me that if the change of flag was a material circumstance in the case, the pursuers were bound to have made themselves aware of it before effecting the insurance. Although Lindsay was the managing owner, and managed the vessel on behalf of himself and the other owners, the pursuers were entrusted with the duty of effecting the insurance of the vessel for behoof of all the owners, and it was clearly their duty to ascertain definitely before effecting it whether the managing owner's previously expressed intention of placing the vessel under the Belgian flag had been carried out, and to communicate the change to the underwriters.

"This being so, the next question is, Was the change of ownership and flag material? Several underwriters were examined by the pursuers for the purpose of showing that, according to the practice of underwriters change of flag made no difference in the risk. But most of these witnesses concurred in saying that vessels under the foreign flag were very rarely insured in this country, and that most of the risks which they were in the habit of underwriting on British ships were on yearly policies, running from February to February, and that in taking the risk they were not guided by the vessel's class in Lloyd's Registry, or any foreign registry, but by an actual survey of each ship, made on behalf of the underwriters previous to effecting or renewing each insurance. Indeed, one of the pursuers' witnesses, Dugald M'Dugald, an insurance broker in Greenock, and agent there for the Union Marine Insurance Company of Liverpool, says that, while in the general case he does not consider the change of flag material, even if made

just before the commencement of an insurance, he thinks it is a circumstance which ought to be communicated to the underwriter. He is asked—'Would the knowledge of the change of flag having taken place shortly prior to September 1874 have suggested to your mind any reason for making inquiry?—(A) I would certainly have made more stringent inquiries, because the change of flag would have led me to understand that it had been made to escape the action of the Board of Trade. There was a great deal of change of flag about that time among vessels of all classes, but chiefly among low-classed vessels. (Q) You would have thought it reasonable in an underwriter, who had got information of the change of flag, to have made those more stringent inquiries to which you have alluded?—(A) I think it reasonable that the underwriter should have made inquiry. We rarely insured vessels sailing under a foreign flag, because we are rarely asked to do so; it is not generally done in Scotland. There is no other reason. The nationality of a vessel is not a material matter to be communicated to the underwriter. It is better to be communicated, but is not material. (Q) What do you mean when you say it is better to be communicated?—(A) The underwriter prefers to have all the circumstances of the risk set before him. (Q) Do you mean that the underwriter's mind would be affected by the knowledge of that fact?—(A) It might or it might not. (Q) And it would be reasonable to think his mind might be affected?—(A) It might be affected.'

"It is intelligible, therefore, that while the Board of Trade inspection is a protection to underwriters insuring British vessels without making an actual survey of the vessel, such inspection may be of less advantage to underwriters who, like most of the pursuers' witnesses, grant time policies after actual survey for themselves. Now, the evidence for the defenders very clearly shews that in Aberdeen, and particularly in the case of policies for single voyages, the underwriters are not in use to accept foreign risks, and that they depend almost entirely upon the information as to the vessel communicated to them by the assured, or disclosed in the list of Llyods Registry, or in the French or other foreign lists. In such cases underwriters insuring vessels after the passing of the Merchant Shipping Act of 1873, considered, and were well entitled to consider, that the risk of insuring a vessel under the British flag without making a special survey was materially lessened, especially in the case of old vessels like the 'John George,' by the powers of inspection and detention given to the Board of Trade.

"I think that the whole evidence leads to this result, that the circumstance of the flag being changed on the eve of the vessel sailing, and avowedly for the purpose of escaping the Board of Trade inspection, was a circumstance so material that it ought to have been disclosed to the underwriters before the policy was effected, and that the failure to disclose vitiates the policy.

"It may be true, as the pursuers allege, that the Board of Trade inspection does not necessarily secure more than that the ship when she sails is seaworthy, and that as the defenders do not maintain that the 'John George' was unseaworthy when she sailed, and as positive proof of her seaworthiness has been adduced by the pursuers, the non-communication of the change of flag is not material. But I think that this argument ignores the principle laid down in the passage from Arnold already quoted, and which is also verly clearly stated in Marshall on Marine Insurance, p. 359 (ed. 1861), viz., that 'concealment so vitiates the policy that it will afford the insured no remedy, even from a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered not with reference to the event, but to its effect at the time of making the contract.' It may therefore be quite true that even if the registry had not been changed, and if the vessel had been inspected by the Board of Trade, she would have been found seaworthy and allowed to sail—so that in point of fact the loss may not have been attributable to the want of inspection. But the question to be decided is, Whether or not the removal of this old and low-class vessel from the control of the Board of Trade on the eve of her leaving Great Britain, and shortly before the insurance was effected, would, if communicated, have influenced the mind of a rational underwriter in entering into the transaction? The import of the evidence is, in my opinion, that the facts, if disclosed, would have influenced the defenders, and have led them either to decline the risk altogether or to undertake it, if at all, at a higher rate than that to which they agreed; and I think it would have been reasonable in them to be so influenced.

