Feb. 17, 1813.

SALE OF MORTGAGED ESTATES.

make it a fraud in him to prosecute the present claim. This had been alleged by the Respondents; and was the only material point on which his noble friend had not touched. He was of opinion, however, that there was no foundation in the case, for any objection on that ground.

The judgment of *Lord Clare* was accordingly reversed, with proper directions relative to the conveyance of the legal estate to the Appellant, accounting for the rents, and re-payment of the purchase money, with interest to Hogan's representatives.

Agent for Appellant, PINKET, Temple.
Agent for Respondents, J. PALMER, Gray's-Inn.

FROM SCOTLAND.

WATT, Merchant—*Appellant*.
MORRIS and others—*Respondents*.

WHETHER a vessel can be deemed sea-worthy for a foreign voyage without knees?

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INSURANCE.

IN 1794, the Appellant freighted the Jenny and Peggy, a vessel lying at St. Andrews, to Riga or St. Petersburgh, and back to Dundee or Newburgh, in Scotland. The owners (the Respondents) engaged "that she *should be completely fitted and found* to proceed on the voyage in four days thence;" and further represented her as so firm and perfect, that she was capable of carrying iron or the weightiest commodity. After the Appellant had freighted the

vessel, he was applied to on the part of the Respondents to insure 700*l.* on her bottom. The Appellant agreed, and the policy was subscribed on the 6th Sept. 1794—"Beginning the adventure upon the said vessel at and from the port of St. Andrew's to the port of Riga, or St. Petersburgh, in ballast, and from either of these ports to the port of Dundee and Newburgh." The question was whether the vessel was sea-worthy.

It appeared that she had been originally only 80 tons burthen when built in 1785—that she had been lengthened in 1794 14 feet, so as to be 113 tons burthen. The new parts of the vessel were not fastened with knees, which are usually placed in vessels intended to carry cargoes: and the reason as stated by the ship-builder was, that none were to be had at St. Andrew's, where the vessel had been lengthened.

The ship lengthened, but the new parts not fastened with knees.

As soon as the vessel had left the harbour, it was found that she wanted several things indispensably necessary for the voyage, and the Master was obliged to put into Dundee, a place out of his course, where he took in some fuel and cordage. The old rigging did not suit her new size, and she sailed so heavily as to fall greatly behind all the other Baltic vessels. She was also very leaky, and from these causes and the want of ballast the Master put into Kettero, a harbour on the coast of Norway, and stopped likewise at Elsineur and Copenhagen, at which last place he took in a supply of fuel, candles, and a chart of the Baltic; all which stoppages occasioned very considerable delay, and the Appellant was thereby deprived of his option of going to Riga, and

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therefore proceeded to St. Petersburgh direct. The vessel did not appear by evidence to have undergone any repairs at St. Petersburgh. She was lost on the voyage homewards on the Shetland coast.

Loss of the ship and action on the policy.

An action was commenced in the High Court of Admiralty in Scotland, by the owners against the Respondent, for payment of the 700*l.* upon the policy. The defence was that the vessel was not sea-worthy, nor "completely fitted and found" for the voyage at the time of her leaving St. Andrew's harbour. A proof was taken, and the evidence as to her sea-worthiness was contradictory, but it was allowed on all hands that *the new parts of the vessel had no knees.* The Judge Admiral (Baron Hepburn) sustained the defences and assoilozied the defender, stating "that he was clear the ship was not sea-worthy from her want of knees." Upon petition by the owners this interlocutor was altered by the next Judge Admiral, the successor of Baron Hepburn, who decerned against the defender. A petition was presented against this last interlocutor, to which, however, the Judge adhered. These judgments were then brought under the review of the Court of Session by suspension, when Lord Hermand, Ordinary, by an interlocutor of the 18th Feb. 1803, "found the letters orderly proceeded in, and decerned."

The Judge Admiral clearly of opinion that the ship not sea-worthy from her want of knees, but his judgment reversed by the Court of Session.

