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ELLIOT, &c. v. WILSON, &c.

[M. App. Vol. I. Insurance, p. 1. No. 1.]

ALEXANDER ELLIOT, and Others, *Appellants;*
WILLIAM WILSON and Company of Glasgow, Merchants, - - - } *Respondents.*

House of Lords, *25th Nov.* 1776.

INSURANCE—DEVIATION.—Brokers were instructed to insure a vessel and cargo, "from Carron to Hull, *with liberty* to call as *usual*;" The broker effected the insurance, only with liberty *to call at Leith.* In former insurances between the same parties, liberty had always been given to call at Borrowstoneness, Leith, Morrison's Haven, and Preston Pans, and the instructions to the broker were given with reference to that practice. The ship, in the course of her voyage, called at Morrison's Haven; and thereafter resumed her course, as contained in the policy, and sometime after was lost. Held, that as no permission was given to call at Morrison's Haven, this deviation vacated the policy.

The respondents shipped 14 hogsheads of tobacco on board of the Kingston, one of the regular traders from Carron to Hull, and gave instructions to Hamilton and Boyle, insurance brokers in Glasgow, to insure "from Carron to Hull, *with liberty to call as usual.*"

These regular trading vessels from Carron were chiefly got up for service of the Carron Company, whose iron and coal were transported by their means to Hull and other places in the eastern coast of England. In going down the Firth of Forth, these vessels were usually allowed to call at Borrowstoneness and Leith, and at Morrison's Haven and Preston Pans, for the purpose of receiving or unloading cargo. And hence the allusion in the instructions to the insurance broker, "*with liberty to call as usual.*" An insurance was effected, the policy bearing, "with liberty to "call at Leith." The insurer was not privy to, or aware of this deviation from his express instructions, the insurance broker having retained the policy in his possession; but he relied that the terms of his instructions would be complied with in drawing out the policy.

The vessel had sailed five days before the date of the policy, and the policy was dated and drawn out with liberty to call at Leith, 9th February. She did not call at Leith, but put into Morrison's Haven, and proceeded thence on the 9th in

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her direct course for Hull, when, experiencing a storm near Holy Island, she was wrecked, and the cargo lost. The underwriters objected to pay the sum insured in the policy, on the ground of deviation, she having gone out of her course, and called at Morrison's Haven, a port not permitted in the policy; while the only liberty granted was to call at Leith. Action was in consequence raised by the respondents before the Admiralty Court, who found the underwriters liable under the policy, "in respect that in cases of insur-" ance of goods on shipboard belonging to others than the " owners and master of the ship, it is a general rule in law " and practice, that the insurance is effectual although the " loss may have happened in a deviation from the course of " the voyage upon which insurance has been made, the in-" sured not knowing or consenting to such deviation; and " as the ship, after going into Morrison's Haven, and sailing " from thence, did attain to, and was in the direct course of " her voyage when she was wrecked." Thereupon the appellants brought a suspension of the Judge Admiral's de-

Jan. 8, 1776. cree. The Lords, of this date, and *founding on the whole circumstances of the case*, repelled the reasons of suspension, and found the letters orderly proceeded and decerned. And, on reclaiming note, they again pronounced this inter-

March 7, locutor:—" Find the suspenders (underwriters) severally " liable to the chargers in payment of the respective princi-" pal sums and interest thereof, decerned for and under-" wrote by them, and also find them conjunctly and several-" ly liable in the expense of the extract of the decreet be-" fore the Admiralty Court, as the same shall be certified " by the clerk of the said Court; and in so far find the let-" ters orderly proceeded, and adhere to the former interlo-" cutor."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—In this case there has been a clear and wilful deviation from the course of the voyage insured; and in all such cases the policy is vacated and the insured cannot recover, it being immaterial at what point thereafter the loss occurred, because the deviation, when it takes place, voids though the vessel should afterwards resume her course, and, while sailing in the direct line, be then lost. Nor does it affect the question, in point of law, that the insured has had no concern with the ship, and was ignorant of any intention to deviate, because the respondents

knew well, by their instructions to their broker, that going into any port, except the port of destination, especially in an inland trading voyage, without permission, is a deviation from the due course of that voyage. The offer to insure in the general terms, proposed by the instructions to the insurance broker, are what few underwriters would accept; accordingly the broker was obliged to take a policy with a permission to call at Leith only. But whatever were the circumstances attending the insurance, and whatever were the respondent's instructions to his insurance broker, the underwriters can in no way be affected by either. The policy must fix the rights and obligations between the parties; and therefore a policy with liberty to call at Leith, excludes every claim to call at any other port.