"On these grounds, I think the pursuers cannot recover under the policy sued on, which I hold to be vitiated by the concealment or non-disclosure of material facts, which were or ought to have been within the knowledge of the pursuers when they effected the policy. As, however, the defenders offer to return the premium paid by the pursuers, decree will be given in their favour for that sum. But as I do not think the pursuers are legally entitled to such return, the defenders will be assoilzied from the conclusions of the summons *quoad ultra*, with expenses."

The pursuers reclaimed.

Argued for them—Board of Trade inspection could give the underwriters no more than guarantee of seaworthiness. Inspection might suggest certain things as desirable for the ship's safety, but unless absolutely unseaworthy, she could not be detained. The fact of seaworthiness was secured to the underwriters by warranty of insurers; therefore the change of nationality was of no importance to them.

Counsel for the respondents were not called upon.

Authorities cited—*Harris*, 3d June 1872, L. R., 7 Com. Pleas, p. 481; *Ioindes*, 9 L. R., Q. B. 539; Parson, vol. i. p. 494.

At advising—

Lord Justice-Clerk—I do not think it necessary in this case to call for any reply, and for my own part, notwithstanding Mr Trayner's very able and ingenious argument, I am quite satisfied with the views expressed in the Lord Ordinary's interlocutor, and indeed have very little to add to what he has there said. The state of the matter of fact seems to me beyond

dispute, and is shortly this—This vessel had been insured by the defenders, the Aberdeen Sea Insurance Co., in April 1873, and at that time the information which the Insurance Company received from the shipowner was, that she was registered at South Shields; and they referred the underwriters to the French Bureau Veritas, from which it appeared that the "John George" was registered at South Shields, that she had been built at Sunderland in 1837, and stood in April 1873 as classed in 1872 of the second class for two years—not a very high-class vessel—but that was the information which the Insurance Company received at that time. In 1874 the pursuers wrote to the Insurance Company to know at what rate a new insurance could be effected on a voyage from the Tyne to Cronstadt; and this proposal was submitted to the underwriters along with the information which had been previously received as to registration and class of the vessel, and the result was that this policy was issued. The policy contains nothing in its terms, it seems to me material as to the general question which we are now considering. The memorandum in regard to capture, and the other matters put on the back of it, probably had reference to the fact, not disclosed at the time, that the vessel had a foreign register. But, apart from that, there seems to be nothing important in the specific terms of the policy.

The vessel sailed, was caught in a storm, and was wrecked at Bamborough, on the coast of Northumberland; and the question now is, Whether the pursuers, the owners, can recover under this insurance? The answer made by the defender is—She was represented to us as a British vessel, whereas, in point of fact, she had been registered at Antwerp as the property of a Belgian owner, and consequently was sailing under the Belgian flag. That was a matter which was concealed from us when the policy was effected; and if it had been disclosed to us we should never have entered into the contract at all. The question now is, Whether, assuming that such is the fact, the contention of the defenders is well founded?