The cause thus went on in the usual course; the interlocutors, four by the Lord Ordinary, and two by the whole Court, being all against the Appellant. From these he appealed to the Lords for the following reasons:

1. Because in every contract of insurance there is

an implied warranty on the part of the assured, that the ship insured shall be tight and staunch and properly constructed and equipped, so as to be able to encounter the ordinary perils of the voyage, and in the present instance this obligation is confirmed by the express engagement of the Respondents in their letter of affreightment; but it appears in evidence, that the vessel in question was defective in the most important and necessary parts of the fabric of a ship, the main-hold beams in the centre, where she had been cut asunder and lengthened to the extent of 14 feet, not being in any manner bound to her sides, or supported or strengthened by knees, which in every operation of lengthening and raising the deck of a ship is essentially necessary to render her sea-worthy and safe; no new anchor having been provided, although it is obvious that an anchor which was sufficient for a vessel of 80 tons, (the burthen of the Jenny and Peggy before she was lengthened), was insufficient for a vessel of 113 tons, which was her burthen after she was enlarged; and it appearing in evidence that a new cable of a larger size was provided, for which a new anchor was to have been got (but which was not got) at Elsineur; and no new masts, sails, ropes, or cordage having been provided, though it is equally obvious that sails and rigging which fitted a vessel of 80 tons burthen could not be adequate for a vessel of 113 tons; and it even appears from the certificate of the repairs, that "the ship had no stove or fire-place in the cabin," which of itself was essential in a voyage to the Baltic at this season of the year, the lives of the.

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crew depending upon it, when the weather was such as to make it impossible to use the stove upon deck, which is often swept away in a storm.

2. Because, admitting, what is however denied, that the Captain did procure some knees for the vessel at Petersburgh, the contract is nevertheless avoided, the implied warranty attaching at the commencement of the risk when the ship sailed from St. Andrew's.

3. Because the Captain, in consequence of the insufficient equipment of the vessel, was obliged to deviate from the voyage insured; and because the very loss, for which the Respondents ask indemnification, was in all probability occasioned by their own neglect, and their breach of a condition precedent.

J. A. PARK.
RALPH CARR.

Mr. Park (for the Appellant) ridiculed the idea of a ship being sea-worthy for such a voyage without knees. It had often been a question at Guildhall, whether the knees were rotten or sufficient, but it had never been conceived that knees were unnecessary. She wanted besides sails and cordage, and was not "completely fitted and found" for the voyage out and homeward according to the warranty.

Mr. Adam and *Mr. Horner* (for the Respondents) argued, that Watt knew the state of the vessel, and made no objection; that it appeared in evidence that a ship might be sea-worthy without knees; that the

Berwick smacks which were remarkably good vessels had no knees. May 10, 1813. INSURANCE.

Chancellor. These are the vessels that carry the fish.

Adam. Yes, fish and passengers: that the lengthening of the ship rather strengthened her: that she was not lost from any defect in herself, but in a severe storm, in which many excellent ships were lost: that there was no proof that she had not got knees at St. Petersburgh; and that the *onus probandi* lay upon the Appellant.

Mr. Park in reply stated, that he had seen the Berwick smacks at sea, and that they appeared to be very good vessels, but they were solely employed in the coasting trade, and not intended for heavy cargoes. As to the *onus probandi* resting with the Appellant, their Lordships would consider that this was a question of warranty, and it was the rule of law, that the warranty must be complied with. Even if Watt had known the state of the vessel (which, being no seaman, he did not), it would not have altered the case. The ship ought to have been sufficient at her sailing from St. Andrew's; but if they thought any repairs at St. Petersburgh would avail them, the *onus probandi* under their warranty lay upon them. So in the case of a horse: if a man knew that a horse was blind of an eye, and wished to try him, he was still not obliged to keep him, if warranted sound, as the warranty must be complied with. Their Lordships he was satisfied would do nothing to overturn this fixed principle of law.

Chancellor. The single question is whether the Judgment,

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ship was sea-worthy. I am of opinion she was not sea-worthy.

Decision of the Court below reversed.

FROM SCOTLAND.

BRUCE—*Appellant.*
OGILVY—*Respondent.*

May 28, 1813.

IT was stated in the last case that the vessel called the Jenny and Peggy had been wrecked on the Shetland coast. The inhabitants of these islands had a peculiar notion of law in regard to wreck, whether derived from Norwegian tradition, or from whatever other source, *Mr. Horner*, who opened the case, did not know. They conceived that one-third belonged to the Admiral, one-third to the proprietor of the estate where the cargo was cast ashore, and the remaining one-third to those who could get it.

Certain persons who had acquired this last kind of right to a quantity of tallow which had formed part of the cargo of the Jenny and Peggy, sold it to Bruce and Ogilvy, the parties in this cause, who carried on trade in partnership, in some place in one of the Shetland islands, for 57*l.* which was alleged to be far below its value.

Watt, the owner of the cargo, having discovered how it had been disposed of, brought his action for the spoliation, in the Admiral's Court, against ten defenders, of whom Bruce was one. The matter