Pleaded for the Respondents.—Policies of insurance are to be construed largely, and for the insured—a rigid interpretation being inconsistent with the spirit of the law merchant. Were the appellant's construction applied, no voluntary deviation whatever would be allowable but what is expressed in the policy, whereas courts of law have been in the practice of allowing calls at places not expressly mentioned in the policy, if that *is according to usage* in such voyages. Here it was not only according to usage to call at Morrison's Haven, but the appellants knew of such usage in regard to this very vessel, because it had been two years before insured by the same company, for the same voyage, with liberty to call at Leith and Morrison's Haven at a less premium. But a policy on the voyage insured "with liberty to call at Leith," cannot surely be construed into an express prohibition to call any where else—the permission to call at one place not necessarily implying a prohibition to call at any other. The appellants, besides, were not at liberty to deviate from the express terms contained in the respondents' note of instructions sent for the insurance. They were bound to give and effect an insurance on the terms wished, or to refuse it. They did not reject it, but drew out a policy, without the respondents' knowledge, with liberty to call at Leith; but as this was never communicated to them, they cannot be affected by it, but were entitled to presume, the underwriters having accepted the proposal of insurance, that the policy would be drawn out as desired in their note of instructions, "with liberty to call as usual." Yet even were it otherwise, there was not such wilful deviation as could vacate the policy; for having liberty to call at Leith, in leaving that harbour she must necessarily pass Morrison's Ha-

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ven, six miles farther down the Firth, so that in point of fact she was never off the course chalked out by the policy. There was not any greater risk in touching at Morrison's Haven than at Leith. The course was the same, and even if it was a deviation at all, no damage was sustained by it; for the loss occurred after the vessel had resumed her due course. While it is clear that it could not be the understanding of parties that Morrison's Haven was entirely excluded from the liberty of call in the policy, because they all well knew that the vessel was then five days on her voyage, and actually at the date of the policy she was leaving Morrison's Haven for Hull, having passed Leith some days before that date. How then could the policy exclude *every* place but Leith, when at that point of time she had sailed past that port?

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After hearing counsel,

The LORD CHANCELLOR said:—

"That there was a wilful deviation, and although ships sailing on this voyage, have sometimes been allowed by the terms of a policy underwritten at the same premium, to go into Morrison's Haven, that could not avail him, since no permission was given here; that a wilful deviation from the course of the voyage insured is, in all cases, a determination of the policy, it being immaterial from what cause, or at what place, a subsequent loss happens; for, from the moment of deviation, the underwriters are discharged"

LORD MANSFIELD said:—

"That there was a necessity for adhering strictly and invariably to the plain terms of the contract, expressed in the policy. That whatever might be the custom or practice, this contract was clearly made to guard against any latitude of construction, and to confine the insurance to one determined track. I have therefore to move that all the interlocutory judgments below be reversed; but that the insurers, having actually run no risk, the contract being null *ab origine*, they should return the premium, and pay costs, which their Lordships unanimously agreed to. His Lordship further observed, that the remedy of the insured in this case, lay against the broker, who had deviated from his instructions, and thereby rendered the policy null and void."*

* In addition to the above notes there is the following:—"Lord Mansfield, it is said, considered it as a clear deviation,—and that the question came simply to this, was Leith Morrison's Haven? An allowance was given to call at Leith, but none to call at Morrison's Haven. He instanced a policy on a ship to sail from the Downs with convoy, but the convoy having sailed, she followed and came up with it at Portsmouth,—the underwriters were liberated. The terms of policies of insurance must be strictly adhered to, otherwise all insurances would be at an end." Brown's Suppl. Tait, p. 486.

It was ordered and adjudged that the interlocutor complained of be *reversed*; And it is declared that the respondents are entitled to a return of the premium paid by them to the appellants, and it is therefore ordered and adjudged that the appellants do pay to the said respondents the said premium.

For Appellants, *J. Dunning*, *Ar. Macdonald*.
For Respondents, *E. Thurlow*, *Al. Wedderburn*.

LIEUT. ANDREW SUTHERLAND, - *Appellant*;
ELIZABETH COUNTESS of Sutherland, and her Guardians, for herself, and on behalf of the other Creditors of Skelbo, } *Respondents*.

House of Lords, 26*th March* 1777.

POSITIVE PRESCRIPTION—ABSOLUTE OR REDEEMABLE RIGHT—TESTING CLAUSE.—A conveyance by charter was made of certain parts of an estate *ex facie* absolute, and bearing to be for a price then paid. Eight days before its date, a wadset had been granted of the same lands, in favour of the same party, which obliged the party to grant a letter of reversion. No letter of reversion was adduced, and no appearance of it on the records. The positive prescription and possession followed. Held, in the Court of Session, that the wadset right and charter qualified each other, and were to be read as one deed, and that the right was redeemable. Reversed in the House of Lords, and held that prescriptive possession on the absolute right, fortified the appellant's title; and that the right was irredeemable. The contract of wadset having been executed by the aid of notaries; Held, that as one notary and two witnesses alone signed it, the wadset was bad.

The estate of Skelbo originally belonged to the Earl of Sutherland, but afterwards came to belong to Lord Duffus, who held the same of and under the Earl of Sutherland and his heirs, as lawful superiors thereof.

Lord Duffus was attainted for high treason in 1715; and, in virtue of the Clan act, the estate of Skelbo was then claimed by and reverted to the Earl of Sutherland, in virtue of the clause in the act, which provided, that in case of forfeiture, the lands of any such subject "shall recognosce and "return into the hands of the superior; and the property "shall be, and is hereby consolidated with the superiority, "in the same manner as if the same lands, or tenements, "had been by the vassal resigned into the hands of the superior *ad perpetuam remanentiam*."

The Earl, and afterwards the Countoss, made a claim to