Now, it turns out—it is not concealed, but is avowed in a somewhat bold manner on the part of the witnesses for the pursuer—that the registration under the Belgian flag was not the result of any *bona fide* transaction, and was not done for any *bona fide* purpose, but that the Legislature having empowered the Board of Trade, by an Act passed in 1873, to make certain inspections of vessels leaving the different ports, with a view of ascertaining both their seaworthiness and the state of their equipment and loading, it has become the practice, I am sorry to say, for the purpose of evading that statute, and no other purpose, to make false declarations in foreign ports for the purpose of obtaining a foreign registry which will exempt them from the inspection of the Board of Trade, and that that was the reason of the registry which subsisted at the date of the insurance. My Lords, I can only say that I can conceive no greater or grosser fraud perpetrated, or one more unworthy of the position of a British merchant. It is all very well for the witnesses to say that the Board of Trade is oppressive, but when statutes are passed for the good of the commonwealth, for the most praiseworthy object of preserving the lives of the sailors on board our ships, to say that it is anything but a most disgraceful fraud to endeavour to evade these provisions of the Legislature under which they live, by false oaths in a foreign port. I think if anything could add to the nature of the fraud it would be the attempt which has been made to defend it; and I must own that, apart from the other questions of fact in the case, it strikes my mind as having a very important bearing on this case that the very unusual step is taken which raises the question as a fraud not merely upon the underwriters, as I think it is, but upon the community. This pursuer is *versans in illicito*, and the question is, What is the effect of that upon the contract of insurance? Now, unquestionably the Board of Trade inspection, and the statute under which it takes place, are not matters directly for the protection of the underwriters. They are supposed to protect themselves under the ordinary rules of law. But, on the other hand, if there be any part of the machinery of these statutes which would be an advantage to the underwriters, then, if it is not disclosed to them that these statutes do not apply in regard to the particular vessel which they are dealing with, it may or may not be a matter material to the risk which the underwriters are asked to undertake. But putting that aside for the present, the plain state of the fact is this, that the vessel was represented to be a British vessel, and she is not a British vessel. That she was represented to be a British vessel is clearly implied in the contract, because this was a reinsurance of a ship registered as a British ship; and the only account which the insurers had of her register or her class was derived from the registry at South Shields, which was furnished upon the occasion of the former insurance. And therefore, not only were the underwriters under the belief that she was a British ship, but, in point of fact, that was represented to them, because, there being no further explanation, the former explanation was available for the second contract. Now, that was false. She was not a British ship. I do not know that that of itself would not be sufficient. The underwriters are not bound to inquire now what are all the incidents to which a foreign ship is liable in the way of capture, in the way of adjustment of claims, in the way of any other parts of the contract of marine insurance, the law in regard to which does vary, or may vary, in the different countries in Europe. Now, are the underwriters bound to inquire into that matter; or if persons wish to insure a foreign ship, are they not bound to say it is a foreign ship on which we are asking insurance? And it is no answer to that to bring various underwriters to say, we do not think the risk materially greater in the one case than in the other. That is not the question. The question, as I regard it, is, Whether there is a duty to disclose before the contract is completed; and whether the contract to insure a British ship is the same thing as a contract to insure a Belgian ship? I think that admits of very great doubt. But the main point on which I wish to put my judgment here is this, that the adoption of the Belgian nationality of this vessel had a purpose, and that purpose was to evade the inspection of the Board of Trade under the statutes. Now, beyond all question, the inspection by the Board

of Trade is a safeguard and security to all who have any interest in the seaworthiness of a vessel. That is the object and the purpose of taking the Belgian flag; and the Belgian registry was to evade that object. And therefore the underwriters, as well as all the rest of the world, were entitled to assume that the inspection of the Board of Trade would be applied to this vessel, because they were entitled to assume it to be a British vessel. It is in vain to say that that is not material to the contracts of insurance. The argument, most ingeniously put, seemed to me to be entirely fallacious. It was said, But it turns out that in point of fact this vessel was seaworthy and we shall prove it. That is an inquiry into which the underwriters just now are not bound to go, because by representing this to be a British vessel they relied on having the inspection of the Board of Trade; and therefore it seems to me that the very foundation of this contract is at an end. Apart from that, it is true that the guarantee of seaworthiness lies upon the insurer, and therefore nothing need be said about that. It is implied. There is a warrant and representation of seaworthiness. But if any question be asked relative to seaworthiness—and it is either not answered or answered erroneously—it is settled law that that may amount to a representation or concealment which may void the contract. Now, what was represented here? It was something relating to the seaworthiness of the ship—not to the fact of seaworthiness, but to the evidence of it, which is precisely the same thing. I think it was direct representation when the vessel was represented to be a British vessel; and as that representation was not true, and there was a safeguard or security by which the seaworthiness might be ascertained and determined which did not take place here, I am of opinion that in this case, upon the mere matter of the seaworthiness of the vessel, or the evidence or the means of ascertaining and determining it, there was concealment, and indeed a false representation quite sufficient to void this contract. My Lords, I can only say that I should have given very little weight to a much larger amount of practice outside of the pursuers than appears here. We know perfectly well that from the kind of business done by the underwriters, which has been a very useful and meritorious employment to a large extent, but from the small sums insured by each underwriter on each vessel, and the large profits that are made out of those vessels that come to their ports in safety, we know very well that the inducement to contend against claims where vessels are not seaworthy is not great; and, consequently, it is the more necessary that when a case of this kind occurs, where there is a deliberate and apparently a wide-spread design to counteract the beneficial enactments of the Legislature by false and fraudulent assumptions of foreign nationality, we should give it no countenance whatever. On the whole case, I am very clearly of opinion that the change of nationality ought to have been communicated to the underwriters; that it was improperly withheld from them; that it was material to the contract which they were undertaking; and that therefore the pursuers ought not to prevail.

Lord Neaves—I am entirely of the same opinion. I think this is a very important case, and I think it very important that such practices as have been here disclosed should, if possible, be put a stop to; and the only way in which we can do that is by preventing the parties who resort to them from reaping the fruits of their undoubted fraud. I have no difficulty in holding that a thing of this kind is a fraud—a fraud upon the law, a fraud upon the country, a fraud upon all those interested in the safety of ships. But it was practised, and now the party seeks to get the benefit of a contract entered into in these circumstances. I need not go over the ground which your Lordship has gone over as to the matters of fact; but I would just observe that the warranty of seaworthiness which is founded upon so strongly here is the very thing which makes important the irregularity and impropriety on the part of the pursuers. There is a difference of opinion among jurists as to where the *onus probandi* lies in a case of warranty of seaworthiness. I am myself inclined to think that where there is a warranty of seaworthiness, the proof of non-seaworthiness is transferred to the underwriters. The reasonable presumption when dealing with honest men is that the ship was seaworthy as warranted; and therefore the underwriter with such a warranty is laid under the burden of proving non-seaworthiness. He may do so. Warranty does not prevent the proof that the warranty was not observed. And here comes in the pre-eminent importance of no concealment, no smuggling, no disguise of facts or failure to answer the necessary questions put to the parties proposing to insure, that shall prejudice the position of the underwriter if he is ultimately driven to resort to a proof of unseaworthiness. Now, then, a party comes and says, either expressly or by necessary implication, this vessel which I am asking you to insure, and which I am willing to guarantee as seaworthy, is subject to the inspection of the Board of Trade, and will undergo that inspection before it proceeds to sea; and therefore it will either be prevented from going to sea, or you will be secure as to its being seaworthy; and at anyrate evidence will be preserved by that inspection which will be beneficial to you. I do not see how it can be said that the inspection of the Board of Trade, carried on in the strict manner in which it is carried on, is not a resulting benefit and security to the underwriters. We will secure the thing as a fact that it may be made seaworthy or shall not go to sea unseaworthy; or, in the next place, if there is an inspection made, and the ship goes to sea without its being carried out, a record will exist that it was unseaworthy, and the insurer may bring forward that evidence to prove that the warranty has not been complied with. Now, not by accident, or from any extraneous or unimportant circumstance, the insured here, before effecting this insurance—which was a continuation of a former one—did these two things, the one positive, and the other negative; they determined to change the register of the ship; and it is a fair presumption, I think, that they did so in order to avoid what they felt to be irksome, because it was a check upon unseaworthiness. That is one of the objects of the inspection, and the more irksome it was the more efficient it would be for the benefit of all

those interested in the fact of seaworthiness. But they evade that by resorting to a foreign country for a register that would save them the necessity of this inspection, and entitle them to put to sea without the Board of Trade interfering. But while they did that, and changed their own position with reference to their own title, they did not inform the underwriters that they had changed the position which they had previously occupied. And, indeed, the position they had taken was a simulate position, as is now admitted. The vessel had not become a Belgian vessel in strictness, but had become apparently a Belgian vessel, so as to sail under false colours, and thereby—without its being communicated to the underwriters—escape that inspection which would either have kept her within harbour or have preserved a record of her unseaworthy state, if she was in that state, which would have been available otherwise. Now, can an insurance entered into in these circumstances be held to have been entered into *bona fide?* It is said the Board of Trade is very oppressive, that they detain vessels, and give a great deal of trouble; but there are parties in the country who think they are not sufficiently stringent, though we have not before us the principal party who interests himself in this subject. It is said there is a guarantee; but that does not at all signify in this case, because the question is, What were the disclosures made before the insurance policy was entered into? In the next place, the fact of a guarantee does not prevent the underwriters from availing themselves, wherever it may be necessary, of the securities that exist for contradicting seaworthiness. Therefore, it appears to me that this insurance has been obtained by means of a false representation, for I think there was a virtual and plain representation that the vessel was still an English vessel, that she was liable to the inspection of the Board of Trade; that she would undergo that inspection, and that that would be a security; but when it turns out that by a simulate transaction and a fraud they evade the inspection of the Board of Trade, I think the underwriters are entitled to say, You have withheld from us that which a reasonable and just man would have disclosed, and therefore our contract from the first is null and void.

Lord Ormidale—It does not appear to me that your Lordships have characterised the conduct of the pursuers too strongly. I do not refer to all the pursuers before us, because I exculpate entirely, in consequence of his ignorance of what had occurred, one of these pursuers who is resident in Edinburgh, although of course he is answerable in law equally with his partners for what they have done. The conduct of the managing partner in Newcastle in entering into the transaction in question was, it appears to me, a fraud of the very worst description; and I cannot help thinking that, if it was not actually subornation of perjury, it was as close as possible to it. For an individual was employed at Antwerp to register himself as the owner of this vessel, under the Belgian flag, and he could not do so without taking an oath that he was so, knowing all the time, as did also his employers, that he was not to be the owner, and that the whole affair was a mere fiction. It was a fraud to evade the law of the land in which they live, and to which the vessel belonged; and it was carried out by means of the most discreditable and disgraceful description. It appears to me that the whole case is pervaded by fraud from beginning to end; but, even if we could take up the question of the insurance in Aberdeen separate and apart from the fraud, what would be the result? The point of law is, I think, accurately stated by the Lord Ordinary, viz., Whether everything was disclosed which would affect the judgment of a rational underwriter, governing himself by the principles and calculations on which underwriters do in practice act, is a proper jury question to be decided on the evidence adduced? Now, the Lord Ordinary has sat as a jury in this case, and heard the whole evidence, and he has come to the conclusion that the verdict on that issue should be given in favour of the defenders. I must say that I entirely concur with him, and I shall state the considerations which have influenced me in coming to this result in a very few words. Mr Trayner stated it as the foundation of his argument that there was a great distinction between direct misrepresentation and a failure to disclose, and that if there had been here a positive averment that this vessel had continued under the British flag when the insurance in question was effected, that would have been a direct misrepresentation which would have vitiated the contract, although after all it did not in the least degree affect the loss of the vessel, for she was just as seaworthy on that assumption as she was on the assumption that he presented his argument, viz., that there was no misrepresentation to that effect, but merely a failure to disclose the fact that there had been a change of flag. But it appears to me that the foundation of the whole of that argument is unsound, for I concur with the Lord Ordinary that there was here a virtual representation by the pursuers that the ship had not changed her flag. The majority of the insurers knew that within two years they had effected an insurance on this very ship as a British ship, and some of them state on oath that in this case they acted in the belief that she was still a British ship, sailing under a British flag, for when asked to insure her again on a different voyage I think there was a virtual representation to them to that effect. Now, in order to test whether it was material for the underwriters to know that she had changed her flag, supposing it had been stated to them that the vessel which they had insured two years before as a British ship sailing under a British flag was now a Belgian ship sailing under the Belgian flag, would they not have asked the meaning of the change? Would they not have declined to take a single step till they knew the reason of it? And what would have been the result? Either the truth would have been told them, or it would have been concealed and a fraudulent statement made. In the former case, would it not have most materially affected their calculations? I think it may be very fairly assumed that they would not have undertaken the risk at all, for it is hardly possible to suppose that they would, as rational and intelligent men, have undertaken the risk of a vessel in such circumstances, belonging to such men. Mr Wawn, one of their own witnesses, says—"My underwriters do not think the change

of flag a matter of additional risk or premium. If the owner is respectable and the ship sound, the flag makes no difference in the risk." We need hardly be told that the owner must be respectable. A disreputable, dishonest individual would hardly get any underwriter to take a risk for him at all; but if all the circumstances had been disclosed to the underwriters here, I think it is impossible to say that they would have undertaken the risk at all. Now, I think that is a very good test, and it satisfies my mind in disposing of the question, Whether the change of flag, in the circumstances in which it took place, was a matter material to a rational insurer to know about when he undertook the risk? We have a number of respectable persons engaged in underwriting who say that it would have materially affected their minds; and if that be so, I concur with the Lord Ordinary, sitting as a jury in the case, that the evidence is sufficient to entitle us to pronounce a verdict in favour of the defenders, and I agree with your Lordships in pronouncing that verdict.

Lord Gifford—I am of the same opinion. I abstain from characterising further than your Lordships have done—and in that characterisation I concur—the nature of the fraud which was here perpetrated against the Legislature and against the country; and I prefer to look at the case simply as a case of contract of insurance, which is said to be voided by false representation or by concealment of material circumstances. I take the law to be very well stated by Mr Arnold, in the passage quoted by the Lord Ordinary, that it is the duty of the assured to communicate to the underwriters all the intelligence he has that may affect the mind of the underwriter as to either of the two following points:—1*st*, Whether he will take the risk at all; and 2*d*, At what premium he will take it. Now, I rather think with Lord Ormidale, and, if I mistake not, with both your Lordships, that there was here something very like actual direct misrepresentation. No doubt it was not said in so many words, Thi sis a British ship sailing under the British flag; but it had been previously insured as such, and this was a reinsurance, which, I take it, very strongly implies, when no statement is made to the contrary, that the circumstances connected with its ownership are the same. Now, if it was a direct misrepresentation, —a direct statement of what was false—it seemed to be conceded at the bar, and I understand it is the law in relation to this case, that that is very nearly of itself conclusive, and that the question of materiality of what is so expressly represented is not so important a matter of inquiry. But even supposing that this was just concealment of the change, I am prepared to affirm the Lord Ordinary's judgment, that it was a concealment of a fact material to the risk, and which every rational and reasonable insurer would wish to know as affecting the question:—1*st*, Whether he would take the risk at all; and 2*d*, At what premium he would accept it. The effect of a ship sailing under the British flag, and being a British registered ship, is since 1873, among other things, that it is subject to certain inspection by the Board of Trade,—inspection intended, no doubt, to secure the lives of the sailors, but that can only be secured by securing the safety of the ship, and the safety of the ship in this matter depends on its being seaworthy, both as to equipment and as to loading, when it leaves a British port. Now, I think it is impossible to doubt—and we do not need any proof on such a question—that a ship under such inspection is a safer ship to insure than a ship under no inspection whatever. The true meaning of the statute is to secure safety, and a ship, the safety of which is more or less secured by such precautions, is a safer ship to insure than a ship regarding which no precautions are taken; for if a man of common sense, not at all connected with maritime matters, was asked, Whether would you insure a ship that has no Government inspection attending its sailing or its loading or its condition, but merely the guarantee of the owner that it is seaworthy, or a ship as to which you have not only the guarantee of the owner that it is seaworthy, but in addition the interference and inspection of a Government official?—can there be any doubt as to what the answer would be. The inspection affords an additional security that the ship will be seaworthy each time it sails. Now, that is the very thing that is material, and it is no answer to that to say, Oh, but the owners guarantee the seaworthiness, and if they do so it is the same thing whether it is seaworthy or not. It is not the same thing. In the first place, if she is lost, and the question arises whether she was seaworthy or not, it imposes on the insurer, who objects upon the ground that she was not, a proof, or at least a litigation, about the question whether she was or was not seaworthy—a litigation which will be avoided, and a risk of loss which will be avoided, if prior to each time she sails there has been a Government inspection. Suppose there had been—what there is not yet—a general load-line fixed, that is, a load-line fixed, not by the shipowner himself, but by the Government inspector, would that not be an additional security to the insurer? for he would then be assured that the Government inspector had fixed a line beyond which the ship was not to be loaded; and if a foreign ship is not subject to that law, then the underwriter has not the same security that when she sails from a British port she will be in a seaworthy condition. Now, that is enough for this case. I think it is a thing that every underwriter would reasonably look at, even in the limited aspect in which I am now regarding it, whether the ship has the additional security of the Government inspection, or whether he has merely to trust to the guarantee of the owners that it is seaworthy. I agree with your Lordships; but I would rather put my judgment upon this short ground, that a material circumstance has been concealed from, or, I would rather say, misrepresented to, the underwriters in this case, which, had it been disclosed, might have reasonably affected their decision. We have the express evidence of one of them that it would. I do not go on that; but still it might have affected their decision as to whether they would take the risk or not. I am therefore of opinion that the Lord Ordinary, in whose remarks I generally concur, has reached a right result in this case.

The Court adhered.

Counsel for Pursuers—Dean of Faculty (Watson)—Trayner—Darling. Agents—Rhind & Lindsay, W.S.

Counsel for Defenders—Balfour—J. P. B. Robertson. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, May 24.

FIRST DIVISION.

[Lord Craighill, Ordinary.

C. *v.* C.

Husband and Wife—Marriage—Impotency—Nullity.

Impotency on the part of the woman, whether congenital or not, is a ground for declarator of nullity of marriage.

The pursuer in this action sought a declarator of nullity of marriage against his wife on account of her impotency. The action was not defended. The Lord Ordinary assoilzied the defender, on the ground that whereas it was alleged in the libel that this impotency was congenital, the import of the evidence was that it was rather the result of age, the woman being 54 years old at the date of the pretended marriage, and that therefore the ground of action had not been established.

The pursuer reclaimed.

Authorities—*Liber officialis sancti Andreæ*, published by the Abbotsford Club, Nos. 138, 137; *Williams* v. *Humphrey*, 30 L. J. (Mat. Cases) 73, 2 Swabey and Trisham, 240; *H.* v. *P.*, July 15, 3 L. R. 126; *G.* v. *G.*, June, 22 1871, 2 L. R. (Prob. and Mat.) 287.

At advising—

Lord President—That marriage may be declared null by reason of the impotency of one of the spouses, at the suit of the other, cannot be doubted. To state the rule of law in the form of a definition of impotency would be dangerous, and is unnecessary.

But it may, I think, be safely affirmed as the result of all the authorities that inability to copulate arising from such a physical obstruction in the woman as cannot be removed or remedied without danger to her life or the infliction of bodily pain, *plus quam tolerabile*, constitutes impotency on her part.

Persons beyond the age when procreation of children may be expected, may marry without hope of issue, but with the expectation of real *commixtio corporum*, which is the proper consummation of marriage, and the disappointment of that expectation by impotency arising from irremediable physical obstruction in the woman may entitle the man to a decree of declarator of nullity.

I am of opinion that such an irremediable physical obstruction to copulation has been proved to exist in the defender in this case, and that the pursuer is therefore entitled to judgment declaring the marriage null.

I cannot concur in the technical ground of judgment adopted by the Lord Ordinary, which in my opinion proceeds on too strict a reading of the summons.

Lords Deas, Ardmillan, and Mure concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer—no appearance being made for the defender—on the reclaiming note for the pursuer, against Lord Craighill's interlocutor, dated 9th December 1875, Recal the said interlocutor: Find and declare the pretended marriage betwixt the pursuer and defender to have been from the beginning, to be now, and in all time coming, null and of no avail, force, strength, nor effect, with all that has followed thereupon; and divorce and separate the defender from the pursuer's society, fellowship, and company; and find and declare the pursuer to be in such case and condition as he was before the said pretended marriage, or as if he had never been contracted or married to the defender, and decern."

Counsel for Pursuer—Fraser—Mair. Agent—William Officer, S.S.C.

Tuesday, May 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

GARDNER *v.* GARDNER.

Parent and Child—Legitimacy—Proof—Presumption.

An action of putting to silence was raised against one who averred that she was the legitimate daughter of the pursuer. The defender was admittedly the child of the pursuer's wife, and was born two months after their marriage, which took place nearly twenty-five years prior to the date of the action. It appeared, on the one hand, that the man whom the pursuer alleged to be the real father of the defender had connection with the mother prior to her marriage, and that the pursuer did not treat the defender as his daughter, but sent her away immediately after her birth, and although he all along maintained her, had no communication with her whatever. On the other hand, it did not appear whether the intercourse with the alleged father corresponded in time with the birth of the defender, and it remained doubtful whether the pursuer had not had illicit intercourse with his wife prior to marriage. It further appeared (1) that the mother's pregnancy took place during the pursuer's courtship; (2) that on his own admission the pursuer was aware of her condition when he married her; (3) that the pursuer did not openly disclaim the defender, but on the contrary assumed the burden of her maintenance and education; and (4) that he never said to any one that he was not the father, or put the paternity on any one else for four-and-twenty years.—*Held* that although the presumption of law *pater est quem nuptiæ demonstrant* did not apply—conception not having taken place during marriage—there was a strong presumption of fact that